ON THE LOGIC OF SUING ONE'S CUSTOMERS AND THE DILEMMA OF INFRINGEMENT-BASED BUSINESS MODELS

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> Did I want all 78 songs the *Police* had recorded? I didn't even ask myself this question. The important thing is that *it was there*, and if I acted now, I could have it all. What, I thought, is happening to me?
> — *Confessions of a Napster Fanatic*, YAHOO! INTERNET LIFE, July 2000.

INTRODUCTION

Copyright's problem in the digital era is rooted in a simple fact: entertainment devices have become copying machines with easy distributive capacity. When the entertainment device is a Walkman with headphones, it is digital but not a problem. Same

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with free-standing digital televisions or portable DVD players. College students were early adopters of a different entertainment device: the networked personal computer ("PC"). Peer-to-peer (P2P) software – beginning with Napster and continuing with its conceptual descendents – has allowed people with PCs on the Internet to engage in historically unprecedented levels of *prima facie* copyright infringement. But the basic problem is the same whether it is a TiVo connected to a plasma screen or an iBook hooked up to your stereo system. The screens and speakers that entertain us are increasingly attached to processors and massive digital memories that readily transmit copies to other processors and massive digital memories.

There are three kinds of responses to this problem. The first is the John Perry Barlow, technological determinism response: do not even try to enforce copyright law, it will either wither away or be abolished. But if your goal is to keep copyright law, you are left with two other kinds of responses: reflect copyright norms and their enforcement in the technology and attendant business models, *or* enforce the copyright norms against end users regardless of the technology. A changing, but usually broad coalition of copyright industries have pursued the first goal effectively across a vast battlefront: the Digital Millennium Copyright Act (DMCA) provisions against anticircumvention activities and devices; parallel legislative provisions in European and other developed countries; digital rights management technology projects between software, consumer electronics, and content industries; and the Federal Communications Commission's ruling on the "broadcast flag." In all these examples, the fora were legislative, administrative, and executive bodies; the project has been having copyright norms and their enforcement reflected in the technology and attendant business models.

These debates have engaged lobbyists, technologists, and academics, but garnered relatively little public attention. Perhaps this is because the issues have been *prospective uses* and people undervalue gains – forms of utility that do not map directly onto present production and consumption patterns. But the broader policy community – people who we hope know better – have also given these issues less attention,[1] raising the possibility that the technolo-

[1] For example, when the *Wall Street Journal* ran a long editorial surveying Michael Powell's tenure as chair of the FCC, there was no mention of the broadcast flag. Editorial, *After Michael Powell*, WALL ST. J., Jan. 21, 2005, at A8. Both the editorial pages and the business pages of the *New York Times* were similarly silent on the broadcast flag in reviewing Powell's legacy and future FCC issues. *See* Stephen Labaton, *F.C.C. Faces a New Set of Challenges After*

gists and academics have overvalued what is at stake.[2] We will never really know: as Stephen Jay Gould reminded us,[3] we do not get to rewind history's tape and see with certainty what progress might have resulted from a different mix of technology and law.

The struggle over P2P technology has offered a stark contrast to the legislative project of reflecting copyright norms and their enforcement in the technology and attendant business models. Peer-to-peer technology blindsided the recording industry in 1999 and, until recently, the recording industry has been fighting this battle alone. The battle has been fought mainly in the courts, not in legislative and administrative agencies. And the battle has attracted much more attention from press and pundits – indeed, a regular stream of front-page stories and television news reports.[4] Yet the choices facing the music industry have still been the same: (a) surrender, (b) seek to enforce copyright norms against the technology and its business models, and/or (c) seek to enforce copyright norms against individual consumers – the individual P2P users offering and downloading music files.

In the period between the rise of Napster and the summer of 2003, everyone said that the record companies would not sue indi-

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Powell, N.Y. TIMES, Jan. 24, 2005 at C1; Editorial, *Another Powell Departs*, N.Y. TIMES, Jan. 24, 2005, at A16 ("Mr. Powell's disappointing reign will be remembered for the extremes to which he went to punish what he called indecency, and for his abdication of responsibility for regulating the businesses that came before him."). Even when the *Los Angeles Times* took up the same theme, the broadcast flag was mentioned only at the twenty-third paragraph of a thirty-four-paragraph story. James S. Granelli et al., *FCC Finds Itself Up to its Neck in Hot Water*, L.A. TIMES, Jan. 24, 2005, at C1.

[2] An example of overreaction to technology – at least on industry's side – was the digital audiotape (DAT) and the resulting Audio Home Recording Act (AHRA) in 1992. *See, e.g.*, Ryan S. Henriquez, *Facing the Music on the Internet: Identifying Divergent Strategies for Different Segments of the Music Industry in Approaching Digital Distribution*, 7 UCLA ENT. L. REV. 57, 79 (1999) ("When enacted, the AHRA contemplated DAT, DCC, and MiniDiscs flooding the consumer market, and enabling pirates to make innumerable perfect copies from one master. Interestingly, only the Sony MiniDisc was actually a commercial success, and the music industry's panic that inspired the AHRA was overstated."); Brian Leubitz, Note, *Digital Millennium? Technological Protections for Copyright on the Internet*, 11 TEX. INTELL. PROP. L.J. 417, 432 (2003) ("The AHRA was relatively unimportant and unsuccessful for several reasons. The most significant of those reasons was that the target technology, DAT, was never significantly adopted by the market and is essentially a non-factor in the consumer electronics marketplace.").

[3] STEPHEN JAY GOULD, WONDERFUL LIFE: THE BURGESS SHALE AND THE NATURE OF HISTORY 45-8, 292-98 (W. W. Norton & Company 1989).

[4] Particularly if you include the front page of business sections. *See, e.g.*, Don Clark and Martin Press, *Can the Record Industry Beat Free Web Music?*, WALL ST. J., June 20, 2000, at B1; Amy Harmon, *In Fight Over Online Music, Industry Now Offers a Carrot*, N.Y. TIMES, June 8, 2003, at A1; Bill Husted, *And the Beat Goes on; Music Downloads Are Going Strong Despite Napster's Setback*, ATL. J.-CONST., Jan. 20, 2002, at 1P; Todd Pack, *Pirating of Music Flourishes Despite Napster's Unplugging*, ORLANDO SENTINEL, Sept. 7, 2001, at B1; Matt Richtel, *Turmoil at Napster Moves the Service Closer to the Day the Music Dies*, N.Y. TIMES, May 15, 2002, at C1; Kelly Zito, *Online Music Firm Settles Lawsuit with Publishers; Napster Settles One Key Lawsuit*, S.F. CHRON., Sept. 25, 2001 at C1.

vidual P2P users. The conventional wisdom was summarized in the pithy phrase "it's not good business to sue your customers."[5] Sure enough the record companies initially chose plan "b." The Ninth Circuit's ruling in *Napster*[6] and the Sixth Circuit's decision in *Aimster*[7] were decisions against particular business models intentionally built on copyright infringement. When the movie studios entered the fray in 2004 against BitTorrent, they too went after particular business models, not P2P technology itself. The high profile failure in this category has been the *MGM v. Grokster*[8] decision. In *Grokster*, a Ninth Circuit panel held that Grokster's infringement-based business model had successfully moved into the "staple article of commerce" safe harbor created by the Supreme Court in its 1984 decision in *Sony Corp. of America, Inc. v. Universal City Studios* (*Betamax*).[9]

But even before this setback, the massive scale of P2P activity forced the recording industry to reassess its strategy and, in 2003, the industry began suing individual P2P users. This turn of events was the real source of news coverage on copyright issues in 2003 and 2004[10] and seems to have left some P2P supporters dazed. Four thousand lawsuits against individual consumers later, P2P activist Fred von Lohman was still asking, in the title to an 2004 op-ed piece, "Is Suing Your Customers A Good Idea?"[11]

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[5] Lisa M. Bowman, *Labels Aim Big Guns at Small File Swappers*, CNET NEWS.COM (June 25, 2003) (Radcliffe, a partner at Gary Cary Ware & Freidenrich, which is based in Palo Alto, California, stated, "[i]t's obviously a high-risk strategy, because you're suing your own customers."), *at* http://msn-cnet.com.com/2100-1027?3-1020876.html; *see also* Sean Silverthorne, *Music Downloads: Pirates – or Customers?*, Harvard Business School Working Knowledge (June 12, 2004) (quoting Felix Oberholzer-Gee as saying "[s]uing potential customers is not exactly a standard entry in the book of good CRM" (customer relationship management)), *at* http://hbswk.hbs.edu/item.jhtml?id=4206&t=innovation (last visited Jan. 31, 2005). In another variation, Jeff Tweedy of the band Wilco says "[t]reating your audience like thieves is absurd." Xeni Jardin, *Music is Not a Loaf of Bread*, WIRED NEWS (Nov. 15, 2004), *at* http://www.wired.com/news/print/0,1294,65688,00.html.

[6] A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

[7] *In re* Aimster Copyright Litig., 334 F.3d 643 (7th Cir. 2003); *cert. denied*, 124 S. Ct. 1069 (U.S. 2004).

[8] 380 F.3d 1154 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 686 (U.S. 2004).

[9] 464 U.S. 417 (1984).

[10] In addition to appropriate examples in *supra*, note 4, see Amy Harmon, *Recording Industry Goes After Students Over Music Sharing*, N.Y. TIMES, Apr. 23, 2003, at A1.

[11] Fred von Lohmann, *Is Suing Your Customers a Good Idea?*, LAW.COM (Sept. 29, 2004), *at* http://www.law.com/jsp/article.jsp?id=1095434496352. The 4280 lawsuits probably did not include 750 more announced in October, 2004, nor the 761 more in November, 2004, nor the 750 more in December, 2004, nor the 717 more in January, 2005. Associated Press, *Recording Industry Sues 750 More Computer Users* (Oct. 28, 2004), *available at* http://www.siliconvalley.com/mld/siliconvalley/news/editorial/10040140.htm (last visited Jan. 31, 2005); *Record Companies Sue 761 More Alleged Music Traders* (Nov. 18, 2004), *available at* http//:siliconvalley.com/mld/siliconvalley/news/editorial/10216917.htm?template=contentModules/printstory.jsp (last visited Jan. 31, 2005); Associated Press, *Record Companies Sue 754 More Alleged File Swappers* (Dec. 16, 2004), *available at* http://www.siliconvalley.com/

Parts I–III of this Article answer that question. It turns out that suing P2P users is not a bad idea. The downside of suing P2P users was always misunderstood and there appears to be a substantial upside, at least for now. This provisional conclusion is reached by sifting through a large number of reports, stories, surveys, and statistics – the kind of bewildering array of materials that confronts a policymaker trying to figure out the reality of P2P's impact on the music industry – but without engaging in any original empirical work or scrutinizing the methodology of each study and each survey.

Parts IV and V then explore, respectively, why the copyright industries should not limit themselves to lawsuits against P2P users; the difficult problem of infringement-based business models built on P2P technologies; and the dilemma of revisiting the Supreme Court's 1982 *Betamax* decision. Although the problem is not easy, the technological opportunities of P2P have become clearer since the early Napster days and we must find, one way or another, a way to cleave the businesses and individuals intent on massive copyright infringement from the promise of the peer-to-peer concept.

I. THE OVERESTIMATED DOWNSIDE OF SUING P2P USERS

The "suing their own customers" mantra was always a little silly if it meant that a business should not irritate or offend those who bring it custom. A customer – a.k.a. "fan" – identifies with her artists: She buys songs by the Dandy Warhols, Outkast, Madonna, the Supreme Beings of Leisure, Bebel Gilberto, etc. There is little or no identification with the record label, let alone the big record company. Not many people know that Laurie Anderson is with Nonesuch; that Prince adopted that symbol as his name until he could extricate himself from a record deal with Warner; or that David Bowie has – in the long course of his career – been signed with Vocalion Pop, Parlophone, Pye, Decca, Mercury, Philips, Deram, RCA, EMI, Victory, JVC Victory, Virgin, and Rykodisc. (He's now with Sony/Columbia, in case you did not know).[12] Try

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mld/siliconvalley/10433480.htm (last visited Jan. 31, 2005); John Borland, *RIAA Sues 717 File-Swappers*, CNET NEWS.COM (Jan. 27, 2005), *at* http://news.com.com/2110-1027?3-5553517.html (last visited Jan. 31, 2005). According to the International Federation of the Phonographic Industry, "7,000 people were sued in 2004" worldwide. Reuters, *Music Exec Defends File-Sharing Lawsuits*, CNET NEWS.COM (Jan. 22, 2005), *available at* http://news.com.com/Musicexec+efendsfile-sharing+lawsuits/2100-1027?3-5546375.html (last visited Jan. 31, 2005). As Sonny Bono might have said, "the beat goes on."

12 Bowiewonderworld.com *at* http://www.bowiewonderworld.com/faq.htm#m11 (last visited Jan. 31, 2005).

to find a fan who stops buying an artist because they changed record labels.

The lawsuits are not even brought by the record labels; they are not even brought by the giant record companies behind the record labels. The lawsuits are brought by an anonymous trade association, the Recording Industry Association of America (RIAA). In other words, the plaintiff is thrice removed from the artist – "customer" relationship. Rounding out this public relations strategy, most artists remain low profile on the P2P issue. If one were giving an artist PR advice on this issue, one would tell her to avoid the topic and, if pressed, have a 2-3 part message: [a] people should pay for their downloads to support artists, but [b] either avoid the lawsuit issue or express "concern" about the lawsuits, and [c] hit the record companies for being greedy, if it suits you. Turns out that is pretty much what a lot of artists do say.[13]

At the end of 2004, the Motion Picture Association of America (MPAA) initiated their own wave of lawsuits to stem P2P distribution of audiovisual works. MPAA has launched lawsuits against individual P2P users[14] as well as BitTorrent "hubs"[15] – websites with functionality somewhere between the original Napster central server, warez sites, and individual uploaders. The same basic logic applies to the MPAA lawsuits as to the RIAA lawsuits. We are way past the days when people made a strong association between particular films and major studios – with the possible exception of the association of children's films with Disney (and Pixar). And, sure

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[13] For some artists' statements advocating that downloaders pay, emphasizing that fans need to be "educated," and none expressly endorsing the lawsuits against users, see whatsthedownload.com (quotations from Sarah McLachlan, Moby, Jason Mraz, Brad Paisley, Steve Vai, etc.), *at* http://www.whatsthedownload.com/word?docs/Whats?The?Download?Artist?Views.doc (last visited, Feb. 2, 2005). When asked about Napster in 2001, Prince said "[t]he fans visiting Napster, they would want everything the artist puts out. They wouldn't want to pay for it. What's up with that?" But he added, "Napster was inevitable . . . given the arrogance of the music industry as a whole. I mean, $18 a CD. Where are they getting that?" Bilge Ebiri, *Prince on the Service Formerly Known as Napster*, YAHOO INTERNET LIFE!, June 2001, at 80. At the other extreme, there are artists like Jeff Tweedy of Wilco who supports downloading. *See* Xeni Jardin, "Music is Not a Loaf of Bread," WIRED NEWS (Nov. 15, 2004) (quoting Tweedy that "[t]reating your audience like thieves is absurd.") *available at* http://www.wired.com/news/print/0,1294,65688,00.html (last visited Feb. 4, 2005).

[14] Jon Healey & Lorenza Munoz, *MPAA Plans Suits to Stop Film Piracy*, L.A. TIMES, Nov. 4, 2004 at C1; Matt Richtel & Sharon Waxman, *Movie Industry Preparing Suits on File Sharing*, N.Y. TIMES, Nov. 5, 2004 at C4.

[15] *See* John Borland, *BitTorrent File-Swapping Networks Face Crisis*, CNET NEWS.COM, (Dec. 20, 2004), *at* http://news.com.com/BitTorrentfile-swappingnetworksfacecrisis/2100-1025?3-5498326.html (last visited Feb. 2, 2005); John Borland, *MPAA Files New File-Swapping Suits*, CNET NEWS.COM, Jan. 26, 2005 ("The group filed its first set of lawsuits against individual computer users in November, and followed up with a worldwide campaign against the operators of BitTorrent, eDonkey and DirectConnect networks."), *at* http://news.com.com/MPAAfiles–ewfilm-swappingsuits/2100-1030?3-5551903.html (last visited Feb. 2, 2005).

enough, one of the holdouts to starting the lawsuits was Disney,[16] a company that is otherwise rarely timid about defending its copyrights. Seeing a faceless trade association sue movie downloaders, consumers will not blame amorphous "studios." Consumers definitely will not blame Keanu Reeves, Spike Lee, Kevin Spacey, or Nicole Kidman.

In short, the public relations downside of suing individuals was always overestimated.

II. But Is There Really an Upside? Are the Lawsuits Working?

When people reasonably ask if the lawsuits are "working" they mean – or should mean – are the lawsuits [A] reducing unauthorized music file distribution through the P2P systems that [B] substitutes for legitimate music sales? The evidence is conflicting and muddled, although there is reasonable evidence of both "A" and "B".

A. *Are the Lawsuits Stemming Downloading?*

The initiation of lawsuits against users in mid-2003 touched off a wave of publicity and initial measures indicated a huge drop in downloading. A survey released in December 2003 by Pew Internet and American Life Project showed that the percentage of United States ("U.S.") Internet users downloading music had been cut in half, to 14% of U.S. Internet users.[17] In Canada, where most of the population lives in overlapping U.S./Canada media markets, the number of people on the Internet who downloaded at least one music file dropped from 47% in June 2002 to 32% by the spring of 2004 – 1.8 million Canadians stopped downloading.[18] Perhaps most important, 21% of those surveyed said that fear of "legal ramifications" led them to stop downloading.[19] (It's worth noting that the Canadian recording industry has been critical of this study.)

Yet by early 2004, firms tracking downloading on the Internet began to report a visible surge in U.S. households downloading music illegally – increases in both October and November 2003.[20]

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16 *See* Healey & Munoz, *supra* note 14.

17 Alex Veiga, *Illegal Music Downloading Climbs*, SiliconValley.com (Jan. 15, 2004), *at* www.siliconvalley.com/mld/siliconvalley/7720607.htm (last visited Feb. 2, 2005).

18 Chris Lackner, *Downloaders Backing Off, Study Says*, Toronto Globe and Mail, May 11, 2004, *available at* www.theglobeandmail.com (available after registration).

19 *Id.*

20 *Id.*

And the Pew Project later found that the number of downloaders in the US grew to 23 million in March 2004 – from 18 million in November 2003, but still far less than the high of 35 million people in Spring 2003, before the lawsuits started.[21] The most iconoclastic claim on this front came in a study by a professor and graduate student at UC Riverside.[22] The group, led by Thomas Karagiannis, used sophisticated tracking of popular and new versions of P2P protocols. They concluded that "P2P traffic volume has not dropped since 2003."[23]

So, toward the end of 2004, there were stories like one in *Rolling Stone* headlined "Lawsuits Fail."[24] Some Hollywood people are publicly saying the recording industry's effort "clearly has not worked" and that the "RIAA has done nothing to change the culture of downloading."[25] Professor Jonathan Zittrain said that the lawsuits have had an "insubstantial effect."[26]

These monochromatic assessments gloss over some important points – some simple and some complex – about file-sharing numbers. When someone claims that "P2P traffic volume has not dropped since 2003," is it a claim about *U.S.* peer-to-peer traffic or *worldwide* activity? Also pay attention: is it the number of Internet *users* or number of *downloads*? On the first point, articles like the *Rolling Stone* piece and von Lohmann's commentary discuss rising worldwide activity. The Karagiannis study, for example, draws its numbers from observing Internet traffic at two links physically located in San Diego. We have no idea how much of that traffic had one or both end points outside the U.S., particularly Latin America.

Using statistics that include non-U.S. downloads to discuss whether the lawsuits in the *U.S.* are working is disingenuous, silly or disturbingly Americentric – implicitly thinking everyone on the planet sees our TV news and fears being hauled into our courts (perhaps the Canadians do). Global consumption trends often lag behind the same trends in the U.S. Ask anyone at McDonalds or another U.S. chain, whose growth abroad continued to rise long

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[21] David McGuire, *Report: Kids Pirate Music Freely*, WASHINGTONPOST.COM (May 18, 2004), *at* http://www.washingtonpost.com/wp-dyn/articles/A37231-2004May18.html (last visited Feb. 2, 2005).

[22] Thomas Karagiannis and Michalis Faloutsos, *Is P2P Dying or Just Hiding?*, CAIDA, SDSC, UC San Diego (2004), *available at* http://www.caida.org/outreach/papers/2004/p2p-dying/p2p-dying.pdf (last visited Feb. 28, 2005)

[23] *Id.*

[24] Steve Knopper, *Lawsuits Fail*, ROLLING STONE, Aug. 19, 2004, at 32.

[25] Healey & Munoz, *supra* note 14 (quoting Dawn Hudson of the Independent Feature Project and George Hedges, attorney for Icon Productions, respectively).

[26] Richtel & Waxman, *supra* note 14.

after growth in the U.S. stagnated. It's only sensible to look at downloading statistics *inside* a jurisdiction some time after lawsuits have been started in that place and gotten significant media attention (although figuring out which downloading is occurring in which country is not so easy). Industry-led lawsuits against P2P users outside the U.S. were only announced in spring 2004.[27]

If you are being presented with numbers of downloads, then those numbers fail to account for how successful the record companies have been at spoofing. They continue to strategically flood major P2P systems with spoofed files that look like song files, but are actually advertisements, warnings, or irritating short track loops.[28] "Significantly contaminated" would be an understatement in describing how most of the P2P systems now seem.[29] Why is that important? Because download numbers seem to *include* downloads of spoofs. If an intent college student has to download four files to get a good copy of Britney Spears' "Toxic," we would see four downloads in the stats, but there has really only been one download. The more successful the record companies are at spoofing, the more dedicated P2P users have to be to get the good stuff. In other words, with spoofing success and a cadre of committed downloaders, download numbers and P2P traffic will rise while real downloads can be stable or actually dropping.

Third, the data from people tracking downloads is simply not

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27 Mark Landler, *Fight Against Illegal File Sharing is Moving Overseas*, N.Y. TIMES, Mar. 31, 2004, at W1 (announcing suit "for the first time" in Denmark, Germany, Italy, and Canada); Reuters, *French Hound Music Pirates*, WIRED NEWS (Mar. 30, 2004) (French downloaders being threatened, but not yet sued), *at* http://www.wired.com/news/digiwood/0,1412,62868,00.html (last visited Feb. 2, 2005).

28 Record company officials prudently try to keep this low profile and exact numbers do not seem publicly available. *See* Katie Dean, *Academics Patent P2P Spoofing*, WIRED NEWS (May 4, 2004) ("Individual record companies and movie studios are already working with software companies like Overpeer and MediaDefender to flood P2P networks with bogus files."), *at* http://www.wired.com/news/digiwood/0,1412,63384,00.html?tw=wn?story?related (last visited Feb. 2, 2005); Paul Bond, *Mercenaries in P2P Tech War*, HOLLYWOOD REP. (Oct. 22, 2003) (reporting one spoof company claiming that on some P2P systems "there's a 90% chance the would-be pirate will get a decoy.") *at* http://www.hollywoodreporter.com/thr/music/feature?display.jsp?vnu?content?id=2007231 (last visited Feb. 2, 2005); *but see* David McCandless, *Cybersleuths*, THE GUARDIAN (Jul. 23, 2003) (reporting spoofing is not adequate), *available at* http://www.guardian.co.uk/online/story/0,3605,1004307,00.html (last visited Feb. 2, 2005).

29 As well as downloads that are worms and viruses. *See* Tyler Hamilton, *What's Music Worth?*, TORONTO STAR, Jan. 12, 2004 ("A recent study from Herndon, Va.-based TruSecure Corp. found that 45 per cent of free files downloaded through Kazaa, the most popular file-sharing program, were viruses, worms, and Trojan horse programs."), *available at* www.thestar.com (last visited Feb. 2, 2005) (available after registration). Among major P2P systems, BitTorrent appears immune to this spoofing. Associated Press, *File-Swap Site Folds for Good*, WIRED NEWS (Dec. 20, 2004) ("The program owes its popularity in part to its immunity to industry attempts to confound it with bogus decoy files."), *at* http://www.wired.com/news/digiwood/0,1412,66099,00.html (last visited Feb. 2, 2005).

as certain as headlines suggest. Consider the Karagiannis study, which looked at routing information on packets traveling through the Net. The routing information allowed the researchers to conclude which packets were likely P2P, but not the contents of those packets.[30] That's an important limitation because different sized files and different compression formats require different amounts of packets. The nascent arrival of feature film downloading involves magnitudes of packets far beyond MP3 files, meaning a small number of audiovisual film downloads can mask a sizeable reduction in MP3 downloads. If *X* packets of P2P traffic in early 2003 was 250,000 MP3 files, that same *X* packets of P2P traffic in mid 2004 could be something like 500-1000 film downloads and 150,000 MP3 downloads. By one count, in October 2004 there were more than 33,000 unique copies of "Hellboy" and more than 32,000 unique copies of "Spider-Man 2" available in P2P systems.[31] The Karagiannis study's measure of P2P traffic included BitTorrent, which further skews their measure because BitTorrent is widely used to download not only feature films, but large files like the Linux operating system.[32] In short, beware of any study that says P2P has not shrunk – and fails to account for the changing size – and types – of the files that are likely flowing through the system.

Finally, when someone says these lawsuits have had an "insubstantial effect," what do they think would have happened without the lawsuits? Outcomes are commonly perceived as positive or negative in relation to a reference outcome that is judged neutral. In this case, the neutral reference outcome would have been what happened if the RIAA had not intervened: what kind of P2P growth curve would we have seen without the lawsuits? The most reasonable answer is that downloading would have continued its relentless, dramatic rise until there was a slow-down for consumption saturation and late [and resistant] technology adopters. When we say something is or is not "working," we need to compare the situation to a *counterfactual,* our best guess of what would have happened otherwise. Against the most reasonable guess of what

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30 *See* Karagiannis and Faloutsos, *supra* note 22.

31 Sarah McBride, *Film Industry Vows Crackdown on Online Movie Thieves,* WALL ST. J., Nov. 5, 2004, at B1 (illegal download statistics from BayTSP). My thanks to Mike Kass, senior scientist at Pixar, for working through the relevant file sizes with me.

32 *See* Karagiannis and Faloutsos, *supra* note 22; Robert Lemos, *LokiTorrent Fights MPAA Legal Attack,* CNET NEWS.COM (Dec. 30, 2005) ("Linux vendors MandrakeSoft and Xandros offer a free version of their operating systems only through a BitTorrent download.") *at* http://news.com.com/LokiTorrentfights+MPAA+legal+attack/2100-1025?3-5508073.html (last visited Feb. 2, 2005); Adam Pasick, *File-Sharing Network Thrives Beneath Radar,* BIZREPORT (Nov. 8, 2004), *at* http://www.bizreport.com/news/8317/ (last visited Feb. 2, 2005).

would have happened without the lawsuits, the lawsuits seem to have suppressed downloading substantially.

It also looks like the lawsuits are increasing awareness of copyright law. In an April 2004 survey of eight to eighteen year-old Americans with Internet access, 85% of respondents said they knew that most popular music is copyrighted, but 56% continued to download.[33] You can look at this two ways. Optimistically for the record companies, awareness of copyright appears to have risen dramatically. Pessimistically, compliance with the law is still an enormous problem. Presumably, if awareness of a law has risen dramatically, but compliance has not, the law enters a window of vulnerability where compliance must rise or the law will fall into disrespect. (It was not disrespected when no one knew about it.)

While the future of respect for copyright is still cloudy, there has been at least one unquestionably salutary effect of the lawsuits. Media and activists were quick to label the lawsuits against twelve year olds and grandmothers as a public relations disaster for the RIAA.[34] That is just wrong. The media attention has been a public relations *coup*, sending a shiver of fear into any parent who is not judgment-proof. "Music piracy suits hitting home" was a November 2004 *Miami Herald* headline.[35] The people who promote parent-child discussions about drugs must have become intensely

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[33] McGuire, *supra* note 21. A Pew Internet Project survey in the summer of 2003 – just as the lawsuits were getting started – showed that 67% of downloaders said "they do not care about whether the music they have downloaded is copyrighted." Mary Madden & Amanda Lenhart, *Pew Internet Project Data Memo*, PEW INTERNET & AMERICAN LIFE PROJECT (July 2003), *available at* http://www.pewinternet.org/pdfs/PIP?Copyright?Memo.pdf (last visited Feb. 2, 2005). It is not clear if or how the Pew questions changed in the 2003 and 2004 data, but it would be desirable to have the same question administered the same way to show increased, decreased, or flat awareness of copyright laws.

[34] *See* Dan Heilman, *The Jukebox of Paradise*, 6 COMPUTER USER 22, June 1, 2004, at 22 ("So far, every effort that the record industry has made to curtail illegal downloading has resulted in a public-relations disaster. Stories of little old ladies and children being erroneously sued has served only to poison any efforts toward deterring downloaders."); Jesse Hiestand, *Leaning to the Rights*, HOLLYWOOD REPORTER (Jul. 13, 2004) ("They're holding back because, let's face it, the [Recording Industry Association of America's] efforts have been . . . a public-relations disaster," famed Hollywood attorney and author Peter Dekom says. "The MPAA has been smart enough so far not to alienate its customers."), *at* http://www.thehollywoodreporter.com/thr/crafts/feature?display.jsp?vnu?content?id=1000589849 (last visited Feb. 2, 2005); John Naughton, *The Networker: If you want to see the future, it's time to consult your peers*, THE OBSERVER, Oct. 10, 2004, at 8 ("[T]he Recording Industry Association of America (RIAA) . . . sued a 12-year-old girl and paid the price in a public-relations disaster of epic proportions."); Richtel & Waxman, *supra* note 14 (quoting Gigi Sohn as saying "the industry risked a public relations headache if it sued 'grandmothers and 12-year-old girls.'"); Paul Sweeting & Ben Fritz, *MPAA Sounds Lawsuit Alarm*, DAILY VARIETY, Nov. 4, 2004, at 4 ("The first round of RIAA suits last year drew some particularly bad press when several of the targets were revealed to be young children.").

[35] Patrick Danner, *Music Piracy Suits Hitting Home*, THE MIAMI HERALD, Nov. 9, 2004, *available at* http://www.miami.com/mld/miamiherald/10133324.htm (last visited Feb. 2, 2005).

jealous: the RIAA lawsuits woke many parents up to the fact that the PC might look like a TV, but it is not. It connects the child to the outside world, so that sitting in the safety of the home a young person can threaten teachers, defame and torment classmates, deface websites, damage businesses, or violate other people's privacy. As a result, there have been a lot of family talks about all this that had never happened before. And we are all the beneficiaries of such increased parental awareness.

A final observation about whether the lawsuits are "working" to reduce P2P music file distribution: the lawsuits against P2P users have targeted people offering significant amounts of music, i.e., the lawsuits are really against uploaders, not downloaders. There are two reasons for this. First, while a person accused of reproducing music files could make a colorable fair use claim, the person accused of offering music files on a P2P system already faces a body of precedent saying that uploading is unauthorized distribution unprotected by fair use. Second, it is easy to gather air-tight evidence against an uploader: the RIAA just logs onto a P2P system and downloads from someone – the P2P user literally supplies the evidence against himself.

If this was widely understood, the lawsuits would depress *supply* but not necessarily demand. Americans might continue to download, but not offer their own music files for uploading [many P2P systems permit this]. An analysis by Oberholzer and Strumpf concluded that in 2002 Americans were already getting 54.9% of their downloads from P2P participants outside the U.S.[36] In other words, if understanding of the lawsuits increases substantially, suppressing P2P music file distribution might require uploader-deterring lawsuits in all countries with enough Internet penetration to serve as "suppliers" to the U.S. and global Internet communities.

B. *Is Downloading Really Connected to Record Sales?*

Even if the lawsuits are dampening enthusiasm for downloading, you have to connect increased downloading to decreased music sales. Experts differ in their beliefs about this. Any claim that every music download is a lost sale (or that 10-12 downloads is a lost album sale) is obviously wrong. Lots of people will take something for free even if they would never pay for the same thing. That's how party favors and much of modern marketing works.

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[36] Felix Oberholzer & Koleman Strumpf, The Effects of File-Sharing on Record Sales: An Empirical Analysis, at 37, Table 2 (Mar. 2004) (unpublished manuscript, on file with The University of North Carolina), *available at* http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf (last visited Feb. 2, 2005).

Along those lines, there are a few studies saying that downloading is not directly connected to reduced music sales – or that "sampling" through P2P systems actually increases music sales. There is an almost numbing number of conflicting studies and surveys.[37]

What we know is that the U.S. music market contracted significantly from 1999 to 2003. Shipments of recorded music in the U.S. fell by an impressive 26%, from 1.16 billion units in 1999 to 860 million units in 2002.[38] U.S. music industry revenues fell from 13.2 billion in 2000 to 11.2 billion in 2003 – a 16% decline before adjusting for inflation.[39] In Canada, the music tumbled from Canadian dollar revenues of 1.5 billion to 881 million in five years.[40] The global music market contracted from $38.5 billion in 1999 to $32 billion in 2003.[41] Some people attribute this decline – most or all – to non-downloading factors. One explanation is that the decline has been caused by economic cycles, either general to the economy [the recent recession in the U.S.] or specific to the music

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[37] *See* John Schwartz, *A Heretical View of File Sharing*, N.Y. TIMES, April 5, 2004, at C1. For studies suggesting that downloading adversely affects music sales, see Kai-Leung Hui & Ivan Png, *Piracy and the Legitimate Demand for Recorded Music*, 2 CONTRIBUTIONS TO ECONOMIC ANALYSIS, article 11 (2003); Stan Leibowitz, Will MP3 Downloads Annihilate the Record Industry? (June 2003) (unpublished manuscript, on file with The University of Texas at Dallas); Alejandro Zenter, Measuring the Effects of Online Piracy on Music Sales (Dec. 2003) (unpublished manuscript, on file with The University of Chicago); Stan Liebowitz, *File-Sharing: Creative Destruction or Just Plain Destruction?* 6 (Dec. 2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract?id=646943 [hereinafter Liebowitz (2004)]; *see also* Rob & Waldfogel study discussed *infra*, notes 53-54 and accompanying text. For a study suggesting that downloading increases music sales, see Oberholzer & Stumpf, *supra* note 36. The Liebowitz (2004) and Oberholzer & Strumpf studies have long bibliographies of the various studies, surveys, and analyses that have been performed.

[38] *See* Bridget Finn, *Can Rip-Proof CDs Save the Music Biz?*, CNN.COM (Sept. 10, 2003); Press Release of Senator Coleman, Coleman Releases Music Industry Response to File-Sharing Inquiry (Aug. 18, 2003) (quoting Letter from Cary H. Sherman, RIAA President and General Counsel, to Senator Norm Coleman, August 14, 2003), *available at* http://www.nacua.org/nacualert/memberversion/Peer? to? Peer/RIAAResponse.pdf (last visited Feb. 2, 2005).

[39] The U.S. music industry grew every year from 1990 to 2000 inclusive, except for 1997 when there was a small decline in both units shipped and dollar revenues. Between 1999 and 2000 – a period when Napster downloading began – growth slowed to 0.4% in units shipped and 3.1% in revenues. Because U.S. inflation in 2000 was 3.38%, the revenues for that year are essentially flat. For the next three years, there was a decline every year in both units shipped and revenues. *See* RIAA's 1999 Yearend Statistics, *available at* http://www.riaa.com/news/marketingdata/pdf/md?riaa10yr.pdf; RIAA's 2003 Yearend Statistics, *available at* http://www.riaa.com/news/newsletter/pdf/2003yearEnd.pdf (last visited Feb. 2, 2005).

[40] Tyler Hamilton, *Music Swappers Win Court Victory*, TORONTO STAR, Apr. 1, 2004, *available at* http://www.thestar.com/NASApp/cs/ContentServer?pagename=thestar/Layout/Article_PrintFriendly&c=Article&cid=1080774614475 (last visited Feb. 2, 2005). The same reporter had given slightly smaller starting number for Canada a few months earlier: "[w]hat was a $1.4 billion industry in Canada a few years ago is now estimated at less than $900 million." Hamilton, *supra* note 29.

[41] *Music Sales Fall 7.6 Percent; Industry Blames Piracy*, SILICONVALLEY.COM (Apr. 7, 2004), *at* http://www.siliconvalley.com/mld/siliconvalley/news/editorial/8377665.htm?template=contentModules/printstory.jsp (last visited Feb. 2, 2005).

industry [the end of the bump from CDs replacing older media]. Another explanation is that the music industry is just not producing great acts that generate enthusiasm and sales – what we might call the "boring product" explanation.[42]

Almost everyone agrees that the industry's decline stems from a combination of factors. We should not accept that P2P systems is the sole cause of the decline – in its somberer moments, even the RIAA recognizes that.[43] But we should also not accept any of these other explanations as an exclusive or dominant explanation over P2P file distribution. Consider the "boring product" explanation. Yes, we may be past the apogee of Madonna's steamy creativity; if Britney Spears is the new Madonna, then there's been at least a short-term qualitative decline in pop music. It is true that the "boring product" explanation is sometimes given in other industries, but it is usually used to explain the situation of individual companies,[44] not entire industries and it is usually attached to a much smaller decline – or even flat sales. The idea that a 26% drop in an entire industry has occurred because its executives have suddenly lost the ability to find good inputs is quite extraordinary (at least outside depletable extractive industries). The alternative to executives suddenly became clueless about discovering and marketing talent is that the musicians themselves suddenly became talentless – an explanation for declining demand that makes even less sense, particularly when the decline has been in the global music market. It is not just the Americans who suddenly became boring and clueless: it also had to have happened to the Brits, Spaniards, and Latin Americans (all simultaneously).

Another possibile cause of the rapid decline of the music market is that consumers are spending their disposable income on

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42 Geoff Boucher, *Grammys Find Sales in a Funk*, L.A. TIMES, Feb. 24, 2002, at A1 (noting that "the industry is obsessed by a lack of star power" and quoting David Geffen as saying that "[a]t the end of the day the biggest challenge to the record industry is the quality of the music, which has been deteriorating.")

43 Press Release, RIAA, RIAA Releases 2003 Consumer Profile (Apr. 20, 2004) (blaming P2P downloading "along with economic conditions and competing forms of entertainment, that is displacing legitimate sales."), *available at* http://www.riaa.com/news/newsletter/042004.asp (last visited Feb. 2, 2005).

44 For example, McDonald's flagging sales at the turn of the millennium have been attributed to people wanting different products and McDonald's not having interesting offerings. *See* Sherri Day, *McDonald's Chief Stresses Food Safety*, N.Y. TIMES, May 23, 2003, at C2. Ford's declining car sales relative to other brands has been attached to boring automobile designs. *See* Daniel Howes, *Ford Design Boss Endures Barbs for Style Restraint*, THE DETROIT NEWS, Dec. 19, 2004; *see also* Sajeev Mehta, *Keeper of the Flame: Ford High Performance*, BLUE OVAL NEWS (Jan. 24, 2005) (stating that Ford's designers "left Lincoln-Mercury with boring cars that (among other things) lost market share every year."), *available at* http://www.blueovalnews.com/2005/products/mehta.keeperofflame24jan05.htm (last visited Feb. 2, 2005).

other forms of entertainment, particularly DVDs and video games. Fitting this explanation, there was a sharp acceleration in DVD sales beginning in 2000, just when music sales dove. But Professor Stan Liebowitz has recently shown that the increase in DVD sales during the past few years "came largely at the expense of the video rental market."[45] When one aggregates the video rental and DVD sales data, the total audiovisual market growth trend does not look like a good explanation for the music market decline. And there is a second problem with this explanation: it could be that free downloadable music *shifted* consumer expenditures to entertainment that still was not free. In other words, part of the rise in DVD and video games sales may be a side effect of downloading, not the cause of the decline in music sales.

There is also circumstantial evidence of P2P's impact in the form of regional variations linking downloading to reduced music sales. The French music market, for example, remained more stable than other western European music markets until October 2002. The third and fourth quarters of 2002 saw accelerated broadband Internet access in France. And from October 2002 to the spring of 2004, French music sales tumbled 30%.[46] For the last few years, the east Asian economy with the most broadband penetration has been South Korea [70% of households] and CD sales in Korea have dropped from 420 billion Won in 2000 to 180 billion Won in 2003 – 58% of the music market disappearing in four years.[47] The collapse of the Korean music market is not explicable from overall economic condition: South Korea's GDP grew by 8.5% in 2000, 3.8% in 2001, 7% in 2002 and 3.1% in 2003.[48] South Korean unemployment peaked in 1999 (8.5%) and declined stead-

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45 Leibowitz (2004), *supra* note 37, at 25-26.

46 *See* Reuters, *supra* note 27 (noting French downloaders being threatened, but not yet sued). Other sources place the rapid growth of broadband in France a little later. *See Research and Markets: 2005 Telecoms in Europe - France and Switzerland*, BROADBAND WIRELESS EXCHANGE MAGAZINE (Jan. 17, 2005) ("Historically under-served in terms of both Internet and broadband penetration, France has experienced a year-long boom in broadband growth since the middle of 2003."), *at* http://www.bbwexchange.com/publications/page1115-1549347.asp (last visited Feb. 2, 2005).

47 Jung-a Song, *Korean Court Acquits Music Swap Service*, FINANCIAL TIMES, Jan. 13, 2005, at 20. Four-hundred-twenty billion Won would have been just over $4 billion U.S. in January 2005 exchange rates. *See* OANDA.COM: THE CURRENCY SITE, (providing historical currency exchange rates), *available at* http://www.oanda.com/convert/fxhistory (last visited Feb. 13, 2005).

48 *South Korean Economy: Economic Data*, KOREA ECONOMIC INSTITUTE (Feb. 2005), *available at* http://www.keia.org/4-Current/currentEconomicData.ppt (last visited Feb. 2, 2005). The Bank of Korea reported slightly lower numbers in 2002 and 2003. *See* Speech by Dr. Seung Park, Governor of the Bank of Korea, at the Seoul Foreign Correspondents' Club, Dec. 16, 2003, (reporting 6.3% for 2002 and 2.9% for 2003), *available at* http://www.bis.org/review/r031222e.pdf (last visited Feb. 2, 2005).

ily during the relevant period (3.5% at the end of 2003).[49]

These figures are highly suggestive of a causal relationship, but also point to good empirical research that can be done. Because nations have differed in their broadband penetration and because there are national data sets for broadband penetration and music sales, if this kind of correlation between the two appears in market after market – and across economic conditions [the French economy was growing much more slowly than the Korean], that could be quite meaningful.[50] This kind of bandwidth-to-music-sales analysis was done by Michael Fine regarding college areas on behalf of the RIAA,[51] but apparently has not been replicated and expanded.[52]

An alternative form of evidence of the relationship between increased downloads and decreased music sales is straightforward survey evidence. A recent survey-based study by economists Rafael Rob and Joel Waldfogel at the University of Pennsylvania concluded that among that university's undergraduate students, downloading reduced student per capita expenditures on hit albums released 1999-2003 from $126 to $100[53] – a 20% reduction that is eerily close to the percentage reductions in the US and global music business from 1999 to 2003.[54] Other surveys have

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49 KOREA ECONOMIC INSTITUTE, *supra* note 48. Similarly, by Liebowitz's measure of the U.S. economy, per capita music sales would have climbed or been flat every year 1999-2003. *See* Liebowitz (2004), *supra* note 37 at 21, Figure 2.

50 In this kind of analysis, broadband access serves as a rough proxy for amount of downloading. The defender of P2P could still argue that the two are correlated for other reasons, i.e., people do not listen to music while they are surfing the web or broadband access correlates with a change in tastes which also shifts consumption patterns away from music.

51 Report of Michael Fine, CEO of SoundScan, on the Effect of Online File Sharing (2000), *available at* http://www.riaa.com/news/filings/pdf/napster/fine.pdf (last visited Feb. 2, 2005).

52 At least, I did not find such studies. Oberholzer and Strumpf are critical of this approach, but without justification. They write "[u]nfortunately, such correlates [high-bandwidth Internet access] also allows for easier access to on-line purchases of albums which will not be reflected in the local sales data." Oberholzer & Strumpf, *supra* note 36, at 5. Of course, geo-locations of on-line purchases – either downloads or physical media – could be measured with statistical data from iTunes, Amazon, etc.

53 Rafael Rob & Joel Waldfogel, Piracy on the High C's: Music Downloading, Sales Displacement, and Social Welfare in a Sample of College Students (Oct. 2004) (working paper, on file with THE NATIONAL BUREAU OF ECONOMIC RESEARCH), *available at* http://papers.nber.org/papers/W10874 (last visited Feb. 2, 2005).

54 Analyzing a separate survey-based dataset of information from students at Penn, CCNY, Hunter College, and Chicago's Harris School (master's students), the researchers found that downloading reduces music purchases "by roughly one fifth of a sale for each download and possibly much more." *Id.* at 1. "Our conservative estimates indicate that downloading reduced recent purchases by individuals in the sample by about 10 percent during 2003." *Id.* And it is doubtful that college students saved that money. In other words, the money that the recording industry lost probably lined the pockets of Dominos Pizza, the GAP, and the local pub.

found downloading dampening music purchases, but in a considerable range.[55]

In contrast, Felix Oberholzer and Koleman Strumpf's March 2004 study took the direct approach of trying to correlate identifiable download data with specific album sales.[56] To their credit, they used a very large data sample; few people have tried to take into account so many variables. Oberholzer and Strumpf make a number of insights (that German vacation periods increase new files available online because students are home with time on their hands)[57] and make a number of points that most will concede ("most [P2P] users are likely individuals who would not have bought the album even in the absence of file sharing"),[58] finally reaching their controversial conclusion that downloads have a positive impact on record sales. The Oberholzer/Strumpf study is based on the hypothesis "that if downloads are killing music, then albums that are downloaded more intensively should sell less"[59] – a hypothesis which makes sense when comparing equally popular albums, but only if you have a way to control for popularity without using album sales – that seems to be the point on which the study's credibility should turn.

Finally, those who argue that downloading has not and does not harm conventional music sales have an interesting problem they have to argue around. There is practically no disagreement that *physical media piracy*[60] – massive production and sale of unau-

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55 A very early U.S. survey – Spring 2001 – found that 5.5% of the 748 adults surveyed were actively downloading music and "ha[d] not purchased a single music CD or cassette in the past year." *Poll: One in 20 Downloads Music, Shuns Stores*, CNET NEWS.COM (June 14, 2001) (survey of 748 Americans aged sixteen to sixty conducted by Edison Media Research) (on file with the *Cardozo Arts & Entertainment Law Journal*). In contrast, a UK survey from 2003 of "500 serial downloaders" found that 38% said they were buying less music, 34% said they were buying more music, and 28% said it made no difference. Claire Smith, *Illegal Music Downloads Boosting Album Sales*, THE SCOTSMAN (July 10, 2003), *available at* http://news.scotsman.com/scitech.cfm?id=748832003 (last visited Feb. 2, 2005). I put these surveys in a footnote because, unlike the Rob-Waldfogel survey, the news reports do not have sufficient information about the method to assess whether the surveys were well-constructed.

56 Oberholzer & Strumpf, *supra* note 36.

57 Although one wonders why the researchers focused on German school vacation periods instead of American school vacations, when the two economies account for 16.5% and 45.1% percent of American downloads in the studied period. *Id.* at 37, Table 2.

58 *Id.* at 3-4.

59 Suw Charman, *Listen to the Flip Side*, THE GUARDIAN, July 22, 2004 (quoting Professor Strumpf), *available at* http://www.guardian.co.uk/online/story/0,3605,1265840,00.html (last visited Feb. 2, 2005).

60 It has become trendy in the past few years to claim that "property," "theft," and "piracy" are concepts about copyrighted works recently being foisted upon the public by the copyright industries. A number of respected legal scholars make such statements without doing extensive historical research. If "theft" and "piracy" tilt the conversation, it's been tilted for a very long time. English and American copyright cases throughout the

thorized CDs – has adversely affected the music industry in countries where the piracy has been rampant. We could take the theory that downloaders do not hurt music sales because they do not buy music anyway and make the parallel argument with pirate CDs: people who buy pirate CDs do not hurt music sales because they would not buy music anyway. The person who defends downloading as harmless must either [a] deny that physical media piracy is harming music sales in countries where it is rampant, or [b] distinguish the economic effects of the Internet from conventional, offline economic activity.

The first argument would be quite difficult – to the best of my knowledge, no one has ever argued that rampant physical media music piracy in countries like China, Mexico, and Malaysia has no impact on the commercial market for recorded music in those countries.[61] The second argument – that music in the form of unauthorized CDs has different market effects than music in the form of unauthorized downloads – warrants serious attention. For example, the "sampling" argument applies more to downloads but much less to unauthorized physical CDs: a person might decide to purchase a CD after downloading one or two tracks; it is hard to imagine a person buying a pirate CD and replacing it shortly thereafter with a legitimate CD purchase.

The problem with the second argument is that it is closely linked to the increasingly abandoned idea that the Internet is "different" and that "cyberspace" is separate from "meatspace."[62] In the case of music, the Internet is demonstrably less different and less separate now than it was four years ago. One obvious way this is true is commercial downloading services. The "sampling" argu-

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19th century regularly used "piracy" as a label for various kinds of infringement, not just mass scale, wholesale, non-transformative reproduction and distribution of a work. For a non-historian's preliminary look at the actual historical record of the use of the terms "property" and "piracy" in relation to copyright, see, Justin Hughes, Balance, Property, and Too Hurried Histories of Copyright (Dec. 2004) (unpublished manuscript on file with the *Cardozo Arts & Entertainment Law Journal*). *See also* Mark Rose, *Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain*, 66 Law & Contemp. Probs. 75 (Winter-Spring 2003) (discussing use of "property" in 17th and 18th century English debates about copyright).

61 For reports on what happened to Mexico's music industry when rampant CD piracy began in 2000, see Laurence Iliff, *Nation sees flip side of cheap, copied music . . . . Where have all the artists gone?*, DALLAS MORNING NEWS, July 7, 2004 at 1A (quoting Mexico City record label owner who had sales plummet by 45% in three months); Marla Dickerson, *Rampant Piracy Threatens to Silence Latin Music Industry*, L.A. TIMES, July 6, 2004, at A1 (reporting music sales in Mexico "plunged" 25% between 2002 and 2003).

62 Michael Totty, *Taming the Frontier*, WALL ST. J., Jan. 27, 2003 at R10 (describing how the use of the term "cyberspace" declined from 2000 to 2002 and noting "[e]ven the notion of a separate place called 'cyberspace' may be fading."); Justin Hughes, *The Internet and the Persistence of Law*, 69 BOSTON COL. L. REV. 359, 359-73 (2003) (explaining shift from conception of Internet as separate jurisdiction to Internet law as parallel to offline laws).

ment does not apply if the unit of commerce for commercial downloading is the single track – then the single track download from Kazaa appears to be a direct substitute for the single track download sale. According to a 2004 Citigroup survey, downloads are expected to account for 25% of the legitimate music market by 2008;[63] thus, as iTunes and its sibling services rise, the "sampling" argument grows weaker.[64]

A less obvious way that Internet music is less separate is that when Napster started, most PCs did not have CD burners, therefore the downloaded music files were relatively unportable. With [a] widespread penetration of CD burners – particularly among those downloading files, [b] improved fidelity in the MP3 compression format, and [c] more portable players substitution for CD sales becomes much more likely – a point aptly made by Professor Stan Leibowitz.[65] Finally, increases in online activities appear to be trigger reductions in parallel offline activities across a wide range of goods and services[66] – in the face of that, one has to argue that music is somehow different.

In the midst of all this argumentation, the recording industry gets to point to one over-riding fact: U.S. record sales started rising just a couple months after hundreds of user lawsuits were launched to much fanfare and controversy. The lawsuits start in the summer of 2003, "[t]he rebound began in earnest in September 2003," and U.S. album sales were up 5.8% in the first nine months of 2004 compared to the first nine months of 2003.[67] Is there a causal relationship between bringing legal liability home to downloaders and people returning to the music stores? For the moment, the bulk of the evidence – all of it indirect (and perhaps permanently so) – is

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63 Don Waller, *Digitized Biz Cranks Out Coin*, VARIETY, Jan. 17-23, 2005, at A1.

64 Even Professor Edward Felten who, in his own survey of the surveys, concludes that downloading has a negligible effect on CD sales recognizes that his analysis "does not predict whether (illegal, free) downloading will reduce online sales of music." Edward W. Felten, *A Grand Unified Theory of Filesharing* (Apr. 12, 2004), *available at* http://www.freedom-to-tinker.com/archives/000574.html (last visited Feb. 13, 2005).

65 Stan Liebowitz, *File-Sharing: Creative Destruction or Just Plain Destruction?* (Dec. 2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract?id=646943 (last visited Feb. 2, 2005).

66 For example, in 2002, the volume of First-Class Mail [single piece and bulk] declined for the first time in more than a quarter century; those numbers had increased annually through all types of economic conditions. The President's Commission on the United States Postal Service, *Embracing the Future*, (July 31, 2003) (concluding that "diversion exists" from offline communications to online communications). Commission presentation *available at* http://clients.bn24.com/usps/# (last visited Feb. 4, 2005); commission report *available at* http://www.treasury.gov/offices/domestic-finance/usps/final?report.shtml (last visited Feb. 4, 2005).

67 Alex Veiga, *U.S. Album Sales up 5.8 Percent in First Nine Months of 2004*, SILICONVALLEY.COM (Oct. 3, 2004) (on file with the *Cardozo Arts & Entertainment Law Journal*).

that "the industry is not crying wolf."[68]

III. A Momentary Brush with the Optimal?

If the spoofing is as successful as some industry people hint, then, ironically, we are heading – for the moment – toward an area some copyright scholars and economists think would be optimal: those who can afford to buy music seem to be buying music (again) and those who cannot afford to buy music are continuing to download.

People who can afford music live at a certain break point between the value of their money and the value of their time. A massively spoofed, therefore time-consumptive P2P system – sprinkled with well-publicized lawsuits – sends those people back into the record stores. Some Pew survey data of Internet users suggests this. The mid-2003 launch of lawsuits against P2P users caused the number of 18-29 year olds who admit to downloading to plummet from 41% before the lawsuits to 23% in November 2003.[69] But the same number for that cohort went up to 31% by May-June 2004.[70] In contrast, among 30-49 year olds, the respective numbers dropped from 21% before the lawsuits to 9% in November 2003 and only increased to 11% by May-June 2004.[71] The number of 50-64 year olds admitting to downloading in May-June 2004 was 6%.[72] Obviously, it's this group – 30-64 year olds – that have both more disposable income and more to lose in a lawsuit than 18-29 year olds.

The people remaining on the P2P systems are those whose time is much less valuable than their (very limited) money. High school and college students are the two obvious groups because other low-income demographics disproportionately live on the other side of the digital divide, without ample access to computers and the network.[73]

A copyright confers exclusive rights on a work (whether an

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68 Liebowitz, *supra* note 65 at 3.

69 Lee Rainie, Mary Madden, Dan Hess, and Graham Mudd, *RE: The impact of recording industry suits against music file swappers*, Pew Internet Project and Comscore Media Metrix Data Memo, Jan. 2004. *See also* Liebowitz (2004), *supra* note 37 at 11, Table 1.

70 *Id.*

71 *Id.*

72 *Id.*

73 According to the Department of Commerce, as of 2004 for persons living in families with incomes of less than $15,000 annually, only 7.5% have broadband access at home, while the same percentage for families with incomes of $100,000-149,999 is 49.3%. Similarly, black and latino households continue to lag significantly in Internet use compared to white and Asian-American households. U.S. Department of Commerce, National Telecommunications and Information Administration, A Nation Online: Entering the Broadband Age A1 (Sept. 2004), *available at* http://www.ntia.doc.gov/reports/anol/index.html (last visited Feb. 2, 2005).

album, film, or book) allowing the copyright owner to charge a premium higher than the cost of reproduction, which is about zero with the Internet when someone else – your university or your parents – are paying all the technology costs. The copyright premium puts money in the pocket of the artist and the company, increasing social welfare by prompting new works to be produced. But the premium also prices some people out of the market – they can't get the album, film, or book, although they could if the price was lower. Economists call the social welfare lost from not making the work available to the lower income groups a "deadweight loss" – a general loss to society.[74]

The copyright system has always had a certain amount of "leakage" – undetected, unauthorized reproduction and distribution. Scholars have observed that when unauthorized copies are made, but otherwise would *not* have been bought, the resulting "leakage" can function as rough carpentry price discrimination that increases social welfare; just as differential airline ticket pricing increases social welfare by letting people fly who would not do so at an average plane seat price.[75] The difference is that with the unauthorized copy the "lower" price is free because the price discrimination is imposed on copyright owners by their inability to patrol the copyright completely.[76] If unauthorized copies on P2P systems were "leakage" only to people who would not buy the albums anyway, part of the deadweight loss in social welfare would disappear – while we would still get the beneficial effects of copyright.

On this count, the same University of Pennsylvania study that showed a $26 reduction in college students buying music also showed a $70 increase in "consumer welfare" – meaning that students were enjoying music they could not have otherwise purchased.[77] The challenge – for a utopian social planner – would be how to eliminate that $26 loss to the record companies while pre-

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74 These are familiar points, but see generally Peter S. Menell, *Intellectual Property: General Theories*, II ENCYCLOPEDIA OF LAW AND ECONOMICS: CIVIL LAW AND ECONOMICS 807 (Bouckaer & DeGeest, eds. 2000), *available at* http://encyclo.findlaw.com/1600book.pdf (last visited Feb. 10, 2005).

75 Michael J. Meurer, *Price Discrimination, Personal Use, and Piracy: Copyright Protection of Digital Works*, 45 BUFF. L. REV. 845 (1997); Wendy J. Gordon, *Intellectual Property as Price Discrimination: Implications for Contract*, 73 CHI.-KENT L. REV. 1367, 1369 (1998) (arguing that "all intellectual property operates by fostering price discrimination."); *see also* James Boyle, *Cruel, Mean or Lavish? Economic Analysis, Price Discrimination, and Intellectual Property*, 53 VAND. L. REV. 2007 (2000).

76 Another way to say this would be that "fair uses" of copyrighted works and other unauthorized, unpunished copying impede the implementation of an express price discrimination system, an observation made by William Fisher. *See* William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659 (1988).

77 *See* Rob & Waldfogel, *supra* note 53, at 27.

serving the $70 increase in consumer welfare that occasions no loss to the record companies. For the record companies, some loss – we'll call it the "lost $26" – will remain unless they could perfectly calibrate the lawsuits and the nuisance of spoofing to raise the "cost" of downloading to the right price point.

Instead of such (impossibly fine-tuned) calibration, the record companies are seeking to recover some of the lost $26 by pushing universities to address unauthorized downloading via campus computer systems. This involves educating students more ("indoctrinating" if you want), using technology to block or filter file-sharing, sending warnings, and signing up for campus-wide services to provide students with legitimate, discounted downloading or free music streaming.[78] If the legitimate services for students are substantially discounted and become widespread, then piracy – unauthorized price discrimination – will have triggered express, official price discrimination. The industry will have responded with a business model specific to the download-prone market that reproduces most of the price discrimination, but allows it to capture a bit more of the copyright premium than it was doing at the height of the P2P piracy.

So, are the lawsuits working? To the degree that the RIAA can [a] address campus downloading by dealing with the universities and [b] make downloading by adults with incomes unattractive by spoofing and lawsuits, then they may well succeed in suppressing much of P2P's market-damaging effects.

IV. Unstable Utopias and Self-Sustaining Litigation

The degree to which the record companies produce that balance depends on two shifting battlefronts, one technological and one legal. The technological battle will presumably seesaw back and forth. The topography of the legal battlefront seems more stable, but has nonetheless shifted perceptibly against the RIAA in the past year.

Initially, the RIAA sought to proceed against P2P users with the section 512 subpoena provisions of the DMCA. Title 17 U.S.C. section 512(h) provides for federal court clerks to issue subpoenas directed at ISPs to identify ISP customers offering infringing materials on the Internet. A few ISPs vigorously opposed such sub-

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78 *Report: Universities Showing Progress in Anti-Piracy Efforts*, SiliconValley.com (Aug. 24, 2004), *at* www.siliconvalley.com/mld/siliconvalley/9484951.htm (last visited Feb. 2, 2005); Stefanie Olsen, *UCLA to Stop Short of P2P Snooping*, CNET News.com (Sept. 28, 2004), *at* http://news.com.com/2100-1027?3-5387859.html (last visited Feb. 5, 2005).

poenas on both statutory and constitutional grounds. Verizon and Charter Communications have prevailed in the D.C. and 8th Circuits, respectively.[79] Each has prevailed on the statutory grounds that section 512(h) applies only to "hosting" ISPs that are storing copyrighted materials on behalf of ISP customers as described in section 512(c), not the "carrier" ISPs in section 512(a) that only transmit, route, and provide connections for data transfers. The section 512(h) subpoena refers to the section 512(c)(3)(A) "notice and take down" notifications, which are directed at section 512(c) ISPs to take down infringing material "residing on [the ISP's] system or network at the direction of users." However, section 512(h) simultaneously says it is directed at "service providers," a statutorily defined term (at section 512(k)) which includes service providers like Verizon and Charter that offer "transmission . . . of material of the user's choosing, without modification."[80] The result is a genuine ambiguity in the statute, with credible policy arguments on both sides, going to the compromise that was struck by the content industries and the Internet companies.[81]

The ISPs announced goal was to protect the privacy of their customers, but the cases are part and parcel of the broader political struggle between content and carrier industries. The result of this victory is to force the RIAA to file John Doe suits before issuing subpoenas to identify P2P users – at least in the D.C. and 8th Circuits. For the carriers, it is payback – increasing the RIAA costs of enforcement. For P2P supporters, the hope may have been to make enforcement so costly the RIAA would take another approach, such as licensing songs to P2P systems. To the degree the added cost of filing John Doe actions decreased the number of suits filed, a P2P user would have her likelihood of being sued reduced a small amount – more on this in a moment. But it is fair to consider what the *sued* P2P user would think about this outcome.

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[79] Recording Industry Association of America, Inc. v. Verizon Internet Servs., Inc., 351 F.3d 1229, 1233-36 (D.C. Cir. 2003), *petition for cert. filed*, 2004 WL 1175134 (U.S. May 24, 2004) (No. 03-1579); Recording Industry Association of America v. Charter Communications, Inc., 393 F.3d 771, 2005 U.S. App. LEXIS 31 (8th Cir. 2004).

[80] 17 U.S.C. § 512(k)(1) (2000).

[81] In terms of legislative history, the DMCA assumed an asymmetrical client/host Internet paradigm (which was quickly disrupted by P2P) that would suggest that § 512(h) is limited to host ISPs in § 512(c). On the other hand, in passing the § 512 provisions, Congress was embracing a compromise that the content and Internet companies had hammered out – the Internet companies had held provisions implementing the WIPO Copyright Treaty (§ 1201 et seq.) hostage to creating safe harbors for them against contributory liability for copyright infringement on the Internet. To the degree that the Internet companies had agreed to identify the source of infringing materials as part of their bargain for "hold harmless" safe harbors, the arguments made by Verizon and Charter Communications seem to go against the spirit of that compromise.

To paraphrase one of my colleagues talking to an imaginary average P2P user:

> When this started, the RIAA might have learned your identity through a subpoena to your ISP and offered you a settlement before suing you. Now, to protect your privacy, the ISPs have ensured that you won't know the RIAA is after you until you are a defendant in an actual lawsuit. Feel better off?[82]

The next steps in trying to raise the costs in pursuing P2P users have been to argue, first, that downloaders have a First Amendment right against disclosure of their identities and, second, that the claims cannot be filed jointly in a single action against multiple John Doe defendants. Courts have rejected the first argument, concluding that the subpoenas are adequately specific and the defendants have a minimal reasonable expectation of privacy for these online activities.[83]

In contrast, at least two federal district courts have embraced the second argument: that such John Doe defendants are not properly joined parties because "[e]ach claim involves different property, facts, and defenses"[84] and "the various [p]laintiffs' claims against various [d]efendants are not logically related to each other."[85] This makes good sense doctrinally – the doctrine being premised on these actions actually going to trial – but the practical result will be to increase dockets with scores of actions that will probably never come to trial. Experts in the administration of justice will know what to make of this; does it clog the dockets or just

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[82] I wish I could take credit for the biting humor, but this really did come from a colleague who teaches intellectual property courses – whose identity remains as protected as a Verizon subscriber's.

[83] Sony Music Entertainment, Inc. v. Does 1-40, 326 F. Supp. 2d 556, 564-67 (S.D.N.Y. 2004). In *Sony Music Entertainment*, Judge Chin applied the balancing test for disclosure of anonymous Internet users from *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 577, 579-81 (N.D. Cal. 1999). *See also* Elektra Entm't Group, Inc. v. Does 1-9, 2004 U.S. Dist. LEXIS 23560 (S.D.N.Y. Sept. 7, 2004) (denying motion to quash subpoena); *In re* Verizon Internet Servs., Inc., 257 F. Supp 2d 244, 261-64 (D.D.C. 2003), *rev'd on other grounds* Recording Industry Association of America, Inc. v. Verizon Internet Servs., Inc., 351 F.3d 1229, 1233-36 (D.C. Cir. 2003), *petition for cert. filed*, 2004 WL 1175134 (U.S. May 24, 2004) (No 03-1579).

[84] BMG Music v. Does 1-203, Civil Action 04-650 at 2 (E.D. Pa. Apr. 5, 2004) (order denying in plaintiffs motion for reconsideration of Court's Order of March 5, 2004); BMG Music v. Does 1-203, Civil Action 04-650 at 2 (E.D. Pa. Mar. 5, 2004) (order severing action and providing that "[c]ounsel shall submit for filing . . . two-hundred and three (203) new Amended Complaints, one for each Defendant.").

[85] Interscope Records v. Does 1-25, Case No. 6:04-cv-197-Orl-22DAB at 3 (M.D. Fl. Apr. 1, 2004) (Magistrate Judge Report and Recommendation); Interscope Records v. Does 1-25, Case No. 6:04-cv-197-Orl-22DAB (M.D. Fl. Apr. 27, 2004) (accepting magistrate judge's report and ordering severance of action).

give the court clerk offices added revenues for scalable, ministerial duties?

Just as we decry consumers not being "at the table" when intellectual property legislation is passed in Washington, we should also lament the game being played here by content and Internet companies. Very little has been written about the RIAA's *strategy* in suing P2P users, but there are certain assumptions that we can reasonably make – and assume that Internet companies have also made in confronting the RIAA.

The RIAA has to assume this will be a long, drawn-out battle. For that reason, they should want a litigation model that is, if possible, self-sustaining. Of the suits filed to date in the U.S., reports are that more than 1300 have been settled at an average $3000 price.[86] Some place the settlement prices higher with "amounts ranging between $3,000 and $11,000,"[87] "rang[ing] from $2,500 to $7,500 each,"[88] or now at a $4,500 average.[89] As an external number, the RIAA needs the settlement amounts to be meaningful – i.e., painful for the average person – but low enough to "discourag[e] Internet users from hiring defense lawyers."[90]

If the litigation drive is to be self-sustaining, settlements must cover costs – getting the IP address information, the subpoena (however obtained), court costs, threatening letter, and settlement communications. Costs have to be kept in check – which includes offering only limited settlement negotiations with each targeted P2P user. Conversely, if the costs of each enforcement action have been driven up by court filing costs and some added attorney and paralegal time in preparing individual lawsuits, the RIAA will have to extract that amount from each settling party in order to make

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86 *Record Companies Sue 761 More Alleged Music Traders*, *supra* note 11. One attorney who has settled a large number of the cases, confirmed that all his cases except for two have settled for $3000; the outliers settled for $2000 and $7500 respectively. Email communication from attorney Jay Flemma to the author, Feb. 3, 2005 (on file with the *Cardozo Arts & Entertainment Law Journal*).

87 von Lohmann, *supra* note 11.

88 Ted Bridis, *RIAA Settlements Spur Complaints, Debate*, THE DAILY TEXAN, (Sept. 30, 2003) ("Defense lawyers familiar with some cases said payments ranged from $2,500 to $7,500 each, with at least one settlement for as much as $10,000."), *available at* http://www.dailytexanonline.com/news/2003/09/30/WorldNation/Riaa-Settlements.Spur.Complaints.Debate-507824.shtml (last visited Feb. 2, 2005).

89 This is the average reported by RIAA counsel to opposing counsel in one case that settled in the fourth quarter of 2004. Email communication from attorney Daniel P. McGlinn to the author, Feb. 2, 2005 (on file with the *Cardozo Arts & Entertainment Law Journal*). The $4500 figure may reflect a new collection approach from the RIAA, which includes use of a collection agency. *See* Email from Jay Flemma, *supra* note 86.

90 *Id.* (quoting one defense counsel as saying "It's a small enough number that it doesn't make economic sense to hire an attorney to litigate these.").

the litigation model self-sustaining.[91] The cost of filing a federal lawsuit is now $250.[92] Add a few hours of associate and paralegal time – but not much because there will be economies of scale – and we might guess that the package of costs for each targeted P2P user could come in under $2500.[93] This hints at two things. First, if the ISPs and activist efforts were intended to slow down the John Doe suits by making them financially painful, that probably has not happened. Second, the litigation could eventually become a profit source for the RIAA – a point rarely discussed when people debate whether the lawsuits are "working," but not lost on a few people who have done the math.[94]

V. THE STRUGGLE AGAINST INFRINGEMENT-BASED BUSINESS MODELS

The RIAA began lawsuits against P2P users after winning two high profile lawsuits against P2P businesses (*Napster* and *Aimster*) and before it lost *MGM v. Grokster* in the Ninth Circuit. In this sense, the recording industry had already decided that lawsuits against P2P businesses were not a complete substitute for lawsuits against individuals. But regardless of the RIAA's conclusions, if we want copyright enforcement, we should want the enforcement to be efficient – imposing minimal social costs. That is the public argument of those defending Grokster. Politically compelled to agree that "protecting copyright is a worthwhile endeavor,"[95] Grokster's supporters focus on the costs to technological progress of modifying the *Betamax* rule.[96]

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91 "Previously, the RIAA said settlements in the music-swapping lawsuits have averaged about $3000 but that the new John Doe process might trigger higher settlements, because the legal process is becoming more expensive than the model used for the RIAA lawsuits filed last year." John Borland, *RIAA Steps up File-Trading Suits*, CNET NEWS.COM (Feb. 17, 2004), *at* http://news.com.com/2100-1027?3-5160262.html (last visited Feb. 2, 2005).

92 28 U.S.C. § 1914(a) (2004).

93 That's the RIAA's cost of "supplying" a settlement, but what about "demand"? The surest way to increase demand for – and the price of settlements – would be a few successful, high-profile cases against the most egregious P2P users. The precedents are there, but the risks are enormous and, to date, there have been no reports of such suits.

94 Interview with Andre Gray, Founder/CEO of Digital Electronic Music Organization, Dec. 4, 2004 (quoting Gray saying "And as far as all these law suits we keep reading about, I mean really, what portion of these out-of-court settlements that the RIAA is collecting (average of $3000 per lawsuit, with roughly 4,000 lawsuits, is around $12 million dollars) are the artists actually receiving?"), *available at* http://www.indie-music.com/modules.php?name=news&file=article&sid=3500 (last visited Feb. 2, 2005). Mr. Gray's remark overlooks that the RIAA will not settle with every party, so the costs of all suits need to be spread among the suits settled.

95 Fred von Lohmann, *New Music Rules Are Needed*, DAILY PRINCETONIAN (Apr. 14, 2003), *available at* http://www.dailyprincetonian.com/archives/2003/04/14/opinion/7930.shtml (last visited Feb. 2, 2005).

96 An example would be Gigi Sohn's argument that "[t]he trade-off of giving content

They are correct to focus our attention on that issue, but are they correct in their conclusion that any other rule beside *Betamax*, or any modification of *Betamax*, would be debilitating for technological progress? If one thinks that "protecting copyright is a worthwhile endeavor" but also cares about preserving the promise of P2P technology (and technology generally),[97] this may be the opportune moment to complete the circuit court efforts in *Napster* and *Aimster* to cleave the technology from the offending business models. First, let us consider the difference between the technology and the business. Then, we will turn to how juridically sound distinctions for third party liability in infringement actions can be drawn based on combinations of causation, knowledge, and intent.

A. *The Opportune Moment to Separate Business Tool from Business Model*

It is good that the contributory liability issue did not come before the Court during the very nascent moments of P2P technology. One of the early arguments in defense of Napster was that the original Napster had to be saved to pursue the promise of P2P technology. In retrospect, that argument was clearly wrong; it was always more posturing than reasoning – a bit like saying in 1885 that if you could not build a particular ten story building at the corner of Adam and LaSalle Streets all skyscraper technology would have been stymied.[98]

That Napster is gone – existing only as a liability black hole for Bertelsmann[99] – but we now have a much wider understanding of

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companies more control over the development of technologies and of overturning Betamax would be very significant and very harmful to consumers and to our economy." Jesse Hiestand, *High Court Takes on File-Sharing Liability Case*, HOLLYWOOD REPORTER (Dec. 11, 2004), *at* http://www.hollywoodreporter.com/thr/article?display.jsp?vnu?content?id=1000735557 (last visited Feb. 2, 2005).

97 Another way to reconcile copyright and the promise of P2P technology is to establish compulsory licensing for music files or create simplified, more efficient infringement adjudication. There is a rich body of such proposals. *See, e.g.*, Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 Harv. J. L & Tech. 1 (2003); Mark A. Lemley and R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 Stan. L. Rev. 1345 (2004); WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT (2004) (chapter 6, "An Alternative Compensation System," *available at* http://cyber.law.harvard.edu/people/tfisher/PTKChapter6.pdf).

98 The building was Chicago's Home Insurance Building (1885), credited as the first skyscraper. *See* Home Insurance Company, Building Big, PBS ONLINE, *at* http://www.pbs.org/wgbh/buildingbig/wonder/structure/home?insurance.html (last visited Feb. 2, 2005); *see generally* JUDITH DUPRÉ, SKYSCRAPERS: A HISTORY OF THE WORLD'S MOST FAMOUS AND IMPORTANT SKYSCRAPERS 14-15 (1996).

99 In *UMG Recordings v. Bertelsmann AG*, 222 F.R.D. 408 (N.D. Cal. 2004), Judge Marilyn Hall Patel has refused to release Bertelsmann from claims that it might be liable for the losses caused by Napster after it invested $35 million in the company. Many have decried

the possible legal – and beneficial – applications of P2P technology. This knowledge reinforces what prudence already told us: [a] we can separate the concept of P2P technology from the particular software applications that are developed, and [b] we can separate the particular software applications that are developed from the particular uses to which they are put. The wide range of existing P2P projects that are *not* based on music piracy shows us that the technology can be separated from the business plan.

BitTorrent has already shown itself to have a wide range of non-infringing uses, ranging from Etree's BitTorrent site which promotes the distribution of large, higher-quality non-MP3 files from "trade friendly" bands to File Soup's offering of open source software and authorized media files.[100] Companies with heavy internal file and video transfer requirements are also using commercial P2P services in-house[101] or as a means to "to pass off much of their distribution costs – largely in the form of Net bandwidth charges – to their customers."[102] Further afield, we will see P2P telephone service (VOIP morphing in VOP2P)[103] and P2P radio services.[104] It looks like there will be P2P applications that record companies themselves are willing – or even want – to use. In 2004, Shawn Fanning's "Snocap" project to identify songs on P2P systems and allow owners to set downloading prices had garnered support from one major record label and seemed set to launch

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this suit as establishing a "tertiary" liability – a new layer of liability beyond contributory infringement. But Judge Patel's decision carefully maps out how the allegations against Bertelsmann is that, once it invested in Napster, it also started controlling – or heavily influencing – Napster's business operations. Bertelsmann settled with one music publisher, Bridgeport Music, for $50,000, but still faces suits from Universal, EMI Music, and a proposed class action of music publishing companies. *See* Alex Veiga, *Bertelsmann to Settle Napster Lawsuit*, BIZREPORT (Jan. 21, 2005), *at* http://www.bizreport.com/news/8603/ (last visited Feb. 2, 2005).

100 *See* Etree, at http://bt.etree.org/; Filesoup, *at* http://www.filesoup.com/forum/index.php?c=14 (last visited Feb. 2, 2005). Other examples include Legal Torrents, a "collection of legally downloadable, freely distributable creator-approved files," located at http://www.legaltorrents.com and Torrentocracy's distribution of Presidential debates located at http://www.torrentocracy.com/torrents.

101 *See* John Borland, *P2P Service Expands Corporate Plans*, CNET NEWS.COM (Dec. 9, 2002), *at* http://news.com.com/P2Pserviceexpandscorporateplans/2100-1023?3-976540.html?tag=nl (last visited Feb. 2, 2005).

102 John Borland, *Legal P2P Networks Gaining Ground*, CNET NEWS.COM (Mar. 11, 2004), *at* http://news.com.com/2100-1027_3-5172564.html?part=cnet&tag=feed&subj=news (last visited Feb. 2, 2005).

103 Earthlink's research and development arm has been pursuing a voice over P2P application called "SIPshare" based on Sessions Initiation Protocol. *See* John Borland, *Earthlink Tests File-Sharing Program*, CNET NEWS.COM (Sept. 16, 2004), *at* http://news.com.com/EarthLinktestsfile-sharingprogram/2100-1032?3-5369839.html (last visited Feb. 2, 2005).

104 John Borland, *Mercora Raises Cash, Plans Fees*, CNET NEWS.COM (Jan. 25, 2005) (describing peer to peer radio service raising venture capital funds), *at* http://news.com.com/Mercoraraisescash%2Cplansfees/2110-1027?3-5550154.html (last visited Feb. 2, 2005).

with a new P2P system called "Mashboxx."[105] Separate licensed P2P music delivery system – referred pejoratively as "walled garden" approaches – have been around for years and continue to attract attention, capital, and, most importantly, licensing from the major record labels.[106]

As Andy Grove recognized quickly upon Napster's emergence, the broad category of P2P technology harkens to the earliest, most decentralized vision of the Internet. In describing its own support for research in P2P applications, Earthlink's research page gives a good summary of this perspective:

> EarthLink believes an open Internet is a good Internet. An open Internet means users have full end-to-end connectivity to say to each other whatever it is they say, be that voice, video, or other data exchanges, *without* the help of mediating servers in the middle whenever possible.[107] No one quibbles with this vision (except, maybe, those in the server business), but leaving the *Betamax* doctrine in place is not necessary to pursue this less-mediated vision of the Internet. The fate of infringement-based business models hinges on what happens to Grokster, Streamcast, and Kazaa, but the fate of the technology does not.

There is a component of the technology community that seems so far immune to the message of *Napster* and *Aimster*. These folks have a simple goal and intent: unauthorized distribution of the copyrighted works of others to generate profits for themselves. One example is Canadian Sajeeth Cherian whose "Videora" software sells for $23.[108] Videora searches the internet for content you want and downloads it: "[t]he program allows its users to 'subscribe' to specific types of content" with options like "want list" or "season ticket."[109] Another example is "Exxem," which combines the download speeds of BitTorrent with the search capacity of Kazaa. The software allows "people to 'publish' files to the network" and "comes bundled with several pieces of advertising

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105 Jeff Leeds, *Music Industry Turns to Napster Creator for Help*, N.Y. TIMES, Dec. 3, 2004, at C1.

106 Katie Dean, *P2P Tilts Toward Legitimacy*, WIRED NEWS (Nov. 24, 2004) (describing major record label licensing of new "Peer Impact" P2P system), *available at* http://www.wired.com/news/digiwood/0,1412,65836,00.html; Katie Dean, *File Sharing Growing Like a Weed*, WIRED NEWS (Nov. 22, 2004) (describing "Weed,"a P2P music service that allows limited before requiring payment), *available at* http://www.wired.com/news/digiwood/0,1412,65774,00.html (last visited Feb. 4, 2005).

107 *SIP Beyond Voice and Video*, EARTHLINK (Sept. 16, 2004), *at* http://www.research.earthlink.net/p2p (last visited Feb. 2, 2005).

108 John Borland, *Exxeem Opens New File-Swapping Doors*, CNET NEWS.COM (Jan. 21, 2005) (on file with the *Cardozo Arts & Entertainment Law Journal*).

109 *Id.* These may be intentional variations on TiVo terminology ("wish list" and "season pass").

software." [110] As described in the press, both software seems capable of substantial non-infringing uses, but the developers' choice of words – subscribe, season ticket, publish – betray their intent to profit off other people's copyrighted works by taking over typical rights-holder activities.

That is the problem confronting the Court: if the Justices simply restate the *Betamax* doctine and fail, at a minimum, to add tests of knowledge and/or intent, these types of tools, designed, intended, and marketed for copyright infringement will flourish.

B. *The Factors that were Forgotten in* Sony

In judges' opinions, like well-played games of chess, there are standard moves in standard situations. The contributory liability issue in *Sony v. Universal City Studios* confronted the Court with such a standard situation: two closely-related laws, each comprehensively overhauled within a twenty-five year period; one with detailed statutory provisions on contributory liability, including express exceptions from such liability; the other completely silent on contributory liability, but with a legislative history showing that Congress intended court-created contributory liability to continue.

In such a situation, a standard move – perhaps *the* standard move – would have been for the Court to say of the first statute "that Congress knew how to draft a[n] . . . exemption when Congress wanted to"[111] and, therefore, that no absolute exception – parallel to the express statutory provision in the first statute – should be read into the second statute.

The Court has repeatedly recognized that "[w]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion,"[112] a standard method of reasoning that also applies between closely related statutes. Indeed, this Congress-knew-how-to-draft reasoning applies when comparing provisions within a single statute,[113] com-

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110 *Id.*

111 Chicago v. Environmental Defense Fund, 511 U.S. 328, 338 (1994) (concluding that an express, codified household waste exception showed that the statute did not "extend the waste-stream exemption to the product of such a combined household/nonhazardous-industrial treatment facility.").

112 Keene Corp. v. United States, 508 U.S. 200, 208 (1993); Rusello v. United States, 464 U.S. 16, 23 (1983) ("Had Congress intended to restrict § 1963(a)(1) to an interest in an enterprise, it presumably would have done so expressly as it did in the immediately following subsection (a)(2).").

113 *Environmental Defense Fund*, 511 U.S. 328; *Keene Corp.*, 508 U.S. 200; Bailey v. United States, 516 U.S. 137, 150 (1995) (interpreting 18 U.S.C. § 924, "§ 924(d)(1) demonstrates that Congress knew how to draft a statute to reach a firearm that was 'intended to be used.'

paring related acts over years,[114] comparing early versions of an act from what was eventually passed by Congress,[115] comparing different titles of federal law,[116] and generally when reasoning about Congress' drafting experience.[117] This standard reasoning also follows from the settled principle of statutory construction that when Congress drafts a statute it does so with full knowledge of the existing law.[118]

In § 924(c)(1), it chose not to include that term . . . ."); Federal Trade Commission v. Simplicity Pattern, 360 U.S. 55, 66 (1959) (interpreting the Clayton Act, Court concluded "the only escape Congress has provided for discriminations in services or facilities is the permission to meet competition as found in the § 2(b) proviso. We cannot supply what Congress has studiously omitted."); NLRB v. Bildisco & Bildisco, 465 U.S. 513, 522-23 (1984) (comparing provisions of the Bankruptcy Code, "Obviously, Congress knew how to draft an exclusion for collective-bargaining agreements when it wanted to; its failure to do so in this instance indicates that Congress intended that § 365(a) apply to all collective-bargaining agreements covered by the NLRA."); United States v. Edmonds, 80 F.3d 810, 829 (10th Cir. 1996).

114 Neff v. Capital Acquisitions & Mgmt. Co., 352 F.3d 1118, 1121 n.5 (7th Cir. 2003) (comparing Truth in Lending Act (TILA) and the Fair Debt Collection Practices Act (FDCPA), the court noted "[s]ignificantly, Congress thus knew how to write a broader definition of 'creditor,' yet chose not to do so in TILA."); Renteria-Gonzalez v. INS, 310 F.3d 825, 834 (5th Cir. 2002) (comparing Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") which amended the Immigration and Nationality Act ("INA"), the court reasoned that the older title provisions showed that new exceptions were not intended: "the INA proves that Congress knew how to write exceptions for certain kinds of post-conviction relief.")

115 Murphy Exploration & Prod. Co. v. United States DOI, 252 F.3d 473, 486 (D.C. Cir. 2001) (referring to a provision proposed, but not passed in the final version of the law, the court notes "[t]he legislative history underscores the point that Congress knew exactly how to write a statute to state that filing a refund request could trigger an "administrative proceeding."); Arizona Pub. Serv. Co. v. Environmental Protection Agency, 211 F.3d 1280, 1289 (D.C. Cir. 2000).

116 West Virginia University Hospitals v. Casey, 499 U.S. 83 (1991) (Comparing cost-shifting provision in 28 U.S.C. § 2412(d)(2)(A) [providing for "'the reasonable expenses of expert witnesses . . . and reasonable attorney fees."] to the "reasonable attorney's fee" cost-shifting provision in 42 U.S.C. § 1988); International Union v. Auto Glass Employees Federal Credit Union, 72 F.3d 1243, 1249 (6th Cir. 1996) (comparing Title 11 and Title 12 provisions to conclude "[t]he fact that Congress revised the Bankruptcy Code in 1984 to exempt collective bargaining agreements from a contract repudiation provision similar to the provision at issue here simply indicates to us that Congress knew how to draft such an exemption."); Guidry v. Sheet Metal Workers Nat'l Pension Fund, 39 F.3d 1078, 1083 (10th Cir. 1994) (comparing Title 38 veteran's benefits with Title 29 ERISA, "Congress knew how to draft a statute protecting benefits that had left the pension plan, and it did not use similar language with ERISA section 206(d)(1).").

117 Chickasaw Nation v. United States, 208 F.3d 871, 884 (10th Cir. 2000) (declining to find an Indian Nation exception to federal wagering excise tax because "[h]ad Congress intended to provide tribes with an exemption from the federal wagering excise taxes, it clearly knew how to draft such an exemption."). The Congress-knew-how-to-draft argument is also a regular move of legal scholars. *See, e.g.*, Mark Rosen, *Root of Formalism: Nonformalistic Law in Time and Space*, 66 U. CHI. L. REV. 622, 625 (1999) ("The fact that a few provisions of the antitrust statutes do employ formalistic rules underscores the significance of Congress's decision to adopt, for the most part, nonformalistic antitrust law, for it establishes that Congress knew how to draft formalistic rules when it wanted to.").

118 Not just the literal language of statutory law, but also the gloss that courts have given the statute. *See* Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990).

> When Congress passed the Jones Act, the *Vreeland* gloss on FELA, and the hoary tradition behind it, were well established. Incorporating FELA unaltered into

This standard Congress-knew-how-to-draft reasoning follows from the Court's recognition that it is "our duty to refrain from reading a phrase into the statute when Congress has left it out."[119] Finally, because contributory liability in copyright was – and is – a judicially-created doctrine, there was also another complementary principle applicable to the issue confronting the court in *Sony*: "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."[120]

Yet, after recognizing the "historic kinship between patent law and copyright law"[121] as well as the need for "caution . . . in applying doctrine formulated in one area to the other,"[122] the Court did not adopt the Congress-knew-how-to-draft reasoning. Instead, the *Sony* majority created a "staple articles of commerce" safe harbor in copyright law drawn directly from the patent statute: "[a]ccordingly, the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses."[123]

The Court not only transplanted a specific provision of the 1952 Patent Act onto the 1976 Copyright Act, but declined to engraft patent law's third party liability provisions that embodies intent, section 271(b).[124] While the patent statute protects "a staple article of commerce . . . suitable for substantial noninfringing use,"[125] the Court – knowingly or unknowingly – expanded this into the broader shield of a staple article of commerce "*merely* [be] *capable* of substantial noninfringing use."[126] The Court also cut off then-developing doctrine of third party liability in copyright jurisprudence. In appropriate circumstances, the staple article of com-

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> the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well. We assume that Congress is aware of existing law when it passes legislation.

Cannon v. University of Chicago, 441 U.S. 677, 696-97 (1979).

119 *See Keene Corp.*, 508 U.S. at 207.

120 Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot., 474 U.S. 494, 501 (1986).

121 *Sony*, 464 U.S. at 439.

122 *Id.* at n.19.

123 *Id.* at 442.

124 15 U.S.C. § 271(b) (2000) (imposing liability on "[w]hoever actively induces infringement"). The Federal Circuit has interpreted to require a showing of intent. *See* Hewlett-Packard v. Bausch & Lomb, Inc., 909 F.2d 1464, 1469 (Fed. Cir. 1990); Water Technologies v. Calco Ltd., 850 F.2d 660, 668 (Fed. Cir. 1988). That is the most sensible way to understanding inducement – it includes an intentional state of mind.

125 *Sony*, 464 U.S. at 440 n.20 (quoting 35 U.S.C. § 271(c)).

126 *Id.* at 440.

merce doctrine appears to excise from copyright contributory liability analysis any and all consideration of the defendant's knowledge and/or intent.

Was this the wrap-up result of an effort to bring an internally divisive case to closure? Or a stroke of foresighted genius, intentionally providing a sheltering environment for technological advances? There are plenty of technologists and scholars who believe the latter,[127] but there is also substantial evidence to indicate the former.

Although there was little case law on contributory liability in copyright before the 1976 Act, its basic components – derived from general third party liability principles – were understood. In the 1911 case *Kalem Co. v. Harper Bros.*, "the exclusive right to dramatize" the novel *Ben-Hur* had been violated by the showing of a motion picture reenacting scenes from the novel.[128] The issue before the Court was whether Kalem, who had prepared – or at least distributed – the motion picture, was also liable for the exhibitor's public performance of the motion picture. There was no question as to Kalem's knowledge and intent concerning public performances of the dramatizations: "[t]he defendant not only expected but invoked by advertisement the use of its films for dramatic reproduction of the story."[129] Evoking principles "recognized in every part of the law," Justice Holmes imposed liability concluding "[i]f the defendant did not contribute to the infringement it is impossible to do so except by taking part in the final act."[130] Decades later, the district court in the 1966 *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc* case formulated the contributory standard in terms of knowing participation or knowing furtherance of infringe-

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127 With some good arguments. One can, for example, point to the Court quoting the inducement provision of patent law in *Sony*, footnote 20, but then not engrafting it into the copyright jurisprudence.

128 222 U.S. 55, 61-62 (1911).

129 *Id.* at 60-62 ("These films it expected and intended to sell for use as moving pictures in the way in which such pictures commonly are used. It advertised them under the title Ben Hur. 'Scenery and Supers by Pain's Fireworks Co. Costumes from Metropolitan Opera House. Chariot Race by 3d Battery, Brooklyn.").

130 Justice Holmes may or may not have been blazing new ground in attaching liability in copyright to general principles of tort liability. Eaton Drone's 19th century copyright treatise describes several cases where the defendant prevailed in contributory or vicarious liability situations for the performance of plays. EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 629-31 (1879). But Drone does describe one, Daly v. Palmer, 6 F. Cas. 1132 (C.C.S.D.N.Y. 1868) (No. 3552), in which the defendants were enjoined and "the court ruled that the unlicensed sale of the infringing drama 'with a view to its public representation, makes the seller a participant in causing the play to be publicly represented." *Id.* at 632 (Drone reports the case as "6 Blatchf. 256"; the case reporter was a Mr. Blatchford).

ment by another party.[131] Like Justice Holmes in *Kalem*, the *Screen Gems* court aligned the criteria for contributory infringement of copyright with those of a third party liability in tort law.[132]

In the 1971 *Gershwin Publishing v. Columbia Artists Management, Inc.* case, [133] the Second Circuit judged a defendant liable under both vicariously and contributorily liable for its role in concert series involving unauthorized public performances of ASCAP works. The defendant's role in creating concert series – through creating and providing professional guidance to the local associations that ran the concerts[134] – was sufficient for contributory liability on the standard that "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer."[135]

The *Gershwin* formulation of third party liability preceded the final legislative push that culminated in the comprehensive reform of copyright law in 1976. In the legislative history to the 1976 Act, Congress made it clear its awareness of contributory liability and its intent to embody such liability in the "to do and to authorize" language of section 106:

> Use of the phrase "to authorize" is intended to avoid any question as to the liability of contributory infringers. For example, a person who lawfully acquires an authorized copy of a motion picture would be an infringer if he or she engages in a business of renting it to others for purposes of unauthorized public performance.[136]

This legislative history shows Congress, like the *Kalem* and *Gershwin* courts, understanding contributory liability through the prism of intent ("for purposes of unauthorized public performance"). The 1976 Act does not make "specific" any Congressional intent to "disrupt the interpretation of a judicially created concept" that had

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131 Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc. 256 F. Supp. 399, 403 Since infringement constitutes a tort, common law concepts of tort liability are relevant in fixing the scope of the statutory copyright remedy, and the basic common law doctrine that one who knowingly participates in or furthers a tortious act is jointly and severally liable with the prime tortfeasor is applicable in suits arising under the Copyright Act.

132 *Id.*

133 443 F.2d 1159 (2d Cir. 1971).

134 *Id.* at 1162-63 (noting:
With knowledge that its artists included copyrighted compositions in their performances, CAMI created the Port Washington audience as a market for those artists. CAMI's pervasive participation in the formation and direction of this association and its programming of compositions presented amply support the district court's finding that it 'caused this copyright infringement.).

135 *Id.* at 1162.

136 H. R. Rep. No. 94-1476 at 61.

developed in *Kalem* and *Gershwin.* There was no such Congressional intent.

So what was the *Sony* majority's intent in injecting the "staple article of commerce" doctrine into copyright? Perhaps the majority believed that in the face of "major technological innovations [having] altered the market for copyrighted materials,"[137] continued application of the traditional approach in *Kalem, Screen Gems,* and *Gershwin* would itself "expand the protections afforded by the copyright without explicit legislative guidance,"[138] a danger justifying the unusual step of judicially engrafting a bright-line safe harbor onto the Copyright Act. That narrative appeals to technologists, but it should be disconcerting to some members of the present Court.

Support for an alternative explanation is found in Justice O'Connor, who provided the critical vote for the majority in *Sony* and was well aware of *Gershwin.* In her June 21, 1983 memorandum to Justice Blackmun, she advocates adoption of a contributory liability analysis based on *Gershwin* and describes "two ways to engage in contributory infringement. First, one may induce the infringement. Second, one may materially contribute to infringement."[139] Justice O'Connor closes this short discussion saying "[i]n any event, it seems that contributory infringement may result from either inducement or material contribution."[140] Some will quibble with whether "inducement infringement" is properly categorized as "contributory infringement." Let us leave the exciting prospect of an ontological debate among tort professors to one side; our concern – like Justice O'Connor's – should be in describing the conditions (both necessary and sufficient) for third party liability in copyright infringement.

In light of [1] *Kalem* and *Gershwin*; [2] Congress' silence in

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137 *Sony*, 464 U.S. at 431.

138 *Id.*

139 Memorandum from Justice Sandra Day O'Connor to Justice Harry A. Blackmun, June 21, 1983, at 3, *available at* http://digital-law-online.info/papers/lah/oconnor-memo.pdf (last visited Feb. 2, 2005). *See generally* Jonathan Band and Andrew J. McLaughlin, *The Marshall Papers: A Peek Behind the Scenes at the Making of* Sony v. Universal, 17 COLUM. J. L. & ARTS 427 (1993).

140 Memorandum from Justice Sandra Day O'Connor, *supra* note 139. The entire passage reads:

> *Gershwin* seems to indicate that there are two ways to engage in contributory infringement. First, one may *induce* the infringement. Second, one may *materially contribute* to infringement. In the context of this case, one would materially contribute to infringement for purposes of being a contributory infringer if one provided a device that is not capable of substantial noninfringing use. In any event, it seems that contributory infringement may result from either inducement or material contribution. (emphasis in the original.)

Id.

1976 as to any modification of court-developed standards for contributory liability and the legislative history recitation of a *Kalem*-like situation for contributory liability; [3] Justice O'Connor's private advocacy for the *Gershwin* standard; and [4] the absence of any evidence in *Sony* as to the electronic manufacturer's intent or knowledge, [5] the Court's dominant view that "it is not our function to eliminate clearly expressed inconsistency of policy and to treat alike subjects that different Congresses have chosen to treat differently."[141] One could reasonably infer that the majority did not foresee their "staple article of commerce" doctrine exhausted the sufficient conditions for contributory liability. In particular, one could reasonably believe that the majority did not foresee their "staple article of commerce" providing a safe harbor to defendants who *induced* or *intended* to materially contribute to copyright infringement.

Such hypotheses are the province of law professors; judges have had to find other means to circumvent the language of *Sony*. In granting *certiorari*, the Court almost certainly recognizes how much this has been done. Judicial resistance to *Sony* began at least as early as the 1996 *A & M Records v. Abdallah* case;[142] was expanded in the Ninth Circuit's *Napster* decision; and became increasingly flagrant with Judge Posner's *In re Aimster*[143] decision. This resistance to *Sony* is based on fealty to the intuitive building blocks of contributory liability. All contributory liability standards can arguably be disassembled into three moving parts: *effect, knowledge* [including constructive], and *intent.*

Outside magical realism, all findings of contributory liability require the liable party's actions to have had *effect*: what the defendant did must have a place in the causal chain leading to the infringement. The "substantial non-infringing uses test" in *Sony* can be viewed as an *exclusive* effects test put in reverse gear: if the product has effect X – being *capable* of substantial non-infringing uses – then the product purveyor is held harmless.

In contrast, the Ninth Circuit's *Grokster* decision was a knowledge/effects combination analysis.[144] The Ninth Circuit's *Napster* and the Seventh Circuit's *Aimster* opinions – preceded by *A&M*

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141 *West Virginia University Hospitals*, 499 U.S. at 101.

142 948 F. Supp 1449 (C.D. Cal 1996).

143 *In re* Aimster Copyright Litig., 334 F.3d 643 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 1069 (U.S. 2004).

144 MGM v. Grokster, 380 F.3d 1154 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 686 (U.S. 2004). If one were distilling the Grokster test one might get to something like this: *if* particular effect (substantial non-infringing uses for D's product), *then* liability for D *if and only if* actual knowledge (at a time when D's action could affect infringement).

Records v. Abdallah – turned away from *Sony* more starkly by pivoting on knowledge and intent. A brief look at *Abdallah* and *Aimster* helps clarify some of the issues in modifying *Sony* so that courts can use knowledge and intent vectors to hone in on infringement-based business models without jeopardizing neutral technologies.

The infringement-based business model at issue in the 1996 *Abdallah* case was defendant's systematic preparation of "time-loaded" cassettes for individual customers. Each cassette tape length corresponded to the length of music the customer wanted to copy. The court concluded that the cassettes were "specifically manufactured for counterfeiting activity" – a conclusion as to intent – and found that *Sony* provided no defense, "even if such products have substantial non-infringing uses."[145] *Abdallah* can be reconciled with *Sony* either on the grounds that Mr. Abdallah engaged in a range of additionally incriminating activities or that the specially manufactured tapes were not "staple articles of commerce."

But the latter view – that the specially-manufactured tapes were not "staple articles of commerce" – raises interesting issues. If "staple article of commerce" has any definitional bite, it surely means a product *not* designed for infringing activities. Product design itself loops back to issues of intent. In patent law, the "substantial non-infringing uses" test had its roots in issues of product design and, therefore, intent. As the Federal Circuit noted in *Hewlett-Packard v. Bausch & Lomb*:

> The most common pre-1952 contributory infringement cases dealt with the situation where a seller would sell a component which was not itself technically covered by the claims of a product or process patent but which had no other use except with the claimed product or process. In such cases, although a plaintiff was required to show intent to cause infringement in order to establish contributory infringement, many courts held that such intent could be presumed because the component had no substantial non-infringing use.[146]

In other words, as courts had developed patent law contributory liability prior to 1952, a showing of "substantial non-infringing uses" defeated an inference of intent.[147] Section 571(c)'s statutory

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[145] *Abdallah*, 948 F. Supp at 1456.

[146] Hewlett-Packard v. Bausch & Lomb, 909 F.2d 1464, 1469 (Fed. Cir. Ct. of App. 1990).

[147] This was the Supreme Court's reasoning in *Henry v. A. B. Dick Co.*, 224 U.S. 1 (1911): Undoubtedly a bare supposition that by a sale of an article which though adapted to an infringing use is also adapted to other and lawful uses, is not enough to make the seller a contributory infringer. Such a rule would block the

phrase "suitable for substantial non-infringing uses" embodies this idea: if the product was *suitable* for substantial non-infringing uses, its manufacture and distribution was presumably not *intended* to cause infringement. As that was the origins of "a staple article or commodity of commerce" in patent law, one might ask whether a piece of software designed to exponentially increase unauthorized reproduction of distribution of music files should count as a staple article of commerce.

Like *Abdallah*, the *Napster* and *Aimster* litigations can be respectably distinguished from *Sony* on categorical grounds. *Sony* concerned a chattel product with which the defendant parted title when the product was distributed; *Napster* and *Aimster* both involved a service or a service/product combination. But that would deny us the fun of seeing how Judge Posner's *Aimster* decision is remarkable in at least three ways. First, Posner implicitly rejects the Court's expansion of "substantial non-infringing uses" from "suitable for" (patent law) to "capable of" (*Sony*). Second, Judge Posner boldly reinterpreted *Sony* as a decision based on cost/benefit analysis (proven by hindsight, no less). Finally, Posner brings intent through the back-door to impugn knowledge to Aimster and, thereby, to remove it from *Sony*'s safe harbor.

As to this first point, Posner baldly re-reads *Sony* (perhaps as a professor might):

> We also do not buy Aimster's argument that . . . all Aimster has to show in order to escape liability for contributory infringement is that its file-sharing system *could* be used in noninfringing ways, which obviously it could be. Were that the law, the seller of a product or service used *solely* to facilitate copyright infringement, though it was capable in principle of noninfringing uses, would be immune from liability for contributory infringement. That would be an extreme result, and one not envisaged by the *Sony* majority.[148]

Posner strengthens this claim that the Court did not really mean "merely capable" of non-infringing uses by pointing to the rest of the majority opinion: if that was really the test, would the Court

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> wheels of commerce. There must be an intent and purpose that the article sold will be so used. Such a presumption arises when the article so sold is only adapted to an infringing use.

Id. at 48.

[148] *Aimster*, 334 F.3d at 651. Arguably, this pushes back toward patent law's "suitable for substantial non-infringing uses" test. The patent standard provides a defensive shield only "where non-infringing uses are common," D.O.C.C. v. Sprintech, Inc., 36 U.S.P.Q.2d 1145, 1155 (S.D.N.Y. 1994), and "a theoretical capability [for non-infringing use] does not suffice," Alcon Laboratories, Inc. v. Allergan, 17 U.S.P.Q.2d 1365, 1369 (N.D. Tex. 1990).

have felt compelled, Posner asks, to document all the non-infringing uses?[149] This links to Posner's cost/benefit analysis. Theoretical non-infringing uses will not save Aimster. Neither will a pittance of actual non-infringing uses if the system is used principally for copyright infringement. Posner tells us that "some estimate of the respective magnitudes of these [two kinds of] uses is necessary for a finding of contributory infringement,"[150] suggesting that a non-infringing uses defense will prevail only when the non-infringing uses reach some relative measure against the infringing activities.

Of course, "use counting" was not the thrust of Aimster's defense. Aimster's proprietor, John Deep, had based his defense on lack of knowledge and the *Sony* axiom that "constructive knowledge" of infringing uses is not enough for contributory infringement.[151] Indeed, Aimster was designed with this axiom in mind: an "encryption feature of Aimster's service prevented Deep from knowing what songs were being copied by the users of his system."[152] Judge Posner interpreted Deep's encryption strategy as "willful blindness" and then deftly equated it with criminal intent.[153] By this reasoning, Posner concluded that Deep could not avoid liability "by using encryption software to prevent himself from learning what surely he strongly suspects to be the case: that the users of his service – maybe *all* the users of his service – are copyright infringers." Recognizing that this conclusion could have dangerously broad ramifications, Posner distinguished Aimster's design from non-incriminating uses of encryption in a way that implicitly turned on Deep's initial epistemic state (a suspicion of

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149 *Aimster*, 334 F.3d at 651 (citations omitted).

> Otherwise its opinion would have had no occasion to emphasize the fact . . . that Sony had not in its advertising encouraged the use of the Betamax to infringe copyright. Nor would the Court have thought it important to say that the Betamax was used "principally" for time shifting, which as we recall the Court deemed a fair use, or to remark that the plaintiffs owned only a small percentage of the total amount of copyrighted television programming and it was unclear how many of the other owners objected to home taping.

Id.

150 *Id.* at 649-50.

> What is true is that when a supplier is offering a product or service that has noninfringing as well as infringing uses, some estimate of the respective magnitudes of these uses is necessary for a finding of contributory infringement. The Court's action in striking the cost-benefit trade-off in favor of Sony came to seem prescient when it later turned out that the principal use of video recorders was to allow people to watch at home movies that they bought or rented rather than to tape television programs.

Id.

151 *Sony*, 464 U.S. at 439.

152 *Aimster*, 334 F.3d at 650.

153 *Id.*

widespread infringement) and his initial intent (not to learn what was happening).[154] In this way, a double layering of intent pulls Deep and Aimster outside the protection of *Sony* through an "actual knowledge" equivalent – willful blindness.[155]

Those who defend *Sony* because it provides a clear, predictable standard to the consumer electronics and software industries should be more concerned about Judge Posner's open-ended cost/benefit analysis than his riff on intent. Posner's understanding of derivative works is arguably more chilling[156] than his use of knowledge and intent to separate Aimster's infringement-based business model from other uses of P2P technology, encryption, and instant messaging. The breadth of Judge Posner's departure from *Sony* is matched only by its confidence. One is reminded of Karl Llewelyn's description of a judge overruling precedent with reinterpretation: "[s]o lip service is done to that dogma, while the rule which the prior court laid down is disemboweled. The execution proceeds with due respect, with mandarin courtesy."[157]

While many of us think the headlines about P2P coupled with the carte blanche granted by the Ninth Circuit triggered the granting of certiorari in *Grokster*, perhaps, at the end of the day, it was really Judge Posner's implicit challenge to the Court.

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154 *Id.* at 650-651 ("Our point is only that a service provider that would otherwise be a contributory infringer does not obtain immunity by using encryption to shield itself from actual knowledge of the unlawful purposes for which the service is being used.").

155 It is not completely clear whether it is *willful blindness equals actual knowledge* or intent that robs Aimster of its *Sony* shield. Posner also discusses Aimster's "invitation to infringe" as distinguishing Aimster from Sony, but does not directly connect that "invitation" to intent. *Id.* at 651.

> In explaining how to use the Aimster software, the tutorial gives as its *only* examples of file sharing the sharing of copyrighted music, including copyrighted music that the recording industry had notified Aimster was being infringed by Aimster's users. The tutorial is the invitation to infringement that the Supreme Court found was missing in *Sony*.

Id. Posner says that the Ninth Circuit erred in "in suggesting that actual knowledge of specific infringing uses is a sufficient condition for deeming a facilitator a contributory infringer." *Id.* at 649 (suggesting that willful blindness equals actual knowledge would not be enough to bring *Aimster* outside *Sony* in Posner's mind).

156 Posner believed that the *Sony* court saw substantial infringing uses in the form of "skipping commercials by taping a program before watching it and then, while watching the tape, using the fast-forward button on the recorder to skip over the commercials." *Id.* at 647-48. To Judge Posner, "commercial-skipping amounted to creating an unauthorized derivative work, namely a commercial-free copy that would reduce the copyright owner's income from his original program, programs are financed by the purchase of commercials by advertisers." *Id.* If Posner were correct that the home viewing – a private performance without fixation – creates a derivative work, then the derivative work right would be converted into a partial right of private performance – applicable only to those occasions when you do not perform the work "correctly." This should be chilling indeed for parents with children taking music lessons. Register of Copyrights Marybeth Peters made a similar point in testimony without directly connecting the problem to a "right of private performance."

157 KARL N. LLEWELLYN, THE BRAMBLE BUSH 67 (5th prtg. 1975).

CONCLUSION

Confronted with unprecedented levels of unauthorized reproduction and distribution of sounds recordings via P2P systems, the record companies have sought to enforce copyright norms both against infringement-based P2P business models and against P2P end users.

As to the lawsuits against P2P end users, the "it's not good business to sue your customers" mantra was always more soundbite than sound analysis – because it failed to understand the relative anonymity of music companies in relation to music customers. There is conflicting evidence as to how much the lawsuits against P2P end users are suppressing downloading, just as there is conflicting evidence as to how much music downloading has suppressed music sales in recent years.

But following the initial wave of lawsuits against individuals, music sales have started to rise again, awareness of copyright seems to have increased, and substantially fewer people report that they are downloading, particularly in age groups with more disposable income. Downloading forced a kind of price discrimination on the music business. The responsive strategy of lawsuits against individuals, contaminating P2P systems with spoof files, and offering university students substantially discounted legitimate downloading is itself a price discrimination model that can improve social welfare over music's old single price point system. Instead of being a bad idea, "suing your own customer" could become a financially self-sustaining activity for the record industry.

Yet the problem of infringement-based P2P business models remains because the equilibrium reached by spoofing, suing, and discounting may be short-lived. If "[t]he widespread equation of P2P with piracy has obscured the fact that the same technology is also being constructively applied in all sorts of fields,"[158] then *Grokster* gives the Supreme Court an opportunity to cut through that obscurity, to recognize that the technology can be distinguished from the business practices of entities like Aimster and Grokster, and to allow knowledge and intent to resume their traditional roles in third party liability cases.

Fully integrating intent back into the contributory liability equation comports with our basic notions of responsibility and human agency. Much has been made of the Pew Research Center's 2004 survey of artists' attitudes toward file-sharing, partic-

158 *In Praise of P2P*, THE ECONOMIST (Dec. 2, 2004), *available at* http://www.economist.com/audio/displayStory.cfm?Story_id=3422905 (last visited Feb. 2, 2005).

ularly the substantial percentage of artists who do not oppose file-sharing. But the survey also showed a clear majority of artists believing that P2P distributors share responsibility for copyright infringement: "makers of file-sharing software like Kazaa and Grokster may be unnerved to learn that nearly two-thirds said such services should be held responsible for illegal file-swapping; only 15 percent held individual users responsible."[159] The point is not that artists are uniquely good moral judges in these circumstances, but that their views on responsibility for illegal activity mirror our broadly shared views.

The 1982 *Sony* case did not provide the Court with the material for a robust analysis of liability based on the defendant's knowledge and intent. In a very real sense, that is why the Court now has before it the dilemma of infringement-based P2P business models. In 1911, Justice Holmes noted that "[i]n some cases where an ordinary article of commerce is sold nice questions may arise as to the point at which the seller becomes an accomplice in a subsequent illegal use by the buyer."[160] For Holmes, the question was asked and answered in *Kalem.* Looking at the "articles of commerce" before him, he concluded that infringement "was the most conspicuous purpose for which they could be used, and the one for which especially they were made,"[161] words which aptly describe the Napster, Aimster, and FastTrack software programs.

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159 Tom Zeller, Jr., *Pew File-Sharing Survey Gives a Voice to Artists,* N.Y. TIMES, Dec. 6, 2004, at E1. The two-thirds number comes from the survey's polling of "artists" generally (including filmmakers, writers, and media artists). For the "somewhat more self-selecting category of musicians" fully 54% thought that P2P systems are either wholly or partially responsible for illegal file-sharing. *Id.*

160 *Kalem,* 222 U.S. at 62.

161 *Id.*