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COPYRIGHT, TECHNOLOGY & THE BOSTON STRANGLER: THE SEVENTH CIRCUIT AND THE FUTURE OF ONLINE MUSIC ACCESS

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INTRODUCTION

Recent technological advancements in media have spurred unprecedented growth in the ever-changing industries of music, television and motion pictures. Over 22 million Americans ages 18—39 own portable MP3 players or iPods®.¹ In fact, 19% of all Americans under the age of 30 own these relatively new devices.² Millions of Americans watch digitally recorded television programs or movies thanks to “On-Demand” services such as TiVo®, Digital Video Recorders or VHS tapes.³ In fact, countless numbers of people have recorded their favorite movie or television program on a VHS or

^{*} J.D. candidate, May 2006, Chicago-Kent College of Law, Illinois Institute of Technology.

¹ Lee Rainie, *PIP Comments: iPods and MPS Players Storm the Market*, PEW INTERNET AND AMERICAN LIFE PROJECT, February 14, 2005, <http://www.pewinternet.org/PPF/p/1047/pipcomments.asp> (last visited April 15, 2006).

² *Id.*

³ BILL ROSE & JOE LENSKI, ARBITRON/EDISON MEDIA RESEARCH, INTERNET AND MULTIMEDIA 2005: THE ON-DEMAND MEDIA CONSUMER (2005), available at <http://www.edisonresearch.com/home/archives/Internet%202005%20Summary%20Final.pdf> (last visited June 25, 2006).

Betamax video tape daily since the United States Supreme Court's landmark decision in *Sony Corp. of America v. Universal Studios, Inc.*⁴

However great these technological advancements have impacted the American economy by making entertainment more readily available to consumers and creating additional markets for producers, these advancements have also threatened – and continue to threaten – the delicate balance between rights in copyrighted material and technological innovation. This article, inspired by the Seventh Circuit's recent decision in *BMG Music v. Gonzalez*⁵, analyzes this balance, and looks toward the future of the relationship between copyright law and technological advancement in the Seventh Circuit.

First, this Article will present a brief history of copyright law in the United States, which has been forced to evolve as newer and more efficient technologies have developed. With the advent of these new technologies, such as peer-to-peer file sharing networks, iPods and MP3 players, right-holders of copyrighted material face unrestricted and widespread dissemination of their works. However, the public's use of copyrighted material through peer-to-peer file sharing networks (P2P) has upset this delicate balance between the rights owners possess in their works and the benefit of open and public access to them as a result of the overwhelming efficiency in dissemination that this technology offers.

Second, this article examines the recent *Gonzalez* decision, the apex of this conflict on an individual level in the Seventh Circuit. Companies such as BMG, the plaintiff in *Gonzalez*, have become increasingly weary of sophisticated infringement technologies such as P2P file sharing networks, and have begun to target individual copyright infringers such as Cecilia Gonzalez.

Lastly, this article will address the problems the recording industries and consumers face in the years to come when dealing with online music access. The impossibility of litigating each and every case against every individual infringer, or even filing suit against every infringer, is readily apparent to the majority of internet users, thereby

⁴464 U.S. 417 (1984).

⁵430 F.3d 888 (7th Cir. 2005).

fostering an “it will not happen to me” attitude in the minds of the P2P communities. Finding the right remedy to this problem can eliminate copyright infringement in P2P file sharing communities and, hopefully, will enable this technology to benefit both sides of the conflict.

I. HISTORY OF COPYRIGHT LAW IN THE UNITED STATES

A. *The Early Days of Copyright Law*

The Constitution of the United States provides Congress with the power “to promote the progress of science and useful arts, by securing for limited times to authors the exclusive right to their respective writings and discoveries.”⁶ The Copyright Act of 1790 granted American authors the right to print, re-print or publish their work for fourteen years and to renew that protection for an additional fourteen years.⁷ The Copyright Act sought to provide an incentive to authors, artists, and scientists to create original works by providing creators with a monopoly; however, this monopoly was limited in order to “stimulate creativity and the advancement of science and the arts *through wide public access of the works . . .*”⁸

In 1841, the Massachusetts Supreme Court heard a dispute brought by the owner and editor of a collection of George Washington’s letters after those letters were used by an author in a book about Washington’s life.⁹ Justice Story, delivering the opinion for the Court, found that the author had infringed on the owner’s copyright when he published a large number of these letters in his book.¹⁰ The author argued that his use of the letters was justified and

⁶U.S. CONST. art. I, § 8, cl. 8.

⁷Association of Research Libraries, Washington D.C., *A History of Copyright Law in the United States*, (2002), www.arl.org/info/frn/copy/timeline.html (last visited June 25, 2006).

⁸*Id.* (emphasis added).

⁹*Folsom v. Marsh*, 9 F. Cas. 342 (D. Mass. 1841).

¹⁰*Folsom*, 9 F. Cas at 349.

that he had a right to use the letters for his original work.¹¹ Justice Story disagreed, holding that if so much of a work is taken “that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient . . . to constitute piracy *pro tanto*.”¹²

Further, the court held that the question of piracy depends upon the balance of:

the comparative use made in one of the materials of the other; the nature, extent and value of the materials thus used; the objects of each work; and the degree to which each writer may be fairly presumed to have resorted to the same common sources of information, or to have exercised the same common diligence in the selection and arrangement of the materials.¹³

In 1909, Congress revised the Copyright Act of 1790 and for the first time addressed the rights a composer holds in his music. The main purpose, Congress said, was:

in expanding copyright protection accorded to music has been to give the composer an adequate return for the value of his composition, and it has been a serious and difficult task to combine the protection of the composer with the protection of the public, and to so frame an act that it would accomplish the double purpose of securing to the composer an adequate return for all use made of his composition and at the same time prevent the formation of oppressive monopolies, which might be founded upon the very rights granted to the composer for the purpose of protecting his rights.¹⁴

¹¹*Id.* at 342-44.

¹²*Id.* at 348.

¹³*Id.* at 344.

¹⁴Association of Research Libraries, *supra* note 7.

B. *Moving Toward the Modern Years*

This “difficult task” recognized by Congress in 1909 would only increase with the development of new technology. In 1973, the photocopier made its way into the realm of copyright law. In *Williams & Wilkins Co. v. United States*,¹⁵ the National Institutes of Health and the National Library of Medicine photocopied articles in medical journals published by plaintiff and gave them to physicians and medical researchers for use in their professional work.¹⁶ The Court of Claims opined that medical research and medicine in general would be harmed if this were found to be infringement.¹⁷ In the decision, Judge Davis, while pleading for congressional treatment of this new technology in copyright law, held that that use of the photocopier to copy this important medical information constituted fair use, but also specifically noted that plaintiff failed to demonstrate any harm from its use.¹⁸

This “fair” use the Supreme Court talked about was a major part of the revisions included in the Copyright Act of 1976. This Act superseded all previous copyright law and was brought about in part because of new technological advancements and their impact on what might be copyrighted.¹⁹ This revision codified for the first time the “fair use” doctrine, and also extended copyright to unpublished works.²⁰

The “fair use” doctrine provides that the “fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an

¹⁵480 F. 2d 1345 (C.C.P.A. 1973).

¹⁶*Williams*, 480 F. 2d at 1347-48.

¹⁷*Id.* at 1354.

¹⁸*Id.* at 1353-54.

¹⁹Association of Research Libraries, *supra* note 7.

²⁰*Id.*

infringement of copyright.”²¹ Four factors are determinative of whether an act constitutes fair use: the purpose and character of the use, nature of the copyrighted work, the amount and substantiality of the portion used in relation to the whole, and the effect of the use on the potential market.²² This doctrine is subject to interpretation for each specific case before a court.²³ Because of that, its application is difficult, and both the legislature and the courts have recognized as much:

The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.²⁴

C. *Sony Corp. of America v. Universal Studios, Inc.*

When Sony introduced the Betamax to the market in 1975, this case-specific nature of the fair use doctrine would play a major role in the advancement of this new technology. Industry heads feared that it, and subsequent VCR technology, would encourage consumers to copy and “library” movies and programs from television, “thereby reducing

²¹17 U.S.C. § 107 (2006).

²²*Id.*

²³*Sony Corp. of America v. Universal Studios*, 464 U.S. 417, 450 (1984).

²⁴*Sony*, 464 U.S. at 450 (1984).

the demand for future syndication of these programs.”²⁵ In fact, the head of the Motion Picture Association of America at the time, Jack Valenti, famously testified in 1982 to the House of Representatives that “the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone.”²⁶

It did not take long for the Courts to become involved in the Betamax conflict. In 1979, the United States District Court for the Central District of California heard argument and ruled in the case of *Universal Studios, Inc. v. Sony Corp. of America*.²⁷ Because of the importance of this case, it and its subsequent decisions in the United States Court of Appeals and the United States Supreme Court will be discussed at length.

In *Sony*, plaintiff Universal Studios alleged that the use of the Betamax to record telecasts and to copy audio-visual material to be viewed at a later time infringed on its copyrights and that Sony was either a direct or contributory infringer for distributing the Betamax to individual consumers.²⁸ Universal sought injunctive relief to prevent any future copyright infringement.²⁹

²⁵Fred von Lohmann, *iPods, Tivo and Fair Use as Innovation Policy*, Presented at the 2005 Fordham Intellectual Property Conference (March 31-April 1, 2005), available at <http://www.law.berkeley.edu/institutes/bclt/courses/fall05/ipscholarship/Von%20Lohmann%20Fair%20Use%20As%20Innovation%20Policy.pdf> at 10 (last visited June 25, 2006).

²⁶*Home Recording of Copyrighted Works, Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary of the House of Representatives*, 97th Cong. (2d Sess. 1982) (statement of Jack Valenti), available at <http://cryptome.org/hrcw-hear.htm> (last visited June 25, 2006).

²⁷480 F. Supp. 429 (C.D. Cal., 1979).

²⁸*Sony*, 480 F. Supp. at 432.

Curiously, before *Sony* was filed, Universal Studios began marketing its products on pre-recorded discs and planned to release these discs before and after the pictures were released. *Id.* at 433. Perhaps Universal Studios was concerned with Sony’s entrance into the home-video market; alleging and proving copyright infringement could have been a way to monopolize its new dissemination tactic.

²⁹*Id.* at 442.

Sony marketed the Betamax as a device capable of recording favorite programs or building a library of recorded works.³⁰ Its advertising strategy also suggested to the public that it record “novels for television” and “classic movies.”³¹ None of the advertisements warned the public that recording copyrighted shows could constitute infringement.³² However, the Betamax instruction booklet did make it known that “[t]elevision programs, films, videotapes and other materials may be copyrighted. Unauthorized recording of such material may be contrary to the provisions of the United States copyright laws.”³³

Both Universal Studios and Sony conducted surveys regarding the usage of the Betamax.³⁴ Some notable findings revealed that:

- 75.4% of owners use their machines to record for time-shifting purposes half or most of the time. Sony’s survey showed that 96% of the Betamax owners had used the machine to record programs they otherwise would have missed.³⁵
- 55.8% of users said there were 10 or fewer tapes in their possession. In Sony’s survey, of the total programs viewed by interviewees, 70.4% had been viewed only that one time and for 57.9%, there were no plans for further viewing.³⁶
- According to Universal Studio’s survey, 58.3% of the owners eliminate commercials from the recording either “sometimes,” “rarely,” or “never”; 56.1% use the fast-forward function to pass commercials either “sometimes,” “rarely,” or “never.” Defendant’s interviewees bypassed commercials 24.6% of the time.³⁷

³⁰*Id.* at 436.

³¹*Id.*

³²*Id.*

³³*Id.*

³⁴*Id.*

³⁵*Id.* at 438.

³⁶*Id.*

³⁷*Id.* at 439.

- 83.2% of the interviewees reported that their frequency of going to the theatre to view movies was unaffected by the Betamax.³⁸

Universal conceded that the Betamax had not harmed its business relationships nor caused it any economic damage.³⁹ Further, expert testimony presented by Universal was inconclusive as to when or after what amount of sales the Betamax would cause Universal any recognizable harm.⁴⁰

Before rendering its opinion, the District Court opined that:

[t]he ramifications of this new technology are greater than the boundaries of this lawsuit. A court reviewing the limited claims of specified parties in a particular factual setting cannot and should not undertake the role of a government commission or legislative body exploring and evaluating all the uses and consequences of the videotape recorder.⁴¹

After a lengthy discussion of the Copyright Act of 1909 (of which some of the alleged infringement were governed), the Copyright Act of 1976 (which governed the remaining infringements), and the fair use doctrine, the court found that the 1971 Amendment to the 1909 Copyright Act permitted home use audio recording.⁴² In fact, the court cited congressional discussions regarding this Amendment, one of which speaks volumes to the subject here. The Court's citation of the discussion is as follows:

When the 1971 Amendment reached the House floor, the question of noncommercial home recording was

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 442.

⁴² *Id.* at 444.

raised by Representative Kazen of Texas and answered by Representative Kastenmeier. Representative Kastenmeier was chairman of the House Judiciary Subcommittee responsible for the New Act, a sponsor of the general revision legislation, and a member of the Conference Committee which put the New Act in final form. The dialogue was as follows:

MR. KAZEN. Am I correct in assuming that the bill protects copyrighted material that [i]s duplicated for commercial purposes only?

MR. KASTENMEIER. Yes.

MR. KAZEN. In other words, if your child were to Record off of a program which comes through the air on [t]he radio or Television, and then used it for her own personal pleasure, for listening pleasure, this would not be included under the penalties of this bill?

MR. KASTENMEIER. This is not included in the bill. I am glad the gentleman raises the point.

On page 7 of the report, under “Home Recordings,” Members will note that under the bill the same practice which prevails today is called for; namely, [t]his is considered both presently and under the proposed law to be fair use. The child does not do this for commercial purposes. This is made clear in the report.⁴³

This legislative history, the court noted, evidences “that, in balance, Congress did not find that protection of copyright holders’ rights over reproduction of their works was worth the privacy and enforcement problems which restraint of home-use recording would

⁴³*Id.* at 446.

create.”⁴⁴ This, the court held, was further evidence that the 1909 and 1976 Copyright Acts permitted, under the fair use doctrine, home recording of both sound-recordings and audio-visual pictures.⁴⁵

In applying the four criteria of the fair use doctrine, the court found (1) that Universal Studios had admitted that there was no economic harm, (2) that because Universal derives the majority of its revenues from advertisements, the harm resulting from the infringement was even more speculative, (3) that because the use occurs within private homes, enforcement would be highly intrusive and practically impossible, and (4) that although the use of the works was substantial, it still constitutes fair use because “there is no accompanying reduction in the market for ‘plaintiff’s original work.’”⁴⁶

Universal appealed to the United States Court of Appeals for the Ninth Circuit.⁴⁷ The Ninth Circuit reversed, opining that:

There is no clear legislative language indicating that home video recording is not within the exclusive rights granted by § 106. The statute itself and the House and Senate Reports accompanying the 1976 Act do not provide for a broad based home use exception. There was never a considered review of the home video recording problem. The statements supporting the district court’s conclusion hardly represent – when considered in the content in which they were made and in the context of the 20 year copyright revision process – a firm expression of Congressional intent to carve out a major exception to the copyright scheme.⁴⁸

⁴⁴*Id.* at 448.

⁴⁵*Id.* at 447.

⁴⁶*Id.* at 450-54.

⁴⁷*Universal Studios, Inc. v. Sony Corp. of America*, 659 F.2d 963 (9th Cir. 1981).

⁴⁸*Sony*, 659 F.2d at 968.

The court further dismissed the legislative history relied upon by the District Court, suggesting that it was not intended to apply to home video recording, because Congress was not considering home video recording during its discussions on the 1971 amendment.⁴⁹ As such, the Ninth Circuit held that it was not fair use to record programs using the Betamax, and remanded to the District Court for purposes of developing appropriate remedies for copyright owners.⁵⁰

Immediately following the court's decision, legislation was introduced addressing the problem.⁵¹ For example, one bill sought to exempt all private, noncommercial home recording from any liability for copyright infringement.⁵² A second bill sought to "grant users of video cassette recorders a compulsory license with royalties to be paid to copyright owners from the sale of machines and blank tapes."⁵³

"The immediate and widespread interest in the *Sony* case is unprecedented in the history of copyright litigation."⁵⁴ Legislators feared that millions of private citizens could be subject to damages and that the manufacturers of the infringing products would go bankrupt.⁵⁵

Now it was Sony's turn to appeal, and the Supreme Court accepted certiorari and heard the case of *Sony Corp. of America v. Universal Studios*.⁵⁶ The Supreme Court recognized that "the average member of the public uses a VTR principally to record a program he cannot view as it is being televised and then to watch it once at a later time," thereby acknowledging the practice of time shifting.⁵⁷ However,

⁴⁹ *Id.* at 968.

⁵⁰ *Id.* at 972.

⁵¹ *Home Recording of Copyrighted Works, Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary of the House of Representatives, 97th Cong. (2d Sess. 1982) (statement of Jack Valenti), available at <http://cryptome.org/hrcw-hear.htm>.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ 464 U.S. 417 (1984).

⁵⁷ *Sony*, 464 U.S. at 420.

the Court noted that the Betamax was also used for “library building” and for “commercial skipping.”⁵⁸

Faced with this evidence, the court opined:

If vicarious liability is to be imposed on Sony in this case, it must rest on the fact that it has sold equipment with constructive knowledge of the fact that its customers may use that equipment to make unauthorized copies of copyrighted material. There is no precedent in the law of copyright for imposition of vicarious liability on such a theory.⁵⁹

The court also reasoned that the sale of copying equipment did not constitute contributory infringement if the product was widely used for non-infringing purposes.⁶⁰ Because the Betamax allowed its customers to record non-copyrighted works as well as copyrighted ones, Sony could not be held liable for contributory copyright infringement.⁶¹ Furthermore, in determining whether the use of the Betamax constituted fair use of the copyrighted works, the Supreme Court held that time-shifting constituted a fair use of the product because it enlarged the audience for the program.⁶²

II. LIFE AFTER *SONY*

We should all be as lucky as Universal Studios. The VCR became an establishment in the homes of millions of American families, and the movie studios recognized the ability to capitalize on this fact.⁶³ The movie studios began to allow consumers to rent and purchase

⁵⁸*Id.*

⁵⁹*Id.* at 437.

⁶⁰*Id.* at 442.

⁶¹*Id.*

⁶²*Id.* at 443.

⁶³von Lohmann, *supra* note 25, at 11.

movies which created the home video market.⁶⁴ According to Fred von Lohmann, this market accounts for almost twice as much revenue than that brought in by the box office today.⁶⁵ The readily available material for fair use recording served as the “bait that persuaded American consumers to make the (initially) large investment in this new fair use technology.”⁶⁶

The *Sony* case represents the dilemma courts have been faced with when technology and copyright laws collide. Today, P2P file sharing technology could be called the Betamax of the 21st century when looked at in a copyright-technology framework. Because of the Supreme Court’s decision in *Sony*, a new market opened – and flourished – for the benefit of those trying to close that very market. If the courts or the legislature were able to find a way to open new markets for copyrighted music via P2P technology, perhaps the same results would follow for the recording industries.

A. *In re: Aimster*

Courts are again being faced with a rift between technology and copyright laws. The popularity of new devices such as iPods and MP3 players have fostered online file sharing networks which are being used to fill these players with free, copyrighted music.

In 2003, the Seventh Circuit Court of Appeals addressed this very issue in *In re :Aimster*.⁶⁷ Numerous plaintiffs joined together to sue Aimster, an online file sharing network, for contributory and vicarious infringement of copyrights.⁶⁸ The district court judge issued an injunction which effectively shut Aimster down pending the resolution of the suit, and the defendant appealed.⁶⁹

⁶⁴*Id.*

⁶⁵*Id.*

⁶⁶*Id.*

⁶⁷334 F. 3d 643 (7th Cir. 2003).

⁶⁸*Id.* at 645.

⁶⁹*Id.*

The Seventh Circuit noted the high popularity of such online file sharing networks among teenagers and young adults.⁷⁰ The Court also noted that if the music shared on these networks is copyrighted, sharing digital copies of this music infringes copyright.⁷¹ Because of the impossibility of suing all primary or direct infringers of copyrighted works, the Court acknowledged that the law allows rightholders to sue a contributor to the infringement instead.⁷²

In determining whether Aimster was a contributory infringer of copyrighted works, it was necessary for the Seventh Circuit to address exactly how the software works. The software could be downloaded for free from Aimster's website and then the user registered on the system by entering a password and user name.⁷³ After doing so, he or she could designate any other user as a "buddy" and was able to communicate directly with them, attaching any files he or she wanted to share with them.⁷⁴ Because the songs were stored on the individuals' computers, Aimster, the court opined, could not be considered a direct infringer of the copyrighted works.⁷⁵

However, the court recognized that the ability of a service provider like Aimster to prevent its customers from infringing is a factor to be considered in determining whether the provider is a contributory infringer.⁷⁶ Further, the court held that when a supplier like Aimster is offering a product or service that has non-infringing as well as infringing uses, "some estimate of the respective magnitudes of these uses is necessary for a finding of contributory infringement."⁷⁷

In addressing the respective arguments of the parties, the court noted that "to the recording industry, a single known infringing use

⁷⁰*Id.*

⁷¹*Id.*

⁷²*Id.*

⁷³*Id.* at 646.

⁷⁴*Id.*

⁷⁵*Id.*

⁷⁶*Id.* at 648.

⁷⁷*Id.*

brands the facilitator as a contributory infringer. To the Aimsters of this world, a single, non-infringing use provides complete immunity from liability. Neither is correct.”⁷⁸ Because Aimster failed to provide *any* evidence of non-infringing uses, the court assumed that there was no such evidence.⁷⁹ Therefore, the court affirmed the decision of the lower court and upheld the injunction.⁸⁰

B. *MGM v. Grokster*

In 2005, the United States Supreme Court issued its opinion in *MGM v. Grokster*.⁸¹ In *Grokster*, copyright holders sued a software distributor, alleging the distributor was liable for copyright infringement because the software was intended to allow users to infringe copyrighted works.⁸² The issue on review was under what circumstances the distributor of a product capable of both lawful and unlawful use is liable for acts of copyright infringement by third parties using the product – similar to the issues addressed in *Sony*.⁸³

Grokster (and co-defendant Streamcast Networks, Inc.) distributed free software which allowed the public to download music through P2P file sharing networks.⁸⁴ A study commissioned by MGM revealed that 90% of all works downloaded from the Grokster software were copyrighted works.⁸⁵ Grokster argued, in *Sony* fashion, that its software was capable of significant non-infringing uses; therefore, it was not in violation of copyright law.⁸⁶

While Grokster’s argument may have sounded in *Sony* fashion, a clear distinction was made by the Supreme Court. When Grokster

⁷⁸*Id.* at 651.

⁷⁹*Id.* at 653.

⁸⁰*Id.* at 655-56.

⁸¹125 S. Ct. 2764 (2005).

⁸²*Grokster*, 125 S. Ct. at 2766.

⁸³*Id.* at 2770.

⁸⁴*Id.*

⁸⁵*Id.*

⁸⁶*Id.* at 2272.

distributed its free software, it “clearly voiced the objective that recipients use it to download copyrighted works, and each took active steps to encourage infringement.”⁸⁷ In fact, when another file sharing system – Napster – was shut down by the Court, Grokster and Streamcast targeted its user base, going so far as to “introduce itself to some potential advertisers as a company ‘which is similar to what Napster was.’”⁸⁸ It also “broadcast banner advertisements to users of other Napster-compatible software, urging them to adopt its [software].”⁸⁹ A company email stated:

We have put this network in place so that when Napster pulls the plug on their free service . . . or if the Court orders them shut down prior to that . . . we will be positioned to capture the flood of their 32 million users that will be actively looking for an alternative.⁹⁰

The defendants blatantly advertised that they sought to exploit the illegal uses of their software and that their goal was to get sued because “[i]ts the best way to get in the news.”⁹¹ No evidence was presented that Grokster or Streamcast made any effort to prohibit its users from downloading copyrighted materials.⁹²

The Supreme Court discussed the case in the context of the *Sony* decision and noted that in *Sony*, there was no evidence of intent by the defendants to promote copyright infringement, and there, the only possible way of imposing liability on Sony was for its distribution of the Betamax.⁹³ Further, because the VCR was “capable of commercially significant noninfringing uses,” the Supreme Court held

⁸⁷*Id.*

⁸⁸*Id.* at 2773.

⁸⁹*Id.*

⁹⁰*Id.* (internal citations omitted).

⁹¹*Id.*

⁹²*Id.* at 2274.

⁹³*Id.* at 2777.

the manufacturer could not be liable solely on the basis of its distribution.⁹⁴

The Supreme Court in *Grokster* declined to limit the *Sony* decision; however, it noted that in *Sony* it was found that:

[i]f vicarious liability is to be imposed on Sony in this case, it must rest on the fact that it has sold equipment with constructive knowledge of the potential for infringement. Thus, where evidence goes beyond a product's characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, *Sony's* staple-article rule will not preclude liability.⁹⁵

The Supreme Court thereby adopted in *Grokster* this new "inducement" test, whereby a defendant who actively induces copyright infringement cannot claim protection under *Sony*.⁹⁶ However, the Court limited its holding to only those situations in which actual inducement was shown, noting that:

mere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability. Nor would ordinary acts incident to product distribution, such as offering customers technical support or product updates, support liability in themselves. The inducement rule, instead, premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.⁹⁷

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 2780.

⁹⁷ *Id.*

Because the court found actual inducement and the evidence showed actual infringement by the users of Grokster's software, the Court vacated the opinions of the lower courts and directed the case to proceed consistent with its opinion.⁹⁸

III. *BMG MUSIC v. GONZALEZ*

While courts have begun to hold companies who develop file sharing software liable for contributory infringement, seemingly cutting to the source of the problem, the epidemic still exists. More and more file sharing networks have sprung up, and more and more individuals, or direct infringers, can download the latest hits in a matter of seconds. The Seventh Circuit's recent decision in *BMG Music v. Gonzalez* should serve as notice to consumers and those who participate in online file sharing activities that rightholders are now targeting them, and are getting results.

BMG Music, Sony Entertainment, Inc., UMG Recordings, Inc., and Atlantic Recording Corp. (hereinafter, jointly "Recording Companies"), brought suit in the United States District Court for the Northern District of Illinois against Cecilia Gonzalez due to her alleged copyright infringement by downloading thirty songs onto her computer.⁹⁹ Gonzalez admitted that she infringed on the Recording Companies' copyrights by downloading thirty songs she did not own.¹⁰⁰ However, Gonzalez claimed that summary judgment was inappropriate because the fair use defense was applicable to her situation and she was entitled to the "innocent infringer" defense with respect to damages.¹⁰¹

Gonzalez argued that her use of the songs was "fair" because (1) she was sampling the music to determine which songs she would like to purchase; (2) she owned many of the songs she downloaded; and (3)

⁹⁸*Id.* at 2783.

⁹⁹*BMG Music v. Cecilia Gonzalez*, 03 C 6276 2005 U.S. Dist. LEXIS 910, *1-2 (January 12, 2005).

¹⁰⁰*Id.* at *1-2.

¹⁰¹*Id.* at *2.

she did not cause the plaintiffs any financial harm by downloading the thirty songs which formed the basis of the suit against her.¹⁰²

However, the court rejected her “sampling” defense, noting the Ninth Circuit rejected the same defense in a similar case.¹⁰³ The court held that “the cumulative effect of direct infringers, like Gonzalez, harms the recording industry by reducing sales and ‘raising barriers’ to the recording industry’s ‘entry into the market for digital downloading of music.’”¹⁰⁴ Accordingly, the court granted summary judgment in favor of the plaintiffs on the infringement claim.¹⁰⁵

Gonzalez sought to go to trial on the issue of damages and contended that the statutory damages attributable to her were too high because she was an “innocent infringer.”¹⁰⁶ In “innocent infringer” situations, the court may award damages of only \$200 where the infringer proves that she “was not aware and had no reason to believe that . . . her acts constituted infringement.”¹⁰⁷ However, the court noted that the “innocent infringer” defense is inapplicable in situations where a notice of copyright appeared on the recordings to which the infringer had access.¹⁰⁸ Notice of the copyrights of the thirty songs at issue here was located on the compact discs sold in stores, not in Gonzalez’s possession; however, a question of fact existed as to whether Gonzalez had access to these discs.¹⁰⁹ Although this question of fact existed, the plaintiffs needed only to prove that the notice was “in circulation and available to the infringer.”¹¹⁰ The Court then held:

¹⁰²*Id.* at *2-3.

¹⁰³*Id.* at *3 (citing *A&M Records v. Napster*, 239 F.3d 1004, 1014-19 (9th Cir. 2005)).

¹⁰⁴*Id.*

¹⁰⁵*Id.*

¹⁰⁶*Id.*

¹⁰⁷*Id.* at *4.

¹⁰⁸*Id.*

¹⁰⁹*Id.*

¹¹⁰*Id.* at *4-5.

[B]ecause it is undisputed that the copyrights of the 30 songs at issue were properly noticed on the covers of the CDs, there is no question of fact as to whether Gonzalez had ‘access’ to notice of the copyrights. Indeed, Gonzalez (sic) admits that she and her husband have legally purchased over 200 CDs. To allow Gonzalez to assert this defense based on her ignorance would eviscerate copyright protection and the old adage that ‘ignorance is no defense to the law.’ This Court thus holds that she is not entitled to the innocent infringer defense and awards the Record Companies \$ 22,500 (30 songs times the minimum statutory penalty (\$ 750)).¹¹¹

The relatively short District Court opinion lacks the reasoning and factual background of the Seventh Circuit’s decision in *Gonzalez*.¹¹² In the Seventh Circuit’s opinion, readers learn that Gonzalez downloaded more than 1,370 copyrighted songs and kept them on her computer until she was caught.¹¹³ The Seventh Circuit recognized that keeping these songs on her computer was not a form of time-shifting in the likes of *Sony*, because “a copy of music downloaded, played and retained and one’s hard drive for future use is a direct substitute for a purchased copy without the benefit of a license fee paid to the rightholder.”¹¹⁴ The court noted that the premise of the *Sony* decision was that the broadcast was licensed for one transmission and thus one viewing; therefore, this “time-shifting” of this single viewing constituted fair use.¹¹⁵

In addressing her fair use defense, the Seventh Circuit realized that because of the circumstances of the case, the only avenue for Gonzalez was to argue that her use of the songs did not affect the

¹¹¹*Id.* at 5.

¹¹²*BMG Music v. Cecilia Gonzalez*, 430 F. 3d 888 (7th Cir. 2005).

¹¹³*Id.* at 888-90.

¹¹⁴*Id.*

¹¹⁵*Id.*

potential market for or the value of the copyrighted works.¹¹⁶ Gonzalez attempted to prove that her activities were beneficial to the recording industry because they served as advertising for the rightholders.¹¹⁷ However, the court noted that “as file sharing has increased over the last four years, the sales of recorded music have dropped by almost 30%.”¹¹⁸ Faced with this statistic, the court could not bring itself to believe that downloading copies of copyrighted music constituted fair use.¹¹⁹

Important to those engaged in file sharing activity is the court’s statement, in dicta, about the songs BMG sought compensation for. The court reasoned that:

[A]lthough BMG Music sought damages for only the 30 songs that Gonzalez concedes she has never purchased, all 1000+ of her downloads violated the statute. All created copies of an entire work. All undermined the means by which authors seek to profit. Gonzalez proceeds as if the authors’ only interest were in selling compact discs containing collections of works. Not so; there is a market in ways to introduce potential customers to music.¹²⁰

The court recognized that there were other options available for Gonzalez to sample music if she merely wanted to sample it, such as listening to live-stream radio over the internet and paying a fee for the right to do so.¹²¹ Had she done this, the court opined, the authors of the works would have received royalties from the broadcasters and it would have reduced the risk of consumers not purchasing actual music from a retail store.¹²² Also important to the court was that in these

¹¹⁶*Id.* at 890.

¹¹⁷*Id.*

¹¹⁸*Id.*

¹¹⁹*Id.*

¹²⁰*Id.* at 891.

¹²¹*Id.*

¹²²*Id.*

alternative options, the song does not remain on the listener's computer.¹²³ Therefore, the court held that:

[W]ith all these means available to consumers who want to choose where to spend their money, downloading full copies of copyrighted material without compensation to authors cannot be deemed 'fair use.' People such as Gonzalez cannot ask courts to second-guess the market and call wholesale copying 'fair use' if they think that authors err in understanding their own economic interests or that Congress erred in granting authors the rights in the copyright statute.¹²⁴

The court then upheld the award of damages in the amount of \$22,500 and affirmed the judgment of the lower court.

The Seventh Circuit also upheld the District Court's ruling on Gonzalez's "innocent infringer" claim. MGM was awarded statutory damages on summary judgment in this case. Under 17 U.S.C 504(c)(1), a plaintiff may recover damages between \$750 and \$30,000 for each work infringed.¹²⁵ Here, MGM sought the minimum \$750 for each of the thirty songs Gonzalez downloaded, did not own, and kept on her computer. In rejecting Gonzalez's argument, Seventh Circuit found that she was not an "innocent infringer" because one cannot be held to such status if a copyright notice appeared on a copy of the copyrighted work.¹²⁶ While the downloaded songs *lacked* such notice, the Seventh Circuit agreed with the District Court that Gonzalez clearly had access to compact discs with such notices, and had she inquired, she could have readily found out.¹²⁷ Accordingly, the trial court's grant of damages on summary judgment was upheld.¹²⁸

¹²³*Id.*

¹²⁴*Id.*

¹²⁵*Id.*

¹²⁶*Id.* at 892.

¹²⁷*Id.*

¹²⁸*Id.* at 893.

While *Gonzalez* raises no new issues in terms of copyright law, it does have a few interesting comments in dicta that could serve to notify consumers or potential infringers exactly how this court will rule in the future. Matt Schruers and Jonathan Band, in their article *BMG Music v. Gonzalez*, offer three such scenarios.

Schruers and Band argue that *Gonzalez* limits the landmark *Sony* case to its facts, holding that time shifting for a single use constitutes fair use while at the same time ignoring the fact that a great number of people “library” or “archive” video cassettes.¹²⁹ This limitation “calls into doubt – at least in the Seventh Circuit – the activity of ‘librarying’ or ‘archiving’ video enabled by both the videocassette recorders and personal video recorders.”¹³⁰

Second, Schruers and Band note that the Seventh Circuit found that *Gonzalez* was not using these songs for “non-profit” use; however, she was not selling these songs, nor was she gaining any other sort of profit from them, “unless the court considers listening to music a ‘profit.’”¹³¹ If the court was referring to this personal use not equating to “non-profit educational usage,” Schruers and Band urge the Court to clarify its ruling in this respect.¹³²

Lastly, Schruers and Band criticize the Seventh Circuit’s “verbal attack on direct infringers” by equating downloading music to shoplifting.¹³³ They note that the Supreme Court had previously clearly distinguished between infringement and theft because “interference with copyright does not easily equate with theft, conversion or fraud.”¹³⁴ This equation by the Seventh Circuit, they argue, “constitutes an unfortunate trend in judicial decisions and

¹²⁹Matthew Schruers & Jonathan Band, *BMG Music, et al. v. Gonzalez*, 5 E-COM. LAW. REP. 14 (2005), available at <http://www.policybandwidth.com/doc/gonzalez.pdf> (last visited June 25, 2006).

¹³⁰*Id.*

¹³¹*Id.*

¹³²*Id.*

¹³³*Id.*

¹³⁴*Id.*

policy discussions of blurring the significant distinctions between intellectual property and tangible property.”¹³⁵

Schruers and Band effectively display the importance *Gonzalez* plays not only in terms of the file sharing community, but also in terms of its relation to *Sony*. While the distinctions between the two cases are obvious (i.e., direct infringers vs. contributory infringers), *Gonzalez* offers a look at how courts are interpreting new P2P technology in relation to the *Sony* decision.

IV. SOLUTIONS TO THE PROBLEM

A. *Is New Legislation Needed?*

In *Sony*, the District Court began its opinion by recognizing the importance and ramifications of the new Betamax or video-recording technology and refused to “undertake the role of a government commission or legislative body exploring and evaluating all the uses and consequences and the videotape recorder.”¹³⁶ The court seemed to suggest (or cry out for) the need for legislative action or assistance, similar to the cry for legislative action in *Wilkins* when the photocopier made its way into the copyright arena. With the advent of P2P technology, a cry for help should sound from both sides of the crisis, and it should be heard and addressed by the legislature. This technology offers enormous and far-reaching (literally) benefits to its users; however, it has fostered a world of copyright infringement which continues to grow.

The Supreme Court accepted the time shifting argument of recording, watching, and erasing recorded, copyrighted materials.¹³⁷ However, does anyone – consumer, producer, copyright holder, Supreme Court Justice – really believe this scenario to be the norm amongst the video-recording public?

¹³⁵*Id.*

¹³⁶*Universal Studios, Inc. v. Sony Corp. of America*, 480 F. Supp. 429, 442 (C.D. Cal., 1979).

¹³⁷*Sony Corp. of America v. Universal Studios, Inc.*, 464 U.S. 417, 455 (1984).

So how did the *Sony* Court rule the way it did? Was the Supreme Court searching for a reason to allow the use of this copyright-infringing technology? Did the Court recognize the economic impact it would have and find a way to keep it in the market? Did the *Sony* Court know the ends it wanted to reach, and did it search (or stretch?) to find the means necessary to reach those ends? When compared to the decisions in *Aimster*, *Grokster*, and *Gonzalez*, it seems the answer to the preceding questions is “yes.”

Copyright must be able to change with the advent of new technologies.¹³⁸ “Prior to the introduction of [P2P] technology, copyright infringement via the Internet was arguably a manageable issue . . .”¹³⁹ File sharing represents the latest and most pressing challenges to copyright law in recent years. However, courts have not yet been willing to embrace this new technology and allow its dissemination when infringement is prevalent, and with good reason. *Gonzalez*’s actions were clearly in violation of the Copyright Act and its purpose to protect the interests of authors, artists, and scientists in their original works.

However, *Gonzalez* is merely a grain of sand on the beach of online file sharers engaging in copyright infringement everyday. It would require a Herculean effort by the courts and the music industry to eliminate each and every individual infringer like *Gonzalez*. On the other hand, this problem cannot persist and grow to the point of creating irreparable harm to the music industry, record labels, and individual artists.

Perhaps Congress should act, and act now, to find a solution to this crisis and re-establish the balance between technological advancement and copyright protections. However, any Congressional

¹³⁸*Id.* at 432 (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose”).

¹³⁹Robert A. Gilmore, *Peer-to-Peer: Copyright Jurisprudence in the New File-Sharing World, the Post Grokster Landscape of Indirect Copyright Infringement and the Digital Millennium Copyright Act*, 5 FL. COASTAL L.J. 85, 86-87 (2004) (citing Wendy M. Pollack, *Tuning In: Future of Copyright Protection For Online Music In The Digital Millennium*, 65 FORDHAM L. REV. 2445, 2445-46 (2000)).

stance on the matter should be “progressive” and strong, and leave no room for debate.¹⁴⁰ To be weak on the matter “would result in an imbalanced solution to the P2P debate and will thereby weaken the fundamental goals of copyright law.”¹⁴¹

Much of the legislation currently proposed in Congress fails to adequately address the balance which is the subject of this article – that of rights in copyrighted material and technology.¹⁴² In 2002, Representative Howard Berman (D-Cal) proposed the Peer-to-Peer Piracy Prevention Act (H.R. 5211). This act (1) enables copyright owners to use technology to deter or prevent the unauthorized distribution of copyrighted works over the Internet, (2) grants copyright holders the right to use any technology at their disposal to disable, interfere, or block the distribution of copyrighted works, and (3) limits liability for the impairment of personal computers, as long as the economic loss suffered by the user is less than fifty dollars.¹⁴³ Notably, Berman’s constituent base is *Hollywood*.¹⁴⁴

Berman’s proposal fails to realize how prevalent the use of P2P technology is today. While his proposed legislation offers a seemingly one-sided solution to the problem, it does not recognize the improbability of curtailing this widespread use. Only when the recording industries, internet service providers and software distributors come together to form a workable solution will this technology, and this industry, find a way to grow and prosper together.

B. *Alternative Compensation Schemes*

This, and other proposed P2P legislation, offers a bleak outlook for P2P technology and the balance between this type of media

¹⁴⁰John M. Moye, *How Sony Survived: Peer-to-Peer Software, Grokster, and Contributory Copyright Liability in the Twenty-First Century*, 84 N.C.L. REV. 646, 689 (2006).

¹⁴¹*Id.* at 689.

¹⁴²*Id.* at 686.

¹⁴³*Id.*

¹⁴⁴*Id.* (emphasis added).

technology and copyright sought by the *Sony* Court.¹⁴⁵ What, then, are acceptable Congressional responses? Alternative compensation to the recording industry may be one way to get around this evolving problem. John M. Moye argues for a “compulsory licensing scheme, which would set a rate at which copyrighted works would have to be licensed over the Internet.”¹⁴⁶ Under this type of system, Congress would have the ability to guarantee compensation to copyright owners while at the same time allowing this information to be disseminated on the Internet.¹⁴⁷ Such a solution was originally proposed for Universal Studios in *Sony* by the Ninth Circuit.¹⁴⁸ It suggested that “a continuing royalty pursuant to a . . . compulsory license may very well be an acceptable resolution of the impasse between the VCR manufacturers and the film companies.”¹⁴⁹ If Congress were to implement such a plan, Moye argues, it would force the two sides of the conflict to work together and ensure compensation to the copyright owners.¹⁵⁰ If the alternative is to receive no compensation for their works, copyright owners may be willing to discuss such a plan.¹⁵¹

Michael Rucci, in his article entitled *Congress Wants to Give the RIAA Control of Your iPod: How the Induce Act Chills Innovation and Abrogates Sony*, has proposed a different alternative compensation plan.¹⁵² Under his plan, he argues that because file sharing networks will always exist, the record labels should adjust to market rather than taking their aggression out on their customers or lobbying Congress to

¹⁴⁵ *Id.* at 688.

¹⁴⁶ *Id.* at 689.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* (citing *Sony Corp. of America v. Universal Studios, Inc.*, 464 U.S. 417, 428 (1984)).

¹⁵⁰ Moye, *supra* note 140, at 690.

¹⁵¹ *Id.* (citing Jennifer Norman, *Staying Alive: Can the Recording Industry Survive Peer-to-Peer?*, 26 COLUM. J. L. & ARTS 371, 399 (2003)).

¹⁵² Michael Rucci, *Congress Wants to Give the RIAA Control of Your iPod: How the Induce Act Chills Innovation and Abrogates Sony*, 4 J. MARSHALL REV. INTELL. PROP. L. 534 (2005).

make changes to existing copyright law.¹⁵³ One solution he cites is for each internet service provider (ISP) to ask their users if they want to pay an additional \$1 per month for legal access to as many MP3s as they desire.¹⁵⁴ Then, these ISPs could track downloads and distribute revenues directly to the artists based on their popularity.¹⁵⁵ A solution, he argues, “which gives incentive to the creation of new works is not antithetical to the Copyright Clause and supports a free market economy.”¹⁵⁶

Rucci’s cited alternative seems the better fit to deal with the evolving technologies which promote or enable copyright infringement. Under his plan, individuals have the option of either (1) being a legitimate downloader of music with unlimited access to copyrighted works, or (2) infringing where known avenues of legitimate access to music are available. Further, his plan would allow appropriate compensation to the authors of the copyrighted works. His plan is the closest step yet to achieving a workable and sustainable balance between technology and copyright infringement. Under either Moye’s or Rucci’s plans, the hope is that both sides of the conflict will work together to achieve a solution – a definite step in the right direction.

C. *Compulsory Alternative Compensation*

Rucci’s plan offers an interesting alternative solution; however, perhaps a compulsory alternative compensation system for all internet users, the proceeds of which would be applied to offset the yearly losses incurred by copyright owners, could provide a more comprehensive – and mandatory – guarantee for copyright owners. According to the Recording Industry Association of America (RIAA), the recording industry loses yearly, on average, \$4.2 billion worldwide

¹⁵³*Id.* at 557.

¹⁵⁴*Id.*

¹⁵⁵*Id.*

¹⁵⁶*Id.*

as a result of copyright infringement.¹⁵⁷ Americans – 205,326,680 to be exact – use the Internet.¹⁵⁸ This number also accounts for 20.1% of all Internet usage worldwide.¹⁵⁹ If all American Internet users were required to pay an additional \$0.50 per month (half of that proposed by Michael Rucci) to offset the losses incurred by the recording industry – in exchange for unlimited Internet music access – the recording industry would receive \$1,231,960,080 yearly. This would account for over 29% of all losses suffered by the recording industry as a result of online file sharing – more than the percentage of Americans using the Internet.

While obstacles would certainly exist in the implementation of any alternative compensation system, these systems seem to offer the simplest, and most effective, way of allowing P2P technology to continue while actively protecting copyrights in original works. A small fee for unlimited access to copyrighted works could be appealing to the file sharing community, especially with a guarantee that those users would not be subject to prosecution or liability for copyright infringement.

V. CONCLUSION

Technological advancements have forced owners of copyrighted material to pursue legal action against individual infringers – and they are getting results, evidence by the Seventh Circuit's *Gonzalez* case. Until a solution to the file sharing problem evolves, there will continue to be direct and contributory infringers of copyrighted work. Addressing this problem, while not upsetting consumer innovation and the economic impact that this sort of technology can have serves as the greatest obstacle to come for copyright owners.

¹⁵⁷Recording Industry Association of America, *Issues: Anti-Piracy*, <http://www.riaa.com/issues/piracy/default.asp> (last visited April 19, 2006).

¹⁵⁸Internet World States, "Usage and Population Statistics," available at www.InternetWorldStats.com (last visited April 19, 2006).

¹⁵⁹*Id.*

Legislation implementing an alternative compensation system certainly seems to be the most effective way to curtail online copyright infringement. However, any legislation would need to be thorough and address both sides of the conflict. If legislation were implemented which serves only to penalize individual infringers, those infringers would inevitably go further “underground” and seek alternative methods of sharing or downloading music. The public has tasted the benefits of online music access. Its appetite will not be easy to subdue.

The Boston Strangler is back, and alive and well in the eyes of the recording and motion picture industries. While the decisions in *Grokster*, *Aimster*, and *Gonzalez* were correctly decided under existing law, it is the effects and benefits the public and to the motion picture industry derived from the *Sony* decision that should be the goal when dealing with this new dissemination technology. If the market adjusts and the technological advancement continues to create new avenues for dissemination of music and video in a profitable and legal way for both rightholders in copyrighted material and the public, it is hopeful that both sides of the conflict will be satisfied.