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The Escalating Copyright Wars

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THE ESCALATING COPYRIGHT WARS

*Peter K. Yu**

INTRODUCTION

Piracy is one of the biggest threats confronting the entertainment industry today. Every year, the industry loses billions of dollars in revenue and faces the potential loss of hundreds of thousands of jobs.¹ In 2002 alone, it is estimated that the United States lost more than ten billion dollars due to copyright piracy abroad, not to mention the significant losses caused by piracy on American soil, notably via the Internet.² As a result of these losses, piracy disrupts not only the entertainment industry, but also the United States economy.³

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1. In a recent music conference, the head of the International Federation of the Phonographic Industry (IFPI) indicated that music piracy had threatened 600,000 jobs in the European music industry. See Simon Beavis, *Record Firms Threaten Big Employers with Action to Combat Piracy*, INDEPENDENT (London) (foreign ed.), Jan. 21, 2003, Business Sec., at 19. If piracy continued at the current level, it would not be surprising to find a similar number of American jobs jeopardized, if not more.

2. See INT'L INTELLECTUAL PROP. ALLIANCE, USTR 2003 "SPECIAL 301" DECISIONS ON INTELLECTUAL PROPERTY (2003), available at http://www.iipa.com/pdf/2003_June_USTR_LossUpd.pdf.

3. See generally STEPHEN E. SIWEK, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2002 REPORT (2002) (documenting the intertwining relationship between the entertainment industry and the United States economy), available at http://www.iipa.com/pdf/2002_SIWEK_FULL.pdf.

In July 2002, Congressman Howard Berman introduced the Peer to Peer Piracy Prevention Act,⁴ targeting the piracy problem created by peer-to-peer networks. This statute, if enacted, would have allowed movie studios and record companies to hack into personal computers and peer-to-peer networks when they suspected infringing materials were being circulated.⁵ The Berman bill was subsequently abandoned.⁶

Congressman Berman's sense of urgency—and perhaps frustration—was recently picked up by Senator Orrin Hatch, the chairman of the Senate Judiciary Committee. During a recent congressional hearing on copyright abuses, Senator Hatch remarked that “he favor[ed] developing new technology to remotely destroy the computers of people who illegally download music from the Internet.”⁷ As he reasoned, damaging someone's computer “‘‘may be the only way you can teach somebody about copyrights.’’⁸

Although the Berman bill and Senator Hatch's remarks were controversial, they were hardly surprising to those who followed the entertainment industry closely; rather, they captured well the tone of the latest copyright war. So far, the industry has been winning. Among its trophies are the enactment of the Digital Millennium Copyright Act (“DMCA”),⁹ Vivendi Universal's defeat and purchase of MP3.com,¹⁰ the

4. H.R. 5211, 107th Cong. (2002). Compare Howard L. Berman, *The Truth About the Peer to Peer Piracy Prevention Act: Why Copyright Owner Self-help Must Be Part of the P2P Piracy Solution*, FINDLAW'S WRIT (Oct. 1, 2002), at http://writ.news.findlaw.com/commentary/20021001_berman.html (explaining the need for the proposed legislation), with Julie Hilden, *Going After Individuals for Copyright Violations: The New Bill That Would Grant Copyright Owners a "License to Hack" Peer-To-Peer Networks*, FINDLAW'S WRIT (Aug. 20, 2002), at <http://writ.news.findlaw.com/hilden/20020820.html> (criticizing the proposed legislation).

5. See H.R. 5211.

6. See Jon Healey, *Rep. Berman May Not Revive Internet Piracy Bill*, L.A. TIMES, Feb. 21, 2003, at C3.

7. Ted Bridis, *Senator Favors Really Punishing Music Thieves*, CHI. TRIB., June 18, 2003, at 2C.

8. *Id.* (quoting Sen. Hatch); see also Dwight Silverman, *Senator's 'Extreme' Cure for Piracy Is Unconstitutional*, HOUS. CHRON., June 21, 2003, at 1C.

9. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.). See *infra* Part I.A for a discussion of the DMCA.

10. See Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337, 347 (2002); see also *TeeVee Toons, Inc. v. MP3.com, Inc.*, 134 F. Supp. 2d 546, 547-49 (S.D.N.Y. 2001); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 353 (S.D.N.Y. 2000); Brad King, *MP3.com Goes Major Labels League*, WIRED NEWS (July 20, 2001), at <http://www.wired.com/news/mp3/0,1285,45377,00.html>; Brad King, *MP3.com Goes Universal*, WIRED NEWS (May 21, 2001), at <http://www.wired.com/news/mp3/0,1285,43972,00.html>; Justin Oppelaar, *Vivendi U Uploads MP3 for \$370 Mil*, DAILY VARIETY, May 21, 2001, at 1.

movie studios' victory in the DeCSS litigation,¹¹ the bankruptcy and subsequent sale of Napster and its recent relaunch as a legitimate subscription-based music service,¹² the Supreme Court's rejection of the copyright bargain theory in *Eldred v. Ashcroft*,¹³ and the recording industry's relative success in its mass litigation campaign.¹⁴

Notwithstanding these victories, the war is expanding and has become even more difficult for the industry to fight than it was a year ago. Today, copyright law is no longer a complicated issue that is only of interest and concern to copyright lawyers, legal scholars, technology developers, and copyright holders.¹⁵ Rather, it is a matter of public significance, affecting all of us in our daily lives. The ground has shifted. If the entertainment industry does not pay attention to the public and if it continues to use ill-advised battle strategies, it eventually might lose the war.

Part I of this Article examines the five strategies used by the entertainment industry to fight the copyright wars: lobbying, litigation, self-help, education, and licensing. Part II examines the impact of *Eldred v. Ashcroft* on these strategies and examines the decision's ramifications on future constitutional challenges to copyright laws, in particular the DMCA. Part III traces recent developments in the international copyright arena. This Part highlights the substantial differences between United States and foreign copyright laws. Part IV describes the changing tone of the ongoing copyright war. This Part suggests that the proliferation of peer-to-peer networks and the increased public consciousness of copyright issues have made the war more difficult for the industry to fight than it was a year ago. Part V concludes by discussing what the industry should do to stem digital piracy.

11. See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 435-36 (2d Cir. 2001). DeCSS is a decryption program that circumvents the Content Scramble System ("CSS") used by the motion picture industry to protect against the unauthorized reproduction of DVD movies. See *id.*

12. See Matt Richtel, *Napster Says It Is Likely to Be Liquidated*, N.Y. TIMES, Sept. 4, 2002, at C2. Napster was the defendant in several copyright infringement lawsuits prior to its filing for bankruptcy protection. See *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001); *A&M Records, Inc. v. Napster, Inc.*, No. C 99-05183 MHP, 2001 U.S. Dist. LEXIS 2186 (N.D. Cal. Mar. 5, 2001). For a discussion of Roxio's relaunch of Napster, see *infra* Part I.E.

13. See 537 U.S. 186, 214-17 (2003); see also *infra* Part II.

14. See *infra* Part I.D.

15. See *infra* Part IV.

I. INDUSTRY STRATEGIES

A. *Battle Strategy #1: Lobbying*

Since the turn of the twentieth century, the entertainment industry has been battling a large array of “new” technologies. As Professor Litman pointed out,

[T]he contours of [the dispute about intellectual property rights in the digital environment] don’t look very different from the shape of very similar disputes that arose in the 1980s, when the gods invented personal computers; or the 1970s, when they invented videocassette recorders; or the 1960s, when they invented cable television; or the 1920s, when they invented commercial broadcasting and talkies.¹⁶

Nonetheless, digital technology is different. Unlike analog technology, digital technology enables consumers to make exact replicas of the copyrighted work without losing any quality.¹⁷ Rather than dealing with low-quality, amateurish cassette tape recordings, copyright infringers can now produce exactly what CD stores offer.¹⁸ Copyright holders, therefore, are understandably concerned about their continued ability to control and exploit creative works.

To protect itself, the entertainment industry lobbied Congress heavily for special protection for works disseminated on the Internet. In

16. Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 22 (1996). See generally Monroe E. Price, *The Newness of New Technology*, 22 CARDOZO L. REV. 1885 (2001) (examining the “newness” of the Internet and new communications technologies).

17. See, e.g., I. Trotter Hardy, *The Proper Legal Regime for “Cyberspace,”* 55 U. PITT. L. REV. 993, 1005 (1994) (noting that “[p]hotocopy machines at one time threatened to turn every individual into a mass publisher, but cyberspace seems actually to have achieved that distinction in a way that photocopying never really did”); Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 264 (2002) (noting that “digital technology makes it possible to make an unlimited number of perfect copies of music, books, or videos in digital form, and through the Internet individuals may distribute those digital works around the world at the speed of light”); Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1808-33 (1995) (arguing that the Internet has greatly reduced the production and reproduction costs of information).

18. For discussions of the threat digital technology posed to the copyright regime, see generally COMM. ON INTELLECTUAL PROP. RIGHTS AND THE EMERGING INFO. INFRASTRUCTURE, NATIONAL RESEARCH COUNCIL, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE* (2000) [hereinafter *DIGITAL DILEMMA*]; and INFO. INFRASTRUCTURE TASK FORCE, *INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS* (1995), available at <http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf>.

1998, Congress enacted the DMCA,¹⁹ which strengthens copyright protection in the digital medium. The statute prohibits the circumvention of copy-protection technologies and the dissemination of information concerning how to defeat those technologies.²⁰ The DMCA also provides a “safe harbor” for Internet service providers to remove any hosted content that allegedly infringes upon the work of a copyright holder.²¹ In addition, the statute protects the integrity of copyright management systems²² and revised the performance right regime in light of changes in the digital environment.²³

Since the statute’s enactment, the industry has used the DMCA to prevent the dissemination of information concerning the circumvention

19. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C. (2000)). Professor Litman criticized the DMCA as follows:

The DMCA is long, internally inconsistent, difficult even for copyright experts to parse and harder still to explain. Most importantly, it seeks for the first time to impose liability on ordinary citizens for violation of provisions that they have no reason to suspect are part of the law, and to make noncommercial and noninfringing behavior illegal on the theory that that will help to prevent piracy.

JESSICA LITMAN, *DIGITAL COPYRIGHT* 145 (2001). For comprehensive discussions of the DMCA, see generally Jane C. Ginsburg, *Copyright Legislation for the “Digital Millennium,”* 23 COLUM.-VLA J.L. & ARTS 137 (1999); Matt Jackson, *The Digital Millennium Copyright Act of 1998: A Proposed Amendment to Accommodate Free Speech*, 5 COMM. L. & POL’Y 61 (2000); Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813 (2001); David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673 (2000); David Nimmer, *Appreciating Legislative History: The Sweet and Sour Spots of the DMCA’s Commentary*, 23 CARDOZO L. REV. 909 (2002); David Nimmer, *Back from the Future: A Proleptic Review of the Digital Millennium Copyright Act*, 16 BERKELEY TECH. L.J. 855 (2001); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519 (1999); and Diane Leenheer Zimmerman, *Adrift in the Digital Millennium Copyright Act: The Sequel*, 26 U. DAYTON L. REV. 279 (2001).

20. See 17 U.S.C. § 1201.

21. See *id.* § 512(g)(1).

22. See *id.* § 1202. As Professor Ginsburg summarized:

Section 1202 prohibits: (a) knowingly providing false copyright management information, with the intent to facilitate or conceal infringement. The provision also prohibits (b) knowingly or intentionally altering or removing copyright management information, knowing (or having reasonable grounds to know) that the alteration or removal will facilitate or conceal infringement. Subsection (c) defines copyright management information. It includes: the name of the author; the name of the copyright owner; and the “[t]erms and conditions for use of the work.”

Ginsburg, *supra* note 19, at 157 (alteration in original); see *id.* at 157-60 (discussing the provision on copyright management information); see also Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at “Copyright Management” in Cyberspace*, 28 CONN. L. REV. 981 (1996) (examining the impact of copyright management mechanisms on the traditional notions of freedom of thought and expression).

23. See Ginsburg, *supra* note 19, at 166-70 (discussing the DMCA amendments to the 1995 Digital Performance Right in Sound Recordings Act).

of encryption technologies. For example, the publisher of hacker magazine *2600* was enjoined from posting on his website the computer code that cracked the encryption technology used in protecting DVDs.²⁴ Professor Edward Felten of Princeton University was asked to withdraw his paper from a scholarly conference, lest he be prosecuted under the DMCA.²⁵ And a Russian cryptographer was arrested after giving a presentation on his company's software that removed security protection from Adobe e-books.²⁶

Even worse, the DMCA has upset the balance between the interests of copyright holders and the need for public access to protected materials. Through its anti-circumvention provision, the statute prevents people from engaging in actions that traditionally have been considered fair use.²⁷ The DMCA also creates a chilling effect by requiring Internet

24. See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 434 (2d Cir. 2001).

25. See David P. Hamilton, *Digital-Copyright Law Faces New Fight*, WALL ST. J., June 7, 2001, at B10. In September 2000, the Secure Digital Music Initiative Foundation issued a public challenge and offered ten thousand dollars to those who successfully broke its proposed copy-protection technologies. See First Am. Compl., *Felten v. Recording Indus. Ass'n of America*, No. CV-01-2660, ¶¶ 14, 24-34 (D.N.J. June 26, 2001), available at http://www.eff.org/IP/DMCA/Felten_v_RIAA/20010626_eff_felten_amended_complaint.html. Professor Edward Felten of Princeton University claimed that he and his research team successfully broke the proposed technologies. See *id.* ¶ 37. When he planned to present his findings at a scientific conference, the recording industry asked him to withdraw the paper, citing potential violation of the DMCA. See *id.* ¶¶ 42-43. In response, Professor Felten filed a lawsuit seeking a declaratory judgment. See *id.*, Prayer for Relief, ¶¶ A-I. The suit was subsequently dismissed when the defendants disavowed their threatened lawsuit and the court found that there was "no substantial threat of real harm of prosecution" by the Attorney General. Tr. of Mots., *Felten v. Recording Indus. Ass'n of America*, No. CV-01-2669, at 31, 44, 48 (D.N.J. Nov. 28, 2001). Although the industry eventually backed down and Professor Felten was able to present his research, the incident demonstrated the statute's potential chilling effect.

26. See Jennifer 8. Lee, *U.S. Arrests Russian Cryptographer as Copyright Violator*, N.Y. TIMES, July 18, 2001, at C8 (reporting Sklyarov's arrest); see also Compl., *U.S. v. Sklyarov*, No. 5 01 257 (N.D. Cal. July 7, 2001), available at http://www.eff.org/IP/DMCA/US_v_Sklyarov/20010707_complaint.pdf; Symposium, *Panel III: Implications of Enforcing the Digital Millennium Copyright Act: A Case Study, Focusing on United States v. Sklyarov*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 805 (2002). The charges against Sklyarov were later dropped in response to strong protests in the United States and in light of his agreement to testify for the United States government against his former employer, ElcomSoft. See David Frith, *A Promotion a Day Keeps Apple A-weigh*, CANBERRA TIMES (Austl.), Jan. 7, 2002, at A12 (reporting that Sklyarov was released in a deal that "saw him admit the facts of the case but not any illegal activity"). Subsequently, his Moscow-based employer, ElcomSoft, was prosecuted for illegally selling software that permitted users to circumvent security features in an electronic book. See Matt Richtel, *Russian Company Cleared of Illegal Software Sales*, N.Y. TIMES, Dec. 18, 2002, at C4. In December 2002, a federal jury acquitted ElcomSoft of all charges. See *id.*

27. See 17 U.S.C. § 1201 (2000); see also LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 187-88 (2001) (arguing that the anti-circumvention provision of the DMCA is constitutionally suspect because of the way it limits fair

service providers to remove content even if the reproduction of such materials is permissible under existing copyright law.²⁸ The statute, therefore, has raised serious concerns about free speech, privacy, academic freedom, learning, culture, democratic discourse, competition, and innovation.²⁹

In light of these weaknesses and problems, legal scholars, college researchers, cryptographers, technology developers, and civil libertarians have widely criticized the DMCA.³⁰ Even some in the technology industry who originally supported the legislation expressed regret and disappointment over the development and interpretation of the statute.³¹ In short, the law seems to satisfy no one except the entertainment industry.

B. Battle Strategy #2: Litigation

Apart from lobbying, the entertainment industry has been actively taking—or threatening to take—legal action against those who allegedly infringe upon its rights granted under existing copyright law. Although it is difficult and expensive to go after individual pirates, the industry has had phenomenal success in lawsuits against companies operating file-sharing networks, forcing most of them into shutdown, sale, or bankruptcy.³²

In January 2000, MP3.com launched its My.MP3.com service, which allowed subscribers to play music over the Internet as long as they owned, borrowed, or purchased the CDs that contain the requested recordings.³³ To facilitate this service, MP3.com purchased tens of

use); LITMAN, *supra* note 19, at 145 (arguing that the DMCA would impose liability for noncommercial and noninfringing behavior).

28. See, e.g., 17 U.S.C. § 512(c) (requiring Internet service providers to remove material on the mere allegation of infringement to obtain safe harbor protection).

29. Shortly after the United States Copyright Office released its report on the effects of the DMCA, U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT (2001), available at <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf>, more than fifty intellectual property law scholars expressed disappointment over the report and urged Congress to conduct its own study. See *IP Law Professors Urge Congress to Do Its Own DMCA Study*, WASH. INTERNET DAILY, Oct. 16, 2001.

30. See the sources cited *supra* note 19 for examples of such criticism.

31. See *DRM Foes Turn Aside Hollywood Peace Gestures*, WASH. INTERNET DAILY, Aug. 5, 2002.

32. See, e.g., *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1024-29 (9th Cir. 2001); see also John Davidson, *Battle for the Internet Bazaar*, AUSTL. FIN. REV., Mar. 25, 2003, at 35 (discussing the KaZaA litigation); Matt Richtel, *A New Suit Against Online Music Sites*, N.Y. TIMES, Oct. 4, 2001, at C4 (discussing lawsuits against Grokster and Morpheus/MusicCity).

33. See *UMG Recordings, Inc. v. MP3.com*, 92 F. Supp. 2d 349, 350 (S.D.N.Y. 2000).

thousands of popular CDs and copied them onto computer servers.³⁴ Although MP3.com purchased licenses to perform the music, it did not own any licenses to reproduce the recordings.³⁵ As a result, the major record companies and their artists brought suits against MP3.com, alleging copyright infringement.³⁶

In its defense, MP3.com claimed that its service constituted fair use,³⁷ contending that its service provided a transformative “space shift” by allowing subscribers to enjoy the sound recordings they owned without carrying physical CDs around.³⁸ The defendant also argued that the My.MP3.com service benefited, rather than harmed, the plaintiffs by enhancing sales, since the service required subscribers to demonstrate that they owned, borrowed, or purchased the CDs containing the requested recordings.³⁹ In addition, MP3.com noted that its service did not compete directly with the plaintiffs in the digital downloading market and, instead, “provide[d] a useful service to consumers that, in its absence, will be served by ‘pirates.’”⁴⁰

At trial, the court rejected all of the defendant’s arguments. The Copyright Act lists four criteria that a court can apply to determine whether the defendant’s use is “fair.” These criteria include:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁴¹

34. *See id.*

35. *See* Litman, *supra* note 10, at 346.

36. *See* TeeVee Toons v. MP3.com, 134 F. Supp. 2d 546, 546 (S.D.N.Y. 2001); *UMG Recordings*, 92 F. Supp. 2d at 349.

37. *See* 17 U.S.C. § 107 (2000); *see also* Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901) (articulating for the first time the concepts that evolved into the fair use doctrine). For comprehensive discussions of fair use, *see generally* WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* (2d ed. 1995); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659 (1988); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990); William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667 (1993).

38. *UMG Recordings*, 92 F. Supp. 2d at 351; *cf.* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 454-55 (1984) (finding “time shifting” fair use).

39. *See UMG Recordings*, 92 F. Supp. 2d at 352.

40. *Id.*

41. 17 U.S.C. § 107 (2000).

The court began by rejecting the defendant's "space shifting" argument, maintaining that such a service was neither transformative nor productive.⁴² As the court explained, the defendant's argument was "simply another way of saying that the unauthorized copies are being retransmitted in another medium—an insufficient basis for any legitimate claim of transformation."⁴³ The court also found that the second and third factors weighed against fair use because the recordings the defendant copied were "'close[] to the core of intended copyright protection'"⁴⁴ and that the defendant had copied and replayed "the entirety of the copyrighted works."⁴⁵ Finally, the court rejected the defendant's market enhancement argument by noting that "[a]ny allegedly positive impact of defendant's activities on plaintiffs' prior market in no way frees defendant to usurp a further market that directly derives from reproduction of the plaintiffs' copyrighted works."⁴⁶ The court also maintained that a copyright "is not designed to afford consumer protection or convenience but, rather, to protect the copyright holders' property interests."⁴⁷ MP3.com lost the lawsuits badly and was sold shortly afterwards to Vivendi Universal, which incorporated MP3.com into its subscription service⁴⁸ and then sold the service to Roxio.⁴⁹

In another well-known lawsuit, the recording industry sued Napster for contributory and vicarious copyright infringement.⁵⁰ Napster

42. See *UMG Recordings*, 92 F. Supp. 2d at 351; see also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) ("[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright . . .") (citation omitted).

43. *UMG Recordings*, 92 F. Supp. 2d at 351; see also *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998) (rejecting the fair use defense by the operator of a service that retransmitted copyrighted radio broadcasts over telephone lines); *L.A. News Serv. v. Reuters Television Int'l Ltd.*, 149 F.3d 987, 994-95 (9th Cir. 1998) (rejecting the fair use defense by television news agencies that copied copyrighted news footage and retransmitted it to news organizations).

44. *UMG Recordings*, 92 F. Supp. 2d at 351 (quoting *Campbell*, 510 U.S. at 586) (alteration in original).

45. *Id.* at 352.

46. *Id.*

47. *Id.*

48. See the sources cited *supra* note 10 for further discussion of Vivendi's acquisition of MP3.com and incorporation of the company into its music service.

49. See *Roxio Acquires Pressplay for \$40 Million*, N.Y. TIMES, May 20, 2003, at C6.

50. See *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 900 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001). For discussions of *Napster*, see generally Peter Jan Honigsberg, *The Evolution and Revolution of Napster*, 36 U.S.F. L. REV. 473 (2002); Ku, *supra* note 17; David G. Post, *His Napster's Voice*, 20 TEMP. ENVTL. L. & TECH. J. 35 (2001); Damien A.

counterargued that the users' "file sharing" constituted fair use.⁵¹ The Napster case is more complicated than the MP3.com cases because Napster did not reproduce copyrighted works itself; rather, the service facilitated unauthorized copying, downloading, transmission, and distribution of copyrighted works by others.⁵²

Napster was started as a project by a college student, Shawn Fanning, who was frustrated by the difficulty in finding MP3 files on traditional Internet servers.⁵³ To alleviate this difficulty, Napster allowed users to search for music on the hard drives of other users and share music files with them while the users were on the network.⁵⁴ As a result of this peer-to-peer network, Napster successfully transformed faraway computers into a large file-sharing network—or some would say piracy network.⁵⁵

At trial, the district court concluded that the record companies had established a prima facie case of direct copyright infringement by Napster users. As the court explained, "virtually all Napster users engage in the unauthorized downloading or uploading of copyrighted music."⁵⁶ The court then moved on to address the four fair use factors specified in the Copyright Act. The court noted that the first factor weighed against fair use, because Napster's users were neither using the copyrighted works in a transformative way nor did they attempt to use the songs for parody or for research.⁵⁷ Rather, users were merely copying and listening to the music.⁵⁸ Likewise, the second and third factors weighed against fair use, because music is creative in nature and because users downloaded entire songs.⁵⁹ Finally, although the court concluded that the use was not "paradigmatic commercial activity," the "vast scale" of file-sharing facilitated by Napster could not be considered private use or

Riehl, *Peer-to-Peer Distribution Systems: Will Napster, Gnutella, and Freenet Create a Copyright Nirvana or Gehenna?*, 27 WM. MITCHELL L. REV. 1761 (2001); Symposium, *Beyond Napster: Debating the Future of Copyright on the Internet*, 50 AM. U. L. REV. 355 (2000); Symposium, *Beyond Napster—The Future of the Digital Commons*, 15 TRANSNAT'L LAW. 257 (2002); Symposium, *Napster: Innocent Innovation or Egregious Infringement?*, 9 VILL. SPORTS & ENT. L.J. 1 (2002); and Alfred C. Yen, *A Preliminary Economic Analysis of Napster: Internet Technology, Copyright Liability, and the Possibility of Coasean Bargaining*, 26 U. DAYTON L. REV. 247 (2001).

51. See *Napster*, 114 F. Supp. 2d at 900-01.

52. See *id.* at 911.

53. See *id.* at 901-02.

54. See *id.* at 905-08.

55. See Susan Stellin, *Napster Use Quadrupled in 5 Months*, N.Y. TIMES, Sept. 12, 2000, at C6 (indicating that 4.9 million Americans accessed the network in July 2000).

56. *Napster*, 114 F. Supp. 2d at 911.

57. See *id.* at 912.

58. See *id.* at 914.

59. See *id.* at 913.

personal use “in the traditional sense.”⁶⁰ As the court explained, “the fact that Napster users get for free something they would ordinarily have to buy suggests that they reap economic advantages from Napster use.”⁶¹ Even though the activity was not for profit, it was certainly economic in nature.

To boost its case, the record companies presented evidence of a decline in CD sales at highly wired college campuses and campuses that had banned Napster use.⁶² According to the study, sales near these college campuses dropped by twelve to thirteen percent from 1997 to 2000, although CD sales nationwide had risen by eighteen percent,⁶³ thus implying that the decline in sales resulted from MP3 downloads that replaced CD purchases. The recording industry also argued that the availability of free downloading reduced the market for competing commercial downloading, and that free downloading deprived copyright holders of royalties for downloading even if it enhanced CD sales.⁶⁴ Based on this evidence, the court found that the effect of the use upon the value of the work and potential markets for the work weighed against fair use.⁶⁵ According to the court, Napster harmed the market for copyrighted music by reducing CD sales among college students and by raising barriers to entry in the market for digital downloading.⁶⁶

The district court ordered Napster to shut down.⁶⁷ On appeal, the Ninth Circuit was more sympathetic to Napster and found that Napster was capable of commercially significant noninfringing uses.⁶⁸ Nonetheless, the appellate court concluded that “sufficient knowledge exist[ed] to impose contributory liability when linked to demonstrated infringing use of the Napster system.”⁶⁹ As the Ninth Circuit reasoned, “[t]he record supports the district court’s finding that Napster has *actual* knowledge that *specific* infringing material is available using its system, that it could block access to the system by suppliers of the infringing material, and that it failed to remove the material.”⁷⁰

60. *Id.* at 912.

61. *Id.*

62. *See id.* at 909-10.

63. *See* Ku, *supra* note 17, at 289 (citing Report of Michael Fine for Plaintiffs at 2, A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000), available at <http://www.riaa.com/news/filings/pdf/napster/fine.pdf>).

64. *See Napster*, 114 F. Supp. 2d at 915.

65. *See id.*

66. *See id.* at 913.

67. *See id.* at 927.

68. *See Napster*, 239 F.3d at 1021.

69. *Id.*

70. *Id.* at 1022.

The Ninth Circuit remanded the case to the lower court, which subsequently ordered Napster to police its system and to block access to infringing material after it was notified of such material's location.⁷¹ Unable to do so, Napster shut down its service in July 2001 and has since filed for bankruptcy protection.⁷²

In November 2002, Roxio, a manufacturer of CD- and DVD-copying software, purchased Napster's name and intellectual property assets.⁷³ A few months later, Roxio acquired PressPlay, the online music service, from Vivendi Universal and Sony Music.⁷⁴ After much anticipation and speculation, Roxio finally relaunched Napster in October 2003 as a subscription-based service featuring music from the five major record labels.⁷⁵

C. Battle Strategy #3: Self-Help

The third strategy the entertainment industry uses concerns the deployment of copy-protection technology, such as encryption,⁷⁶ digital watermarking,⁷⁷ and the use of trusted systems.⁷⁸ Consider encryption, for example. By encrypting copyrighted works, the industry successfully prevents the general public from reproducing its products without authorization. After all, it takes a tremendous amount of skill and time for an ordinary user to crack copy-protection technology.

71. See *A&M Records, Inc. v. Napster, Inc.*, No. C 99-05183 MHP, 2001 U.S. Dist. LEXIS 2186, at *5-*7 (N.D. Cal. Mar. 5, 2001).

72. See Richtel, *supra* note 12.

73. See *Roxio Buys Napster Assets*, N.Y. TIMES, Nov. 28, 2002, at C10.

74. See *Roxio Acquires Pressplay for \$40 Million*, *supra* note 49.

75. John Borland, *Napster Launches, Minus the Revolution*, CNET NEWS.COM (Oct. 9, 2003), at http://news.com.com/2100-1027_3-5088838.html.

76. As the recent National Research Council study explained:

Cryptography is a crucial enabling technology for IP management. The goal of encryption is to scramble objects so that they are not understandable or usable until they are unscrambled. The technical terms for scrambling and unscrambling are "encrypting" and "decrypting." Encryption facilitates IP management by protecting content against disclosure or modification both during transmission and while it is stored. If content is encrypted effectively, copying the files is nearly useless because there is no access to the content without the decryption key. Software available off the shelf provides encryption that is for all practical purposes unbreakable, although much of the encrypting software in use today is somewhat less robust.

DIGITAL DILEMMA, *supra* note 18, at 156.

77. "While [digital watermarking] does not prevent the content from being copied and redistributed, this technique can at least make evident who owns the material and possibly aid in tracking the source of the redistribution." *Id.* at 83.

78. See *id.* at 167-71. See generally Jonathan Weinberg, *Hardware-Based ID, Rights Management, and Trusted Systems*, 52 STAN. L. REV. 1251 (2000) (discussing hardware-based identifiers and trusted systems).

Notwithstanding these technologies, however, the entertainment industry remains vulnerable.⁷⁹ Although copy-protection technologies allow copyright holders to lock up their creative works, these technologies lose their protective function when they are decrypted. Thus, once hackers defeat the technology, the general public can take advantage of the hackers' breakthrough and make copies without the copyright holders' permission.⁸⁰ They also can share illegal copies freely with others via websites, file-swapping software, and peer-to-peer networks.

To prevent the public from doing so, the industry must constantly upgrade its encryption technologies. Unfortunately, such upgrading would attract more attention from hackers, who are just too eager to crack the latest encryption technology available.⁸¹ Ultimately, the repeated encryption and decryption will create a vicious cycle in which the entertainment industry and the hacker community engage in an endless copy-protection arms race.⁸² Instead of devoting resources to

79. Although the industry might remain vulnerable, copy-protection technology does not necessarily need to be perfectly robust:

Most people are not technically knowledgeable enough to defeat even moderately sophisticated systems and, in any case, are law-abiding citizens rather than determined adversaries. TPSs [Technical protection services] with what might be called "curb-high deterrence"—systems that can be circumvented by a knowledgeable person—are sufficient in many instances. They can deter the average user from engaging in illegal behavior and may deter those who may be ignorant about some aspects of the law by causing them to think carefully about the appropriateness of their copying. Simply put, TPSs can help to keep honest people honest.

DIGITAL DILEMMA, *supra* note 18, at 218.

80. The hacker's breakthrough need not necessarily take the form of a computer program, to which the general public might not have ready access even if it is made available on the Internet. For example, a Princeton University computer science graduate student recently posted a paper on his website explaining how to disarm SunnComm's copy-protection technology by pushing the shift key when loading a CD into a computer. See John Borland, *Student Faces Suit Over Key to CD Locks*, CNET NEWS.COM (Oct. 9, 2003), at <http://news.com.com/2100-1025-5089168.html>.

81. See, e.g., Dorothy E. Denning, *Hacker Ethics*, at <http://www.southernct.edu/organizations/rccs/resources/research/security/denning02/introduction.html> (stating that "hackers do it for the challenge, thrill, and social fun") (last visited Feb. 29, 2004); The Mentor, *The Conscience of a Hacker* (1986), at <http://cybercrimes.net/Property/Hacking/Hacker%20Manifesto/HackerManifesto.html> (declaring that "[m]y crime is that of curiosity. . . . My crime is that of outsmarting you").

82. As Professor Ku explained:

[C]opy protection for digital content necessitates an expensive technological arms race Given the difficulty of protecting digital works from copying, copyright holders will be forced constantly to spend significant resources developing technology just to keep the cat in the bag. These costs will in turn be passed on to the public, not to provide the public with access to new works, but for the sole purpose of limiting access. Given that hackers appear to be as adept, if not more so, at picking the locks of copyright

developing artists and improving products, the industry would have to invest these rare resources in encryption technology and in preventing consumers from accessing copyrighted works. This strategy would hurt artists, the industry, and ultimately consumers.

Moreover, the increased use of encryption technologies to protect copyright has sparked concerns among consumer advocates and civil libertarians.⁸³ An encrypted CD may not function the same way as a conventional CD. Previously available functions, including those to which consumers may have a legal right—under the “fair use” privilege in copyright law perhaps—may no longer exist.⁸⁴ Even worse, an encrypted CD might not be playable on car stereos, computers, and old CD players, forcing consumers to buy new ones they do not otherwise need or cannot afford.⁸⁵ Thus, it is not surprising that the recording industry has encountered highly negative responses—including a lawsuit by two California consumers—when Sony released Celine Dion’s album in encrypted format.⁸⁶ As some consumer advocates demanded, record companies should label their CDs carefully to avoid confusion and to allow consumers to choose whether they want to purchase those CDs.⁸⁷

D. Battle Strategy #4: Education

The fourth strategy the entertainment industry uses is education. In recent years, the industry has been very active in educating the consuming public. For example, the recording industry set up the “Byte

protection as those trying to lock up digital works, the costs associated with a copy protection arms race would be unending.

Ku, *supra* note 17, at 319-20 (footnotes omitted); see also Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 251 (discussing the “wasteful ‘arms race’ of technological-protection schemes, with each side increasing its spending to outperform the other’s technology”).

83. See, e.g., Liza Klausmann, *Watchdog Rips Distributors’ Coding*, DAILY VARIETY, June 2, 2003, at 10 (noting that a watchdog group filed suit to prevent distribution of encrypted CDs in France); see also Kevin Hunt, *Record Industry Opens Attack on Consumer Rights*, HARTFORD COURANT, May 23, 2002, at 21.

84. For example, consumers may no longer be able to make archival backups or analog compilations of copyrighted songs for personal use.

85. See George Cole, *Celine Dion and the Copycats*, FIN. TIMES (London), July 19, 2002, at 11.

86. See Jon Healey & Jeff Leeds, *Record Labels Grapple with CD Protection*, L.A. TIMES, Nov. 29, 2002, at C1 (reporting that “[t]wo California consumers already have filed a class-action lawsuit against the five major record companies, alleging that copy-protected CDs are defective products that shouldn’t be allowed on the market”).

87. In 2003, Congressman Richard Boucher introduced the Digital Media Consumers’ Rights Act to help restore the historical balance in copyright law and to ensure proper labeling of copy-protected CDs. See H.R. 107, 108th Cong. (2003).

Me” website to stem the distribution of illegal copies of popular music in MP3 format.⁸⁸ “Entertainment groups [also] have sent thousands of letters to colleges and corporations, alerting them to infringements,” while celebrities like the Dixie Chicks and Missy Elliott have appeared on MTV and BET to relay artists’ concerns.⁸⁹ Even Madonna chastised her fans for downloading an illegal copy of her new single, *American Life*.⁹⁰ And most recently, during the 2004 Annual GRAMMY Awards Ceremony, the Recording Academy unveiled a major public education campaign, which includes the new website whatsthe-download.com, print and radio public service announcements, grassroots initiatives, and retail activities.⁹¹

Since September 2003, the entertainment industry has tried another education strategy—mass litigation. So far, the recording industry has filed more than two thousand lawsuits against individuals suspected of swapping music illegally via peer-to-peer networks. As Cary Sherman, president of the Recording Industry Association of America, declared, “lawsuits are a very potent form of education.”⁹² Although CD sales have increased since the filing of lawsuits and some studies have shown that illegal file sharing has declined,⁹³ it remains unclear as to whether the lawsuits have the proclaimed educational value.⁹⁴

88. See DIGITAL DILEMMA, *supra* note 18, at 308 n.3.

89. *Entertainment Industry Widens War*, USA TODAY, Feb. 13, 2003, at 9D.

90. See Lev Grossman, *It's All Free!*, TIME, May 5, 2003, at 60.

91. Press Release, Recording Academy, “What’s the DownloadSM” Consumer Education Campaign Addressing the Value of Paying for Music Unveiled at 46th Annual Grammy® Awards, (Feb. 8, 2004), available at http://www.whatsthe-download.com/word_docs/Whats_The_Download_Launch_Press_Release.doc.

92. Benny Evangelista, *Online Music Finally Starts to Rock ‘n’ roll*, S.F. CHRON., Dec. 29, 2003, at E1.

93. See, e.g., PEW INTERNET & AM. LIFE PROJECT, SHARP DECLINE IN MUSIC FILE SWAPPERS: DATA MEMO FROM PIP AND COMSCORE MEDIA METRIX (2004) (reporting a survey that showed that the percentage of music file downloaders had fallen to fourteen percent (about eighteen million users) from twenty-nine percent (about thirty-five million) in spring 2003), available at http://www.pewinternet.org/reports/pdfs/PIP_File_Swapping_Memo_0104.pdf. But see Marguerite Reardon, *Oops! They’re Swapping Again*, CNET NEWS.COM (Jan. 16, 2004), at <http://news.com.com/2100-1027-5142382.html> (reporting survey by The NPD Group, an independent market research firm, that “peer-to-peer usage was up 14 percent in November 2003 from September”).

94. Commentators have attributed the recent increase in record sales to such other factors as an improving economy, a better selection of artists and albums, and an increasing tendency to deny downloading activities. See, e.g., Chris Nelson, *CD Sales Rise, but Industry Is Too Wary to Party*, N.Y. TIMES, Feb. 23, 2004, at C1 (noting the recent improvement in selection of artists and albums); see also COMM. FOR ECON. DEV., PROMOTING INNOVATION AND ECONOMIC GROWTH: THE SPECIAL PROBLEM OF DIGITAL INTELLECTUAL PROPERTY 29 (2004) (noting that factors other than file sharing appear to have played a part in recent revenue declines experienced by the music industry), available at http://www.ced.org/docs/report/report_dcc.pdf; FELIX OBERHOLZER &

E. Battle Strategy #5: Licensing

The final strategy the entertainment industry has used—recently and reluctantly—is licensing. In April 2003, Apple Computer unveiled a new online music service, the iTunes Music Store, offering low-priced music downloads from the five major record labels.⁹⁵ In October, a few months after Apple introduced iTunes, Roxio relaunched Napster as a subscription-based music service.⁹⁶ Napster has since announced deals with the Pennsylvania State University and the University of Rochester to provide students with campus-wide subscriptions to its service.⁹⁷

From the industry's standpoint, both iTunes and Napster provide an exciting opportunity. While these services offer legal alternatives to KaZaA, Grokster, Morpheus, and other allegedly illegal file-sharing networks, they also help students and computer users develop habits that the industry hopes will continue. As Napster's former President Michael Bebel proclaimed, "[t]his deal encourages a new generation to try a legitimate service, enjoy and adopt it, and later when they have more time and money, continue it."⁹⁸

So far, customers seem to be generally satisfied with these services. For example, one iTunes customer remarked that "[the service has] solved all my problems.' . . . 'It's so fast, and there's no guilt, no recriminations.'"⁹⁹ By using legitimate services, customers also save time and avoid those decoy files, spywares, viruses, and computer crashes that often come with illegal downloads.¹⁰⁰ Nevertheless, there

KOLEMAN STRUMPF, *THE EFFECT OF FILE SHARING ON RECORD SALES: AN EMPIRICAL ANALYSIS* (2004) (showing that file sharing has only had a limited effect on record sales), available at http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf.

95. See Laurie J. Flynn, *Apple Offers Music Downloads with Unique Pricing*, N.Y. TIMES, Apr. 29, 2003, at C2.

96. See John Borland, *Napster Launches, Minus the Revolution*, CNET NEWS.COM (Oct. 9, 2003), at http://news.com.com/2100-1027_3-5088838.html. The service offers ninety-nine cent downloads of single songs to anyone who downloads the free software. It also provides monthly subscribers with access to an unlimited number of music streams and "tethered" downloads that expire when the users stop subscribing to the service.

97. See John Borland, *Napster to Give Students Music*, CNET NEWS.COM (Nov. 6, 2003), at <http://news.com.com/2100-1027-5103557.html>; see also John Borland, *Colleges Explore Legal Net Music Setups*, CNET NEWS.COM (Aug. 1, 2003), at <http://news.com.com/2100-1027-5059030.html>.

98. Borland, *Napster to Give Students Music*, *supra* note 97.

99. Amy Harmon, *In Fight Over Online Music, Industry Now Offers a Carrot*, N.Y. TIMES, June 8, 2003, at A1.

100. See Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 432-33 (2003) (discussing the frustration in locating what one wants in illegal websites); see also DIGITAL DILEMMA, *supra* note 18, at 80-81.

remain questions as to whether the purchased songs are resaleable,¹⁰¹ whether the delivery format is secure,¹⁰² and whether consumers will receive the needed support service for the playback devices.¹⁰³

II. *ELDRED V. ASHCROFT*

While the entertainment industry was busy fighting the copyright war, the Supreme Court was considering what many industry analysts believed to be one of the most important copyright cases in United States history. On January 15, 2003, the United States Supreme Court announced its decision in *Eldred v. Ashcroft*,¹⁰⁴ upholding the constitutionality of the Sonny Bono Copyright Term Extension Act¹⁰⁵ (“Bono Act”). Dubbed the “Mickey Mouse Protection Act” by its opponents,¹⁰⁶ the statute extended the copyright term for twenty years.¹⁰⁷ As with prior copyright term extension legislation, the Bono Act applies

101. See, e.g., Ina Fried & Evan Hansen, *Apple: Reselling iTunes Songs 'Impractical'*, CNET NEWS.COM (Sept. 8, 2003), at http://news.com.com/2100-1027_3-5072842.html (stating that “Apple’s position is that it is impractical, though perhaps within someone’s rights, to sell music purchased online”); Alorie Gilbert, *iTunes Auction Treads Murky Legal Ground*, CNET NEWS.COM (Sept. 3, 2003), at http://news.com.com/2100-1025_3-5071108.html (discussing the legal and technical challenges concerning the resale of iTunes through Internet auctions); Evan Hansen, *Apple Customer Resells iTunes Song*, CNET NEWS.COM (Sept. 10, 2003), at <http://news.com.com/2100-1027-5074086.html> (reporting a customer’s successful resale of online song he purchased from Apple Computer’s iTunes Music Store).

102. See, e.g., John Borland, *Program Points Way to iTunes DRM Hack*, CNET NEWS.COM (Nov. 24, 2003), at <http://news.com.com/2100-1027-5111426.html> (discussing a program that “served as a demonstration of how to evade, if not exactly break, the anticopying technology wrapped around the songs sold by Apple in its iTunes store”).

103. See, e.g., Chris Ayres, *Apple Acts After Battery of iPod Complaints*, TIMES (London), Jan. 12, 2004, at 9 (discussing iPods’ battery problems); Rene A. Guzman, *Apple’s Portable iPod Rotten to Some*, SAN ANTONIO EXPRESS-NEWS, Feb. 20, 2004, at 1F (discussing the class action lawsuits filed against Apple Computer alleging that the company misrepresented the battery life of its iPod).

104. 537 U.S. 186 (2003). For discussions of the implications of *Eldred* for copyright law, see generally Marci Hamilton, *Now That the Supreme Court Has Declined to Limit Copyright Duration, Those Who Want to Shorten the Term Need to Look at Other Options, Including Constitutional Amendment*, FINDLAW’S WRIT (Feb. 13, 2003), at <http://writ.news.findlaw.com/hamilton/20030213.html>; Peter K. Yu, *Four Remaining Questions About Copyright Law After Eldred* (Feb. 2003), at <http://www.gigalaw.com/articles/2003-all/you-2003-02-all.html> [hereinafter Yu, *Four Remaining Questions*]; and Peter K. Yu, *Mickey Mouse, Peter Pan, and the Tall Tale of Copyright Harmonization*, IP L. & BUS., Apr. 11, 2003, at 24 [hereinafter Yu, *Mickey Mouse, Peter Pan*].

105. Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. §§ 301-304 (2000) and other scattered sections of 17 U.S.C.).

106. See, e.g., Lawrence Lessig, *Copyright’s First Amendment*, 48 UCLA L. REV. 1057, 1065 (2001).

107. See 17 U.S.C. §§ 302-304 (2000).

to both future and existing works.¹⁰⁸ Works that are supposed to fall into the public domain, like Disney's Mickey Mouse, therefore will remain "locked up" for another twenty years.

In 1999, several publishers and users of public domain works challenged the Bono Act before the United States District Court for the District of Columbia.¹⁰⁹ The case turned on the meaning of the Copyright Clause, which provides that "Congress shall have Power . . . To promote the Progress of Science . . . , by securing for limited Times to Authors . . . the exclusive Right to their respective Writings."¹¹⁰ The plaintiffs argued that Congress exceeded its enumerated power by disregarding the "limited Times" requirement under the Copyright Clause and that the retroactive extension violated the public trust doctrine.¹¹¹ They also contended that the Bono Act violated their free speech rights by preventing dissemination of copyrighted works that otherwise would have entered the public domain.¹¹²

The district court rejected the plaintiffs' First Amendment argument by observing that "there are no First Amendment rights to use the copyrighted works of others."¹¹³ In addition, it maintained that Congress had not violated the "limited Times" provision because the life-plus-seventy term conferred by the Bono Act is limited and within Congress's discretion.¹¹⁴ The court also noted that the retroactive extension did not violate the public trust doctrine, which "applies to navigable waters and not copyrights."¹¹⁵

On appeal, the United States Court of Appeals for the District of Columbia affirmed the lower court's decision. Like the lower court, the appellate court found the Bono Act constitutional,¹¹⁶ maintaining that the plaintiffs' First Amendment argument was foreclosed by *Harper & Row Publishers, Inc. v. Nation Enterprises*,¹¹⁷ a 1985 case involving the unauthorized publication of President Ford's memoirs.¹¹⁸ In that case, the United States Supreme Court declared that the idea-expression

108. Compare Pub. L. No. 105-298 § 102(b)-(d), 112 Stat. at 2827-28, with, e.g., An Act for the General Revision of the Copyright Law, Pub. L. No. 94-553, 90 Stat. 2541, 2572-76 (1976).

109. See *Eldred v. Reno*, 74 F. Supp. 2d 1, 2 (D.D.C. 1999), *aff'd*, 239 F.3d 372 (D.C. Cir. 2001).

110. U.S. CONST. art. I, § 8, cl. 8; see also *Eldred*, 74 F. Supp. 2d at 2.

111. See *Eldred*, 74 F. Supp. 2d at 2.

112. See *id.*

113. *Id.* at 3.

114. See *id.*

115. *Id.* at 4.

116. See *Eldred*, 239 F.3d at 380.

117. 471 U.S. 539 (1985).

118. See *id.* at 542.

dichotomy in copyright law struck “a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts [and ideas] while still protecting an author’s expression.”¹¹⁹ Based on *Harper & Row*, the court maintained that copyrights are “categorically immune” from First Amendment challenges.¹²⁰

The appellate court also found irrelevant the plaintiffs’ originality argument.¹²¹ As the court explained, “[h]ere we ask not whether any work is copyrightable—indeed, the relevant works are already copyrighted—but only whether a copyright may by statute be continued in force beyond the renewal term specified by law when the copyright was first granted.”¹²² Finally, the appellate court rejected the plaintiffs’ argument that the term “limited Times” should be interpreted in light of the Copyright Clause’s preceding phrase “To promote the Progress of Science and useful Arts.”¹²³ As the court reasoned, the plaintiffs’ argument was inconsistent with prior case law holding that the introductory language of the Copyright Clause did not constitute a limit on congressional power.¹²⁴

The plaintiffs petitioned for a rehearing en banc, but the D.C. Circuit denied their petition.¹²⁵ In February 2002, the Supreme Court granted certiorari to hear the case.¹²⁶ A year later, the Court found, in a 7-2 decision, that Congress had made a rational judgment to extend the copyright term for both existing and future works.¹²⁷ Writing for the majority, Justice Ruth Bader Ginsburg noted that the Court was not in a position to “second-guess” the legislature’s “policy judgment[.] . . . however debatable or arguably unwise [it] may be.”¹²⁸

Justices John Paul Stevens and Stephen Breyer dissented. Justice Stevens found that *ex post facto* extension of the copyright term frustrated the goal of the Copyright Clause by transferring wealth from

119. *Id.* at 556 (quoting with approval, and reversing on other grounds, 723 F.2d 195, 203 (2d Cir. 1983)); *see also* 17 U.S.C. § 102(b) (2000) (stipulating that copyright does not protect “any idea”).

120. *Eldred*, 239 F.3d at 375 (citing *United Video, Inc. v. FCC*, 890 F.2d 1173, 1176-78 (D.C. Cir. 1989)).

121. *See id.* at 377.

122. *Id.*

123. *Id.* at 377-78.

124. *See id.* at 378 (citing *Schnapper v. Foley*, 667 F.2d 102, 112 (D.C. Cir. 1981)).

125. *See Eldred v. Ashcroft*, 255 F.3d 849, 852 (D.C. Cir. 2001).

126. *See Eldred v. Ashcroft*, 534 U.S. 1126 (2002), *amended by* 534 U.S. 1160 (2002).

127. *See Eldred*, 537 U.S. at 206-07.

128. *Id.* at 208.

the public to copyright holders.¹²⁹ Similarly, Justice Breyer declared that “[n]o potential author can reasonably believe that he has more than a tiny chance of writing a classic that will survive commercially long enough for the copyright extension to matter.”¹³⁰ In addition, as Justice Breyer noted, the Bono Act will pose serious harm to society: “It will likely restrict traditional dissemination of copyrighted works. It will likely inhibit new forms of dissemination through the use of new technology. It threatens to interfere with efforts to preserve our Nation’s historical and cultural heritage and efforts to use that heritage, say, to educate our Nation’s children.”¹³¹

Although the public domain activists found the ruling disappointing, the decision was neither groundbreaking nor different from prior Supreme Court precedents in the field of copyright law.¹³² In fact, the Court found it significant “that early Congresses extended the duration of numerous individual patents as well as copyrights.”¹³³ As Justice Ginsburg pointed out, Congress’s action was strongly supported by the text of the Constitution, the country’s history, and precedents in the fields of both copyright and patent law.¹³⁴

Prior case law also revealed that the Court has always shown substantial deference to Congress in copyright matters.¹³⁵ For example, in *Stewart v. Abend*,¹³⁶ a 1990 case concerning the renewal provisions and the right to use a short story in Alfred Hitchcock’s *Rear Window*, the Court stated: “Th[is] evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces . . . [I]t is not our role to alter the delicate balance Congress has labored to achieve.”¹³⁷ In the famous 1984 Betamax case, *Sony Corp. of America v. Universal City Studios, Inc.*,¹³⁸ the Court maintained that “it is Congress that has been assigned the task of defining the scope of [rights] that should be granted to authors or to inventors in order to give the public appropriate access to their work product.”¹³⁹ And in *Graham v. John Deere Co.*,¹⁴⁰ a case

129. *See id.* at 226-27 (Stevens, J., dissenting).

130. *Id.* at 254 (Breyer, J., dissenting).

131. *Id.* at 266.

132. *See Yu, Four Remaining Questions, supra* note 104.

133. *Eldred*, 537 U.S. at 201.

134. *See id.* at 199-201 & nn.5-6.

135. *See generally* Marci A. Hamilton, *Copyright at the Supreme Court: A Jurisprudence of Deference*, 47 J. COPYRIGHT SOC’Y U.S.A. 317 (2000).

136. 495 U.S. 207 (1990).

137. *Id.* at 230.

138. 464 U.S. 417 (1984).

139. *Id.* at 429.

140. 383 U.S. 1 (1966).

upon which the *Eldred* Court relied heavily, the Court stated: “Within the limits of the constitutional grant, the Congress may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim.”¹⁴¹

The only recent case that seeks to limit Congress’s enumerated power in the copyright field is *Feist Publications, Inc. v. Rural Telephone Service Co.*,¹⁴² a 1991 case involving the copyrightability of telephone white pages.¹⁴³ However, the Court carefully distinguished the present case from *Feist*. As the Court explained, *Feist* “did not touch on the duration of copyright protection. Rather, the decision addressed the core question of copyrightability The decision did not construe the ‘limited Times’ for which a work may be protected, and the originality requirement has no bearing on that prescription.”¹⁴⁴

Notwithstanding the Court’s “traditional” copyright analysis in *Eldred*, the Court rejected emphatically the petitioners’ First Amendment argument and reminded us of the various “built-in First Amendment accommodations” in existing copyright law.¹⁴⁵ For example, the idea-expression dichotomy prevents copyright holders from monopolizing ideas, theories, facts, and concepts.¹⁴⁶ The fair use

141. *Id.* at 6.

142. 499 U.S. 340 (1991).

143. *See id.* at 342.

144. *Eldred v. Ashcroft*, 537 U.S. 186, 211 (2003).

145. *Id.* at 218-19. For excellent discussions of the relationship between copyright law and the First Amendment, see generally Floyd Abrams, *First Amendment and Copyright*, 35 J. COPYRIGHT SOC’Y U.S.A. 1 (1987); C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891 (2002); Dan L. Burk, *Patenting Speech*, 79 TEX. L. REV. 99 (2000); Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283 (1979); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1 (1987); Jed Rubenfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112 YALE L.J. 1 (2002); David E. Shipley, *Conflicts Between Copyright and the First Amendment After Harper & Row, Publishers v. Nation Enterprises*, 1986 BYU L. REV. 983 (1986); Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 NW. U. L. REV. 1099 (2002); Lionel S. Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 COPYRIGHT L. SYMP. (ASCAP) 43 (1971); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work’s “Total Concept and Feel,”* 38 EMORY L.J. 393 (1989); and Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665 (1992).

146. *See Eldred*, 537 U.S. at 219; *see also* 17 U.S.C. § 102(b) (2000) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”). The *idea-expression dichotomy* “is the term of art used in copyright law to indicate the elements in a copyrighted work which the grant

provision allows the general public to use copyrighted materials under certain circumstances without the copyright holder's authorization.¹⁴⁷ In fact, the Bono Act contains an exception for libraries, archives, and similar institutions to reproduce, distribute, display, or perform certain copyrighted works in facsimile or digital form for preservation, scholarship, and research purposes during the last twenty years of the copyright term.¹⁴⁸

Much to the disappointment of public domain activists, the Court also rejected the petitioners' "copyright bargain" theory,¹⁴⁹ the originality argument,¹⁵⁰ and the allegation that Congress sought to achieve a perpetual term on an "installment plan."¹⁵¹ As the Court explained, "[t]he First Amendment securely protects the freedom to make—or decline to make—one's own speech; it bears less heavily when speakers assert the right to make other people's speeches."¹⁵² The

of the copyright monopoly does not take from the public." Howard B. Abrams, *Copyright, Misappropriation, and Preemption: Constitutional and Statutory Limits of State Law Protection*, 1983 SUP. CT. REV. 509, 563 (1983). It "'strike[s] a definitional balance . . . by permitting free communication of facts while still protecting an author's expression.'" Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985) (quoting with approval, and reversing on other grounds, 723 F.2d 195, 203 (2d Cir. 1983)). For discussions of the idea-expression dichotomy, see generally Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 IND. L.J. 175 (1990); Robert A. Gorman, *Fact or Fancy? The Implications for Copyright*, 29 J. COPYRIGHT SOC'Y U.S.A. 560 (1982); Leslie A. Kurtz, *Speaking to the Ghost: Idea and Expression in Copyright*, 47 U. MIAMI L. REV. 1221 (1993); and Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321 (1989). See also Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936) ("[I]t is convenient to define such a use by saying that others may 'copy' the 'theme,' or 'ideas,' or the like, of a work, though not its 'expression.'"); Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) ("[T]here is a point in this series of abstractions where [creative works] are no longer protected, since otherwise the playwright could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended."); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 347-49 (1989) (discussing the economic rationale for the idea-expression dichotomy).

147. See 17 U.S.C. § 107; see also *Eldred*, 537 U.S. at 219-20; *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901) (articulating for the first time the concepts that evolved into the fair use doctrine). For comprehensive discussions of fair use, see generally the sources cited *supra* note 37.

148. See 17 U.S.C. § 108(h)(1) (2000); see also *Eldred*, 537 U.S. at 220.

149. See *Eldred*, 537 U.S. at 214-17.

150. See *id.* at 211.

151. See *id.* at 209 n.16; cf. *The Copyright Term Extension Act of 1995: Hearings on S. 483 Before the Senate Comm. on the Judiciary*, 104th Cong. 72 (1995) (remarks of Prof. Peter Jaszi) (discussing "perpetual copyright on the installment plan").

152. *Eldred*, 537 U.S. at 221; see also Symposium, *The Constitutionality of Copyright Term Extension: How Long Is Too Long*, 18 CARDOZO ARTS & ENT. L.J. 651, 701 (2000) [hereinafter *Constitutionality of Copyright Term Extension*] (remarks of Prof. Jane Ginsburg) (expressing doubt about whether the First Amendment "is about the freedom to make other people's speeches again for them").

Bono Act “does not oblige anyone to reproduce another’s speech against the carrier’s will. Instead, it protects authors’ original expression[s] from unrestricted exploitation.”¹⁵³ Although the Court ultimately “recognize[d] that the D.C. Circuit spoke too broadly when it declared copyrights ‘categorically immune from challenges under the First Amendment,’”¹⁵⁴ its *Eldred* decision might create substantial difficulties for future constitutional challenges to the copyright statute.

Thus, many commentators are concerned that the decision might create setbacks to potential challenges to other copyright statutes, such as the DMCA, the Uruguay Round Agreements Act,¹⁵⁵ or potential database protection legislation.¹⁵⁶ Some commentators, however, are more optimistic and suggested that *Eldred* might offer hope for potential constitutional litigants. At the end of the decision, the Court seemed to imply that further First Amendment inquiry may be necessary “when . . . Congress has . . . altered the traditional contours of copyright protection.”¹⁵⁷ Based on this wording, Professor Jack Balkin suggested in his weblog that the DMCA is constitutionally suspect, for the statute takes away such traditional public interest safeguards as the idea-expression dichotomy and the fair use privilege.¹⁵⁸

Notwithstanding this insightful observation, it is unclear whether the Court would find that the DMCA had altered “the traditional contours of copyright protection.” After all, Congress has enacted a lot of “nontraditional” legislation in the past. For example, the Semiconductor Chip Protection Act of 1984¹⁵⁹ created new sui generis

153. *Eldred*, 537 U.S. at 221.

154. *Id.* (quoting and affirming *Eldred v. Reno*, 239 F.3d at 375).

155. Pub. L. No. 103-465 §§ 511-514, 108 Stat. 4809, 4974-81 (1994) (codified as amended at 17 U.S.C. §§ 104A, 1101, and 18 U.S.C. § 2319A).

156. For discussions of the expediency and constitutionality of United States database protection legislation, see generally Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 BERKELEY TECH. L.J. 535 (2000); Marci A. Hamilton, *A Response to Professor Benkler*, 15 BERKELEY TECH. L.J. 605 (2000); Malla Pollack, *The Right to Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause, and the First Amendment*, 17 CARDOZO ARTS & ENT. L.J. 47 (1999); J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51 (1997); J.H. Reichman & Paul F. Uhlir, *Database Protection at the Crossroads: Recent Developments and Their Impact on Science and Technology*, 14 BERKELEY TECH. L.J. 793 (1999); and Peter K. Yu, *Evolving Legal Protection for Databases* (Dec. 2000), at <http://www.gigalaw.com/articles/2000/yu-2000-12.html>.

157. *Eldred*, 537 U.S. at 221.

158. See Jack M. Balkin, *Is the Digital Millennium Copyright Act Unconstitutional Under Eldred v. Ashcroft?* (Jan. 18, 2003), at http://balkin.blogspot.com/2003_01_12_balkin_archive.html#87596430.

159. 17 U.S.C. §§ 901-914 (2000).

protection for mask works that might otherwise fail to secure copyright protection.¹⁶⁰ The anti-bootlegging provision of the copyright statute affords protection to works that are not fixed within the definition of the Copyright Act.¹⁶¹ To allow the United States to comply with the World Trade Organization framework and the Agreement on Trade-Related aspects of Intellectual Property Rights (“TRIPS”), the Uruguay Round Agreements Act of 1994 added protection to materials that were withdrawn from the public domain.¹⁶² And most recently, Congress extended copyright-like protection to boat hull designs by passing the Vessel Hull Design Protection Act,¹⁶³ which reversed the 1989 Supreme Court decision of *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*¹⁶⁴ It is very unlikely that the Court will invalidate all of these statutes, just as it was unlikely that the Court would invalidate all the copyright statutes that were enacted since 1790.

III. INTERNATIONAL DEVELOPMENTS

In *Eldred*, the Court openly embraced the United States’ need to harmonize its copyright law with that of the European Union. As the Court observed, “a key factor”¹⁶⁵ in the passage of the Bono Act was the Council Directive 93/98/EEC of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights,¹⁶⁶ which instructed member states of the European Union to extend copyright protection for an additional twenty years.¹⁶⁷ Based on this observation, one might assume that the Bono Act successfully harmonized United States copyright law with that of the European Union. Unfortunately, the opposite is true. As Justice Breyer pointed out in his dissent, the United States and the European Union provide different copyright terms for a

160. *See id.*

161. *See* 17 U.S.C. § 1101 (2000); *cf.* *United States v. Moghadam*, 175 F.3d 1269 (11th Cir. 1999) (upholding the constitutionality of the federal anti-bootlegging statute).

162. Pub. L. No. 103-465 § 514, 108 Stat. 4809, 4976-81 (1994) (codified as amended at 17 U.S.C. § 104A).

163. Pub. L. No. 105-304 §§ 501-505, 112 Stat. 2860, 2905-18 (1998) (codified as amended at 17 U.S.C. §§ 1301-1332).

164. *See* 489 U.S. 141, 168 (1989) (invalidating the Florida statute that protects against the copying of boat hull designs).

165. *Eldred v. Ashcroft*, 537 U.S. 186, 205-06 (2003).

166. 1993 O.J. (L 290) 9 [hereinafter EC Copyright Term Directive]. *See generally* Silke von Lewinski, *The EC Duration Directive and Its Legislative Background*, in *EXTENDING MICKEY’S LIFE: ELDRED V. ASHCROFT AND THE COPYRIGHT TERM EXTENSION DEBATE* (Peter K. Yu ed., forthcoming 2004).

167. *See* EC Copyright Term Directive, *supra* note 166, recital (5), arts. 1(1), 1(3), 2(2).

large number of works,¹⁶⁸ including works-made-for-hire,¹⁶⁹ pre-1978 works,¹⁷⁰ and anonymous and pseudonymous works.¹⁷¹

Consider sound recordings, for example. In the United States, sound recordings are deemed works-made-for-hire and are protected for ninety-five years.¹⁷² In the European Union, recordings are protected for only fifty years.¹⁷³ Recently, many sound recordings—including popular 1950s albums by such artists as Maria Callas, Ella Fitzgerald, and Elvis Presley—have fallen into the public domain in Europe.¹⁷⁴ In response, the United States recording industry has been calling for stronger protection against parallel imports, those presumably cheaper foreign goods imported without the authorization of the copyright holders.¹⁷⁵ As the recording industry points out, it does not matter whether the recordings are in the public domain abroad; as long as they remain

168. See *Eldred*, 537 U.S. at 257-58 (Breyer, J., dissenting); see also William F. Patry, *The Copyright Term Extension Act of 1995: Or How Publishers Managed to Steal the Bread from Authors*, 14 CARDOZO ARTS & ENT. L.J. 661, 661-62 (1996) (arguing that the copyright term extension legislation would not create parity between European Union and United States authors); J.H. Reichman, *The Duration of Copyright and the Limits of Cultural Policy*, 14 CARDOZO ARTS & ENT. L.J. 625, 626 (1996) (arguing that the copyright term extension legislation “cannot be justified [as an exercise in] harmonization”). But see *Constitutionality of Copyright Term Extension*, *supra* note 152, at 690-91 (remarks of Prof. Arthur R. Miller) (arguing that the Bono Act will create parity between European Union and United States authors); *id.* at 698 (remarks of Prof. Jane Ginsburg) (arguing that the international trade rationale provides a stronger justification for copyright term extension than does the copyright rationale).

169. Compare 17 U.S.C. §§ 302(c), 304(a)-(b) (2000), with EC Copyright Term Directive, *supra* note 166, arts. 1(4), 2(2), 3(2)-(4).

170. Compare 17 U.S.C. § 304(a), with EC Copyright Term Directive, *supra* note 166, art. 1(1).

171. Compare 17 U.S.C. §§ 302(c), 304(a)-(b), with EC Copyright Term Directive, *supra* note 166, art. 1(3).

172. See 17 U.S.C. §§ 302(c), 304(a)-(b).

173. See EC Copyright Term Directive, *supra* note 166, art. 3.

174. See Anthony Tommasini, *Companies in U.S. Sing Blues as Europe Reprises 50's Hits*, N.Y. TIMES, Jan. 3, 2003, at A1.

175. For discussions of parallel imports, see generally Margreth Barrett, *The United States' Doctrine of Exhaustion: Parallel Imports of Patented Goods*, 27 N. KY. L. REV. 911 (2000); Carl Baudenbacher, *Trademark Law and Parallel Imports in a Globalized World—Recent Developments in Europe with Special Regard to the Legal Situation in the United States*, 22 FORDHAM INT'L L.J. 645 (1999); Shubha Ghosh, *An Economic Analysis of the Common Control Exception to Gray Market Exclusion*, 15 U. PA. J. INT'L BUS. L. 373 (1994); Shubha Ghosh, *Gray Markets in Cyberspace*, 7 J. INTELL. PROP. L. 1 (1999); and Seth Lipner, *Trademarked Goods and Their Gray Market Equivalents: Should Product Differences Result in the Barring of Unauthorized Goods from the U.S. Markets?*, 18 HOFSTRA L. REV. 1029 (1990).

protected in the United States, any unauthorized importation of these recordings would be an act of piracy.¹⁷⁶

Moreover, the United States copyright term does not match up with that of the other members of the international community, including its neighbor Canada. A recent dispute over *Peter Pan* demonstrates this disharmony. In 1904, Sir James Barrie wrote the play *Peter Pan*.¹⁷⁷ Two decades later, Sir Barrie awarded the play's copyright to the Great Ormond Street Hospital for Children in London.¹⁷⁸ A subsequent British statute extended the hospital's royalty rights in perpetuity.¹⁷⁹ British law notwithstanding, the play has fallen into the public domain in many countries, including many member states of the Berne Convention.¹⁸⁰ In those countries that adopted the Convention's statutory minimum—life of the author plus fifty years for works created by an individual author¹⁸¹—the copyright in *Peter Pan* would have expired in 1987, fifty years after Sir Barrie's death.

Canadian author J.E. Somma recently published the book *After the Rain: A New Adventure for Peter Pan*.¹⁸² Although the book was published in Canada, it is available to British and United States customers via the Internet. To preempt legal action in the United States by the British hospital, Somma filed suit in San Francisco in December 2002 seeking a declaratory judgment.¹⁸³ While she claimed that the characters in *Peter Pan* are now in the public domain, the British hospital contended that the United States Copyright Act had extended copyright protection for *Peter Pan* until 2023.¹⁸⁴ The court has yet to

176. See Tommasini, *supra* note 174 (“The import of those products would be an act of piracy.’ . . . ‘The industry is regretful that these absolutely piratical products are being released.” (quoting Neil Turkewitz, Executive Vice President International of the RIAA)).

177. See JANET DUNBAR, J.M. BARRIE: THE MAN BEHIND THE IMAGE 170 (1970).

178. See *id.* at 369, 392.

179. See Copyrights, Designs and Patents Act, 1988, ch. 48, § 301 (Eng.); see also E. P. SKONE JAMES ET AL., COPINGER AND SKONE JAMES ON COPYRIGHT § 1-2 (13th ed. 1991) (“[T]he 1988 Act has created a new perpetual non-copyright right . . . to receive royalties in respect of certain acts of exploitation of the play *Peter Pan* by Sir James Matthew Barrie, notwithstanding that the copyright in such work expired on December 31, 1987.”).

180. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised in *Paris July 24, 1971*, 25 U.S.T. 1341, 828 U.N.T.S. 221.

181. See *id.* art. 7(1); see also, e.g., Copyright Act, 1968, pt. III, div. 1, § 33(2) (Austl.) (adopting life-plus-fifty-years copyright term); Copyright Act, R.S.C., ch. C-42, § 6 (1985) (Can.) (same).

182. J.E. SOMMA, *AFTER THE RAIN: A NEW ADVENTURE FOR PETER PAN* (2002).

183. See Yu, *Mickey Mouse, Peter Pan, supra* note 104; Ian Stewart, “*Peter Pan*” Falls into Clutches of Lawyers: Author Challenges Copyright Ruling, *SAN DIEGO UNION-TRIB.*, Jan. 1, 2003, at A6.

184. See *id.*

rule on the case, and it is unclear whether Peter Pan can grow up in the way Somma fantasized.

Although the European Union and the United States agree on the need for strong international intellectual property protection, the progress of copyright harmonization has been held back by the different backgrounds and traditions of European and United States copyright laws. While European copyright law was developed from the author's right (*droit d'auteur*) tradition, which covers both personal and economic rights, American copyright law emerged from the utilitarian tradition, which emphasizes economic rights.¹⁸⁵

Consider, for example, the protection of moral rights.¹⁸⁶ In Europe, an author, as compared to a copyright holder, has a right to claim authorship of the work and to prevent the use of his or her name as the author of any work the author did not create.¹⁸⁷ The author also has the right to prevent any intentional distortion, mutilation, or modification of the work if such action would damage his or her reputation.¹⁸⁸ Similar protection is not available in the United States, except in works of visual arts that exist in limited quantity, such as paintings, drawings, sculptures, and still photographic images.¹⁸⁹

The United States and the European Union also disagree over many other copyright issues, including database protection,¹⁹⁰ fair use,¹⁹¹ the

185. See, e.g., PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 165-96 (1994); Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1, 5 (1997); Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 991-92 (1990); Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 5-16 (1985); Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 1-6 (1994).

186. For discussions of the tension between United States copyright and moral rights in Europe, see the sources cited *supra* note 185 and Geri J. Yonover, *The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 CARDOZO ARTS & ENT. L.J. 79, 86-100 (1996).

187. See Netanel, *supra* note 185, at 34-37 (discussing the right of attribution).

188. See *id.* at 37-45 (discussing the right of integrity).

189. See Visual Artists Rights Act, 17 U.S.C. § 106A (2000) (providing limited moral rights to visual art); see also CAL. CIV. CODE § 987 (West 1998) (California Art Preservation Act); N.Y. ARTS & CULT. AFF. LAW §§ 14.51-14.59 (McKinney 1984) (New York Artists' Authorship Rights Act).

190. For discussions of the expediency and constitutionality of United States database protection legislation, see generally the sources cited *supra* note 156.

191. See Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 87 (2000) ("[A]n international fair use doctrine does not currently exist in the international law of copyright. . . . [S]uch a doctrine is vital for effectuating traditional copyright policy in a global market for copyrighted works as well as for capitalizing on the benefits of protecting intellectual property under the free trade system."); Tyler G. Newby, Note, *What's Fair Here Is Not Fair Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law?*, 51 STAN. L. REV. 1633, 1642 (1999) (discussing the distinctiveness of the fair use doctrine under

first sale doctrine,¹⁹² the work-made-for-hire arrangement,¹⁹³ and protection against private copying in the digital environment.¹⁹⁴ In light of these differences, one might wonder if *Eldred* would change the tone of the international harmonization debate.

Although the *Eldred* Court openly—and to some extent uncharacteristically—embraced the need to harmonize United States copyright law with that of the international community, its ruling shows its strong and usual deference to Congress on the issue.¹⁹⁵ Such deference is alarming, for it might make harmonization even more difficult. While Congress, on occasion, might harmonize its laws with those of the European Union or the international community, most of the time it does not.¹⁹⁶ Due to its strong interest in exporting intellectual property-based products, the United States generally offers stronger intellectual property protection than countries abroad.¹⁹⁷ By giving

United States copyright law). *Compare* *Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510, 1520 (9th Cir. 1992) (holding that reverse engineering for the purpose of gaining an understanding of the unprotected functional elements of a computer program qualifies as fair use), with Council Directive 91/250/EEC of 14 May 1991 on the Legal Protection of Computer Programs art. 6, ¶ 1, 1991 O.J. (L 122) 42 (permitting reverse engineering only for the purpose of “obtain[ing] the information necessary to achieve the interoperability of an independently created computer program with other programs”).

192. See Vincent Chiappetta, *The Desirability of Agreeing to Disagree: The WTO, TRIPS, International IPR Exhaustion and a Few Other Things*, 21 MICH. J. INT’L L. 333, 335 (2000) (discussing the disagreement over the exhaustion issue during the negotiation of the TRIPS Agreement).

193. See Reichman, *supra* note 168, at 631-33 (arguing that “[a] more substantial discrepancy between American copyright law and that of other Berne Union countries stems from the greater reliance of the former on the work-made-for-hire doctrine in general and on the principle of corporate authorship in particular”).

194. *Compare, e.g.*, Audio Home Recording Act of 1992, 17 U.S.C. § 1002(c) (2000) (prohibiting manufacture, importation, and distribution of devices whose primary purpose or effect is to circumvent copy-protection technology), with Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, art. 6(2), 2001 O.J. (L 167) 10, 17 (requiring member states to provide “adequate legal protection” against the “manufacture, import, distribution, sale, rental, advertisement . . . , or possession” of devices with the primary purpose or effect of circumvention or which “are promoted, advertised, or marketed for the purpose of circumvention”).

195. See Hamilton, *supra* note 135, at 321-22, 335-46 (discussing how rare it is for the United States Supreme Court to address constitutional issues in copyright cases).

196. See Peter K. Yu, *The Harmonization Game: What Basketball Can Teach About Intellectual Property and International Trade*, 26 FORDHAM INT’L L.J. 218, 226-32 (2003).

197. The United States was instrumental in putting intellectual property on the international trade agenda. See Assafa Endeshaw, *A Critical Assessment of the U.S.-China Conflict on Intellectual Property*, 6 ALB. L.J. SCI. & TECH. 295, 337 (1996) (noting the United States’ success “in placing intellectual property on an arguably ‘international’ pedestal”); Reichman & Samuelson, *supra* note 156, at 97 (“Universal intellectual property standards embodied in the TRIPS Agreement had become enforceable within the framework of a World Trade Organization, largely as the result

Congress strong deference, the Court therefore encourages lower courts to uphold intellectual property statutes, even if they would isolate the country from the global community or if they would violate international norms.

A case in point is the Fairness in Music Licensing Act of 1998 (“FIMLA”),¹⁹⁸ which the Court cited with approval in *Eldred*.¹⁹⁹ Enacted as a compromise between copyright holders and small business enterprises,²⁰⁰ the FIMLA amended section 110(5) of the United States Copyright Act by exempting from royalties those restaurants, bars, and retail stores that use “homestyle” audio and video equipment to play broadcast music.²⁰¹ In 1999, a WTO dispute settlement panel found the statute in violation of the United States’ obligations under the TRIPS Agreement.²⁰² In particular, the statute violated articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention as incorporated into the TRIPS Agreement.²⁰³ In view of this violation, the panel recommended that “the Dispute Settlement Body request the United States to bring [the FIMLA] into conformity with its obligations under the TRIPS Agreement.”²⁰⁴

of sustained pressures by a coalition of powerful manufacturing associations in Europe, the United States, and Japan.” (footnote omitted). To protect its economic interests, the country constantly has applied pressure to induce foreign countries, in particular less developed countries, to reform their intellectual property regimes. See 19 U.S.C. §§ 2242(a), 2412(b)(1)(A) (2000) (granting the United States Trade Representative power to identify and investigate foreign nations that do not provide adequate intellectual property protection or that deny American intellectual property goods fair or equitable market access); Kim Newby, *The Effectiveness of Special 301 in Creating Long Term Copyright Protection for U.S. Companies Overseas*, 21 SYRACUSE J. INT’L L. & COM. 29, 39-50 (1995) (discussing the history and effectiveness of Special 301 actions in Taiwan, China, and Thailand); Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-first Century*, 50 AM. U. L. REV. 131, 140-54 (2000) (discussing the United States’ success in using section 301 sanctions to pressure China to reform its intellectual property regime).

198. Pub. L. No. 105-298, §§ 201-207, 112 Stat. 2830-34 (1998) (codified in part as amended at 17 U.S.C. §§ 101, 110(5)(B), 504, 512, 513 (2000)).

199. See *Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003).

200. See Laurence R. Helfer, *World Music on a U.S. Stage: A Berne/TRIPS and Economic Analysis of the Fairness in Music Licensing Act*, 80 B.U. L. REV. 93, 102 (2000) (noting that the FIMLA “split the difference between business interests who wanted a total exemption for secondary uses of broadcast music and [performing rights organizations] and copyright owners who opposed any relaxation of the homestyle exemption”).

201. See 17 U.S.C. § 110(5)(B) (2000).

202. United States—Section 110(5) of the US Copyright Act: *Report of the Panel*, ¶ 7.1(b), WT/DS160/R (June 15, 2000) [hereinafter WTO Panel Report] (finding that the FIMLA violated the TRIPS Agreement), available at http://www.wto.org/english/tratop_e/dispu_e/1234da.pdf. For excellent discussions of the dispute, see generally Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733 (2001); and Helfer, *supra* note 200.

203. See WTO Panel Report, *supra* note 202, ¶ 7.1(b).

204. *Id.* ¶ 7.2. Ironically, despite a negative finding in the WTO panel decision, the United States refused to amend its copyright law and, instead, entered into an agreement with the European

In the years to come, it will be interesting to see how the “harmonization game” will play out. Will the United States change its laws in an effort to harmonize them with those of foreign countries? Or will other countries change their laws in an effort to harmonize them with American law? If there is no harmonization, the entertainment industry might face some new challenges from its foreign competitors.

IV. THE CHANGING TONE OF THE COPYRIGHT WAR

So far, the entertainment industry seems to be winning the war. As commentators have noted, the MP3.com and Napster litigation signified the end of what had been termed the “Wild, Wild West” era of the Internet.²⁰⁵ The copy-protection technologies and the DMCA also provide the industry with the needed self-help protection that allows it to adapt to the new environment. However, if one looks further, the Wild Wild West is even wilder than it was two years ago. True, the recording industry is no longer dealing with MP3.com and Napster. However, a whole host of engines and services—such as Madster (formerly Aimster), KaZaA, AudioGalaxy, Morpheus/MusicCity, Grokster, iMesh, Filetopia, BearShare, BitTorrent, and LimeWire—has emerged, and these “successors” can be used for the very same purposes as Napster.

In fact, from the industry’s perspective, these engines are even more problematic. Unlike MP3.com and Napster, many of these engines and services do not have centralized servers.²⁰⁶ Rather, they allow users

Union to submit to binding arbitration as permitted under article 25 of the Dispute Settlement Understanding. See Phil Hardy, *WTO Arbitrators Rule That US Should Pay \$1.4m a Year to EU Copyright Owners*, MUSIC & COPYRIGHT, Nov. 7, 2001. In November 2001, the arbitration panel awarded EU copyright holders about \$1.4 million per year for lost revenues caused by the FIMLA. See United States—Section 110(5) of the US Copyright Act: Recourse to Arbitration Under Article 25 of the DSU ¶5.1, WT/DS160/ARB25/1 (Nov. 9, 2001), available at http://www.wto.org/english/tratop_e/dispu_e/160arb_25_1_e.pdf. Although questions remain as to how the United States government will fund the settlement and distribute the penalty money, the manner in which this dispute was resolved will undeniably have long-lasting implications for the development of the dispute resolution mechanism under the WTO. For discussion of events occurring after the arbitration decision, see *International Developments*, ENT. L. REP., Mar. 2002; *Settlement Between European Union and United States of WTO Fairness in Music Licensing Case Appears to Have Fallen Apart*, ENT. L. REP., Feb. 2002.

205. See, e.g., Marci A. Hamilton, *The Distant Drumbeat: Why the Law Still Matters in the Information Era*, in PETER K. YU, *THE MARKETPLACE OF IDEAS: TWENTY YEARS OF CARDOZO ARTS & ENTERTAINMENT LAW JOURNAL* xiv (2001); Marci Hamilton, *Bringing the People into the Copyright Arena: How the New Awareness of Copyright Law Issues Can Help in Guarding the Public's Domain*, FINDLAW'S WRIT (Mar. 29, 2001), at <http://writ.news.findlaw.com/hamilton/20010329.html> [hereinafter Hamilton, *Copyright Arena*].

206. See Riehl, *supra* note 50, at 1773-79 (describing the architecture of gnutella-based engines).

to transfer files among various locations. Some of them, like Freenet, also allow users to remain anonymous.²⁰⁷ Thus, enforcement has become a major problem, and the outcome of these battles becomes even harder to predict.²⁰⁸ The industry forced Napster to shut down its server, but there is little the industry could do to deal with gnutella and its uncountable successors.

Moreover, the transnational nature of the Internet might create jurisdictional barriers that curtail the industry's litigation efforts. The KaZaA litigation, for example, involves first Estonian developers, then a Dutch company, and now Australian business executives in a company incorporated in the South Pacific tax haven of Vanuatu.²⁰⁹ To make things even more complicated, foreign countries might have different laws, and their courts might come to different conclusions even when they apply identical laws.²¹⁰ Unless the recording industry is willing to go after all the users (which would likely result in an enforcement fiasco and a publicity disaster), piracy will remain rampant.

In recent years, the *Eldred* litigation and the public domain, free software, and open source movements have created a tremendous momentum toward a major change in copyright policy. As Professor Marci Hamilton put it, if the consumers "were to ally . . . , and organize, [with the open sourcers] together they could be a powerful movement."²¹¹ Thus, regardless of how disappointing one would find the decision, *Eldred* might not be what Professor Siva Vaidhyanathan called the "'Dred Scott case for culture."²¹² After all, the case, as the Court stated in the opening sentence, is about the scope of Congress's power

207. See *id.* at 1779-87 (describing the architecture of Freenet).

208. Compare *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1046 (C.D. Cal. 2003) (upholding the legality of Grokster and Morpheus/MusicCity), with the Napster litigation as discussed *supra* notes 50-75 and accompanying text.

209. See Ariana Eunjung Cha, *File Swapper Eluding Pursuers*, WASH. POST, Dec. 21, 2002, at A1. But see Michael Geist, *In Web Disputes, U.S. Law Rules the World*, TORONTO STAR, Feb. 24, 2003, at D1 (noting that United States laws were applied in most Internet disputes).

210. See Yu, *supra* note 196, at 232-41; see also COMM'N ON INTELLECTUAL PROPERTY RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY: REPORT OF THE COMMISSION ON INTELLECTUAL PROPERTY RIGHTS 114 (2003) (noting that "it is not uncommon for different courts in Europe, even when applying identical law, to come to different conclusions on whether a patent is or is not obvious"); Patti Waldmeir, *Material Published on the Internet and Thus Accessible Anywhere in the World Is Increasingly Being Challenged Under the Laws of Individual Nation States*, FIN. TIMES (London), Dec. 16, 2002, at 19 (noting the increasing willingness of national courts to assert jurisdiction over activities conducted on the Internet).

211. Hamilton, *supra* note 104.

212. Siva Vaidhyanathan, *After the Copyright Smackdown: What Next?* (Jan. 17, 2003), at <http://www.salon.com/tech/feature/2003/01/17/copyright/print.html>.

“to prescribe the duration of copyrights.”²¹³ It is not about whether the public can use copyrighted works during the prescribed period.

Copyright has always been a balancing act. Indeed, the public interest safeguards—such as the idea-expression dichotomy, the first sale doctrine, and the fair use privilege—are “just as important as the grant of the right itself.”²¹⁴ Thus, any change in one area of the copyright system could easily be offset by an opposite change in another area of the system. For example, increased copyright protection could be offset by an expanded reading of the fair use provision or the miscellaneous exemptions contained in the Copyright Act. In fact, some lower courts—especially those sympathetic to the *Eldred* cause—might be willing to adjust the existing copyright scheme in an effort to offset the effects of an extended copyright term.²¹⁵

Thanks to the MP3.com, Napster, *Eldred*, and KaZaA litigation, public awareness of intellectual property issues has increased considerably.²¹⁶ In the past, copyright law was considered a complicated issue that was only of primary interest and concern to intellectual property lawyers, legal scholars, technology developers, and copyright holders.²¹⁷ Today, members of the public increasingly see it as something that affects their daily lives.²¹⁸ As political support grew, legislative proposals that placed a heavier emphasis on the protection of the public domain surfaced. For example, Congressman Richard Boucher introduced the Digital Media Consumers’ Rights Act to restore the historical balance in copyright law and to ensure proper labeling of copy-protected CDs.²¹⁹ Senator Sam Brownback circulated among consumer groups and within the Senate a draft bill requiring copyright holders to file suits before obtaining the identities of alleged infringers

213. *Eldred v. Ashcroft*, 537 U.S. 186, 192 (2003).

214. JAMES BOYLE, SHAMANS, SOFTWARE & SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 138 (1996).

215. See *Constitutionality of Copyright Term Extension*, *supra* note 152, at 701 (remarks of Prof. Jane Ginsburg) (expressing concern that, if the Court were to uphold the Bono Act, the decision might invite lower courts to further adjust the existing copyright scheme in an effort to offset the effects of a longer copyright term).

216. See, e.g., Hamilton, *Copyright Arena*, *supra* note 205.

217. See, e.g., Jane C. Ginsburg, *Can Copyright Become User Friendly?*, 25 COLUM. J.L. & ARTS 71, 71 (2001) (arguing that “[c]opyright law is too complicated and counterintuitive . . . [and] has been written by and for copyright lawyers”).

218. See Hamilton, *Copyright Arena*, *supra* note 205.

219. See Digital Media Consumers’ Rights Act of 2003, H.R. 107, 108th Cong.

from Internet service providers.²²⁰ Most recently, Reps. Zoe Lofgren and John Doolittle introduced the Public Domain Enhancement Act, which, if enacted, would require copyright holders to pay a one-dollar fee to maintain their copyrights fifty years after the original publication of their works.²²¹

Scholars and commentators also have paid increasing attention to access issues and have proposed safeguards to limit copyright protection. For example, Professor Ann Bartow advocated the adaptation of “pre-existing real space copyright use norms to electronic formats as a mechanism for protecting the legitimate interests of copyright owners without depriving individuals of the customary real space access to information provided by bound books and periodicals.”²²² Professor Yochai Benkler advocated the use of Justice Louis Brandeis’s concept that information should be “free as the air to common use” to limit property rights in information products.²²³ Professor Julie Cohen advocated the recognition of the right to read anonymously.²²⁴ Professor Niva Elkin-Koren argued that users must be allowed “to do the same things they are able to do in a non-digitized environment.”²²⁵ Professor Marci Hamilton noted the need to construct a “free use zone” that will “mak[e] explicit what is already accepted practice in a hard copy universe—that copyright owners do not have rights to prohibit individuals from browsing and borrowing their works.”²²⁶ Professor Lawrence Lessig called for significant term limits to copyright protection.²²⁷ And Professor Diane Zimmerman emphasized the

220. See Consumers, Schools, and Libraries Digital Rights Management Awareness Act of 2003, S. 1621, 108th Cong.; see also Farhad Manjoo, *Can Anyone Stop the Music Cops?*, (June 17, 2003), at http://archive.salon.com/tech/feature/2003/06/17/brownback_bill/.

221. See Public Domain Enhancement Act § 3(c), H.R. 2601, 108th Cong. (2003); see also Brian Krebs, *Bill Seeks to Loosen Copyright Law's Grip* (June 25, 2003), at <http://www.washingtonpost.com/wp-dyn/articles/A32488-2003Jun25.html>.

222. Ann Bartow, *Electrifying Copyright Norms and Making Cyberspace More Like a Book*, 48 VILL. L. REV. 13, 18 (2003).

223. Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 355 (1999) (quoting Int'l News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting)).

224. See Cohen, *supra* note 22, at 1003-04.

225. Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215, 277 (1996).

226. Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT'L L. 613, 631 (1996).

227. See, e.g., LESSIG, *supra* note 27, at 251 (proposing a regime whereby a published work will be protected for a term of five years once registered, the registration can be renewed fifteen times, and the work will fall into the public domain if the registration is not renewed); Lawrence Lessig, *Protecting Mickey Mouse at Art's Expense*, N.Y. TIMES, Jan. 18, 2003, at A17 (proposing a scheme whereby copyright holders will have to pay a tax fifty years after a work is published and

importance of providing exceptions for scholarship and scientific research.²²⁸

Finally, some citizens might consider civil disobedience in the name of justice (or in the name of poor Mickey, who—as noted by a humor columnist—is denied sex, drugs, and cigarettes by its copyright holder and the Bono Act).²²⁹ Shortly after the Court handed down the *Eldred* decision, strong, bitter reactions emerged from supporters of the public domain movement.²³⁰ While many believed the Court had sold them out to private corporations, like Disney, the more radical ones advocated civil disobedience as a counteracting strategy.²³¹ In fact, long before the public debate on copyright term extension heated up, visionary commentators had considered MP3s “a kind of protest movement against record companies, which many artists hate because they control access to the music market.”²³² Nonetheless, civil disobedience is generally discouraged, regardless of how strong one believes in the need to protect the public domain and maintain balance between copyright holders and the users at large; indeed, that was the reason why *Eldred* was brought in the first place.²³³

that the work will fall into the public domain if the copyright holder fails to pay the tax for three years in a row); *The Public Domain Enhancement Act FAQ*, at http://www.eldred.cc/ea_fa.html (last visited Mar. 29, 2004) (discussing the scheme).

228. See Diane Leenheer Zimmerman, *Copyright in Cyberspace: Don't Throw Out the Public Interest with the Bath Water*, 1994 ANN. SURV. AM. L. 403, 405 (noting the need to “maintain[] some approximation of our current cheap and simple access to copyrighted works for research, scholarship and pleasure”); see also Reichman & Samuelson, *supra* note 156, at 113-24 (discussing the adverse impact of sui generis database protection on scientific research and education); Reichman & Uhler, *supra* note 156, at 796-821 (discussing the adverse impact of database protection laws on scientific, technical, and educational users of factual data and information).

229. See Jesse Walker, *Mickey Mouse Clubbed*, REASONONLINE (Jan. 17, 2003), at <http://reason.com/links/links011703.shtml>.

230. See, e.g., Ken Paulson, *Copyright Extensions Put Profits Ahead of the Public* (Jan. 26, 2003), at <http://firstamendmentcenter.org/commentary.aspx?id=2205>.

231. See Lord Macaulay, Speech Delivered in the House of Commons (Feb. 5, 1841) (cautioning that an ill-advised copyright law eventually would be “repealed by piratical booksellers”), reprinted in EXTENDING MICKEY’S LIFE: *ELDRED V. ASHCROFT AND THE COPYRIGHT TERM EXTENSION DEBATE* (Peter K. Yu ed., forthcoming 2004); Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 869-70 (2001) (suggesting that “civil disobedience may offer the only effective means for ordinary consumers to express their political discontent with copyright’s excessive scope”). But see Vaidhyanathan, *supra* note 212 (discouraging acts of civil disobedience by noting that “[w]hile disobedience might be more fun, the power of civil discourse remains” in the post-*Eldred* era).

232. *The Big Five Hit the Web*, ECONOMIST, May 8-14, 1999, at 63.

233. See Lawrence Lessig, *Copyright’s First Amendment*, 48 UCLA L. REV. 1057, 1066 (2001).

V. WHAT SHOULD THE ENTERTAINMENT INDUSTRY DO?

A. Stop Fighting Multi-front Wars

First of all, the entertainment industry should stop its futile attempt to fight multi-front wars. Today, because of the emergence of digital technology and the Internet, peer-to-peer networks have caused major headaches for artists, songwriters, photographers, publishers, film producers, software developers, and other copyright holders. To fight pirates and protect its economic interests, the entertainment industry has deployed many different battle strategies, including lobbying, litigation, self-help, education, and licensing.²³⁴

The industry was winning in the beginning, but its latest efforts have become increasingly futile, disorganized, and counterproductive. Although the industry initially boasted about its latest encryption technologies,²³⁵ those technologies were cracked,²³⁶ and the industry has had to resort to other low-technology or unconventional protective measures. For example, when Epic Records distributed review copies of Tori Amos, Pearl Jam, and AudioSlave albums in 2002, the label sent them inside portable CD players that had been glued shut.²³⁷ What an innovative protective technology! Likewise, before Madonna released her new single, *American Life*, the label started circulating a spoofed version of the song on the Internet, featuring the singer saying ““What the f__ do you think you’re doing?””²³⁸ Unfortunately for the label, that strategy backfired when a hacker made MP3 copies of every song on the album available for download when the hacker took over Madonna’s website.²³⁹ Angry fans also responded by remixing Madonna’s tirade

234. See *supra* Part I (discussing the various battle strategies).

235. For example, the Secure Digital Music Initiative Foundation, an association of electronic companies involved in designing copy-protection technologies, issued a public challenge in September 2000, offering ten thousand dollars to those who successfully cracked their proposed copy-protection technologies. SDMI described its public challenge in a press release as follows:

So here’s the invitation: Attack the proposed technologies. Crack them.

By successfully breaking the SDMI protected content, you will play a role in determining what technology SDMI will adopt. And there is something more in it for you, too. If you can remove the watermark or defeat the other technology on our proposed copyright protection system, you may earn up to \$10,000.

SDMI, *An Open Letter to the Digital Community* (Sept. 6, 2000), available at http://www.sdmi.org/pr/OL_Sept_6_2000.htm.

236. See *supra* note 25.

237. See James Sullivan, *A Sticky Situation*, S.F. CHRON., Oct. 27, 2002, at 31; Josh Tyrangiel, *Pirates, Beware: This CD Stays Put*, TIME MAG., Oct. 14, 2002, at 27.

238. *Id.* at 66.

239. See *id.*

with other songs.²⁴⁰ Some websites even held contests for these remixes.²⁴¹

In April 2003, the recording industry won *Recording Industry Association of America v. Verizon Internet Services, Inc.*,²⁴² requiring the Internet service provider to hand over names of individuals whom the industry accused of illegally trading music.²⁴³ (The United States Court of Appeals for the District of Columbia Circuit subsequently overruled that decision.²⁴⁴) However, on the next day, it lost an important case on *Grokster and Morpheus/Music City*, risking an unfavorable precedent upholding the legality of peer-to-peer file-sharing technology.²⁴⁵

In the same month, the major record companies filed high-profile lawsuits against students at Princeton University, Michigan Technological University, and Rensselaer Polytechnic Institute, seeking billions of dollars in damages.²⁴⁶ Yet, they created an anti-climax when they settled with the student defendants for meager amounts.²⁴⁷ More ironically, one student was able to raise his entire twelve-thousand-dollar fine in less than six weeks over the Internet, while another was working his way to complete a similar feat.²⁴⁸

240. See Nik Bonopartis, *Firms Say the Swap Must Stop*, POUGHKEEPSIE J. (N.Y.), July 16, 2003, at 1A.

241. See *id.*

242. 257 F. Supp. 2d 244 (D.D.C. 2003), *rev'd*, 351 F.3d 1229 (D.C. Cir. 2003).

243. See *id.* at 246, 275.

244. See *Recording Indus. Ass'n of Am. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003).

245. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029 (C.D. Cal. 2003).

246. See Frank Ahrens, *4 Students Sued Over Music Sites*, WASH. POST, Apr. 4, 2003, at E1; Katie Dean, *RIAA Hits Students Where It Hurts*, WIRED NEWS (Apr. 5, 2003), at <http://www.wired.com/news/digiwood/0,1412,58351,00.html> (reporting the RIAA's charges "that one network operator distributed 27,000 music files, while the other three students ran networks offering 500,000 music files, 650,000 files and over 1 million files"); Jon Healey, *Students Hit with Song Piracy Lawsuits*, L.A. TIMES, Apr. 4, 2003, at C1. For the individual complaints, see Compl., *Atlantic Recording Corp. v. Jordan*, No. 03-CV-0417 (N.D.N.Y. Apr. 3, 2003), available at <http://news.findlaw.com/hdocs/docs/riaa/arcjordan40303cmp.pdf>; Compl., *Atlantic Recording Corp. v. Nievelt*, No. 2:03CV0064 (W.D. Mich. Apr. 3, 2003), available at <http://news.findlaw.com/hdocs/docs/riaa/arconievelt40303micmp.pdf>; Compl., *Atlantic Recording Corp. v. Peng*, No. 03-1441 (SRC) (D.N.J. Apr. 3, 2003), available at <http://news.findlaw.com/hdocs/docs/riaa/arcopeng40303njcmp.pdf>; *Atlantic Recording Corp. v. Sherman*, No. 03-CV-0416 (N.D.N.Y. Apr. 3, 2003), available at <http://news.findlaw.com/hdocs/docs/riaa/arcosherman40303nycmp.pdf>.

247. Jon Healey & P.J. Huffstutter, *4 Pay Steep Price for Free Music*, L.A. TIMES, May 2, 2003, at § 1, 1 (reporting that students will pay the recording industry damages in the range of \$12,000 to \$17,500).

248. See Jefferson Graham, *Fined Student Gets Donations to Tune of \$12K*, USA TODAY, June 25, 2003, at 4D.

More recently, the recording industry launched a mass litigation campaign against file swappers who made large number of songs available on peer-to-peer networks.²⁴⁹ Since September 2003, the recording industry has filed several rounds of lawsuits, suing more than two thousand individuals suspected of swapping music illegally via peer-to-peer networks.²⁵⁰ Understandably, the industry needs to protect artists aggressively against Internet pirates. However, its aggressive tactics might result in public backlashes while causing collateral damages, such as invasion of privacy.²⁵¹

In fact, the RIAA has had to apologize for issuing erroneous take-down notices. In one episode, it sent a notice to Speakeasy, a national broadband provider, alleging that one of Speakeasy's subscriber sites had illegally "offer[ed] approximately 0 sound files for download."²⁵² Approximately zero! In another episode, the industry—or, to be more precise, its automated web-crawlers—confused Usher the rhythm-and-blues performer with Peter Usher, a retired astronomy and astrophysics professor at Pennsylvania State University who stored on the departmental server an *a cappella* song about a gamma ray satellite.²⁵³ The RIAA later withdrew, and apologized for, the faulty copyright notice, which it attributed to a temporary employee.²⁵⁴ The trade group

249. See Jefferson Graham, *Swap Songs? You May Be on Record Industry's Hit List*, USA TODAY, July 22, 2003, at 1D.

250. For reports of the recording industry's lawsuits, see Amy Harmon, *The Price of Music: The Overview*, N.Y. TIMES, Sept. 9, 2003, at A1 (261 lawsuits); *Record Industry Files 80 More Lawsuits*, N.Y. TIMES, Oct. 31, 2003, at C6 (80 lawsuits); *Music Industry Files More Suits*, N.Y. TIMES, Dec. 4, 2003, at C9 (41 lawsuits); John Schwartz, *Music Industry Returns to Court, Altering Tactics on File Sharing*, N.Y. TIMES, Jan. 22, 2004, at C1 (532 lawsuits); *More Downloading Suits by Recording Industry*, N.Y. TIMES, Feb. 18, 2004, at C3 (531 lawsuits); John Schwartz, *More Lawsuits Filed in Effort to Thwart File Sharing*, N.Y. TIMES, Mar. 24, 2004, at C4 (532 lawsuits); Brock Read, *Record Companies Sue People at 14 Colleges for Alleged Music Piracy*, CHRON. HIGHER EDUC., May 7, 2004, at A33 (477 lawsuits).

251. See Sonia K. Katyal, *A War on CD Piracy, a War on Our Rights*, L.A. TIMES, June 27, 2003, at § 2, 17.

252. Declan McCullagh, *RIAA Apologizes for Erroneous Letters*, CNET NEWS.COM (May 13, 2003), at <http://news.com.com/2100-1025-1001319.html> (quoting the RIAA's form letter).

253. As Declan McCullagh described:

The department has on its faculty a professor emeritus named Peter Usher whose work on radio-selected quasars the FTP site hosted. The site also had a copy of an a capella song performed by astronomers about the Swift gamma ray satellite, which Penn State helped to design.

The combination of the word "Usher" and the suffix ".mp3" had triggered the RIAA's automated copyright crawlers.

Declan McCullagh, *RIAA Apologizes for Threatening Letter*, CNET NEWS.COM, (May 12, 2003), at http://news.com.com/2100-1025_3-1001095.html.

254. See *id.*

also added that it would send Professor Usher an Usher CD and T-shirt “in appreciation of his understanding.”²⁵⁵

So far the entertainment industry has tried many different strategies to combat piracy.²⁵⁶ Yet, most of them were ill-conceived, making the industry’s efforts look hurried, confused, disorganized, and somewhat desperate. Instead of directing its energy toward the pirates, the industry has been fighting battles everywhere—against telecommunications service providers, consumer electronics developers, new media entrepreneurs, corporate employers, universities, lawyers, college researchers, hackers and cryptographers, students, legal scholars, civil liberty organizations, and ultimately consumers. What began as a war on piracy has now become a war against the whole world. No country has ever won a war by fighting battles on all fronts.²⁵⁷ Not Napoleon’s France. Not Hitler’s Germany. The entertainment industry should take heed of this aphorism. Rather than using every weapon in its arsenal, it might be well advised to reconsider *where* and *how* it fights its battles.

B. Bridge the Copyright Divide

A robust and dynamic copyright regime requires support, and problems arise when support is lacking. Today, a *copyright divide* exists between those who have stakes in the copyright regime and those who do not.²⁵⁸ While the stakeholders are eager to protect what they have, the nonstakeholders neither understand nor believe in the copyright system. As a result, the stakeholders and nonstakeholders battle against each other over the change and retention of the status quo. Unless the nonstakeholders understand why copyright needs to be protected and until they become stakeholders or potential stakeholders, they will not be eager to comply with copyright laws and consent to stronger copyright protection.

To help bridge the copyright divide, the entertainment industry can focus its remedial efforts in four areas. First, the industry must educate the nonstakeholders about the copyright system. It needs to make the nonstakeholders understand what copyright is, how copyright is protected, and why they need to protect such property. The industry also

255. *Id.*

256. *See Entertainment Industry Widens War*, USA TODAY, Feb. 13, 2003, at D9.

257. *Cf.* ERIC HOBBSBAWM, ON THE EDGE OF THE NEW CENTURY 49 (Allan Cameron trans., 2000) (cautioning that it is “a dangerous gamble” and “a mistake” for a single power, however great and powerful it is, to control world politics).

258. *See generally* Yu, *supra* note 100; Peter K. Yu, *Four Misconceptions of Copyright Piracy*, 26 LOY. L.A. INT’L & COMP. L. REV. (forthcoming 2003).

needs to show the nonstakeholders the benefits of copyright protection—how such protection can help them and how the lack thereof can hurt them. As a recent study by the National Research Council stated, “[a] better understanding of the basic principles of copyright law would lead to greater respect for this law and greater willingness to abide by it, as well as produce a more informed public better able to engage in discussions about intellectual property and public policy.”²⁵⁹

Second, the industry needs to transform the nonstakeholders into stakeholders or potential stakeholders by helping them develop a stake in the system and understand how they can get their products protected and royalties paid. So far, the industry has a difficult time explaining why the general public has a stake in the copyright system. Although the industry has repeatedly extolled the benefits of strong copyright protection and how such protection can induce artists to create music, movies, and other entertainment products, the industry’s rhetoric was lost on most consumers.

Fortunately, the industry has begun to adopt other strategies to attract consumers. For example, some software manufacturers offer post-sale benefits that are not available to purchasers of counterfeit goods, such as warranty service, replacement part guarantees, free upgrades, and contests or giveaways.²⁶⁰ Some music publishers also include special photos, files, and interviews on password-protected websites that are made only accessible to purchasers of legitimate CDs.²⁶¹ Some courageous publishers even compete directly against the pirates by upgrading the quality of their products, thus making their reproduction more expensive (and less profitable for the pirates).²⁶²

259. DIGITAL DILEMMA, *supra* note 18, at 16-17; *see also* INFO. INFRASTRUCTURE TASK FORCE, *supra* note 18, at 208 (outlining the controversial “just say yes” campaign to licensing).

260. *See* Doris Estelle Long, *China’s IP Reforms Show Little Success*, IP WORLDWIDE, Nov.-Dec. 1998, at 6 (arguing that post-sale benefits would create incentives for the Chinese to buy legitimate products).

261. For example, Gracenote CDKey allows CD owners to unlock bonus tracks, exclusive links, contests, and other bonus content. *See What is CDKey?*, at <http://www.cdkey-promotions.com/cdkeyabout.html> (last visited Mar. 29, 2004).

262. As one pair of commentators recounted:

One joint venture publishing company which publishes popular comics chose to compete directly against their pirates. Beyond wrapping the magazine in hard-to-reproduce plastic, the company has continuously upgraded the quality of the comic’s graphics and paper relative to pirate editions, and included inexpensive, educational prizes with each issue. These gambits have worked. Despite being significantly more expensive than the pirated version, this popular comic book has seen increasing subscriptions and readership, and the company is planning to expand its operations.

Warner Brothers's recent change of strategy toward Harry Potter fan sites provides an illustrative example. In December 2000, Warner Brothers threatened to sue a fifteen-year-old English schoolgirl, Claire Field, over her website and domain name, www.harrypotterguide.co.uk.²⁶³ In response, Field and others organized a boycott of Harry Potter merchandise in protest through another website, potterwar.org.uk.²⁶⁴ The studio eventually backed down.²⁶⁵ Since the incident, Warner Brothers changed its position toward fan sites. Instead of antagonizing Harry Potter fans, Warner Brothers now tries to bring them into the fold. To do so, the studio created a Webmaster Community page on its official site,²⁶⁶ allowing fans to enroll their unofficial sites and to download official banners, shields, and seals.²⁶⁷

Third, the industry must help develop intellectual property laws and strengthen enforcement mechanisms. Today, although most countries have intellectual property laws that conform to international standards, very few have adequate mechanisms to enforce those laws.²⁶⁸ Thus, the industry needs to work with the United States government and policymakers in those countries to strengthen intellectual property laws and develop effective enforcement mechanisms.

While the United States government had used coercive tactics in the past to induce, if not compel, foreign countries to change their laws in the American image, past experience suggests that such changes would not be complete and sustainable until those countries consider

John Donaldson & Rebecca Weiner, *Swashbuckling the Pirates: A Communications-Based Approach to IPR Protection in China*, in *CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE* 409, 432 (Mark A. Cohen et al. eds., 1999).

263. See *Harry and the Web Wars*, *BOSTON GLOBE*, Mar. 25, 2001, at E6.

264. The protest website is no longer accessible. For more information about the history of the protest website and an interview with its webmaster, see The Bringers, *The Potterwar Campaign*, at <http://web.ukonline.co.uk/bringers/temp/c-potter.html> (last visited Mar. 31, 2004).

265. See *Warner Conjures up Trouble*, *NEW MEDIA AGE* (U.K.), Apr. 12, 2001, at 34.

266. See PLATFORM 9¾, at <http://harrypotter.warnerbros.com/platform/index.html> (last visited Feb. 27, 2004).

267. See *id.*; see also James Norman, *Copyright Issues Become Kids' Stuff*, *AGE* (Melbourne), May 7, 2002, at 3.

268. See OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2003 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 58 (2003) (noting that significant problems remain with enforcement of intellectual property laws in China), available at <http://www.ustr.gov/reports/nte/2003/china.pdf>; see also J.H. Reichman, *The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?*, 32 *CASE W. RES. J. INT'L L.* 441, 450 (2000) ("[T]he bulk of the developing countries appear behind schedule in implementing the TRIPS Agreement. . . . [The] costs of building and staffing intellectual property systems . . . constitute a palpable drain on very scarce resources.") (footnotes omitted)).

themselves stakeholders or potential stakeholders in the international intellectual property system.²⁶⁹ Thus, the entertainment industry should work together with its foreign counterparts to increase the public awareness of intellectual property rights. For example, the Business Software Alliance and the Chinese Software Alliance successfully promoted the use of original software in China by teaming up together.²⁷⁰ Thanks to these efforts, many Chinese no longer see copyright protection as alien, abstract, and incomprehensible. Rather, they consider these rights closely related to their daily lives and the country's domestic growth and international reputation.²⁷¹

In addition, the industry can work together to develop digital rights management tools that help enable and manage transactions made in the online world. When the Internet was first developed, commentators discussed how the new environment allowed for the creation of a "celestial jukebox."²⁷² Although this jukebox has yet to materialize in the form commentators envisioned and the Internet has made enforcement difficult at times,²⁷³ new communications technologies provide effective ways for copyright holders to enforce their rights and collect royalties.

Finally, the industry must help develop legitimate alternatives if products are needed, yet unaffordable, by the local people. As Gene

269. See SUSAN K. SELL, *POWER AND IDEAS: NORTH-SOUTH POLITICS OF INTELLECTUAL PROPERTY AND ANTITRUST* 12-13 (1998) (noting the sharp distinction between overt coercion and persuasion in the American foreign intellectual property and antitrust policies); Reichman, *supra* note 268, at 463-67; Yu, *supra* note 197, at 207-11; Peter K. Yu, *Piracy, Prejudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate*, 19 B.U. INT'L L.J. 1, 71-72 (2001).

270. See INT'L INTELLECTUAL PROP. ALLIANCE, 2002 SPECIAL 301 REPORT: PEOPLE'S REPUBLIC OF CHINA 35-36, available at <http://www.iipa.com/rbc/2002/2002SPEC301PRC.pdf> (discussing how the Business Software Alliance and the Chinese Software Alliance will jointly supervise the Chinese Government's agreement to use only legal software).

271. See PETER K. YU, *THE SECOND COMING OF INTELLECTUAL PROPERTY RIGHTS IN CHINA* 29 (Benjamin N. Cardozo School of Law Occasional Papers in Intellectual Property No. 11, 2002).

272. GOLDSTEIN, *supra* note 185, at 199.

273. See, e.g., PIPPA NORRIS, *DIGITAL DIVIDE: CIVIC ENGAGEMENT, INFORMATION POVERTY, AND THE INTERNET WORLDWIDE* 100 (2001) (noting that "officials normally find it far more difficult to silence critical voices on the new media compared with their ability to regulate and control the TV airwaves"); A. Michael Froomkin, *The Internet as a Source of Regulatory Arbitrage*, in *BORDERS IN CYBERSPACE: INFORMATION POLICY AND THE GLOBAL INFORMATION INFRASTRUCTURE* 129 (Brian Kahin & Charles Nesson eds., 1997) (discussing the difficulties of censorship on the Internet); David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1373-74 (1996) (describing how efforts to control the flow of electronic information across physical borders will likely fail); Peter K. Yu, *Bridging the Digital Divide: Equality in the Information Age*, 20 CARDOZO ARTS & ENT. L.J. 1 (2002) (discussing how the nature of the Internet architecture has resulted in greater online freedom in countries in Asia, the Middle East, Europe, and Latin America).

Hoffman, the CEO of Emusic, Inc., said, “[w]e think the best way to stop piracy is to make music so cheap it isn’t worth copying.”²⁷⁴ In April 2003, Apple Computer unveiled its iTunes Music Store.²⁷⁵ Since its opening, the service has sold more than 50 million songs,²⁷⁶ and customers seem to be satisfied with the service.²⁷⁷ It nevertheless remains interesting to see how the service will develop. Unless record companies are willing to provide content, the iTunes service eventually might end up with the same fate as other earlier subscription-based services, which failed to attract substantial interest from consumers.²⁷⁸

To fight piracy, some copyright holders also have used bargain pricing to make products more affordable in foreign markets.²⁷⁹ For example, some movie studios have released low-priced audiovisual products dubbed in the local language or with added foreign-language subtitles.²⁸⁰ On the one hand, these bargain products are able to provide an affordable alternative that accommodates local needs. On the other hand, by dubbing the products in the local language or including subtitles, the studios successfully make the products unappealing to English-speaking consumers. This strategy therefore successfully prevents the discounted products from entering the English-speaking world as parallel imports.²⁸¹

274. DIGITAL DILEMMA, *supra* note 18, at 80.

275. *See supra* Part I.E.

276. *See* Ina Fried, *Apple’s iTunes Sales Hit 50 Million*, CNET NEWS.COM (Mar. 15, 2004), at <http://news.com.com/2100-1027-5173115.html>.

277. *See id.*

278. *See* David Pogue, *Online Piper, Payable by the Tune*, N.Y. TIMES, May 1, 2003, at G1.

279. *See* MICHAEL P. RYAN, KNOWLEDGE DIPLOMACY: GLOBAL COMPETITION AND THE POLITICS OF INTELLECTUAL PROPERTY 80-81 (1998); *see also* Donaldson & Weiner, *supra* note 262, at 433-34 (asserting that one approach to stop piracy is to offer the affected people a legitimate way to earn a living); *see generally* Harold Demsetz, *The Private Production of Public Goods*, 13 J.L. & ECON. 293 (1970) (arguing that variable pricing can produce an efficient equilibrium and encourage adherence to intellectual property norms); Wendy J. Gordon, *Intellectual Property as Price Discrimination: Implications for Contract*, 73 CHI.-KENT L. REV. 1367 (1998) (discussing the dynamics of price discrimination); Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 CARDOZO L. REV. 55 (2001).

280. *See, e.g.*, Don Groves, *Warner Bros., MGM Dip into China Vid Market*, DAILY VARIETY, Feb. 21, 1997, at 1 (stating that Warner Brothers and MGM have entered a licensing deal with a Chinese government-owned conglomerate to release low-priced video products dubbed in Mandarin).

281. For discussions of parallel imports, *see* the sources cited *supra* note 175.

*C. Adopt a Nonzero-sum Approach to
Intellectual Property Dispute Resolution*

Today, the copyright wars have antagonized consumers, making their relationship with the entertainment industry increasingly hostile. Consider the following imaginary conversation between two people using maritime radios:

FIRST SPEAKER Please divert your course 15 degrees to the north to avoid a collision, over.

SECOND SPEAKER Recommend you divert YOUR course 15 degrees, over.

FIRST SPEAKER This is the captain of a US Navy ship. I say again, divert your course, over.

SECOND SPEAKER No, I say again, divert YOUR course, over.

FIRST SPEAKER This is an aircraft carrier of the US Navy. We are a large warship. Divert your course now! Over.

SECOND SPEAKER This is a lighthouse, your call.²⁸²

This conversation not only captures well the tone of the current copyright war, but provides valuable lessons on the counterproductiveness of the belligerent tactics used by the entertainment industry.

Commentators always talk about how society needs authors, and how some authors would take up more remunerative jobs—perhaps as copyright lawyers?—if they were not compensated for their creative efforts. The converse is also true. Authors need fans and customers, just as ships need lighthouses. Thus, the entertainment industry should cast aside its belligerent tactics and battle strategies and consider what I called the “nonzero-sum approach” to intellectual property dispute resolution.²⁸³ In game theory terms, a zero-sum game is a game in which a player’s gain must result in another player’s loss. If one wins, the other must lose. By contrast, in a nonzero-sum game, a player’s gain will not necessarily result in another player’s loss. Instead, there will be a win-win solution.

To be certain, the zero-sum approach does not necessarily result in confrontation, as parties might still cooperate through accommodation

282. JERRY EVERARD, *VIRTUAL STATES: THE INTERNET AND THE BOUNDARIES OF THE NATION-STATE* 82 (2000).

283. Peter K. Yu, *Toward a Nonzero-sum Approach to Resolving Global Intellectual Property Disputes: What We Can Learn from Mediators, Business Strategists, and International Relations Theorists*, 70 U. CIN. L. REV. 569, 608-20 (2002) (describing the nonzero-sum approach and discussing its prerequisites, limitations, and implications).

and compromises, thus allowing them to split the difference by giving up something valuable and by sharing the pain of losing.²⁸⁴ However, the nonzero-sum approach is generally more preferable. It not only will create forward-looking solutions that provide mutual benefits to all the parties involved, but also will preserve the hard-earned relationships between the disputing parties.²⁸⁵

Notwithstanding the usefulness of this approach, we should not forget its limitations and ignore other equally appealing solutions.²⁸⁶ In *Getting to Yes*,²⁸⁷ a book widely studied by students of conflict resolution, Professors Roger Fisher and William Ury discussed how to resolve a dispute between two children quarreling over an orange.²⁸⁸ Instead of dividing the orange in half or giving one child an apple—or maybe two—Fisher and Ury reminded us the need to understand what each child wants.²⁸⁹ As they explained, perhaps one child might want only the fruit to eat, while the other might want only the peel for baking a cake.²⁹⁰ By giving each of them what he or she wants, as compared to half of what each of them does not want, the parent might be able to find a nonzero-sum solution that is mutually beneficial to both children.²⁹¹

Although this nonzero-sum approach is insightful and works well in theory, there are many cases in which the approach is unsatisfactory. For example, it would be hard to imagine that every child fighting for an orange would want only the fruit to eat or only the peel for baking a cake. Most of the time, they fight because they want the same thing. Consumers want free music; yet, artists and record companies want to get paid. Moreover, as conflict resolution scholars pointed out, value creating in the nonzero-sum approach and value claiming in the zero-sum approach “are linked parts of negotiation. Both processes are present. No matter how much creative problem solving enlarges the pie, it must still be divided; value that has been created must be claimed.”²⁹² Indeed, the interaction of the tactics used to create or claim value might

284. See *id.* at 611; LINDA R. SINGER, *SETTLING DISPUTES* 17 (2d ed. 1994).

285. See Yu, *supra* note 283, at 587.

286. See *id.* at 616-18 (discussing the limitations of the nonzero-sum approach).

287. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed. 1991).

288. See *id.* at 59.

289. See *id.* at 76.

290. See *id.*

291. See *id.* at 73.

292. DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR* 33 (1986).

further exacerbate the tension between the cooperative and competitive moves.²⁹³

In sum, the nonzero-sum approach has its limitations and might not work in every situation. Yet, the entertainment industry should always keep this option in mind. A nonzero-sum solution not only would benefit all the parties involved, but also would help reconcile the increasingly confrontational relationships between the industry and consumers. Maybe a copyright war is not what society needs. Maybe a copyright war is not what consumers want. Let's hope the industry will eventually figure that out.

CONCLUSION

When the digital copyright war first started, the entertainment industry was winning most of the battles. Notwithstanding these early victories, the war is now expanding and has become even more difficult for the industry to fight than it was a year ago. Today, copyright law is no longer a complicated issue that is only of interest and concern to copyright lawyers, legal scholars, technology developers, and copyright holders. Rather, it is a matter of public significance, affecting all of us in our daily lives. The ground has shifted. If the entertainment industry does not pay attention to the public and if it continues to use ill-advised battle strategies, it eventually might lose the war.

293. *See id.* at 34. As Lax and Sebenius explained:

First, tactics for claiming value . . . can impede its creation. . . .

Second, approaches to creating value are vulnerable to tactics for claiming value. . . .

In tactical choices, each negotiator thus has reasons not be [sic] open and cooperative. Each also has apparent incentives to try to claim value. Moves to claim value thus tend to drive out moves to create it. Yet, if both choose to claim value, by being dishonest or less than forthcoming about preferences, beliefs, or minimum requirements, they may miss mutually beneficial terms for agreement.

Id. at 34-35.
