Hail to the Thief: A Tribute to Kazaa

Matthew Rimmer*

THIS PAPER CONSIDERS THE ONGOING LITIGATION against the peer-to-peer network KaZaA. Record companies and Hollywood studios have faced jurisdictional and legal problems in suing this network for copyright infringement. As *Wired Magazine* observes: "The servers are in Denmark. The software is in Estonia. The domain is registered Down Under, the corporation on a tiny island in the South Pacific. The users—60 million of them—are everywhere around the world." In frustration, copyright owners have launched copyright actions against intermediaries—like against Internet Service Providers such as Verizon. They have also embarked on filing suits against individual users of file-sharing programs. In addition, copyright owners have called for domestic- and international-law reform with respect to digital copyright. The Senate Committee on Government Affairs of the United States Congress has reviewed the controversial use of subpoenas in suits against users of file-sharing peer-to-peer networks. The United States has encouraged other countries to adopt provisions of the *Digital Millennium Copyright Act 1998* in bilateral and regional free-trade agreements.

CET ARTICLE PASSE EN REVUE LES AFFAIRES EN COURS concernant le réseau d'homologues KaZaA. Les compagnies d'enregistrement et les studios hollywoodiens ont été confrontés à des problèmes jurisprudentielles et juridiques en poursuivant ce réseau pour violation des droits d'auteurs. Comme l'indique le *Wired Magazine* : « [TRADUCTION] Les serveurs sont situés au Danemark. Le logiciel est en Estonie. Le domaine est enregistré aux antipodes. L'entreprise est établie sur une petite du Pacifique du Sud. Les utilisateurs—de l'ordre de 60 millions—sont répartis un peu partout dans le monde. » En désespoir de cause, les titulaires de droits d'auteurs ont poursuivi les intermédiaires—comme le fournisseur de services Internet Verizon. Ils ont aussi entrepris des poursuites contre des utilisateurs individuels de programmes de partage de fichiers. En outre, les titulaires de droits d'auteurs réclament une réforme du droit national et international en matière des droits d'auteurs numériques. Le Comité sénatorial des affaires gouvernementales du Congrès des États-Unis a revu l'utilisation controversée des assignations à témoigner dans les poursuites contre les utilisateurs de réseaux d'homologues pour le partage de fichiers. Les États-Unis ont encouragé d'autres pays à adopter les dispositions de la *Digital Millenium Copyright Act 1998* au moyen d'accords bilatéraux et d'ententes régionales de libre-échange.

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INTRODUCTION

IN APRIL 2003, the nihilist rock band, Radiohead, were working on their new album *Hail To The Thief* named, in part, after protests calling into question the legitimacy of the Presidential victory of Republican George W. Bush.[1] The lead singer, Thom Yorke, was annoyed that all 14 tracks from the album *Hail To The Thief* had, ironically enough, been distributed on peer-to-peer networks on the internet, including Kazaa.[2] In the meantime, the Australian youth radio network, Triple J, played three of the songs downloaded by a staff member. The music director, Arnold Frolows, said in a *mea culpa*:

> We don't want to infringe on the copyright. This was a one-off event. We're not interested in ripping off an artist's work three months out. It was like a found object. As fans it was more about getting excited about finding something like this and we thought, "what can we do, we have to play it on the radio."[3]

John O'Donnell, the managing director of the Australian branch of the record company, EMI, said that the security breach was "a concern."[4] He said that when Frolows called EMI to advise that the songs were about to be played, "we spoke to them and [made Triple J] aware it was infringing copyright" and that it could "short-change the band" by hurting sales of the album.[5] Triple J promised not to play any more material from the upcoming Radiohead album after it had become the first radio station in the world that week to download and air the unreleased

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1. Bernard Zuel, "EMI Says It's Not Okay, Computer" *Sydney Morning Herald* (3 April 2003), <http://www.smh.com.au/articles/2003/04/02/1048962814654.html>.
2. Stephen Dowling, "Radiohead: Hail To The Thief" *New Zealand Herald* (1 June 2003), <http://www.nzherald.co.nz/entertainment/entertainmentstorydisplay.cfm?storyID=3504858&thesection=entertainment&thesubsection=music&thesecondsubsection=reviews>.
3. *Supra* note 1.
4. *Ibid.*
5. *Ibid.*

songs. For their part, EMI said that there were no plans to take action against Triple J nor to bring forward the album's release date in order to thwart further pirating. The album *Hail To The Thief* was released by EMI subject to new copy-protection.

This article appropriates the title of the Radiohead album, "Hail To The Thief," as a sobriquet for Kazaa, the most menacing of the peer-to-peer networks. Its predecessor, Napster, had a certain charming naivety and innocence.[6] The creator, Shawn Fanning, had grown up in a caravan park and wanted to share his music with a community of like-minded computer nerds and radioheads. The popular success of Napster challenged the pretensions of Silicon Valley that it was the font of all creativity and innovation in intellectual property. It also presented a fundamental threat to the established norms of the music industry. Of course Napster was an ephemeral dragonfly. After receiving venture capital and a commercial structure, the peer-to-peer network was targeted by lawsuits from record companies and from established musical acts such as Metallica and Dr Dre. After losing cases in the District Court and the Federal Court in the United States,[7] the company resisted being taken over by the German record company Bertelsmann[8] and ended up in bankruptcy court. Nonetheless, it seems that the Napster brand is not entirely moribund. A recent advertisement in the *Wired Magazine* featured a long-haired millenarian waving around a sign promoting the second coming of Napster.[9] It seems that Napster has been resurrected, in an act of necromancy, as an authorized distributor of online music—with the moniker "It's Back (And It's Legal)."[10]

The peer-to-peer network Kazaa is a formidable successor to Napster. This program enables internet users to search for and to exchange digital media—including MP3 files, computer programs, films and e-books—with other users of file-sharing software powered by the FastTrack technology. Sharman Networks operates the Kazaa.com website, which serves as a central distribution and customer-support hub for the software. Australian businesswoman Nicola Hemming runs Sherman Networks under the Australian management company LEF Interactive, named after the French revolutionary slogan "Liberty, Equality, Fraternity." She waxes eloquent about the future of the venture:

> We are spearheading the delivery of possibly the biggest market-changing technologies ever available to human beings. It takes a visionary attitude to charter through difficult waters. What we are doing is an evolution, even, from the Internet.[11]

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6. Matthew Rimmer, "Napster: Infinite Digital Jukebox Or Pirate Bazaar" (2001) 98 Media International Australia Incorporating Culture & Policy 27 at pp. 27–38; Kathy Bowrey & Matthew Rimmer, "Rip, Mix, Burn: The Politics of Peer to Peer and Copyright Law" *First Monday* (August 2002), <http://firstmonday.org/ issues/issue7_8/bowrey/index.html>; Matthew Rimmer, "The Genie's Revenge" (18 December 2003), <http://www.opendemocracy.net/debates/debate-8-101.jsp>.
7. *A&M Records Inc. v. Napster Inc.*, 114 F.Supp.2d 896 (ND Cal 2000) [*A&M Records (ND Cal)*]; *A&M Records Inc. v. Napster Inc.* 239 F.Supp.3d 1004 (9th Cir 2001) <www.ca9.uscourts.gov/ca9/newopinions.nsf/998C4FAC8 B2B2708882569F1005FA015/$file/0016401.pdf?openelement> [*A&M Records (9th Cir)*].
8. Brad King, "Napster's Assets Go For A Song" *Wired News* (28 November 2002), <http://www.wired.com/news/digiwood/0,1412,56633,00.html>.
9. Napster, Advertisement, "It's Coming Back" *Wired Magazine* 11:11 (November 2003) at p. 213.
10. <http://www.napster.com/>
11. Chris Johnston, "Pirate Queen" *The Age* (5 March 2003), <http://www.theage.com.au/articles/2003/03/04/1046540185222.html>.

Sharman Networks has been lauded by its admirers as a Robin Hood, a Ned Kelly—as stealing from the digital rich and giving to the digital poor. However, such enthusiasm is unhelpful. There is a need to subject such public relations and marketing to a sober analysis. Arguably, peer-to-peer networks have not yet lived up to the revolutionary promises of promoting "liberty, equality and fraternity." They have been used for much more quotidian ends, such as circulating copyright media around the globe.

Conversely, the peer-to-peer network Kazaa has been denigrated by its detractors as a Robber Baron. It has been the subject of a number of lawsuits for copyright infringement by the Record Industry Association of America (RIAA) and the by the Motion Picture Association of America (MPAA). Kazaa has been attacked as a purveyor of pornography, computer viruses and pirated copyright works. Jack Valenti of the MPAA had this to say about peer-to-peer networks:

> We know that the infestation of P2P not only threatens the well-being of the copyright industries but consumers and their families as well. As hearings in the House and Senate have conclusively established, downloading KaZaa, Gnutella, Morpheus, Grockster, etc., can lay bare your most private financial and personal information to identity thieves. It can bring into your home and expose your children to pornography of the most vile and depraved character imaginable. Most insidious of all, the pornography finds its way to your children disguised as wholesome material: your son or daughter may "search" for "Harry Potter" or "Britney Spears," and be confronted with files that contain bestiality or child pornography…. Therefore, the business model that current P2P networks celebrate as "the digital democracy" is built on the fetid foundation of pornography and pilfered copyrighted works.[12]

There is an element of truth in this statement. Peer-to-peer networks such as Kazaa have been used to circulate such taboo and forbidden subject matter. However, Valenti overstates his case. He seems to be intent upon creating a moral panic about peer-to-peer networks amongst politicians and the wider public. His lurid claims deserve critical attention, as much as Kazaa's outlandish promises. There is a need to show a greater degree of scepticism about the revolutionary claims made regarding such new technologies.

In his book *Free Culture*, Stanford University Professor Lawrence Lessig considers the polarized debate over copyright law and peer-to-peer networks.[13] He contends that the competing world visions of Kazaa and the RIAA are both chimeras—part truth, part falsehood. With equipoise, Lessig seeks to mediate between the extremities of these positions, and weighs the available responses:

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12. US, Senate Committee on Governmental Affairs, 108th Cong., *Privacy and Piracy: The Paradox of Illegal File Sharing on Peer-to-Peer Networks and the Impact of Technology on the Entertainment Industry* (September 2003) at pp. 93–94 (statement of Jack Valenti).

13. Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin Books, 2004) [*Free Culture*]. See also Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999) [*Code*]; Lawrence Lessig, *The Future of Ideas* (New York: Random House, 2001) [*Future*].

> We could respond by simply pretending that it is not a chimera. We could, with the RIAA, decide that every act of file sharing should be a felony. We could prosecute families for millions of dollars in damages just because file sharing occurred on a family computer. And we can get universities to monitor all computer traffic to make sure that no computer is used to commit this crime. These responses might be extreme, but each of them has either been proposed or actually implemented.
>
> Alternatively, we could respond to file sharing the way many kids act as though we've responded. We could totally legalize it. Let there be no copyright liability, either civil or criminal, for making copyrighted content available on the Net. Make file sharing like gossip: regulated, if at all, by social norms but not by law.
>
> Either response is possible. I think either would be a mistake. Rather than embrace one of these two extremes, we should embrace something that recognizes the truth in both.[14]

Lessig advocates law reform as a solution to such an addictive technology: "Rather than seeking to destroy the Internet or the p2p technologies that are currently harming content providers on the Internet, we should find a relatively simple way to compensate those who are harmed."[15] William Fisher has put forward the proposal that artists be compensated for the distribution of content by an appropriate tax.[16] Similarly, Neil Weinstock Netanel has suggested that there should be a non-commercial use levy to allow file-sharing on peer-to-peer networks.[17] There is an array of legislative proposals to reform copyright law and peer-to-peer networks.[18]

This article considers recent litigation over peer-to-peer networks, Internet Service Providers and downloading by individuals in the context of such theoretical debates as those concerning power, surveillance, discipline and punishment.[19] It emphasizes the social life of copyright law—giving consideration to legal cases, political processes and media controversies. It focuses on the practical application of copyright law, as well as on its performative power. Siva Vaidhyanathan comments:

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14. *Free Culture*, *ibid.* at p. 180.
15. *Ibid.* at p. 201.
16. William Fisher, "Digital Music: Problems and Possibilities" (2000), <http://www.law.harvard.edu/faculty/tfisher/Music.html>; William Fisher, *Promises To Keep: Technology, Law, and the Future of Entertainment* (Stanford: Stanford University Press, 2004).
17. Neil Weinstock Netanel, "Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing" (2003) 17 Harv. J.L. & Tech. 1, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=468180>.
18. Matthew Fagin, Frank Pasquale & Kimberlee Weatherall, "Beyond Napster: Using Antitrust Law to Advance and Enhance Online Music Distribution" (2002) 8 B.U.J. Sci. & Tech. L. 451, <http://www.bu.edu/law/scitech/volume8issue2/pasquale.pdf>.
19. James Boyle, "Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors" (1997) 66 U. Cin. L. Rev. 177, <http://eprints.law.duke.edu/archive/00000619/01/66_U._Cin._L._Rev._177_(1997-1998).pdf>; James Boyle, *Net Total: Law, Politics and Property in Cyberspace* (forthcoming).

> It might surprise casual observers of these battles that the important conflicts are not happening in court. The Napster case had some interesting rhetorical nuggets. But this was basically classic contributory infringement by a commercial service. Kazaa is a bit more interesting because it is a distributed company with assets under a series of jurisdictions and a technology that limits its ability to regulate what its clients do. Kazaa might collapse and only fully distributed, voluntary networks might remain: namely, Gnutella and Freenet. The real conflicts will be in the devices, the networks, and the media products themselves.[20]

This article has four parts. Part 1 considers recent litigation against the peer-to-peer network Kazaa. It considers the efforts of copyright owners to overcome the jurisdictional hurdles presented by the corporate structure of Kazaa, which has been dispersed from Europe and the United States to Australia and the Pacific Island of Vanuatu. Part 2 examines the unsuccessful attempt by copyright owners to sue Kazaa's relatives Grokster and Streamcast for contributory and vicarious infringement. It also considers the counter-claims made by Kazaa against the record companies with respect to copyright misuse and competition law. Part 3 focuses on legal action taken against intermediaries—such as Internet Service Providers, educational institutions and universities—and against individual users for downloading copyright material on file-sharing systems. It looks at the controversial subpoena lodged by RIAA against the Internet Service Provider Verizon. It evaluates the hundreds of lawsuits filed by RIAA against individual users who have downloaded copyright materials. Part 4 considers the independent legal action taken by copyright owners against Sharman Networks and Brilliant Digital Entertainment in the jurisdiction of Australia. It focuses on the debate over the review of the Australian *Copyright Amendment (Digital Agenda) Act 2000*.[21] It also highlights the ramifications of the Australia-United States Free Trade Agreement (AUSFTA).[22]

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1. THE RACE TO KILL KAZAA: LIBERTY, EQUALITY, FRATERNITY

> The servers are in Denmark. The software is in Estonia. The domain is registered Down Under, the corporation on a tiny island in the South Pacific. The users—60 million of them—are everywhere around the world. The next Napster? Think bigger. And pity the poor copyright cops trying to pull the plug.[23]

IN OCTOBER 2001, the major American music labels and movie studios filed suit against the company of Niklas Zennström, co-founder of Kazaa, the popular file-

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20. Siva Vaidhyanathan, "Peer-to-peer: The New Information War" (June-October 2003), <http://www.opendemocracy.net/debates/debate-8-101.jsp>. See also Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York: New York University Press, 2001); Siva Vaidhyanathan, *The Anarchist in the Library: How Peer-to-peer Networks Are Transforming Politics, Culture, and the Control of Information* (Basic Books) (forthcoming).
21. *Copyright Amendment (Digital Agenda) Act 2000* (Cth), <http://www.worldlii.org/au/legis/cth/consol_act/caaa2000294/> [*CADA*]. <http://www.austlii.edu.au/au/legis/cth/num_act/caaa2000n1102000321/>.
22. *United States-Australia Free Trade Agreement*, 8 February 2004 (entered into force 1 January 2005).
23. Todd Woody, "The Race To Kill Kazaa" *Wired Magazine* 11:2 (February 2003) 104 at p. 104, <http://www.wired.com/wired/archive/11.02/kazaa.html>.

sharing service. Their goal was to shut down the service, and to thwart the tens of millions of people sharing billions of copyrighted music, video and software files.

In January 2002, while related legal action was pending against it in the Netherlands, Kazaa BV transferred ownership of key assets to the newly formed Sharman Networks, Ltd.[24] Perhaps this flight was premature, given the fact that Kazaa BV won its appeal in the Dutch Supreme Court.[25]

Sharman is a company organized under the laws of the island-nation of Vanuatu and doing business principally in Australia. The assets transferred to Sharman include the Kazaa.com website and domain and the Kazaa Media Desktop software.[26] In its agreement to acquire these assets, Sharman explicitly disclaimed the assumption of any of Kazaa BV's liabilities, including any liability arising from these lawsuits.

The FastTrack software was owned by a company known as Joltid, Ltd., which was controlled by Zennström. Shortly after Sharman's acquisition of the Kazaa assets, Joltid granted an "irrevocable, perpetual, worldwide license" to Sharman for the use and sub-licensing of FastTrack. In return, Joltid receives 20 percent of Sharman's revenue. In essence, Sharman has acquired Kazaa BV's primary assets—the Kazaa brand, domain and website, the KMD software and a long-term licence to the FastTrack software—without having formally acquired the company. Meanwhile, Kazaa BV has apparently ceased defending this action.

The head of LEF Interactive, Nikki Hemming, explained that there were legitimate reasons for the corporate structure of Sharman Networks:

> You're absolutely right. Sharman Networks is actually registered in Vanuatu. It's an offshore international company. What that does, along with other prudent investors in the multimedia world, is it provides us with some tax efficiencies for the purposes of our investor team. Just for reference, we elected with the user terms to regulate our affairs by Australian law. That was with a developed legal system. My attorneys advised me that the legal system around copyright is very similar to that of the US and Europe.[27]

Vanuatu is a tax haven: companies established there are not subject to any corporate tax, income tax or withholding tax, for instance.[28] However, international corporations should be wary about using Vanuatu, because of a general lack of knowledge and trust in its legal system—indeed it was only removed from the

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24. Kazaa lost the initial case in the Netherlands on the November 29, 2001.

25. However, it won the appeal in the *Kazaa BV v. Buma and Stemra* (28 March 2002), *unreported* (Amsterdam Court of Appeal), <http://www.eff.org/IP//P2P/BUMA_v_Kazaa/20020328_kazaa_appeal_judgment.html>, as well as the final decision in *Buma* and *Stemra v. Kazaa BV* (18 December 2003), *unreported* (Netherlands Supreme Court). For a discussion of this litigation, see Gert-Jan Van Bergh, "Case Comment Netherlands Copyright—File Sharing Service" (2002) 13(6) Ent. L.R. 77; Alex Morrison, "Case Comment: *Kazaa BV v. Buma and Stemra*" (2002) 24(8) E.I.P.R. 130; "Dutch Supreme Court Dismisses Suit Against Kazaa" *ZDNet UK* <http://news.zdnet.co.uk/business/0,39020645,39118691,00.htm>.

26. A freelance Romanian software programmer, Fabian Toader, has launched a $25 million suit against Sharman Networks claiming to have written the source code for the Kazaa Media Desktop. See "Kazaa's Own Copyright In Dispute" (17 March 2004), <http://news.bbc.co.uk/2/hi/technology/3519464.stm>.

27. John Borland, "The Brains Behind Kazaa" *Gnutella News* (23 April 2002), <http://www.gnutellanews.com/article/4751>.

28. The Australian Tax Office has investigated the use of Vanuatu for the purposes of tax avoidance: Matthew Wade, "Tax Office Eyes Dodgy Vanuatu Tax Schemes" *The Sydney Morning Herald* (15 February 2003), <http://www.smh.com.au/articles/2003/02/14/1044927802186.html>.

OECD's "blacklist" in 2003.[29] Tax advantages could be gained from other, more usual, tax havens, such as the Cayman Islands, Jersey and Bermuda, which have greater security and rule of law.

Rather than merely looking to Vanuatu as a tax haven, Sharman Networks could have chosen Vanuatu because of the difficulty of enforcing foreign judgments in that country.[30] Only weak protection is afforded by the intellectual-property laws in most of the countries of the South Pacific. Miranda Forsyth, a scholar from the University of the South Pacific, has observed:

> Vanuatu has recently introduced a *Patents Act*, *Copyright Act*, *Trademarks Act* and *Designs Act*, but none of these has as yet come into force…. Although these systems of intellectual property exist in legislation, there is a real question about the extent to which they are in fact utilised and enforced. To date there have only been two reported trade mark cases, three reported copyright cases, and no reported patent cases in the whole of the region. In addition, many of the enforcement agencies essential to the efficacy of the system are not operational.[31]

Furthermore, there are few practising lawyers in Vanuatu and a judge has had to come from Melbourne in Australia to adjudicate legal cases. There is of course increasing pressure upon South Pacific countries to adopt Western systems of intellectual-property law and to join the World Trade Organization.[32] However, it is arguably more appropriate for such nations to develop laws protecting traditional knowledge and genetic resources, which would be appropriately adapted to their needs. Consequently, it would be difficult to bring a legal proceeding against Kazaa in the jurisdiction of Vanuatu.

1.1. Jurisdiction

As a result, record companies and motion-picture studios filed lawsuits against the peer-to-peer network Kazaa in the United States. In *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*, Wilson J of the District Court of California considered the question of whether Sharman Networks and LEF Interactive did enough business in the United States to be lawfully included as part of the *Morpheus-Grokster* lawsuit.[33]

Nikki Hemming chose to be deposed in Vancouver, Canada; she feared that copyright owners might seek to detain her in the United States. Obviously Hemming was wary of what had happened to Dimitri Skylarov, the computer pro-

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29. Republic of Vanuatu, "OECD Harmful Tax Initiative" Letter from Honourable Sela Monsa, Minister of Finance and Economic Management, Republic of Vanuatu, to Donald Johnson, OECD Secretary General, <http://www.oecd.org/dataoecd/61/28/2634587.pdf>.

30. However, the changes wrought by the OECD agreement mean that Vanuatu will become less attractive for this purpose.

31. Miranda Forsyth, "Cargo Cults And Intellectual Property In The South Pacific" (2003) 14 Australian Intellectual Property Journal 193 at p. 197.

32. Bronwyn Parry, "Cultures Of Knowledge: Investigating Intellectual Property Rights and Relations in the Pacific" (2002) 34 Antipode 679; Forsyth, *supra* note 31.

33. *Metro-Goldwyn-Mayer Studios Inc.. v. Grokster Ltd.*, 243 F.Supp.2d 1073 (CD Cal 2003), <http://www.cacd.uscourts.gov/CACD/RecentPubOp.nsf/bb61c530eab0911c882567cf005ac6f9/e19d0bcc761118ad88256cb700708a1f?OpenDocument> [*Grokster (Jan 2003)*].

grammer who was arrested when he visited the United States.[34] There have also been efforts made by the United States Department of Justice to extradite individuals engaged in copyright piracy under "Operation Buccaneer."[35]

Wilson J found that there was jurisdiction to hear the copyright claims against Sharman Networks. His Honour dismissed the arguments of Sharman Networks about personal jurisdiction, subject-matter jurisdiction, improper venue and *forum non conveniens*:

> Plaintiffs clearly have carried their burden in this respect. Sharman provides its KMD software to millions of users every week, and executes a licensing agreement with each user permitting use of the software. Sharman has not denied and cannot deny that a substantial number of its users are California residents, and thus that it is, at a minimum, constructively aware of continuous and substantial commercial interaction with residents of this forum. Further, Sharman is well aware that California is the heart of the entertainment industry, and that the brunt of the injuries described in these cases is likely to be felt here. It is hard to imagine on these bases alone that Sharman would not reasonably anticipate being haled into court in California.[36]

Wilson J concluded: "Because Sharman has succeeded Kazaa BV in virtually every aspect of its business, Sharman reasonably should have anticipated being required to succeed Kazaa BV in this litigation as well."[37]

Wilson J denied that Sharman made a "compelling case" that jurisdiction would be unreasonable on the basis of any of the other factors considered with respect to reasonableness. His Honour noted:

> Although Australia or Vanuatu might be alternative forums for suing Sharman, it is not clear that the non-Australian co-Defendants would be amenable to service of process in either country. Moreover, these are suits under U.S. law for copyright infringement within the United States. Thus, even if a foreign court were available to hear this litigation, it would be forced to interpret U.S. law.[38]

Subsequent litigation by the music industry against Sharman Networks has revealed that Australia is indeed a viable alternative forum in which to hear the matter.

Sharman Networks also argued that the complaint should be dismissed under the political-question doctrine, which stipulates that a court should not rule on a case if the issues to be litigated are best resolved by the political process. Wilson J observed in a bemused fashion:

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34. Bowrey & Rimmer, *supra* note 6.
35. US, Department of Justice & United States Customs Service, Operation Buccaneer (United States Attorney, Eastern District of Virginia; Computer Crime and Intellectual Property Section; United States Customs CyberSmuggling Center – C3), <http://www.cybercrime.gov/ob/OBMain.htm>.
36. *Supra* note 33 at p. 1092.
37. *Ibid.*
38. *Ibid.* at p. 1094.

> Nothing in *Sony* suggests that this Court should refuse to hear the instant cases merely because they present novel or dynamic questions of law. The Court cannot abstain from adjudicating actions properly before it based upon mere speculation or hope that greater legislative guidance may one day be afforded.[39]

The defendant LEF Interactive also moved to dismiss for lack of personal jurisdiction only. LEF Interactive contended that it was "a management company that merely provides services to other businesses, one of whom is [Sharman]."[40] LEF Interactive argued that it does not own or operate the Kazaa system or have any other relationship with the conduct charged in these actions. Rather, LEF Interactive asserts, it is an Australian business with no connection to this case, and no other contacts with the United States or California. Naming LEF Interactive as a defendant, it adds, "makes no more sense than naming Sharman's accountants."[41]

Rejecting such arguments, Wilson J held: "Despite the relatively novel corporate affiliation at issue in the instant actions, the relationship between Sharman and LEF includes the indicia of both attribution and merger."[42] His Honour was satisfied that the activities of Sharman Networks were predominantly instigated by employees of LEF Interactive. Furthermore Wilson J accepted the argument of the plaintiffs that LEF Interactive and Sharman were virtually coterminous. His Honour accepted the claim that LEF Interactive was formed for the sole purpose of operating the business of Sharman Networks.

The case has wider implications with respect to internet jurisdiction.[43] Undoubtedly, the litigation against Kazaa would have been resolved in a similar fashion if it had been brought in the jurisdiction of Australia instead of in the jurisdiction of the United States. There are strong parallels between the Kazaa litigation and an Australian defamation case.

In a groundbreaking case, the High Court of Australia considered whether a Melbourne mining magnate could bring a defamation action in his home state of Victoria over an article published on *Barron's Online* by Dow Jones, which is based in New York.[44] The joint judgment of Gleeson CJ and McHugh, Gummow and Hayne JJ took an expansive view of jurisdiction, and held that Mr. Gutnick could indeed take action in the Supreme Court of Victoria. They were disinclined to accept arguments that the internet is a unique medium:

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39. *Ibid.* at pp. 1096–1097.
40. *Ibid.* at p. 1097.
41. *Ibid.*
42. *Ibid.* at p. 1100.
43. Michael Geist, "Is There a There There? Toward Greater Certainty for Internet Jurisdiction" (2001) 16 Berkeley Tech L.J. 1345, <http://www.law.berkeley.edu/journals/btlj/articles/vol16/geist/geist.pdf>; Brian Fitzgerald, Gaye Middleton & Anne Fitzgerald, *Jurisdiction and the Internet* (Sydney: Lawbook Company, 2004).
44. *Dow Jones & Co. Inc. v. Gutnick*, 2002 HCA 56, (2002), 194 A.L.R. 433 [*Gutnick*]; David Rolph, "A Clearly Inappropriate Forum? Jurisdiction, Internet Defamation and the High Court of Australia" (2003) 8 Media & Arts L.R. 59.

> In the course of argument much emphasis was given to the fact that the advent of the World Wide Web is a considerable technological advance. So it is. But the problem of widely disseminated communications is much older than the Internet and the World Wide Web. The law has had to grapple with such cases ever since newspapers and magazines came to be distributed to large numbers of people over wide geographic areas. Radio and television presented the same kind of problem as was presented by widespread dissemination of printed material, although international transmission of material was made easier by the advent of electronic means of communication. [45]

This decision in the *Gutnick* case will undoubtedly guide the Australian courts in matters of jurisdiction involving copyright law and the internet.[46] The judiciary will be confident in asserting jurisdiction over copyright infringement online, so long as the harm is experienced locally and the party had knowledge that such harm was a likely consequence of their actions.

However, it should be noted that a different approach may be taken in other fields of legal doctrine. In contrast to the expansive jurisdiction granted in commercial matters, national governments in Australia and the United States have been willing to circumscribe jurisdiction on more contentious human-rights matters.[47]

1.2. Earth Station 5

The jurisdictional issues raised by Kazaa foreshadow future legal battles over peer-to-peer networks.[48] Neil Weinstock Netanel comments: "Even if the industries win their battle in the United States, they face a serious risk of being unable to halt the operation of P2P file swapping sites from countries with laxer laws regarding copyright in general, or contributory infringement in particular."[49] New adaptive, camouflaged forms of peer-to-peer networks pose difficult regulatory problems.[50] Earth Station 5, or ES5, is a peer-to-peer file-sharing network based out of the Jenin refugee camp in the Palestinian Territories.[51] The president, Ras Kabir, observes: "Earthstation 5 is at war with the Motion Picture Association of America (MPAA) and the Record Association of America (RIAA), and to make our point very clear that their governing laws and policys [*sic.*] have absolutely no meaning to us here in Palestine, we will continue to add even more movies for

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45. *Gutnick*, *supra* note 44 at p. 444.
46. Miranda Lee, "Twisted Sisters: Jurisdiction and International Copyright in the Digital Age" ACIPA Seminar Series (July 2003).
47. The Australian Government has interned asylum seekers in Nauru and Papua New Guinea, so that they fall outside Australian refugee laws: Penelope Mathew, "Australian Refugee Protection in the Wake of the *Tampa*" (2002) 96 Am. J. Int'l L. 661. The Supreme Court of the United States has heard oral argument over the detainment of enemy combatants in the "lawless havens" of Camp X-Ray in Guantanamo Bay in the case of *Rasul v. Bush*, 124 S.Ct. 2686 (2004), <http://a257.g.akamaitech.net/7/257/2422/28june2004 1215/www.supremecourtus.gov/opinions/03pdf/03-334.pdf>.
48. Seagrumn Smith, "From Napster to Kazaa: The Battle over Peer-to-peer File-sharing Goes International" (2003) Duke L. & Tech. Rev. 8, <http://www.law.duke.edu/journals/dltr/articles/2003dltr0008.html>.
49. *Supra* note 17 at p. 20.
50. Kate Crawford, "Steal This Tune: Copyright, Theft and Music Online" Copyright—Unlucky For Some, ACIPA Conference (13 February 2004), <http://www.acipa.edu.au/PDFs/BrisbaneConfProgram2004.pdf>.
51. Mathew Honan, "The Enigma of Earth Station 5" *Salon* (3 December 2003), <http://www.salon.com/tech/feature/2003/12/03/es5/index.html>.

FREE."[52] The operators of the network boast that program can provide anonymity for its users via third-party proxy-servers. Earth Station 5 has posted the following notice on its website:

> Earthstationv Ltd., a Palestinian Corporation, does not accept any legal process via email, nor will we accept any attachments via email. For service of process, you must serve our legal department located at our offices in the Jenin refugee camp, Jenin, Palestine. No employee outside of our legal department is authorized by our corporation to accept service of process under Palestinian law. Earthstationv advertising is through third party companies which are not authorized to accept service of process on behalf of Earthstationv Ltd.[53]

The financial ownership and corporate structure of Earth Station 5 is somewhat mysterious. The media liaison, Steve Taylor, maintains that the company is funded by six investors, four of whom are billionaires.[54] He claims that "the company sees ES5 not as a P2P network, but rather as a full-service portal, complete with voice-over IP for making long-distance calls on the cheap, online dating, and eventually, online gambling."[55] It remains uncertain how Earth Station 5 will continue to fund its venture without engaging in advertising or relying upon spyware.[56]

Copyright owners are determined to shut down Earth Station 5, in spite of the jurisdictional issues. The senior vice president of MPAA, Matthew Oppenheim, refers to the court decision dealing with Kazaa that found that, even though the company was headquartered in Vanuatu, a Pacific Island state, it could still be sued in the United States because of its millions of American subscribers: "We saw that a court was willing to exercise jurisdiction over [Kazaa parent company Sharman Networks]. And underlying infringers are subject to enforcement here."[57] Lessig concurs:

> When someone downloads something in the U.S. that constitutes a violation in the U.S. So there is a U.S.-based wrong. They could get a default judgment against the Palestine-based P2P network, and then start foreign proceedings to try to get a judgment. But more likely is that they would get companies supplying bandwidth to stop supplying bandwidth. So whether or not it would be meaningless in Palestine, the RIAA can get effective justice just outside the border.[58]

Tom Temple, the director of world-wide internet enforcement at the MPAA, had engaged legal counsel in Israel: "We have sent a takedown notice to their ISP. It's

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52. Ras Kabir, "Earth Station 5 Declares War Against The Motion Picture Association of America" (19 August 2003), <http://amsterdam.nettime.org/Lists-Archives/nettime-l-0308/msg00119.html>.
53. <http://www.earthstation5.com/>.
54. *Supra* note 51.
55. There has been speculation that the peer-to-peer network is a sting operation set up by copyright owners. Honan, *supra* note 50, comments: "Many in the online file-trading community have speculated that ES5 is some sort of front for the RIAA and MPAA, engaging in a giant dragnet to snare unsuspecting sharers. Or that the network's list of trusted proxy servers are actually RIAA 'honeypots,' designed to snag users' IP addresses."
56. *Supra* note 51.
57. *Ibid.*
58. *Ibid.*

clearly illegal under Israeli law."[59] Israel has intellectual-property agreements with the Palestinian Authority that provide copyright protection between the two entities. At the very least, this would secure Israeli copyrights. Palestine is still subject to the 1911 *Copyright Act*, which was established when the region was subject to British rule.[60] Temple acknowledged that there is "a jurisdictional question" but was confident that action would be taken as the investigation progressed.[61]

Earth Station 5 remains defiant to the threats of copyright owners, declaring: "The next revolution in P2P file sharing is upon you. Resistance is futile and we are now in control."[62] The media liaison, Steve Taylor, comments:

> They can try [to sue us in the United States]. What are they going to do? Why don't they sue us in China? Let's say they did sue us and did win a judgment…. How do they enforce it?[63]

However, United States courts are increasingly taking an expansive view of jurisdiction. The District Court of Columbia asserted jurisdiction over puretunes.com, a Spanish-based site that allowed users to download music.[64] Similarly, the District Court of New York recognized that it had jurisdiction over the peer-to-peer network Imesh, which is based in part in Israel.[65] Such legal cases show that peer-to-peer networks will find it difficult to evade legal action for copyright infringement by secreting themselves in foreign jurisdictions outside the United States.

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2. ALTNET: BRILLIANT DIGITAL ENTERTAINMENT

> A small office in Cremorne has beaten Harry Potter, American Idol, Paris Hilton and rapper 50 Cent in grabbing the attention of internet users worldwide. The search engine Yahoo! has named its top 10 searches in 2003, and at number one is Kazaa, the "peer-to-peer" software program controversially used to share pirate music online.[66]

SHARMAN NETWORKS HAS ENTERED into a joint-enterprise partnership with a third-party called Altnet, a subsidiary of Brilliant Digital Entertainment, a California-based multimedia company founded by Kevin Bermeister. Altnet provides digital-rights management technology, a technology designed by Microsoft that "wraps" licensed copyrighted content and that enables users to obtain access to that content on terms set by the copyright owner. When a Kazaa user searches for content, the Altnet files are displayed along with other content. An Altnet song

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59. Chris Marlowe, "P2P Service 'at War' with MPAA: Based at Palestinian Refugee Camp, ES5 Taunts Biz" *Hollywood Reporter* 380:5 (22 August 2003) at p. 3.
60. *Copyright Act*, 1911 (U.K.), c. 46.
61. *Supra* note 59.
62. Kabir, *supra* note 52.
63. Honan, *supra* note 51.
64. *Arista Records v. Sakfield Holding Company*, 314 F.Supp.2d 27 (DC District Court, 2004), <http://www.dcd.uscourts.gov/03-1474.pdf> [*Arista*].
65. *Motown Record Company v. IMesh.com Inc.*, No. 03 Civ. 7339 (PKC) (SD NY, 12 March 2004) [*Motown*].
66. Kirsty Needham, "A Site For Sore Ears: How One Small Office Beat The World" *Sydney Morning Herald* (31 December 2003), <http://www.smh.com.au/articles/2003/12/30/1072546531382.html>.

or video game is downloaded like any other file. Unlike illegally traded files, however, only those who pay a fee to Altnet can actually use the Altnet files. Sharman Networks claims that Kazaa has become the world's largest distributor of licensed, digitally rights managed content over the internet.

Sharman Networks obviously hopes to raise the defence of fair use in the event of litigation over copyright infringement. The alliance with Altnet is designed to demonstrate that the technology has substantial non-infringing uses. Sharman Networks has made a number of press releases detailing the legitimate uses of Kazaa. For instance, the company announced that it would distribute a Bollywood film, the Hindi-language thriller "Supari."[67] According to Nikki Hemming:

> The Bollywood movie market is growing at twice the rate of Hollywood, in terms of production and revenue. This is where the benefits of peer-to-peer technology become really clear, by selling large, high quality files online, such as feature films, at low cost to a massive audience across the globe which quite simply cannot be done efficiently using traditional websites. Peer-to-peer technology offers the movie industry a huge opportunity to massively enhance its distribution and generate revenue.[68]

Similarly, Sharman Networks has distributed musical works by emerging artists, management organizations and independent record companies. Such activities are designed to provide evidence that Kazaa is the subject of legitimate fair use.

For their part, the major record companies and movie studios have refused to permit their copyrighted musical works to be distributed through Altnet and Kazaa. Hilary Rosen of the RIAA scorns the business model of Sharman Networks: "I think their attempt at trying to legitimize themselves will never work."[69]

Nikki Hemming is haughty about the opposition from the entertainment industry:

> I have a favorite quote of mine, which I borrow from Einstein. And it goes something like: Great vision is often met with opposition from mediocre minds.[70]

Such a statement would undoubtedly be divisive: some would agree that the company is visionary; others would protest that such a declaration shows a certain amount of arrogance and hubris. True, the commercial vision of Sharman Networks is not exactly comparable to the achievements of the twentieth century's greatest physicist. However, the company could lay claim to be pioneering, especially given the challenge it has posed to traditional methods of music distribution in the music industry.

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67. Sharman Networks, Press Release, "Bollywood Comes To Kazaa: World's First Full-Length Feature Film Sold Online Using Peer-to-Peer Technology" (12 November 2003), <http://www.sharmannetworks.com/content/view/full/237>.
68. *Ibid.*
69. TechTV, "Nikki Hemming – v – Hilary Rosen" *P2PNet*, <http://www.p2pnet.net/article/7382>.
70. *Ibid.*
71. Grokster maintains its servers in St. Kitts & Nevis, a 36-square-mile nation-state in the West Indies. Only Morpheus resides in the United States.

2.1. Grokster

The Motion Picture Association of America and the Record Industry Association of America filed copyright-infringement lawsuits against three file-trading services: Grokster,[71] Streamcast and Kazaa BV.[72] The pleadings of the entertainment companies declared:

> [The] defendants have created a 21st century piratical bazaar where the unlawful exchange of protected materials takes place across the vast expanses of the Internet, and where the materials being exchanged include first-run movies currently playing in theaters and hit songs from virtually every major recording artist.[73]

Such florid, swashbuckling rhetoric about piracy is reminiscent of the indictment against the peer to peer network, Napster.

In *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*, Wilson J held as a threshold matter that there was sufficient evidence of direct infringement by end users of the defendants' software: "Just as in Napster, many of those who use Defendants' software do so to download copyrighted media files, including those owned by Plaintiffs, and thereby infringe Plaintiffs' rights of reproduction and distribution."[74]

Citing the decision of the Supreme Court of the United States in *Sony Corporation of America v. Universal City Studios Inc.*, Wilson J affirmed: "[T]he sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement" if the product is "capable of substantial noninfringing uses."[75] His Honour observed that the Morpheus program was capable of substantial non-infringing uses:

> Here, it is undisputed that there are substantial noninfringing uses for Defendants' software—*e.g.*, distributing movie trailers, free songs or other non-copyrighted works; using the software in countries where it is legal; or sharing the works of Shakespeare.[76]

This reasoning is somewhat debatable. Is the internet actually the preserve of Shakespearean enthusiasts and thespians rather than of computer geeks? Is Morpheus really being used to download *Hamlet*, *Titus Andronicus* and the Scottish Play? Undoubtedly, this finding that the Morpheus program is capable of substantial non-infringing uses will be challenged by copyright owners.

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72. Brad King, "File Trading Sites In Crosshairs" *Wired News* (3 October 2001), <http://www.wired.com/news/mp3/0,1285,47296,00.html>. Since this case was originally filed, the operation of the "Kazaa system" passed from Kazaa BV to defendant Sharman Networks. In addition, Kazaa BV has apparently ceased defending this action. Given the fact that Kazaa BV has failed to defend this action, the Court would enter a default judgment against Defendant Kazaa BV.
73. MGM Studios *et al.*, Complaint for Damages and Injunctive Relief for Copyright Infringement, (2 October 2001) at 2.
74. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*, 259 F.Supp.2d 1029 (CD Cal, 2003) at 1034–1035 [*Grokster (April 2003)*].
75. *Sony Corporation of America v. Universal City Studios Inc.*, 464 U.S. 417, 104 S.Ct. 774 (1984) [*Sony* cited to U.S.].
76. *Supra* note 74 at p. 1035.

Wilson J held that the distributors were not liable for contributory infringement because there was no evidence that they had any material involvement in the users' conduct. His Honour also held that the distributors were not liable for vicarious infringement absent showing that they had any right or ability to supervise users' conduct. Wilson J observed:

> Plaintiffs appear reluctant to acknowledge a seminal distinction between Grokster/StreamCast and Napster: neither Grokster nor StreamCast provides the "site and facilities" for direct infringement. Neither StreamCast nor Grokster facilitates the exchange of files between users in the way Napster did. Users connect to the respective networks, select which files to share, send and receive searches, and download files, all with no material involvement of Defendants. If either Defendant closed their doors and deactivated all computers within their control, users of their products could continue sharing files with little or no interruption.[77]

Wilson J concluded that, unlike in *Napster*, there was no admissible evidence before the Court indicating that the defendants had the ability to supervise and control the infringing conduct—which occurred after the product had passed to end users.

Wilson J acknowledged that the peer-to-peer networks had been structured in such a way as to evade the threat of contributory infringement. His Honour observed:

> The Court is not blind to the possibility that Defendants may have intentionally structured their businesses to avoid secondary liability for copyright infringement, while benefitting financially from the illicit draw of their wares. While the Court need not decide whether steps could be taken to reduce the susceptibility of such software to unlawful use, assuming such steps could be taken, additional legislative guidance may be well-counseled.[78]

Wilson J observed that: "To justify a judicial remedy, however, Plaintiffs invite this Court to expand existing copyright law beyond its well-drawn boundaries."[79] His Honour took notice of the cautionary waring of the Supreme Court in *Sony Corporation of America v. Universal City Studios Inc.*[80] that courts must tread lightly in circumstances such as these: "In a case like this, in which Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment which never calculated such a calculus of interests."[81] As a result, Wilson J granted summary judgment in favour of Grokster and Streamcast, albeit reluctantly.

The caution of Wilson J is understandable. As Peter Jaszi has said, copyright law has become "grotesque."[82] The well-drawn boundaries of copyright law

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77. *Ibid.* at p. 1041.
78. *Ibid.* at p. 1046.
79. *Ibid.*
80. *Supra* note 75.
81. *Supra* note 74 at p. 1046.
82. Peter Jaszi, "Database Protection" (Paper presented to the University of Ottawa, October 2003) [unpublished].

have been distorted by the new additions effected by the *DMCA*.[83] The decision of Wilson J shows a respect for the delicate political balances and compromises wrought by Congress. Nonetheless, his deferential approach has been met with disbelief amongst copyright owners.

2.2. The Court of Appeals

The motion-picture studios, record companies and music publishers requested that the United States Court of Appeals for the Ninth Circuit overturn the decision by the district court and hold StreamCast Networks and Grokster liable for those infringements.[84] The lawsuits make a number of rude comments about the judgment of Wilson J, such as: "The decision below is not an application of copyright law to the online world but an abdication."[85] The President of RIAA, Cary Sherman, argued:

> We appreciate that the district court affirmed that the underlying activity of downloading or distributing copyrighted works is illegal, but the ruling on the services themselves rewrote years of well-established copyright law. It was wrong. These are businesses that were built for the exclusive reason of illegally exchanging copyrighted works, and they make money hand over fist from it. The Court of Appeals should hold them accountable.[86]

The copyright owners implored the United States Court of Appeals for the Ninth Circuit to follow the decision in the *Aimster* case.[87] In this case, Posner J held that Aimster was liable for contributory infringement because of its wilful blindness to the activities of its users. His Honour dismissed defences raised by Aimster dealing with fair use, safe harbours and encryption. MGM had online music services, entertainment-industry groups, international rights owners and a group of law professors and treatise authors, including Hugh Hansen, filing briefs in its favour.

The peer-to-peer network Kazaa was triumphant at the decision dealing with its sister peer-to-peer networks Grokster and Streamcast. Sharman Networks and Altnet have filed amicus briefs in support of Grokster in the appeal. Nikki Hemming emphasized the significance of the *Grokster* case in a submission to the Digital Agenda Review:

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83. *Digital Millennium Copyright Act*, Pub. L. No. 105-34, 112 Stat. 2860 (1998), <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_public_laws&docid=f:publ304.105.pdf>.
84. Motion Picture Association of America. Press Release, "Music and Motion Picture Companies Appeal Court Decision In Grokster, Morpheus Case" (19 August 2003), <http://www.mpaa.org/Press/2003_08_19_music_city.pdf>.
85. Movie Studio and Record Companies Opening Brief, Appeal from *Metro-Goldwyn-Mayer Studios v. Grokster Ltd.*, 259 F.Supp.2d 1029 (20 August 2003) at 6, <http://www.eff.org/IP/P2P/MGM_v_Grokster/20030820 _mgm_appeal_opening_brief.pdf>.
86. *Supra* note 84.
87. *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir 2003), <http://www.ca7.uscourts.gov/op3.fwx?submit1=showop&caseno=02-4125.pdf> [*Aimster*].

> In a major ruling in a pending case involving Sharman, a United States Federal Court in California (April 2003) found for two co-defendants, the owner of two P2P software applications substantially identical in all material respects to the KMD, on the grounds that there were substantial non-infringing uses for the defendants' "software."
>
> The United States Federal Court's decision followed the legal principles established by the United States Supreme Court in the Betamax case, as well as those established by the United States Ninth Circuit Court of Appeals in the Napster case. P2P software provides users with the means to search for and exchange files of all types, and as in the case of Sony Betamax, courts have now ruled that responsibility for misuse of technology rests with those individuals who choose to misuse the technology.[88]

A group of law professors, led by the redoubtable Pamela Samuelson, has made an *amicus curiae* submission: "[W]e respectfully urge this Court to reject Plaintiffs' attempts to rewrite the standard set by the Supreme Court in *Sony Corporation of America v. Universal City Studios Inc.*,…which shields those who develop technologies that have or are capable of substantial non-infringing uses from secondary liability for copyright infringement."[89] Grokster has also had the Consumer Electronics Association, library associations, the ACLU and the Computer and Communications Industry Association filing briefs on its side.

After deliberating on the matter, the Federal Court of Appeals held that decentralised peer to peer networks such as Grokster could not be held liable for contributory or vicarious copyright infringement because they could not police the conduct of its users, as Napster could.[90] Thomas J observed that the software was capable of substantial, non-infringing uses:

> One striking example provided by the Software Distributors is the popular band Wilco, whose record company had declined to release one of its albums on the basis that it had no commercial potential. Wilco repurchased the work from the record company and made the album available for free downloading, both from its own website and through the software user networks. The result sparked widespread interest and, as a result, Wilco received another recording contract. Other recording artists have debuted their works through the user networks. Indeed, the record indicates that thousands of other musical groups have authorized free distribution of their music through the internet.[91]

The court noted, though, in the marginalia: "Indeed, even at a 10% level of legitimate use, as contended by the Copyright Owners, the volume of use would indicate a minimum of hundreds of thousands of legitimate file exchanges."[92] Such

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88. Sharman Networks Limited / Philips Fox Digital, Agenda Review, "Review of Copyright Amendment (Digital Agenda) Act" Letter from Nikki Hemming, CEO Sharman Networks, to Phillips Fox (n.d. 2003), <http://www.phillipsfox.com/whats_on/Australia/DigitalAgenda/submissions/Sharman_submission.pdf>.
89. Amicus brief of law professors supporting affirmance, Appeal from *Metro-Goldwyn-Mayer Studios v. Grokster Ltd.*, 259 F.Supp.2d 1029, <http://www.eff.org/IP/P2P/MGM_v_Grokster/20030930_lawyers_amicus.pdf>.
90. *Metro-Goldwyn-Mayer Studios, Inc v Grokster Ltd*, 380 F 3d 1154 (9th Cir. 2004), *cert. granted* 10 December 2004.
91. *Ibid* at p. 1161.
92. *Ibid* at p. 1162.

a verdict is at odds with the decision of the Seventh Circuit of the Federal Court in *In re Aimster Copyright Litigation*, which found that the peer to peer network Madster was liable for contributory and vicarious copyright infringement.

The Federal Circuit was reluctant to accede to the demands of copyright owners to expand the reach of the doctrines of contributory and vicarious copyright infringement. Thomas J noted: "Not only would such a renovation conflict with binding precedent, it would be unwise."[93] His Honour observed that the courts were an inappropriate forum to resolve such clashes over market forces and technological change:

> We live in a quicksilver technological environment with courts ill-suited to fix the flow of internet innovation. The introduction of new technology is always disruptive to old markets, and particularly to those copyright owners whose works are sold through well established distribution mechanisms. Yet, history has shown that time and market forces often provide equilibrium in balancing interests, whether the new technology be a player piano, a copier, a tape recorder, a video recorder, a personal computer, a karaoke machine, or an MP3 player. Thus, it is prudent for courts to exercise caution before restructuring liability theories for the purpose of addressing specific market abuses, despite their apparent present magnitude.[94]

The Federal Circuit emphasized that it was the role of Congress to craft copyright laws in order to deal with new technologies. It was inappropriate for the courts to engage in judicial creativity to satisfy the economic concerns of copyright owners.

The US Supreme Court has agreed to consider whether Grokster and SteamCast Networks may be held responsible for their customers' online swapping of copyright songs and movies. The justices will review a lower ruling in favour of the two P2P networks. Oral arguments are expected in March 2005 with a decision to follow by June. The Supreme Court of the United States will need to resolve the tension between the decision of the Ninth Circuit Opinion in the Grokster case and the verdict of the Seventh Circuit in *In re Aimster Copyright Litigation*.

2.3. Countersuits

The peer-to-peer networks have also raised concerns about anti-competitive practices and copyright misuse on the part of the motion-picture and record companies. The record companies have been somewhat surprised and disconcerted by this counter-attack. Australian RIAA lawyer Michael Williams said that under Hemming's leadership Sharman was "ultra-aggressive": "Instead of saying, 'Don't persecute me,' they say that we are the aggressors. This turns the tables entirely."[95]

In *Metro-Goldwyn-Mayer Studios Inc v. Grokster Ltd.*, Sharman Networks launched a lawsuit against the motion-picture and record companies

93. *Ibid* at p. 1166.
94. *Ibid* at p. 1167.
95. Johnston, *supra* note 11.

alleging that they were engaged in a conspiracy to monopolize and that they were refusing to deal with other parties in violation of the *Sherman Act*.[96] Sharman Networks also sought declaratory relief as to copyright misuse, and for unfair business practices.

The lawsuit reads like a grand conspiracy that one would find in the literary narratives of Thomas Pynchon; there is a litany of complaints. Sharman Networks alleges that Plaintiffs control as much as 85 percent of the market for manufacturing, labelling and distributing copyrighted music and films.[97] Sharman Networks further alleges that the copyright owners together have acted monopolistically and in restraint of trade by refusing to license any copyrighted works to a business partner called Altnet. This conduct unlawfully precludes Sharman Networks and Altnet from competing effectively in the market for distribution of licensed, copyrighted works. Sharman Networks alleges, for instance, that there are companies affiliated with the record companies that themselves distribute file-sharing software, and that they have not insisted that these companies police their systems. Sharman Networks also asserts that the copyright owners distributed "fake" songs and viruses in order to harm peer-to-peer networks such as Kazaa. They claim that the record companies engage in unfair business practices and breach copyright law and privacy provisions by covertly gathering information about users of Kazaa.

It is difficult to determine whether Sharman Networks has a well-founded fear of persecution or whether such claims are merely indicative of paranoia. Neil Weinstock Netanel comments that copyright owners have made a few forays into the use of sabotage:

> Copyright industries have tentatively begun to use technological self-help, including placing faulty files on P2P networks, to make P2P file sharing less desirable. Conducting such sabotage on a massive scale could be a public relations nightmare, and in any event might not succeed against P2P network countermeasures. Nevertheless, the industries are laying the foundations for the more extensive use of aggressive self-help.[98]

However, he notes that such actions have had limited success against peer-to-peer networks and that they have the potential to attract adverse comment and sanction.

Wilson J doubted whether Sharman Networks had standing to bring an anti-trust action under the *SA* because its alleged injuries were only incidental to those that were claimed to have been suffered by Altnet:

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96. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*, 269 F.Supp.2d 1213 (CD Cal 2003) , <http://www.cacd.uscourts.gov/ CACD/RecentPubOp.nsf/bb61c530eab0911c882567cf005ac6f9/882626055381375988256d5800654a59/$FILE/CV01-8541SVW.pdf> [*Grokster (July 2003)*]; *Sherman Act*, U.S.C. § 1 (1890), <http://www.access.gpo.gov/uscode/title15/chapter1_.html> [*SA*].

97. James Pearce, "Music Industry Stymies Record Companies: Kazaa Counterclaim" (24 September 2003), <http://www.zdnet.com.au/news/business/0,39023166,20278927,00.htm>.

98. *Supra* note 17 at pp. 18–19.

> Sharman's alleged injuries arise only because it stands to benefit from Altnet's potential success in the relevant market. As Sharman is neither a competitor nor customer in the restrained market, and because its injury is incidental, and not integral, to the alleged anticompetitive scheme, Sharman does not have standing.[99]

Wilson J also dismissed the action for copyright misuse. However, his Honour granted leave for further submissions on the matter of unfair business practices. Such an outcome is not surprising. Competition lawyer David Boies made similar arguments that Napster was the victim of anti-competitive conduct by the record industry. His claims about competition law and copyright misuse were given short shrift by the Federal Court of Appeals. Similarly, it is difficult for peer-to-peer networks to substantiate their claims of anti-competitive conduct and of copyright misuse by copyright owners.

Sharman Networks filed an amended counterclaim on September 23, 2003 in the US District Court of California against the entertainment companies.[100] Nikki Hemming commented:

> We take little pleasure in moving this next step to place the spotlight on the entertainment industry's behaviour…. The industry has lost its way, choosing a path of endless litigation rather than accepting a solution to copyright infringement that is available now and a technology that is inexorable.[101]

The federal countersuit claims that certain entertainment companies accessed the Kazaa network with an unauthorised version of the free software, known as Kazaa Lite, to look for user information. In their hunt for music file pirates, the entertainment companies allegedly violated Kazaa's copyright by using a replica of Kazaa devoid of advertisements, which are Sharman's chief source of revenue. Kazaa accuses the entertainment companies of sharing bogus versions of copyrighted works and of sending instant messages to harass users, both of which violate the terms for using the network. The judge has rejected the motion to dismiss the action by the United States entertainment industry, and will hear the key claims of the lawsuit.[102]

Sharman Networks is also not adverse to bringing legal action against unauthorized versions of Kazaa—most notably Kazaa Lite, which provides greater protection against viruses and spyware. Nikki Hemming confirmed that she had approached the product's distributors with a cease-and-desist request drafted by her legal team at Phillips Fox. Sharman Networks requested that the popular search engine Google remove and disable access to infringing copyright material, including websites such as <http://www.kazaa-lite.info>. The matter has been documented on the Chilling Effects Clearinghouse, which monitors

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99. *Grokster (July 2003)*, *supra* note 96 at 1221.
100. Caron Alarab, "Kazaa Distributors File Suit Over Software Program Use" *Oregon Daily Emerald* (6 October 2003), <http://www.dailyemerald.com/vnews/display.v/ART/2003/10/06/3f8181c572215?in_archive=1>.
101. *Ibid.*
102. Sharman Networks, Press Release, "Sharman Networks Cleared To Bring Lawsuit Against Entertainment Industry" (23 January 2004), <http://www.sharmannetworks.com/content/view/full/275>.

legal action on the internet.[103] This episode highlights that the company is very competitive against rival peer-to-peer networks.

Furthermore, Altnet has sent legal threats to nine companies that monitor file-trading networks, accusing them of violating its patent rights.[104] The division of Brilliant Digital Entertainment acquired rights to a 1999 patent, which covers the technique of identifying files on peer-to-peer networks using a "hash," or digital fingerprint based on the contents of the file. Derek Broes of Altnet comments:

> Our intent has always been to commercialize peer to peer, and if anyone is misusing our patent for any reason, I have to protect that intellectual property. If they're building business on the backs of the patent I worked hard to acquire, then they should talk to us.[105]

Altnet has not yet pursued a similar strategy against the RIAA, which has publicly outlined its use of file hashes to identify copyrighted files downloaded from Kazaa users' hard drives. It is possible that the company will take such measures in the future. Of course the validity of the patent could be challenged; there is increasing scrutiny of patents on business methods and computer software.

Sharman Networks is a curious combination of revolutionary fervour and commercial acumen. RIAA spokeswoman Amanda Collins commented:

> Sharman's newfound admiration for the importance of copyright law is ironic to say the least. Too bad this self-serving respect stops at its headquarters' door and doesn't extend to preventing the rampant piracy on its networks or lifting a finger to educate its users about the consequences of illegal file sharing.[106]

However, it must be recognised that Sharman Networks is at heart an entrepreneurial enterprise. It does not want to abolish copyright law; it merely wants to reform copyright law to encourage new forms and modes of e-commerce.

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3. DISCIPLINE AND PUNISH: COPYRIGHT PIRACY AND DIGITAL PRIVACY

> If the digital technologies enlarge our space for living, both conceptually and practically, the dangers posed by that expansion will prompt the demand—often the very reasonable demand—that the Panopticon be hard-wired into the "technologies of freedom."
>
> – James Boyle, "Foucault In Cyberspace"[107]

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103. Letter from Sharman Networks, Ltd. (KaZaA) to Google Inc., (11 August 2003), <http://www.chillingeffects.org/dmca512/notice.cgi?NoticeID=789>.
104. John Borland, "Altnet Says P2P Spies Violate Patent Rights" *CNET News.com* (11 November 2003), <http://news.com.com/2100-1025_3-5106093.html>.
105. *Ibid.*
106. Alarab, *supra* note 100.
107. Boyle, "Foucault in Cyberspace," *supra* note 19 at p. 177.

IN THE EFFORT TO SHUT DOWN offshore peer-to-peer networks, copyright owners have placed increasing pressure on Internet Service Providers and telecommunications networks. As Seagrumn Smith comments: "Without U.S. assets to seize, the recording and movie industries are left with few options, namely government cooperation, *DMCA* Section 512 requests to ISPs and pressuring universities, all of which have garnered formidable concern and resistance."[108] Moreover, copyright owners have also brought legal action against a number of alternative pressure points—including search engines, financial institutions and users of peer-to-peer networks. Michael Geist comments on this important trend:

> With Internet users joining ISPs, e-commerce companies, financial institutions and search engines as intermediaries, we must begin to reconsider what it means to be an intermediary on the Internet. While the initial reaction was to provide broad legal protection for intermediaries, it may be time to re-evaluate that approach. The issue has ceased to become whether an intermediary bears responsibility when harmful activity occurs online. The question is now which intermediary bears responsibility.[109]

The music industry has sought to take legal action against venture capitalists in order to deprive peer-to-peer networks of capital.[110] There has been legal action taken against the legal representatives of peer-to-peer networks.[111] This matrix of legal action is designed to isolate and sequester peer-to-peer networks, such as Kazaa. It is intended to deprive such networks of financial support and investment, legal advice and expertise, media content and, of course, users.

3.1. Internet Service Providers

Since July 2003, the RIAA has used a controversial subpoena provision introduced by the *DMCA* and has issued over 1,600 subpoenas to Internet Service Providers, requesting the names and contact information of particular subscribers. In most cases, the return period listed on the subpoena for the information sought was seven days. Some Internet Service Providers acceded to such demands by the RIAA out of commercial prudence. However, a few exceptional companies sought to protect the privacy and anonymity of their consumers.

The RIAA brought a legal action against Verizon Internet Services because it refused to reveal the identity of a Verizon subscriber who allegedly used Kazaa peer-to-peer software to share music online. The President of the Association, Cary Sherman, challenged the claims of Verizon that they were protecting the privacy of their subscribers:

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108. *Supra* note 48.

109. MP3.com has brought a legal malpractice suit for $175 million in damages against their former counsel, Cooley Godward LLP, in the Los Angeles Superior Court. See Michael Geist, "Web Quandary For Regulators" *Toronto Star* (25 August 2003) and see Lessig, *Free Culture*, *supra* note 13 at pp. 189–190.

110. EMI and Universal Records has sued Hummer Winblad, the venture-capital firm that raised the initial funds for the Napster program and its distribution. See "EMI, Universal Sue Napster Backers" *USA Today* (23 April 2003) and see Lessig, *Free Culture*, *supra* note 13 at 191.

111. Stephanie Francis Cahill, "Dot-Com Sues Law Firm Over Advice: MP3.com Says Cooley Godward Should Have Warned of Copyright Issues" *UD Cyberspace Law* (7 February 2002); *MP3.com Inc. v. Cooley Godward LLP*, No. BC 266625 (Filed, LA Super. Ct., Jan. 2002).

> Verizon disingenuously implies that they are protecting the "privacy" of their subscribers. But they are not. Recognizing there is no right to commit an illegal act anonymously, Verizon readily concedes that they will turn over the name of the subscriber once a lawsuit has been filed against "John Doe." So their subscribers' "privacy" is not going to be protected regardless. The only thing Verizon is protecting is Verizon's own business interests. They are trying to avoid the cost of identifying infringers as provided for in the DMCA by imposing unrealistic and burdensome obligations on copyright owners instead.[112]

Sherman was scathing about the lack of the cooperation of the Internet Service Provider Verizon: "Verizon seems to be playing a legal shell game that ignores the balances and compromises embodied in the *DMCA*."[113]

In response, Verizon argued that the relevant provision of the *DMCA* did not cover copyright-infringing material that resided on individuals' own computers—only material that resided on the system of the Internet Service Provider. It maintained that the subpoena sought by the record companies violated a number of constitutional guarantees concerning judicial powers to issue subpoenas in the absence of a pending case and the First Amendment rights of internet users in relation to privacy and civil liberties. The constitutionality of the subpoena provision is also being challenged in a number of other lawsuits.[114]

In January 2003, Bates J of the Washington D.C. District Court rejected Verizon's interpretation of the *DMCA* subpoena provision, ordering Verizon to reveal the subscriber's identity.[115] Bates J refused to quash the subpoena sought by the RIAA:

> Verizon's motion to quash RIAA's February 4, 2003 subpoena is denied. The Court finds that § 512 of the DMCA, as construed by this Court in its *First Subpoena Decision*, does not violate the "case or controversy" requirement of Article III of the Constitution, and does not abridge the First Amendment rights of Internet users. Because Verizon cannot demonstrate that it has a substantial likelihood of prevailing on the merits of its statutory or constitutional claims, and has not shown that it will be irreparably harmed if a stay pending appeal is not granted, Verizon has not met its heavy burden "to justify the court's exercise of such an extraordinary remedy."[116]

Bates J concluded: "In the end, Verizon's customers should have little expectation of privacy (or anonymity) in infringing copyrights."[117]

In the appeal against the decision of Bates J, the Court of Appeals was

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112. RIAA, Press Release, "Sherman On Dispute With Verizon" (11 September 2002), <http://www.riaa.com/news/newsletter/091102_2.asp>.

113. *Ibid.*

114. See *e.g. Recording Industry Association of America v. Verizon Internet Services*, 351 F.3d 1229 (DC Cir 2003); *RIAA v. Boston College and Jane Doe*, No. 03-MC-10256 WGY (D Mass, 26 September 2003); *RIAA v. Charter Communications, Inc.* 393 F.3d 771 (8th Cir. 2005); *RIAA v. Pacific Bell Internet Services* (26 November 2003), No. C 03-3560 (ND Cal 2003), <http://www.eff.org/IP/P2P/?f=riaa-v-thepeople.php>.

115. *Recording Industry Association of America v. Verizon Internet Services*, 257 F. Supp. 2d 244 (DDC 2003), <http://www.dcd.uscourts.gov/02-ms-323.pdf>.

116. *Ibid.*

117. *Recording Industry Association of America Inc. v. Verizon Internet Services Inc.*, 275 F.Supp. 2d 244 (DDC 2003), <http://www.dcd.uscourts.gov/03-ms-0040.pdf>.

surprisingly sympathetic to the arguments of Verizon about the statutory interpretation of section 512(h) of the *DMCA*.[118] First, Ginsburg J held: "[T]he text of § 512(h) and the overall structure of § 512 clearly establish, as we have seen, that § 512(h) does not authorize the issuance of a subpoena to an ISP acting as a mere conduit for the transmission of information sent by others."[119] His Honour commented that Internet Service Providers such as Verizon had no capacity to police copyright material on its subscribers' computers. Second, Ginsburg J commented that this interpretation of section 512(h) was consistent with the legislative history behind the *DMCA*:

> The Congress had no reason to foresee the application of §512(h) to P2P file sharing, nor did they draft the DMCA broadly enough to reach the new technology when it came along. Had the Congress been aware of P2P technology, or anticipated its development, §512(h) might have been drafted more generally. Be that as it may, contrary to the RIAA's claim, nothing in the legislative history supports the issuance of a §512(h) subpoena to an ISP acting as a conduit for P2P file sharing.[120]

Third, Ginsburg J commented that the decision was in keeping with the purpose of the *DMCA*. His Honour observed: "Legislative history can serve to inform the court's reading of an otherwise ambiguous text; it cannot lead the court to contradict the legislation itself."[121] Finally, Ginsburg J declined to address the constitutional arguments of Verizon: "Because we agree with Verizon's interpretation of the statute, we reverse the orders of the district court enforcing the subpoenas and do not reach either of Verizon's constitutional arguments."[122] The decision of the Court of Appeals shows a great reluctance to read copyright law in light of wider constitutional concerns about freedom of speech and privacy. This remains a consistent judicial trend in the United States.

Echoing the comments of Wilson J in the *Grokster* case, Ginsburg J expressed sympathy for the position of the copyright owners. His Honour nonetheless stressed that the court had to obey the intentions of Congress, and could not engage in judicial creativity to enhance the rights of copyright owners:

> We are not unsympathetic either to the RIAA's concern regarding the widespread infringement of its members' copyrights, or to the need for legal tools to protect those rights. It is not the province of the courts, however, to rewrite the *DMCA* in order to make it fit a new and unforeseen internet architecture, no matter how damaging that development has been to the music industry or threatens being to the motion picture and software industries. The plight of copyright holders must be addressed in the first instance by the Congress; only the "Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology."[123]

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118. *Recording Industry Association of America v. Verizon Internet Services*, 351 F.3d 1229 (DC Cir 2003), <http://pacer.cadc.uscourts.gov/docs/common/opinions/200312/03-7015a.pdf>.
119. *Ibid.* at p. 7.
120. *Ibid.*
121. *Ibid.*
122. *Ibid.*
123. *Ibid.* at p. 8.

The copyright owners were indignant at what it saw as the legal pedantry of the Court of Appeals. The president of RIAA, Cary Sherman, argued that the decision was inconsistent with both the views of Congress and the findings of the district court: "It unfortunately means we can no longer notify illegal file sharers before we file lawsuits against them to offer the opportunity to settle outside of litigation."[124]

Nonetheless, the Supreme Court of the United States refused to grant a writ of certiorari to the RIAA to appeal against the decision. Thus the decision of the Federal Court of Appeals was left undisturbed. Vice President and associate general counsel for Verizon, Sarah Deutsch, emphasized that the decision of the Supreme Court of the United States was a victory for privacy and freedom of speech:

> This decision means copyright holders and their representatives—or identity thieves and stalkers posing as copyright holders—will not be allowed to obtain personal information about internet users by simply filing a one-page form with a court clerk.[125]

The RIAA was undeterred by the refusal of the Supreme Court of the United States to hear its appeal. Senior vice president of legal affairs, Stanley Pierre-Louis, observed: "The 'John Doe' litigation process we have successfully utilized this year continues to be an effective legal tool."[126] No doubt the RIAA will be able to explore some of the larger issues involving peer-to-peer networks in the Grokster case before the Supreme Court of the United States.

Similar litigation against Internet Service Providers has been underway in other jurisdictions. In *BMG Canada v. John Doe*, a Canadian Federal Court has rejected an action taken by record companies against Internet Service Providers to reveal the identities of subscribers.[127] Von Finckenstein J followed a decision of the Supreme Court of Canada on liability for authorizing copyright infringement.[128] His Honour von Finckenstein observed: "I cannot see a real difference between a library that places a photocopy machine in a room full of copyrighted material and a computer user that places a personal copy on a shared directory linked to a P2P service."[129]

In response, copyright owners have presented the verdicts in the Verizon case and the *BMG Canada* case as providing further justification for bringing legal action against a wider range of intermediaries and end users. In the longer term, the record companies will seek to overturn the judgments in superior courts. They will also lobby Congress for amendments to the *DMCA* in order to

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124. RIAA, Press Release, "RIAA on Verizon Appeals Court Decision" (19 December 2003), <http://www.riaa.com/news/newsletter/121903.asp>.

125. Michael Grebb, "Music Industry Spurned By Court" *Wired News* (12 October 2004). <http://www.wired.com/news/digiwood/0,1412,65321,00.html>

126. *Ibid.*

127. *BMG Canada Inc. v. John Doe*, [2004] 3 F.C. 241, <http://www.fct-cf.gc.ca/bulletins/whatsnew/T-292-04.pdf> (FC) [*BMG Canada*].

128. *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, <http://www.lexum.umontreal.ca/csc-scc/en/pub/2004/vol1/html/2004scr1_0339.html>, [2004] 1 S.C.R. 339 [*CCH Canadian*].

129. *Supra* note 127.

force Internet Service Providers to reveal the identities of subscribers engaged in copyright infringement. Similar legislative pressure is to be expected to be placed upon governments in other significant jurisdictions, such as Canada.[130]

3.2. Individual Users

On the September 8, 2003, RIAA announced that its member companies had filed civil lawsuits against hundreds of individuals identified through the subpoena process. The record companies targeted users who were distributing substantial amounts of copyrighted music on peer-to-peer networks, including Kazaa, Grokster, IMesh, Gnutella and Blubster.[131] The RIAA's Cary Sherman said:

> Nobody likes playing the heavy and having to resort to litigation. But when your product is being regularly stolen, there comes a time when you have to take appropriate action. We simply cannot allow online piracy to continue destroying the livelihoods of artists, musicians, songwriters, retailers, and everyone in the music industry. We've been telling people for a long time that file sharing copyrighted music is illegal, that you are not anonymous when you do it, and that engaging in it can have real consequences. And the message is beginning to be heard. More and more P2P users are realizing that there are dozens of legal ways to get music online, and they are beginning to migrate to legitimate services. We hope to encourage even the worst offenders to change their behavior, and acquire the music they want through legal means.[132]

The RIAA emphasized that these lawsuits have come only after an effort to educate the public about the illegality of unauthorized downloading. It noted that: "Additional education efforts include more than four million Instant Messages sent since May directly to infringers on the Kazaa and Grokster networks warning them that they are not anonymous when they illegally offer copyrighted music on these networks and that they could face legal action if they didn't stop."[133] However, there has been controversy over a number of legal cases in particular.

First of all, the music industry was criticized for taking legal action against a 12-year-old girl, Brianna La Hara, who lived in a public-housing apartment in the Upper West Side of New York.[134] The Electronic Frontier Foundation urged its members:

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130. Angela Pacienza, "Record Giants Appeal Uploading Decision" *The Ottawa Citizen* (14 April 2004).
131. RIAA, Press Release, "Recording Industry Begins Suing P2P File Sharers Who Illegally Offer Copyrighted Music Online" (8 September 2003), <http://www.riaa.com/news/newsletter/090803.asp>.
132. *Ibid.*
133. *Ibid.*
134. Lorena Mongelli, "Music Pirate" *New York Post* (9 September 2003).

> Rather than working to create a rational, legal means by which its customers can take advantage of file-sharing technology and pay a fair price for the music they love, it has chosen to sue people like Brianna LaHara, a 12 year-old girl living in New York City public housing. Brianna, and hundreds of other music fans like her, are being forced to pay thousands of dollars they do not have to settle RIAA-member lawsuits—supporting a business model that is anything but rational. This crusade is generating thousands of subpoenas and hundreds of lawsuits, but not a single penny for the artists that the RIAA claims to protect. Copyright law shouldn't make criminals out of 60 million Americans.[135]

Brianna La Hara was frightened to learn that she had been sued: "I got really scared. My stomach is all turning. I thought it was OK to download music because my mom paid a service fee for it. Out of all people, why did they pick me?"[136] Her mother, Sylvia Torres, paid $2,000 to settle her daughter's lawsuit.

Second, the record companies were criticized for bringing an action against a wrong person.[137] The IP address listed in the subpoena was traced to an account held by a Romanian graduate student studying at the Massachusetts Institute of Technology. After initially opposing the subpoena on educational privacy and jurisdictional grounds, MIT revealed the student's name in response to a motion to enforce brought by the RIAA. However, the student identified had been out of the United States in Romania at the time of the alleged file-trading on the MIT campus, did not own a computer and therefore could not have uploaded the songs from that IP address as alleged.

Finally, the music industry was criticized for bringing an action for copyright infringement against a 66-year-old artist, educator and grandmother, Ms. Sarah Seabury Ward.[138] She was accused of illegally downloading and sharing more than 2,000 songs online, including *I'm a Thug* by Trick Daddy. Ward replied that she and her husband only used the internet to email their family and did not have the software to download music. Indeed, her Macintosh computer was unable to run the Kazaa file-sharing software. In any case, she explained that she listened to classical and folk music, not the rock and hip-hop music referred to in the complaint. Ward was represented by the Electronic Frontier Foundation, a non-profit organization which says it aims to protect "digital rights."[139] She commented:

> I'm particularly concerned about others who may not have the support I did to defend myself and clear my name…. And of course as a grandmother and teacher, I worry about a world where people don't feel the need to apologize or make amends when they make a mistake.[140]

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135. Electronic Frontier Foundation, Press Release, "Take a Stand Against the Madness. Stop the RIAA!" (n.d.), <http://www.eff.org/share/petition>.
136. *Ibid.*
137. Gwen Hinze, "The Electronic Frontier Foundation Comments Regarding Phillips Fox's Issues Papers On The Australian Digital Agenda Review" (30 September 2003).
138. Electronic Frontier Foundation, Press Release, "Recording Industry Withdraws Music Sharing Lawsuit: Lack of Due Process Leads to Mistaken Identity" (24 September 2003), <http://www.eff.org/IP/P2P/20030924_eff_pr.php>.
139. "Downloading Claim Against Granny Dropped" *Sydney Morning Herald* (25 September 2003), <http://www.smh.com.au/articles/2003/09/25/1064083091917.html?oneclick=true>.
140. *Ibid.*

The seven record labels sued Ward solely on the basis of "screen shots" from the Kazaa network and information obtained from a subpoena issued to Comcast, Ward's Internet Service Provider. There was no attempt made to contact Ward by either Comcast or the record companies before the legal action was taken. The RIAA admitted that it may have been a case of mistaken identity. It withdrew the lawsuit as "a gesture of good faith."[141]

The RIAA announced that the industry was prepared to grant what amounted to "amnesty" to P2P users who voluntarily identified themselves and pledged to stop illegally sharing music on the internet.[142] The choice of language is interesting—"amnesty" derives from the term "amnestia," which means "to forget." The RIAA guaranteed not to sue file sharers who have not yet been identified in any RIAA investigations and who provide a signed and notarized affidavit in which they promise to respect recording-company copyrights. The website <www.musicunited.org> provided detailed information on this amnesty. However, the Electronic Frontier Foundation warned P2P users against the plan to offer "amnesty" to file-sharers who sign admissions of guilt.[143]

The Electronic Frontier Foundation elaborated that the Association did not own any copyrights, and that its member labels were not bound by this arrangement: "In reality, *the RIAA cannot actually protect anyone from all civil suits, and individuals who sign these affidavits may open themselves up to criminal prosecution.*"[144] It recommended users to speak to a qualified attorney and to visit the Foundation's page on reducing their vulnerability to lawsuits. There has been a lawsuit filed against the Amnesty program for being false and misleading.[145]

3.3. Congressional Action

In the midst of such litigation, Congress has been considering how best to deal with the threat to copyrights posed by peer-to-peer file-sharing systems. It has investigated the need to facilitate the operations of Internet Service Providers to and protect the privacy and anonymity of internet users.

United States Republican Senator Sam Brownback of Kansas has introduced a bill into the US Senate, *Consumer, Schools, and Libraries Digital Rights Management Awareness Bill*, which calls for alteration of the *DMCA* access regime on the grounds of privacy.[146] Senator Brownback noted that the issue was one of privacy, not piracy: "There are no checks, no balances, and the alleged pirate has no opportunity to defend themselves."[147] The Senator has written an

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141. RIAA, Press Release, "Recording Industry Begins Suing P2P File Sharers Who Illegally Offer Copyrighted Music Online" (8 September 2003), <http://www.riaa.com/news/newsletter/090803.asp>.
142. *Ibid.*
143. Electronic Frontier Foundation, Press Release, "Recording Industry Recording Industry Plans 'Amnesty' for Music Sharers: Electronic Frontier Foundation Says Share, Get Artists Paid" (5 September 2003), <http://www.eff.org/IP/P2P/20030905_eff_pr.php>.
144. Electronic Frontier Foundation, "Why the RIAA's 'Amnesty' Offer Is A Sham" <http://www.eff.org/share/amnesty.php>.
145. *Parke v. RIAA* ("No Clean Slate Lawsuit"), (9 September 2003), <http://www.eff.org/IP/P2P/Parke_v_RIAA/Parke_RIAA_Complaint.pdf>.
146. US, Bill S.1621, *Consumers, Schools, and Libraries Digital Rights Management Awareness Act of 2003*, 198th Cong., 2003, <http://brownback.senate.gov/pressapp/record.cfm?id=211699>.
147. Sam Brownback, *Brownback Introduces Digital Rights Management Bill* (16 September 2003), <http://brownback.senate.gov/record.cfm?id=211699>.

editorial in the *Wall Street Journal* supporting this bill.[148]

Republican Senator Norman Coleman of Minnesota, the chairman of the Senate's permanent subcommittee on investigations, a part of the Senate Committee on Government Affairs, sought to examine the RIAA's controversial use of subpoenas in its lawsuits against individual consumers.[149] He expressed concerns that the RIAA's method inadvertently targeted unwary consumers that may lack understanding about digital downloads and copyright infringement:

> In this country, we don't chop off fingers for people who steal something. I think we need to have a broader discussion about how to deal with this issue. I want to be sure that any process being utilized here is fair. The record industry has a legitimate concern about protecting copyright interests. I want to find out, does the punishment fit the crime?[150]

The RIAA was conciliatory in the investigation by the subcommittee on investigations. Its chairman Mitch Bainwol announced that major record companies would give notice to alleged "egregious" P2P infringers prior to filing lawsuits against them.

There was some interesting testimony from a user of Kazaa, Lorraine Sullivan, who was named in a lawsuit by the RIAA.[151] She was the subject of a copyright-infringement suit after her Internet Service Provider Time Warner was subpoenaed by the RIAA for her personal information. Sullivan grudgingly agreed to settle the lawsuit. However, she was angry at the litigation methods used by the record companies: "I resent being unfairly targeted and having to choose between paying a settlement I can barely afford or to deal with the worry and stress of litigation with the possible outcome of being held personally responsible for a couple of hundred thousand or millions of dollars in damages."[152] Sullivan complained that the record companies had not contacted her through the instant messaging system. Furthermore, she argued that the record companies had not sent her a letter warning her of their intended action. Sullivan said that she intended to boycott the music industry in the future: "I have been a music fan all my life and until recently had still bought CDs of the artists I love because I want to support them. I won't be buying any more and I know many other consumers feel the same."[153]

Sharman Networks has hired a Washington-based lobbyist to promote the notion of an "IP user fee" to United States legislators. The peer-to-peer network Kazaa sent its deputies to present their case before Congress. The execu-

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148. Sam Brownback, Letter to the Editor, "Who Will Police The Pirate-Hunters?", *The Wall Street Journal* (7 October 2003) A20.

149. US, *Privacy & Piracy: The Paradox of Illegal File Sharing on Peer-to-Peer Networks and the Impact of Technology on the Entertainment Industry*, 108th Cong. (2003) (Statement of Norm Coleman), <http://govt-aff.senate.gov/index.cfm?Fuseaction=Hearings.Testimony&TestimonyID=324&HearingID=120>.

150. Katie Dean, "Senator Wants Answers From RIAA" *Wired News* (1 August 2003), <http://wired.com/news/politics/0,1283,59862,00.html>.

151. US, *Privacy & Piracy: The Paradox of Illegal File Sharing on Peer-to-Peer Networks and the Impact of Technology on the Entertainment Industry*, 108th Cong. (2003) (Statement of Lorriane Sullivan), <http://govt-aff.senate.gov/index.cfm?Fuseaction=Hearings.Testimony&HearingID=120&WitnessID=421>.

152. *Ibid.*

153. *Ibid.*

tive vice president of Sharman Networks, Alan Morris, was critical of the litigation undertaken by the RIAA against individual file-sharing users:

> What we have witnessed in the recent RIAA litigation against consumers can only be considered a backward step in a market that is growing with rapid momentum. The market is not wayward—reactionary protectionism is. Though we have before us an effective means to influence consumers, we are seeing those same consumers overpowered by the RIAA's legal assaults. This may well cause a counterproductive backlash likely to damage those the RIAA's litigation purports to benefit most—artists and creators.[154]

The company representative cited the criticism of SBC spokesperson Selim Bingol: "It's chipping away at personal privacy and using kind of a meat axe to get at it."[155] The position of Sharman Networks was supported by its partner, Altnet.[156]

In a camp Churchillian mood, the head of the MPAA, Jack Valenti, invoked martial rhetoric in his speech to the Senate Committee on Governmental Affairs. He thundered in his finest pantomime fashion:

> It was said that during World War I, French General Foch, later to be Supreme Allied Commander, was engaged in a furious battle with the Germans. He wired military headquarters, "My right is falling back, my left is collapsing, my center cannot hold, I shall attack!"
>
> Some say this version is apocryphal. I choose to believe it is true, because that is precisely the way I feel about the assault on the movie industry by "file-stealers," a rapidly growing group whose mantra is "I have the technological power to use as I see fit and I will use it to upload and download movies, no matter who owns them for I don't care about ownership."
>
> To paraphrase Mr. Churchill, I did not become the head of the Motion Picture Association to preside over a decaying industry. I am determined to join with my colleagues in making it plain that we will not allow the movie industry to suffer the pillaging that has been inflicted on the music industry.[157]

His metaphors, though, did become somewhat mixed—confusing the first and second world wars. Valenti concluded with a statement of intent: "Copyright holders have a firm belief that the Congress will never approve any legislation to strip copyright holders of their rights, and will never allow America's greatest trade export to become the victim of theft."[158]

In response to this clarion call by copyright owners, Republican Senator Orrin Hatch and Democrat Patrick Leahy introduced the bill, *Protecting Intellectual Rights Against Theft and Expropriation Act 2004*—the so-called

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154. US, *Privacy & Piracy: The Paradox of Illegal File Sharing on Peer-to-Peer Networks and the Impact of Technology on the Entertainment Industry*, 108th Cong. (2003) (Statement of Alan Morris), <http://govt-aff.senate.gov/index.cfm?Fuseaction=Hearings.Testimony&HearingID=120&WitnessID=418>.

155. *Ibid.*

156. US, *Privacy & Piracy: The Paradox of Illegal File Sharing on Peer-to-Peer Networks and the Impact of Technology on the Entertainment Industry*, 108th Cong. (2003) (Statement of Derek Broes), <http://govt-aff.senate.gov/index.cfm?Fuseaction=Hearings.Testimony&HearingID=120&WitnessID=420>.

157. *Supra* note 12.

158. *Ibid.*

"Pirate Act."[159] The legislation would enable the Department of Justice to bring civil actions, in addition to criminal prosecutions. Senator Hatch declaimed that the legislation would allow law-enforcement agencies to take strong action against peer-to-peer networks:

> Only recently has America faced the specter of widespread copyright-enforcement actions against individual users of copyrighted works … some unscrupulous corporations may have exploited new technologies and discovered that the narrow scope of civil contributory liability for copyright infringement can be utilized so that ordinary consumers and children become, in effect, "human shields" against copyright owners and law enforcement agencies. Unscrupulous corporations could distribute to children and students a "piracy machine" designed to tempt them to engage in copyright piracy or pornography distribution.[160]

Furthermore, Representative Lamar Smith introduced the complementary *Piracy Education and Deterrence Act 2004*.[161] This legislation is designed to enhance the criminal enforcement of copyright law, and to educate the public about copyright law on the internet. Again, such measures are specifically targeted at peer-to-peer networks. The RIAA and MPAA welcomed the announcement of these bills.

Such a web of sanctions may prove to be oppressive and overbearing for internet users and cultural consumers alike. The danger is that intellectual-property rights will become so extensive that they will actually stifle innovation, free speech and educational potential. There is a need to ensure that the current panic about peer-to-peer networks does not result in the emergence of a draconian system of copyright law based upon surveillance and punishment. The internet should be an area of freedom and play, a public commons, rather than a privatized Panopticon.

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4. A GLOBAL ALLIANCE: THE DIGITAL AGENDA AND FREE TRADE

> Let us build together a Global Alliance whose mandate it is to Protect Creative Works in the Digital World. None of us can go this alone. We need each other because we all speak the same language, the language of the cinema. So let us start the building of this Global Alliance of every nation in the world who wants to protect its precious creative works.
>
> – Jack Valenti, Motion Picture Association of America[162]

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159. Patrick Leahy, *Leahy-Hatch Bill Takes Aim At Copyright Infringement* (25 March 2004), <http://leahy.senate.gov/press/200403/032504a.html>; U.S., Bill S. 2237, *Protecting Intellectual Rights Against Theft and Expropriation Act 2004*, 108th Cong., 2004.

160. Orrin Hatch, *Hatch Continues To Fight Against Copyright Infringement* (25 March 2004), <http://hatch.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=1005>.

161. Lamar Smith, *Markup Statement On Piracy Deterrence Act* (1 April 2004), <http://lamarsmith.house.gov/News.asp?FormMode=Detail&ID=379>; U.S. Bill H.R. 4077, *Piracy Education and Deterrence Act 2004*, 108th Cong., 2004.

162. Jack Valenti, "Let us build together a Global Alliance whose mandate is to protect Creative Works in the Digital World" *The Copyright Assembly* (22 October 2002), <http://www.copyrightassembly.org/briefing/test_2002_10_22.htm>.

IN ADDITION TO SUCH legal action and lobbying in the United States, record companies and movie studios have undertaken co-ordinated efforts against peer-to-peer networks in other jurisdictions. Most notably, copyright owners have taken a combination of legal action and policy actions to challenge the operators of Kazaa in the jurisdiction of Australia.

First of all, the record industry has taken out Anton Piller orders from the Federal Court of Australia to investigate the operations of Sharman Networks and Brilliant Digital Entertainment. Such procedural moves have been a prelude to a legal action against the companies for authorizing copyright infringement. Second, copyright owners have also lobbied for stronger protection in the domestic review of the *CADA*.[163] The Sharman Networks and Brilliant Digital Entertainment have also made representations about the need for law reform. Finally, record companies and motion-picture studios have used the battle against peer-to-peer networks as a pretext to push for stronger protection of copyright law at an international level. Copyright owners have been instrumental in pushing for the inclusion of stronger enforcement measures against copyright piracy in free-trade agreements, such as the AUSFTA.

4.1. The Trial

In February 2004, Music Industry Piracy Investigations (MIPI), which is the copyright unit of the Australian Record Industry Association (ARIA), obtained court orders to allow its investigators to obtain documents and other electronic records about Kazaa's activities in Australia.[164] The general manager of MIPI, Michael Speck, said the action had been taken "to stop the illegal use of music through use of the Kazaa network."[165] He maintained:

> Kazaa has built a large international business through encouraging and authorising the illegal copying of music users of its network. It authorises this copying without seeking the licence or permission of the owners and creators of the music, nor does it pay any royalties to either the owners or creators of the music.[166]

MIPI conducted raids on the premises of Sharman Networks and Brilliant Digital Entertainment—as well as on the homes of Nikki Hemming (the chief executive of the Sharman organization), Philip Moore (Kazaa's IT director) and Kevin Bermeister (the head of the Brilliant Digital Entertainment). MIPI also conducted raids on three universities: the University of Queensland, the University of New South Wales and Monash University. It also conducted investigations of a number of telecommunications carriers and Internet Service Providers—including Akamai Technologies AAP, NTT Australia, Telstra Corporation and NTT Australia IP.

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163. *Supra* note 21.

164. To read the search and seizure order, see <http://www.eff.org/IP/P2P/MGM_v_Grokster/20040206_Search_Seizure_Order.pdf>.

165. Sam Varghese, "Record Industry Enforcer Raids Kazaa Offices" *Sydney Morning Herald* (6 February 2004), <http://www.news.vu/en/news/InternationalMediaCoverage/record-industry-enforcer-.shtml>.

166. *Ibid.*

Furthermore, MIPI served papers on two Kazaa-related companies in Vanuatu.[167]

In the Federal Court of Australia, the counsel for the music industry emphasized that Australia provided strong protection for copyright owners: "There is in Australia no right of private copying of copyright sound recordings."[168] Accordingly, he emphasized that "it is an infringement of copyright for an individual to 'rip' (copy) the content of a copyright commercial CD, or to download a digital music file that is a copyright sound recording, unless specifically authorised to do so."[169] He alleged not only that Sharman Networks and its affiliates had infringed copyright works, but also argued that they had breached the *Trade Practices Act 1974* (Cth) and fair-trading laws by engaging in misleading and deceptive conduct.[170]

The counsel stressed that the legal action against Sharman Networks in Australia was independent of the litigation that was ongoing in the United States. They referred to the release of new Kazaa software in June 2003, and to changes to that software in September and December 2003. They asserted that "it has become apparent that the Kazaa scheme, which promotes enormous infringement of sound recording copyright, is now substantially administered from Australia."[171] The counsel commented that "there remain significant features of the Kazaa system about which the applicants have not been able to obtain detailed knowledge."[172]

The counsel for Sharman Networks and Brilliant Digital Entertainment contended that the applicants had failed to disclose material facts in their application for the Anton Piller orders. They argued that such orders should therefore be set aside. In particular, Sharman's lawyer highlighted the company's cooperation in producing documents to courts in the United States and the Netherlands as one reason why the Anton Piller order should not have been granted. He submitted:

> Whilst there may be additional plaintiffs in the US proceedings, and whilst the US law on secondary liability or authorization of copyright infringement may differ somewhat from Australian law, these are not matters which serve to distinguish the current proceedings from the US proceedings when it comes to the exercise of a discretion whether or not to grant *ex parte Anton Piller* relief.[173]

Citing a warning by Branson J,[174] the counsel for Brilliant Digital Entertainment

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167. "MIPI Serves Papers On Kazaa Offices In Vanuatu" *Sydney Morning Herald* (9 February 2004), <http://www.smh.com.au/articles/2004/02/09/1076175068630.html?from=storyrhs>.

168. *Universal Music Australia Pty Ltd. v. Sharman License Holdings Ltd.*, 2004 FCA 183, <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal%5fct/2004/183.html?query=%5e+2004+fca+183> [*Universal Australia*].

169. *Ibid.*

170. Patrick Gray, "Sharman Shuffles Legal Team" *Wired News* (15 April 2004), <http://www.wired.com/news/digiwood/0,1412,63062,00.html?tw=wn_tophead_4>; Trade Practices Act 1974 (Cth.).

171. *Supra* note 168.

172. *Ibid.*

173. *Ibid.*

174. *Microsoft Corporation v. Goodview Electronics Pty Limited*, 1999 FCA 754, <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal%5fct/1999/754.html?query=%22microsoft%22+and+%22goodview+electronics%22> [*Goodview*].

commented that Anton Piller orders were a drastic means of obtaining information: "Anton Piller orders are by their nature draconian and highly invasive."[175] He maintained that "had full and proper disclosure been made about Kevin Bermeister and Brilliant Digital Entertainment, then in my respectful submission, Anton Piller orders would not have been made against them."[176]

With a touch of world-weariness, Wilcox J of the Federal Court of Australia observed philosophically: "In an ideal world, it would be preferable for parties not to need to resort to *Anton Piller* action."[177] His Honour was not so much concerned about the possibility of deliberate destruction of electronic material containing static data required for the United States proceedings. Rather, he was concerned with electronic material that was overwritten or lost during the ordinary operation of computer systems. Accordingly, Wilcox J thought that it was necessary to grant the Anton Piller orders sought by the music industry.

After such preliminary battles over the Anton Piller orders, the Federal Court of Australia heard legal argument over the substantive issues at stake in matter in late 2004 and early 2005.

In defence of the Sharman Networks, the barrister Robert Ellicot has invoked the 1899 case of *Boosey v. Whight*.[178] In this matter, a United Kingdom court ruled that the reproduction of perforated player piano rolls did not infringe the copyright protecting sheet music. Ellicot cited this historical precedent in response to allegations that the file-sharing network, Kazaa, was engaged in copyright infringement. The barrister told the Federal Court: "It will be our submission in this case that we are exactly in that position now in relation to sound recordings."[179] Ellicot argued: "That is to say that, however you describe an MP3 file on a computer hard drive—it is not a copy of a sound recording."[180] The barrister maintained that an "infringing copy has to be a sound recording", and said his clients are further removed from liability by the fact that they are not responsible for uploading the songs.[181]

However, some have thought that this historical analogy with the pianola roll to be a contingent one. As journalist Nicholas Kohler comments: "Mr. Ellicot's historical analogy is ironic given the otherwise vast chasm separating the sheet music publishers of yesteryear from today's 'virtual' operations."[182] It has been suggested that the connection between the pianola roll and the peer-to-peer network is far-fetched and tenuous.

Early in the trial, Wilcox J directed the parties to concentrate upon the central question of whether Sharman Networks and Altnet had authorised copy-

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175. *Supra* note 168.
176. *Ibid.*
177. *Ibid.*
178. [1899] 1 Ch. 836.
179. Nicholas Kohler, "Kazaa's New Legal Weapon: The 'Piano Roll' Defence. Tells Universal Music MP3 Files Same as 1863 Device" *The Financial Post (Canada)* (29 May 2004), p 1.
180. *Ibid.*
181. Abby Dinham, "Sharman Pleads 100-Year-Old Defence" *ZDNet Australia* (19 May 2004), <http://www.zdnet.com.au/news/business/0,39023166,39148079,00.htm>.
182. *Supra* note 179.

right infringement through the peer-to-peer network, Kazaa. His Honour observed:

> It really comes down to whether or not you can be said to authorise the infringements and that in turn probably comes down to the question of what…steps, if any, you take that can be said to be [by] way of encouragement… That's what really the case is all about.[183]

Accordingly, the record industry has sought to establish in the trial that Sharman and Altnet executives knew about copyright infringements on the peer-to-peer network Kazaa, and that they failed to take reasonable steps to control it.

Sharman Networks has argued that peer-to-peer networks such as Kazaa do not violate Australian copyright law. Nikki Hemming argues rather tendentiously:

> The efforts against P2P technology mirror the failed efforts of the motion picture industry to have US Courts ban VCRs, which culminated in the famous 1984 Sony "Betamax" case in which the US Supreme Court ruled that technology had actual or potential, non-infringing uses and did not violate applicable copyright laws. Of course today, the sale of video cassettes and DVDs is a significant contributor to the revenue streams derived by the very industry that first moved to ban its existence. P2P software is legal. The only superior court to have considered the copyright issues raised by P2P technology was the Dutch Appellate Court in 2001. That Court, relying on the precedent established in the Sony Betamax ruling of the United States Supreme Court, found the P2P software created and distributed by Kazaa BV and now distributed by Sharman was legal.[184]

However, Sharman Networks is concerned that the defence of fair dealing in Australia has been specifically confined to an exclusive set of purposes—such as research or study, criticism or review, reporting news and providing professional advice.[185] It is concerned "that there is no 'fair use' provision which would enable the owner of a legally purchased or legally downloaded music CD to make a back up copy or to copy on to hard disc including MP3s, iPods or similar."[186] In its view, the defence of fair dealing should be reformed to specifically include time-shifting,[187] space-shifting,[188] and transformative use.[189] It observed: "In Sharman's view copyright legislation should look for a balance between what is sensible and widespread practice in terms of access as well as taking account of copyright owners' interests."[190]

In the course of the trial, Wilcox J has emphasized that any remedies

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183. John Davidson, "Billions at Stake in Kazaa Court Case" *Australian Financial Review* (7 December 2004), p. 30.
184. Sharman Networks, *supra* note 88.
185. Australia, Copyright Law Review Committee, *Simplification of the Copyright Act 1968* (2002) at para. 6.35.
186. Sharman Networks, *supra* note 88.
187. *Sony*, *supra* note 75.
188. *Recording Industry Association of America v. Diamond Multimedia*, 180 F.3d 1072, <http://www.law.cornell.edu/copyright/cases/180_F3d_1072.htm> (9th Cir 1999) [*Diamond Multimedia*].
189. *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994) [*Acuff-Rose*].
190. Sharman Networks, *supra* note 88.

granted to the copyright owners in the matter would be necessarily limited.[191] His Honour observed to the lawyers acting for the record industry:

> You're entitled to protect your copyright. You're not entitled to control the internet.[192]

Wilcox J observed that any remedies he ordered would be limited to preventing the illegal distribution of copyrighted files on Kazaa. His Honour stressed that non-infringing use of the peer-to-peer network would not be affected. Furthermore, Wilcox J emphasized that the implied freedom to political communication recognised under the Australian Constitution would be important in deciding any remedies. The outcome of the trial should be known later in 2005.

Despite such assurances, many in the academic community have remained concerned about the wider implications of the litigation. Dr Kathy Bowrey, a senior lecturer in law at the University of New South Wales, observed: In a world where media companies control the technology, even transaction becomes a sale. We really should be scared of that.[193]

Her fear was that, if the record industry managed to shut down Kazaa and similar peer-to-peer file-swapping systems, it would help media companies gain control over the way all information was distributed over the Internet. There could be potential for litigation against the manufacturers of technologies such as the Windows Media Player and the iPod for authorising copyright infringement in Australia.

4.2. Digital Agenda Review

The Australian law firm, Phillips Fox, was commissioned by the Commonwealth Attorney-General to undertake a review of the *CADA*.[194] It considered whether the provisions of the legislation dealt adequately with existing copy technologies, including peer-to-peer networks, CD burning and any likely future technological developments.

In its final report, the Phillips Fox noted that there were two conflicting lines of authority regarding peer-to-peer software in the United States.[195] The *Grokster* case held that software makers are not liable for copyright infringement perpetrated by their users because of a lack of actual knowledge of infringement by users combined with a lack of control and the possibility of legitimate use.[196] This was contrasted with the *Madster* case where similar activities were judged to be wilful blindness to the actual use of software.[197]

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191. John Davidson, "Win or Lose, Kazaa Won't Be Shut Down" *Australian Financial Review* (3 December 2004), p. 64.
192. *Ibid.*
193. John Davidson, "Cyber Music Battle Begins" *Australian Financial Review* (27 November 2004), p. 25.
194. *Universal Australia*, *supra* note 168.
195. Phillips Fox, *Digital Agenda Review: Report and Recommendations* (Canberra: Attorney General's Department, January 2004) at p. 50, <http://www.ag.gov.au/DigitalAgendaReview/reportrecommendations>.
196. *Grokster (April 2003)*, *supra* note 74.
197. *Aimster*, *supra* note 87.

The Phillips Fox report observed that there had been no precedents in Australia dealing with copyright law and peer-to-peer networks. It surmised that such matters would raise issues of authorization of copyright infringement:

> There have as yet been no cases in Australia in relation to the legalities or otherwise of providing peer to peer file sharing software. If such a case was to be brought, it would fall to be decided under section 36(1A) of the Act which sets out three factors that must be taken into account in determining whether a person has authorised an infringement. The principal question to be answered would be whether or not the actions of those providing (or making available) peer to peer file sharing software which is subsequently used for infringing purposes can be said to have authorised the infringement in accordance with the provisions of this section.[198]

Accordingly, Phillips Fox recommended to the Federal Government that no specific reforms were necessary with respect to copyright law and peer-to-peer networks. It noted: "No submission that was received demonstrates that any party has sought to test the relevant provisions of the Digital Agenda Act and found them wanting."[199] Nonetheless, the report noted that there have been a number of recent developments, which have highlighted judicial attitudes to copyright law and new technologies.

In October 2003, the Australian music industry also embarked upon legal action against an Internet Service Provider called E-Talk Communications, which trades as Comcen Internet Services.[200]

The record companies charged that the intermediary had failed to stop consumers from downloading music from the website, <http://www.mp3s4free.net>. Michael Speck of Music Industry Piracy Investigations provided the affidavit: "This case proves what the music industry has been saying about the Internet industry for many years, that music piracy is an integral part of the ISP business model."[201] If the matter proceeds, this will be the first occasion in which the Court will be required to determine the meaning of sections 39B and 36A of the Act inserted by the *CADA*.[202]

In November 2003, the music industry undertook legal proceedings against Peter Tran, Charles Ng and Tommy Le who were alleged to have run a Napster-style website called MP3 WMA Land.[203] The three students pleaded guilty to the charges. The senior counsel for the Commonwealth Director of Public Prosecutions sought custodial sentences for defendants Tran and Ng, but not for Le. It was alleged that they copied 390 commercially available CD albums and 946 singles and adopted nicknames to avoid detection. The Deputy Chief

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198. *Supra* note 195 at p. 50.
199. *Ibid.* at p. 102.
200. *Universal Music Australia Pty Ltd v Cooper*, [2004] F.C.A. 78, <http://www.austlii.edu.au/au/cases/cth/federal_ct/2004/78.html>.
201. James Pearce, "Australian ISP in 'World First' Music Industry Court Case" *ZDNet Australia* (21 October 2003), <http://www.zdnet.com.au/newstech/ebusiness/story/0,2000048590,20279975,00.htm>.
202. *Supra* note 21, ss. 39B and 36A.
203. *Commonwealth Director of Public Prosecutions v. Ng, Tran and Le* (unreported, guilty plea, sentencing 18 November 2003). [Case on file with author].

Magistrate Graeme Henson sentenced two students, Charles Ng and Peter Tran, each to 18-month suspended custodial sentences, and to a $1,000 three-year good-behaviour bond.[204] The magistrate sentenced a third defendant, Tommy Le, to two hundred hours of community service.

In its final report, Phillips Fox did make a number of substantive recommendations to reform the *CADA*. First, the report suggested that there needed to be further clarification of liability for authorizing copyright infringement. It recommended amending s. 36 of the Act to set down minimum standards of conduct in relation to notice and take-down procedures for Internet Service Providers.[205] Second, the report recommended amendments to implement a limited subpoena process to identify alleged infringers of copyright, where there was existing evidence of infringement.[206] Third, the report recommended that a narrow definition of technological-protection measures be adopted under the legislation.[207] It also recommended that the permitted purposes in s. 116A(3) be amended so as to clearly allow any supply or use of a circumvention device or service for any use or exception allowed under the Act, including fair dealing and access to a legitimately acquired non-pirated product. Fourth, the report recommended clarification of the meaning of "temporary copying."[208]

Controversially, it suggested that the educational statutory licence provisions be amended to allow an educational institution to make active caches of copyright material for the purpose of a course of instruction by the educational institution, in return for a payment of equitable remuneration to the copyright owner.[209] Finally, the report also suggested a number of amendments to exceptions relating to libraries, archives and cultural institutions.

Phillips Fox remained concerned that copyright owners were reluctant to engage with or to make use of advances in technology because of a mixture of indifference, fear of the unknown and incredulity. The authors comment:

> Such a position of withdrawal or denial will not produce any long term viable solution. As has been demonstrated by the release (by Apple) of iTunes and Napster 2.0, if there is a legitimate source of copyright material that is available to the market, the market will support it.[210]

Amusingly, it cites comments of Niccolo Machivaelli in *The Prince*: "Innovation makes enemies of all those who prospered under the old regime, and only lukewarm support is forthcoming from those who would prosper under the new.[211]

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204. Kirsty Needham & Sue Lowe, "Fans Mourn The Day The Pirated Music Died" *Sydney Morning Herald* (19 November 2003) at p. 1.
205. *Supra* note 195, recommendations 11 and 12.
206. *Ibid.*, recommendation 13.
207. *Ibid.*, recommendation 17.
208. *Ibid.*, recommendation 15.
209. *Ibid.*, recommendation 16.
210. *Ibid.* at 34.
211. Niccolo Machiavelli, *The Prince*, 2d ed. (London: W.W. Norton, 1992).

4.3. Australia-United States Free Trade Agreement

To some extent, the Digital Agenda Review has been overtaken by the Australia-United States Free Trade Agreement (AUSFTA). The Federal Government admitted as much in a press release. The Attorney-General Philip Ruddock and the Minister for Communications, Information Technology and the Arts, Daryl Williams, observed:

> The Australian Government's digital agenda copyright reforms are effective and working well, according to an independent report released today…. In some areas, notably in the area of Internet Service Provider liability, the report will assist in implementing Australia's FTA obligations. In others, the copyright obligations of Australia's Free Trade Agreement with the United States supersede the recommendations made in the report.[212]

The recommendations of the Digital Agenda Review have been made redundant and superfluous because of the reforms brought about by the AUSFTA .[213]

After a year of diplomatic negotiations, the AUSFTA was concluded in February 2004.[214] Chapter 17 of the Agreement deals with intellectual-property rights. It required a number of legislative reforms by the Australian Government to the *Copyright Act 1968* (Cth).[215] There was much parliamentary debate over the AUSFTA and its implementing legislation.[216] Nonetheless, the Federal Government was able to pass the *US Free Trade Agreement Implementation Act* 2004 (Cth), with the reluctant support of the opposition party.[217]

The changes to Australian copyright law are sweeping. The Australian Government agreed to ratify and accede to the *WIPO Copyright Treaty* (1996) and the *WIPO Performances and Phonograms Treaty* (1996).[218] It has adopted a number of features akin to the *DMCA*. There are nine major changes to the regime, which are worth outlining. First, Australia has replaced its current regime of limited liability for Internet Service Providers and telecommunications carriers with the safe-harbours regime of the *DMCA* of the US. As a result, Australia has adopted requirements for effective written notice to service providers with respect to materials that are claimed to be infringing.[219] Second, Australia has adopted higher standards of protection with respect to electronic rights man-

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212. Australia, Attorney-General & Ministry for Communications, Information Technology and the Arts, Press Release, "Report on Copyright Digital Agenda Reforms" by Daryl Williams & Philip Ruddock (28 April 2004), <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2004_Second_Quarter_28_April_2004_-_Report_on_copyright_digital_agenda_reforms_-_0512004>.
213. "Challenge of the Digital Age" *Australian Financial Review* (26 September 2003).
214. Australia-United States Free Trade Agreement, February 2004, <http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/index.html>. Charles Lawson and Catherine Pickering, "'TRIPs-Plus' Patent Privileges—An Intellectual Property 'Cargo Cult' in Australia", *Prometheus*, 2004, Vol. 22 (4), p. 355.
215. *Copyright Act 1968* (Cth)., <http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/>.
216. Australia, Joint Standing Committee on Treaties, "Report 61: The Australia-United States Free Trade Agreement" (23 June 2004), <http://www.aph.gov.au/house/committee/jsct/usafta/report.htm>; Australia, Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, "Final Report" (5 August 2004), <http://www.aph.gov.au/Senate/committee/freetrade_ctte/report/final/index.htm>.
217. *US Free Trade Agreement Implementation Act* 2004 (Cth).
218. *Supra* note 22, article 17.1.3, <http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/chapter_17.html>.
219. *Ibid.* article 17.11.29.

agement information. Third, Australia will have to reform its regime for copyright technological protection measures in the next two years.[220] The country will have to enact a broad ban on the act of circumventing a technological-protection measure, and limit the range of permissible exceptions.[221] Fourth, Australia adopted stronger copyright protection in respect of encoded broadcasts. Such measures are targeted at the protection of pay television services. Fifth, the Commonwealth Government has provided legislative copyright protection of temporary copies. Such a directive will overturn existing case law on this matter.[222] Sixth, Australia has adopted features of the US *Sonny Bono Copyright Term Extension Act 1998*.[223] The term of protection for copyright works has been extended to the life of the author plus 70 years.[224] The term of protection for sound recordings and films has been extended from the current 50 years to 70 years after publication. However, there will be no revival of copyright works from the public domain. Seventh, Australia also extended the duration of copyright protection of photographs in line with other artistic works. Photographers can now enjoy copyright protection for the life of the author plus 70 years. Eighth, the Federal Government has provided some symbolic recognition of economic and moral rights of performers of sound recordings. However, such measures were quite controversial because they vested joint ownership in both the performer and the maker of the sound recordings.

Finally, Australia will have to provide for stronger enforcement of intellectual-property rights. Most notably, it will have to provide for criminal procedures and penalties to be applied to cases of copyright piracy on a commercial scale.[225]

One could be forgiven for concluding that Australia has adopted United States copyright law in its entirety. However, it is important to emphasize that the AUSFTA is very selective in its harmonization of copyright laws. In this agreement, Australia has adopted the harsher measures of the *DMCA* and the *Sonny Bono Copyright Term Extension Act 1998*. However, Australia has not adopted features of the United States law that support copyright users—such as the higher standard of originality[226] and the open-ended fair-use defence of United States law.[227] An editorial in the *Australian Financial Review* observes:

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220. Kimberlee Weatherall, "On Technology Locks and the Proper Scope of Digital Copyright: Sony in the High Court" (2004) 26 Sydney L. Rev. 613-638; and Kimberlee Weatherall and Emma Caine, "Australia-US Free Trade Agreement—Circumventing the Rationale for Anti-Circumvention" (2005) 7 Internet Law Bulletin 121–126.

221. *Supra* note 22, article 17.4.7.

222. *Kabushiki Kaisha Sony Computer Entertainment v. Stevens* (2002) 55 IPR 497; on appeal (2003) 132 FCR 31.

223. Matthew Rimmer, "The Dead Poets Society: The Copyright Term and the Public Domain" *First Monday* (June 2003), <http://firstmonday.org/issues/issue8_6/rimmer/index.html>; *Sonny Bono Copyright Term Extension Act*, U.S.C. tit 17 § 505 (1998) <http://thomas.loc.gov/cgi-bin/query/D?c105:3:./temp/~c1050fzYjT::>.

224. *Supra* note 22, article 17.4.4.

225. *Ibid.*, article 17.11.26.

226. *Feist Publications Inc. v. Rural Telephone Service*, 499 U.S. 340 (1991), <http://www.techlawjournal.com/cong106/database/19910327feist.htm> [*Feist*].

227. *Acuff-Rose*, *supra* note 188; *Suntrust Bank v. Houghton Mifflin Company*, 268 F.3d 1257 (11th Cir. 2001) [*Suntrust*].

> The US wants Australia to bring the Digital Agenda Act closer to its US equivalent, the Digital Millennium Copyright Act. The problem is that US copyright laws also include constitutionally based safeguards that ameliorate the more draconian effects of the Digital Millennium Copyright Act. Most notable are the "fair use" rights, which free up consumption of copyrighted material so that, for example, home copying of CDs and DVDs is legal. Australia lacks such balancing rights; our "fair dealing" rights are much more limited. If we align the Digital Agenda Act with the Digital Millennium Copyright Act without aligning fair dealing with fair use, we will have the bad without the good. Yet fair dealing, according to participants in the review, is off the agenda.[228]

As a result, there will be a wider range of copyright material protected in Australia than the United States. In particular, there will be a much greater amount of factual information protected under copyright law. Moreover, Australian users of information will have less access to copyright material than their counterparts in the United States because of the absence of an open-ended defence of fair use. Overall, Australia will provide higher standards of copyright protection than the United States.

The United States Government believes that such bilateral agreements will lock-in controversial domestic measures, such as the *DMCA* and *Sonny Bono Copyright Term Extension Act 1998*.[229] It also hopes that there will be greater scope for domestic reforms in light of such free-trade agreements. The United States Government is also keen to export a super version of the *DMCA* in a number of bilateral negotiations with favoured trading nations, such as Singapore, Chile, the Dominican Republic and Australia.[230] Such agreements involve "expanding intellectual property's empire."[231] They contain detailed prescriptions about safe harbours, technological-protection measures, copyright term, and civil and criminal penalties. Other countries such as New Zealand will face increasing pressure to follow suit.[232] The United States Government has also been pushing for higher standards of intellectual-property protection in regional agreements, such as the proposed Free Trade Agreement of the Americas.[233] One commentator has wondered whether "Canadian copyright concerns may ultimately amount to little more than an issue to be sacrificed at the negotiation

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228. "Challenge of the Digital Age" *Australian Financial Review* (26 September 2003).

229. Kathy Bowrey, *Law and Internet Cultures* (Cambridge: Cambridge University Press, 2004).

230. *United States-Singapore Free Trade Agreement*, 3 September 2003 (entered into force on 1 January 2004), <http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf>; *United States-Chile Free Trade Agreement*, 1 January 2004, <http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html>; United States-Dominican Republic Free Trade Discussions, <http://www.ustr.gov/Document_Library/Press_Releases/2003/March/Joint_Statement_of_the_U.S._the_Dominican_Republic.html>; *United States-Australia Free Trade Agreement*, <http://www.dfat.gov.au/trade/negotiations/us.html>.

231. Peter Drahos, "Expanding Intellectual Property's Empire: The Role of FTAs" (November 2003), <http://www.grain.org/rights_files/drahos-fta-2003-en.pdf>. See also Peter Drahos & John Braithwaite, *Information Feudalism* (London: Earthscan Publications, 2002).

232. The New Zealand Government is currently considering amendments to the *Copyright Act 1994* (NZ) to deal with developments in digital technology. See Paul Apathy, "Napster and New Zealand" (2002) 33 U. Wellington L.R. 287.

233. Free Trade Area of the Americas, "Free Trade Area of the Americas Agreement: Draft Agreement" (2003), <http://www.ftaa-alca.org/alca_e.asp>.

table for gains to fisheries, forestry and farmers.[234] The United States hopes that such bilateral and regional agreements will lay the foundation for further revisions of the *TRIPS Agreement* and the WIPO Internet treaties.

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CONCLUSION

IN THE FACE OF SUCH LEGAL ACTION, Sharman Networks has launched a marketing campaign entitled "Join the Revolution" designed to mobilize consumer support and garner industry acceptance. Nikki Hemming said of this "Children's Crusade":

> It is time for peer-to-peer users to mobilize and "pump up the volume"; and let their voices be heard. And it's time for the entertainment industry to stop turning a deaf ear to what consumers want and recognize that there is a revolution underway that is changing the way that music, movies and other content is distributed and purchased. It is time the entertainment industry embraced this technology and worked with it to capture this enormous market by presenting users of Kazaa with an option to buy their products.[235]

The campaign includes a print advertising campaign with advertisements in a number of international newspapers and college newspapers, and online advertisements on *yahoo.com*, *billboard.com*, *wired.com* and *rollingstone.com*. Such advertisements boast that the "revolution is unstoppable." However, there is nothing inherently invincible about Kazaa. For all its tenacity and creativity, Kazaa may well succumb to the implacable legal and political pressure of copyright owners.

The record companies and motion-picture studios have embarked upon a web of coordinated litigation in Europe, the United States and Australia against the peer-to-peer networks Kazaa, Grokster and Streamcast. They have launched a number of lawsuits against intermediaries associated with peer-to-peer networks, such as Internet Service Providers, educational institutions and venture capitalists. Controversially, copyright owners have engaged in surveillance of internet users and have brought legal action against individuals who upload media onto peer-to-peer networks. Neil Weinstock Netanel neatly sums up this approach:

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234. Michael Geist, "Why we must stand guard over copyright" *Toronto Star* (20 October 2003).

235. Sharman Networks, Press Release, "Sharman Networks Launches 'Join The Revolution'" (19 November 2003), <http://www.sharmannetworks.com/content/view/full/248>.

> In short, the copyright industries' antidote for peer-to-peer copying and distribution is to attempt to assert hermetic control over every access and use of digital content, backed by DRM technology, ISP and other third-party policing, compliant consumer electronics, taxpayer financed criminal prosecutions, and aggressive technological self-help…. But whatever their motives and the desirability of their aims, copyright industry efforts seem increasingly scattershot. At times they lead to the suppression of valuable, noninfringing expression and at others they fail to suppress anything.[236]

The copyright industries have engaged in a strategy of "discipline" and "punish," as James Boyle predicted in his piece "Foucault in Cyberspace."[237] However, this risky strategy is in danger of alienating consumers and users. The copyright industries have found it difficult to compete with the marketing of peer-to-peer networks. They have been unable to provide a satisfactory alternative, which would satisfy the immense consumer demand for downloading music and media.

Rather than accede to the demands of copyright owners, judges have taken a strict formalistic interpretation of the US *DMCA*. They have been unwilling to go beyond the legislative compromises laid down by Congress. The loss by copyright owners in the District Court in the *Grokster* case was an unexpected setback. The judgment of Wilson J provides some hope of survival for peer-to-peer networks. Perhaps more significantly, copyright owners will keenly feel the defeat in the Court of Appeals in the Verizon case. It will be difficult to pursue legal actions against individual users without the full cooperation of Internet Service Providers. However, the limits of these judgments should be stressed. The judges have not been partial to the constitutional ideals of freedom of speech and privacy espoused by peer-to-peer networks, Internet Service Providers and consumers. They were undoubtedly sympathetic to the predicament of copyright owners in facing the challenges posed by peer-to-peer networks.

There has also been feverish, hectic debate over the *DMCA*. Record companies and motion-picture studios have engaged in a massive media and lobbying campaign. They have used the battle against peer-to-peer networks as a pretext to push for stronger protection of copyright law at a legislative level in the United States Congress. Public-interest groups have struggled to counter such draconian measures in the legislative arena.[238] As Jessica Litman acerbically observes:

> There are not many Don Quixotes in Washington. The conflict over the scope of copyright in a digital age may have been fueled by differences in principles as much as narrow self-interest, but it is being fought in the usual way: representatives of private interests are simultaneously jockeying for advantage while offering to sit down at the bargaining table and negotiate a deal they find satisfactory..[239]

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236. *Supra* note 17 at 19.

237. *Supra* note 19.

238. Siva Vaidhyanathan, "The state of copyright activism" (2004) 9:4 First Monday (April 2004), <http://firstmonday.org/issues/issue9_4/siva/>.

239. Jessica Litman, *Digital Copyright* (New York: Prometheus Books, 2001) at 192.

Copyright owners have also lobbied for stronger enforcement measures against copyright piracy to be included in revisions of overseas legislation—like the review of the *CADA*. They have also relied heavily upon the device of bilateral free-trade agreements—such as the AUSFTA. Such international agreements serve the dual purpose of entrenching domestic reforms in the *DMCA* and of exporting those standards to other significant jurisdictions.

The future of digital copyright remains uncertain. As Antonio Gramsci once wrote in his prison notebooks, "The old is dying and the new cannot be born; in this interregnum there arises a great diversity of morbid symptoms.[240] The matrix of copyright protection proposed by record companies and movie studios will be countered by new technological innovations in peer-to-peer networks. Kazaa may well suffer the same fate as Napster. Regardless, it will leave behind an important legacy. The strategies of resistance pioneered by the peer-to-peer network will be refined by its rivals and successors—most notably, by Earth Station 5. Kazaa can deservedly be criticized for its slick marketing and its overweening commercial ambitions. But it certainly deserves credit and respect for its ingenious legal and technical defences against copyright owners. Hail to the thief, indeed.

240. Antonio Gramsci, *Letters From Prison* (London: Jonathan Cape, 1975).