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Ryan Bates

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# Communication Breakdown:\* The Recording Industry's Pursuit of the Individual Music User, a Comparison of U.S. and E.U. Copyright Protections for Internet Music File Sharing

*Ryan Bates\*\**

*A college sophomore stared at his computer desk, taking in the stack of CD cases, wondering if he was next. The news reporter said that over two hundred and fifty Internet users were served with lawsuits by the Recording Industry Association of America. These lawsuits stemmed from illegal music file swapping, a common practice among all of the student's friends. He uploaded and downloaded music files to make "mixed CDs" of his favorite songs, giving him something to listen to on long road trips. Now, as he stared at his collection, he wondered if he might need to make another call to his parents. Across the country, an elderly couple answered the doorbell to find a legal summons and complaint waiting for them on the other side. Married for forty years and retired for ten, the couple had just finished dinner and planned to take their grandson to his basketball game. The man looked at the complaint, stating the basis of a lawsuit, and wondered what "digital music file-sharing" meant. His wife went upstairs to pry their grandson off the computer.*

As the preceding hypothetical (but realistic) situations point out,<sup>1</sup> there is broad uncertainty in Internet music activity after the recording industry attack on individual file swappers. While music file swapping over the

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\* LED ZEPPELIN, *Communication Breakdown*, on LED ZEPPELIN (Atlantic Records 1969).

\*\* J.D. Candidate, 2005, Northwestern University School of Law; B.S., University of Arizona, 2000. I would like to thank my family and friends for their support; Andrew Stroth, adjunct professor of Negotiations at Northwestern Law; and the Journal staff for their hard work on the editing process. Needless to say, all mistakes are completely my own.

<sup>1</sup> Indeed, one of the first victims of the industry lawsuits was a twelve-year-old honor student living in New York public housing. The suit was subsequently settled just one day after being filed. See John Borland, "Court: RIAA lawsuit Strategy Illegal," CNET News.com, Dec. 19, 2003, available at [http://news.com.com/2100-1027\\_3-5129687.html?tag=st\\_rm](http://news.com.com/2100-1027_3-5129687.html?tag=st_rm) (last visited Sept. 26, 2004).

Internet has become a common practice in recent years,<sup>2</sup> record companies blame the illegal swapping for a 14% drop in compact disc sales since mid-2000.<sup>3</sup> In an ever-evolving attempt to gain a stronghold on the distribution of digital music via the Internet,<sup>4</sup> the recording industry's latest attack comes on individual Internet file-sharers. The initial lawsuits targeted only those who made files available for others to download, and alleged an average of 1,000 copyright violations for each defendant.<sup>5</sup> However, the message seems to be clear: everyone who participates in illegal file swapping is a potential defendant.<sup>6</sup>

## I. INTRODUCTION

This comment examines the development of copyright protections in the United States and the European Union, and argues that a balance of rights and technical development is needed to carry the music industry into the future. Part II analyzes the impact of digital technology and the Internet on the music industry to provide a foundation for legal framework. Part III gives the relevant legislative history and applicable law in both the United States and the European Union, while Parts IV and V analyze the developments of copyright case law under both systems. Part VI ties the discussion together by comparing the copyright protections offered under both systems. Finally, Part VII examines the repercussions of the recent Recording Industry Association of America ("RIAA") lawsuits, and makes an argument for a United States and European Union return to the traditional private use protections on which initial copyright law was founded. By adopting a more traditional balance of consumer use and ownership protections, a copyright protection system can help develop legal

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<sup>2</sup> See NATIONAL RESEARCH COUNCIL, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE*, 76-77 (2000).

<sup>3</sup> Lisa Takeuchi-Cullen, *How to go Legit: Pay for Music Online? It Used to be Square, but the Crackdown on Pirates is Giving Legal Sites New Life*, TIME, Sept. 22, 2003 at 44.

<sup>4</sup> *Id.*

<sup>5</sup> Bob Egelko, *Mass-lawsuit Tactic Aimed at the Public; Lawyers Call it a Music Industry Warning*, THE SAN FRANCISCO CHRON., Sept. 9, 2003 at A8. More lawsuits were filed as "John Doe" lawsuits after the D.C. court of appeals changed the subpoena process. See discussion of Verizon litigation, *infra* Part IV. From September 2003 to early January 2004, the RIAA issued more than 3,000 subpoena requests and filed almost 400 copyright infringement attacks. See Roy Mark, *RIAA Lawsuits Chilling Illegal Downloads*, INTERNET NEWS, Jan. 5, 2004, at <http://www.internetnews.com/bus-news/article.php/3295051> (last visited Sept. 26, 2004).

<sup>6</sup> This message became even more apparent with the recent adoption of the Directive on the Enforcement of Intellectual Property Rights by the European Commission ("E.U. IP Enforcement Directive"), which applies to "any infringement of intellectual property rights." See Commission Proposal for Council Directive on the Enforcement of Intellectual and Industrial Property Rights, IP/03/144, art. 2, 2004, available at <http://ipjustice.org/CODE/021604.html> (last visited Sept. 26, 2004).

usage and encourage creativity while maintaining an adequate compensation system for copyright owners.

## II. TECHNOLOGICAL ADVANCES AND THE DIGITAL AGE OF MUSIC

Music recording has come a long way from the days of vinyl records and eight track tapes. Even ten to twelve years ago, the average person made copies of their favorite songs on tape and the technology to “burn” individual compact discs was not widespread.<sup>7</sup> Digital technology marked a significant improvement over previous recording technologies. For the first time, music files could be copied by consumers “repeatedly with no loss of quality.”<sup>8</sup> Information conveyed through digital technology has an “indefinite life” as it will not decay over time, and the information can be “combined, altered, mixed and manipulated fairly easily.”<sup>9</sup> Whereas in the past, music stores could offer the consumer the best possible recording of an album, consumers can now obtain a copy of an album through a computer download at minimal cost and with no loss in quality of sound.<sup>10</sup>

The record industry’s desire to gain traction in the digital music market on the Internet is therefore understandable. This need became even more apparent in recent years with the advancement of Internet technology and the ability of the consumer to download files faster than in the past. While digital audio tape (“DAT”) and recordable compact disc (“CD-R”) technology has been commercially available since the late 1980s, the ability to easily transfer digital data and download songs did not come about until the onslaught of audio compression technology.<sup>11</sup> Internet music transmissions usually come in two forms: compression format (such as WAV and MP3), which is typically downloaded in its entirety before being played, and streaming format (such as RealAudio), where users access the files in real time.<sup>12</sup> Compression formats were not commonly used because

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<sup>7</sup> Andrew Hartman, *Don’t Worry, Be Happy! Music Performance and Distribution on the Internet is Protected After the Digital Performance Rights in Sound Recordings Act of 1995*, 7 DEPAUL-LCA J. ART. & ENT. L. & POL’Y 37, 39 (1996).

<sup>8</sup> See Monica E. Antezana, *The European Union Internet Copyright Directive as Even More than it Envisions: Toward a Supra-EU Harmonization of Copyright Policy and Theory*, 26 B.C. INT’L & COMP. L. REV. 415, 439 (2003).

<sup>9</sup> *Id.*

<sup>10</sup> Hartman, *supra* note 7, at 47.

<sup>11</sup> David A. Hepler, *Dropping Slugs in the Celestial Jukebox: Congressional Enabling of Digital Music Piracy Short-Changes Copyright Holders*, 37 SAN DIEGO L. REV. 1165, 1173 (Fall 2000) (citing H.R. Rep. No. 102-873, pt. 1, at 12 (1992)).

<sup>12</sup> Fred Koenigsberg et al., *Music, the Internet, and the Music Industry*, 640 PLI/Pat. 9, 13-14 (2001). “Real time” means that users can access music without saving the information first to a storage drive.

they consumed too much memory and required long download periods, but newer formats such as MP3 compress a song into only a few megabytes and allow songs to be downloaded in minutes or even seconds.<sup>13</sup>

This expansion in technology has produced a considerable headache for the recording industry. Studies estimate that the migration of consumers, turned off by high CD prices and marginal products, to the illegal music download market costs the record business at least \$700 million in lost CD sales annually.<sup>14</sup> Given that the quality and speed of digital recordings available on the Internet constitutes a vast improvement over making copies of a CD on tape, copyright law necessarily needed to develop to keep up with new technology.<sup>15</sup>

### III. THE EVOLUTION OF COPYRIGHT LAW TOWARDS PROTECTION OF DIGITAL MUSIC FILES

Changes in the dynamics of technology, the ability of consumers to reproduce exact copies of songs,<sup>16</sup> and the rise of Internet exchange networks have prompted a significant extension of copyright protections in both the United States and abroad.<sup>17</sup>

#### A. U.S. Regulation

##### 1. *The Copyright Act of 1976*

Under the Copyright Act of 1976 and subsequent amendments, music is copyrightable subject matter<sup>18</sup> and given federal protection.<sup>19</sup> The Copyright Act gives copyright holders the exclusive rights to reproduce works, prepare derivative works, distribute the work to the public, perform the work publicly, and display the work.<sup>20</sup> Music recordings generally

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<sup>13</sup> *Id.*

<sup>14</sup> Takeuchi-Cullen, *supra* note 3, at 44.

<sup>15</sup> As discussed in later sections, *see infra* p. 234, Copyright Law did not address digital reproductions until the passage of later acts such as the Digital Millennium Copyright Act ("DMCA").

<sup>16</sup> *See* discussion on digital technology, *supra* p. 230; *See also* Jeffrey L. Dodes, *Beyond Napster, Beyond the United States: The Technological and International Legal Barriers to On-Line Copyright Enforcement*, 46 N.Y.L. SCH. L. REV. 279, 287-88 (2002).

<sup>17</sup> *See* Joshua S. Bauchner, *Globalization and Democratization: The Reclaiming of Copyright*, 4 TUL. J. TECH. & INTELL. PROP. 93, 104 (2002).

<sup>18</sup> *See* Eleanor M. Lackman, *Slowing Down the Speed of Sound: A Transatlantic Race to Head off Digital Copyright Infringement*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1161, 1164 (2003) ("[t]he term 'copyright' actually refers to a bundle of exclusive rights retained by the author or owner of the copyright").

<sup>19</sup> 17 U.S.C. § 102(2) (2000).

<sup>20</sup> *See id.*

contain two distinct copyrighted works: the “musical work,” the underlying musical composition and words created by the composer, and the “sound recording,” the actual musical sound that results from the recording by the performing artist.<sup>21</sup> In practice these copyrights are often held by different owners, i.e., a musical work copyright will be owned by the composer or a music publisher and the sound recording is typically assigned by the performer to the record label through contract.<sup>22</sup> An individual wanting to make use of a copyrighted piece of music must obtain the applicable rights from both the musical work holder and the sound recording holder.<sup>23</sup> While the Copyright Act lays out protections for musical rights ownership, in its initial stage there was no account of the methods with which these materials could travel.

The Act also lays out protections for consumer use that were prevalent at common law, enabling consumers to use copyrighted material in a restricted manner.<sup>24</sup> Traditional fair use rights allow a person or organization to use a copyrighted work for teaching, research, news reporting, comment or criticism, and various other non-profit uses.<sup>25</sup> Courts use four factors to determine whether someone other than the copyright holder can use protected material: (1) the purpose and character of use (i.e., commercial v. non-profit); (2) the nature of the copyrighted work; (3) the amount of the work used in respect to the whole; and (4) the effect of the use on the potential market of the work or the value of the work.<sup>26</sup> In this way, the Act created a balancing test between protections of copyright holders and consumer’s rights to use the material.<sup>27</sup>

## 2. *The Audio Home Recording Act of 1992*

The first Congressional address to the threat of digital music piracy came with the Audio Home Recording Act (“AHRA”) of 1992.<sup>28</sup> The AHRA addressed the conflict between intellectual property law and new technologies by: (1) establishing a royalty fund to compensate copyright

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<sup>21</sup> Koenigsberg et al., *supra* note 12, at 12 (quoting 17 U.S.C. § 102(a)(7), §§ 101, 201(b)).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See 17 U.S.C. 1007 (2001) (codifying fair use rights that were historically protected by common law). These protections are discussed further in the analysis of the *MP3.com* and *Napster* cases, *infra* p. 244.

<sup>25</sup> Dodes, *supra* note 16, at 291.

<sup>26</sup> *Id.* at 292.

<sup>27</sup> *Id.* See also Lackman, *supra* note 18, at 1199 (arguing that, before the digital age, legislative and judicial goals included “balancing copyright against the advancement of technology and protection of the public’s rights to access the works, protect their privacy, and express themselves freely”).

<sup>28</sup> 17 U.S.C. §§ 1003-1007 (1994 & Supp. IV 1998).

owners for expected digital infringement,<sup>29</sup> and (2) mandating incorporation of copyright controls into “digital audio recording” devices to prevent serial copying.<sup>30</sup> The AHRA purported to balance the rights of consumers and copyright holders by ensuring consumers’ ability to make analog or digital audio recordings of music for private, noncommercial use while providing a royalty payment system to compensate copyright holders.<sup>31</sup>

While the AHRA was a step in the right direction as far as acknowledging the problems developing technology presented to copyright owners,<sup>32</sup> the AHRA provided no protection to copyright owners from personal computer downloads.<sup>33</sup> In fact, the AHRA exempted personal computers from the category of “digital recording device” by providing coverage only to devices whose “primary purpose” is to make digital audio copies of recordings for private use.<sup>34</sup> Moreover, the AHRA defines a “digital music recording as a material object . . . in which are fixed, in a digital recording format, only sounds, and material, statements, or instructions incidental to those fixed sounds.”<sup>35</sup> These two provisions serve to exempt personal computers from the sphere of control of the AHRA, thereby preventing copyright owners from receiving compensation for recordings made through a computer.<sup>36</sup> In the wake of court decisions upholding this interpretation of the Act,<sup>37</sup> copyright owners were in need of additional protection for digital downloading activity through computer and Internet applications.

### 3. *Digital Performance Rights in Sound Recordings Act of 1995*

Until 1995, ownership of a musical work copyright included exclusive rights to perform and display the copyrighted work publicly.<sup>38</sup> With the Digital Performance Right in Sound Recordings Act (“DPRA”), copyright owners were further granted an exclusive right “to perform [sound

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<sup>29</sup> *Id.*

<sup>30</sup> 17 U.S.C. § 1002 (1994).

<sup>31</sup> See Hepler, *supra* note 11, at 1178. (citing Senate committee reports for the proposed adoption of the AHRA); S. Rep. No. 102-294, at 32 (1992).

<sup>32</sup> See Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 379 (2003). Yu notes that the AHRA may be a model for future compromise between copyright owners and manufacturers in that it protects the copyright owners, by requiring manufacturers to pay compensatory royalties for use of digital technology, while simultaneously allowing distributors to focus on selling their products without interference.

<sup>33</sup> *Id.* at 386.

<sup>34</sup> 17 U.S.C. § 1001(3).

<sup>35</sup> 17 U.S.C. § 1001(5)(A)(i) (1994).

<sup>36</sup> Hepler, *supra* note 11, at 1182. See also *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072 (9th Cir. 1999).

<sup>37</sup> See discussion of the *Diamond Multimedia* case, *infra* p. 242.

<sup>38</sup> 17 U.S.C. §§ 106(4)&(5) (1994 & Supp. IV 1998).

recordings] publicly by means of a digital audio transmission.”<sup>39</sup> The DPRA attempted to give musicians limited protection in sound recordings performed over the Internet. The DPRA essentially forces Web Site owners wishing to webcast music over the Internet to obtain a license authorizing the public performance of the recording from the owner of the copyright in the sound recording, in addition to obtaining a license from the owner of the musical work copyright.<sup>40</sup>

While the DPRA recognized a new type of right held by copyright owners, allowing royalties to be collected from Internet performances of music where no such right was provided for radio broadcasting,<sup>41</sup> the DPRA was focused on digital copying by the “uploader” (those who make files available on the Internet to others), not by “downloaders” (those who access available music for themselves).<sup>42</sup> File sharing and Internet music download services were still not within the boundaries of the regulation.

#### 4. Digital Millennium Copyright Act of 1998

In order to implement two World Intellectual Property Organization (“WIPO”) treaties,<sup>43</sup> Congress passed the Digital Millennium Copyright Act (“DMCA”) in 1998.<sup>44</sup> The DMCA contained amendments and additions to the Copyright Act in an effort to bring the law up to date with the onslaught of digital technology and copying capabilities. The DMCA includes anti-circumvention provisions to prevent users from breaking codes to encrypted files and safe harbor provisions for Internet Service Providers (“ISPs”) to keep them from liability for illegal piracy activities of users, as long as certain conditions are met.<sup>45</sup>

The main focus of the DMCA is to protect copyright holders against

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<sup>39</sup> 17 U.S.C. § 106(6) (Supp. IV 1998).

<sup>40</sup> See Hepler, *supra* note 11, at 1183 (citing Heather D. Rafter et al., *Streaming into the Future: Music and Video on the Internet*, 547 PLI/Pat. 605, 618 (1999)).

<sup>41</sup> See Eric Boehlert, *Record Companies: Save us From Ourselves*, Salon.com, at [http://www.salon.com/ent/feature/2002/03/13/indie\\_promotion/index.html](http://www.salon.com/ent/feature/2002/03/13/indie_promotion/index.html) (last updated Mar. 13, 2002) (showing that almost all airplay on commercial FM radio is paid for by 5 major record labels).

<sup>42</sup> Hepler, *supra* note 11, at 1182. The term “uploader” refers to users who make files available on the Internet for others to access and “download.”

<sup>43</sup> These treaties are discussed further in the WIPO treaties section of this comment, *infra* p. 238. WIPO has 175 member states, including members of the European Union and the United States. The adoption of the WIPO copyright treaty and the WIPO Performances and Phonograms Treaty set the background for the DMCA and the European Union Copyright Directive. See Lackman, *supra* note 18, at 1171.

<sup>44</sup> Pub. L. No. 105-304, 112 Stat. 2860 (1998).

<sup>45</sup> David Balaban, *The Battle of the Music Industry: The Distribution of Audio and Video Works via the Internet, Music and More*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 235, 258-59 (2001).



the circumvention of built-in protections found in digital recordings.<sup>46</sup> Known as the “black box” provisions, these requirements prevent users from interfering with standard “technical measure[s]” designed to identify or protect copyrighted works.<sup>47</sup> Examples of these technological methods include watermarking and encryption methods. Watermarks are inaudible additions to music that inform playback devices of the authenticity of the recording.<sup>48</sup> Watermarks provide a trail that owners can use to trace the distribution of a sound recording through the Internet. Moreover, the watermarks cannot be removed from the recording without degrading the sound quality.<sup>49</sup> Encryption devices serve as an electronic lock, preventing users that do not have the correct password from listening to the sound.<sup>50</sup> However, once a correct password is found, that password can be passed along with the recording, making the encryption useless.<sup>51</sup> The DMCA thus prohibits users from circumventing measures like watermarking and encryption (or any other technological measures that may be devised) in order to gain access to protected music files. Violations of the DMCA subject the violating party to civil liability for copyright infringement.<sup>52</sup>

The compromise in the DMCA comes from its “safe harbor” provisions, which serve to limit the circumstances under which ISPs can be found liable for infringing the copyrights of sound recordings.<sup>53</sup> The DMCA also does not require ISPs to police their own sites.<sup>54</sup> Although the DMCA provides strict liability for infringement of copyrights, four categories are given that serve to limit the circumstances under which infringement occurs. These “safe harbor” categories include: (1) conduit functions, (2) system caching, (3) user storage, and (4) information location tools.<sup>55</sup> These provisions ultimately laid the groundwork for the record industry’s recent attack on individual file sharers as they opened the door for initial subpoenas on ISPs by the RIAA.<sup>56</sup>

These four “safe harbor” categories provide ISPs with protection against copyright infringement liability.<sup>57</sup> The conduit function provision limits liability for routing sound from one point to another. Under the

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<sup>46</sup> Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

<sup>47</sup> Balaban, *supra* note 45, at 258. See 17 U.S.C. § 1201(a)(1).

<sup>48</sup> See David Balaban, *Music in the Digital Millennium: The Effects of the Digital Millennium Copyright Act of 1998*, 7 UCLA ENT. L. REV. 311, 321 (2000).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Hepler, *supra* note 11, at 1186-87.

<sup>53</sup> See 17 U.S.C. § 512 (1996 & Supp. V 2001).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> See discussion of recent RIAA lawsuits, *infra* p. 245 .

<sup>57</sup> 17 U.S.C. § 512; See also Balaban, *supra* note 45, at 262.

DMCA, transmissions that occur automatically and without any material selection by the ISP will not subject the ISP to liability.<sup>58</sup> System caching allows ISPs to make temporary copies of sound recordings in order to provide quicker access for users.<sup>59</sup> The DMCA requires ISPs to limit access to the sound recording to those who meet the conditions imposed by the person who posted the recording.<sup>60</sup> User storage, perhaps the most “far reaching” of the provisions,<sup>61</sup> protects ISPs from liability for storing a copy of an infringing sound recording on its system at the direction of a third party.<sup>62</sup> An ISP faces limited liability as long as it has no actual knowledge, or reason to know, that a sound recording is infringing a copyright, and it may not receive a direct financial benefit from the infringing material residing in its system.<sup>63</sup> Finally, the Information Location Tools provision limits an ISP’s liability for providing search engines, hyperlinks, and directories that link a user to unauthorized copies of musical recordings.<sup>64</sup>

With the passage of the DMCA, the United States brought added protections for copyright holders in a digital world. The progression of copyright law, from the Copyright Act to the DMCA, thus evolved from acknowledged forms of private consumer uses<sup>65</sup> towards a more restrictive stance on digital piracy.<sup>66</sup> The DMCA provides a significant increase in the protection afforded to copyright owners from Internet trading activity with the addition of anti-circumvention provisions. However, the provisions in the DMCA limiting liability for Internet Service Providers left room for copyright liability to pass onto individual users and music consumers.

## B. E.U. Regulation

The European Union, much like the United States, has struggled to secure copyright protections in the ever changing digital age. While both systems ultimately expose individuals to attack by the recording industry, E.U. copyright protections evolved along a separate path from those of the United States. Considering the expansive and continuously developing

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<sup>58</sup> 17 U.S.C. § 512 (b)(1)(C) (1996).

<sup>59</sup> Balaban, *supra* note 45, at 263.

<sup>60</sup> 17 U.S.C. § 512 (b)(1)(C) (1996).

<sup>61</sup> Balaban, *supra* note 45, at 264.

<sup>62</sup> 17 U.S.C. § 512 (b)(2)(D) (1996 & Supp. V 2001).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at § 512(d).

<sup>65</sup> See Yu, *supra* note 32, at 389 (discussing the fair use factors specified in the Copyright Act).

<sup>66</sup> See Matthew C. Mousley, *Peer to Peer Combat: the Entertainment Industry’s Arsenal in its War on Digital Piracy*, 48 VILL. L. REV. 667, 681 (2003). Many consumer organizations argue that the DMCA’s anti-circumvention provisions, and other provisions, severely undermine consumers’ fair use rights which were historically protected in common law and codified in the Copyright Act.

nature of the European Union,<sup>67</sup> it is useful to look at the history of international copyright legislation to observe how the U.S. legislation described above shaped E.U. directives. While the legislative copyright controls in the United States consist mostly of additions to existing law, the European Union copyright system requires member states to conform their laws to the “directives” laid down by the European Council.<sup>68</sup>

### 1. *GATT and the TRIPS Agreement (1986)*

Prior to 1986, there was little in the way of uniform global standards for the protection of copyright in the modern age.<sup>69</sup> The General Agreement on Trade and Tariffs (“GATT”) and Trade Related Aspects of Intellectual Property (“TRIPS”) represented a significant effort to formulate a global, protectionist system.<sup>70</sup> TRIPS, passed in 1986, provided internationally accepted minimum standards for intellectual property enforcement and protection.<sup>71</sup> It obligates members of the World Trade Organization (“WTO”), including European Union countries and the United States, to make provisional measures available in disputes involving intellectual property.<sup>72</sup> Although TRIPS tries to maintain broad copyright protections, it was not developed in view of the emerging online world, so Internet technology was ignored.<sup>73</sup>

### 2. *The WIPO Treaties*

The World Intellectual Property Organization (“WIPO”), established in 1996, was created to expand previously ineffective standards for international copyright law and the Internet.<sup>74</sup> WIPO promulgated two treaties in 1996 which heavily influenced the advancement of international

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<sup>67</sup> See Lackman, *supra* note 18, at 1176.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 1169. The first attempt at global copyright protections came with the Berne Convention for the Protection of Literary and Artistic Works in 1888 (“Berne Convention”). The Berne Convention set minimum standards for copyright protection but did not protect the owners of sound recordings, nor did the convention create any global system of copyright enforcement.

<sup>70</sup> Bauchner, *supra* note 17, at 108.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 108-09.

<sup>73</sup> *Id.* at 109-10. *But see* Francine Cunningham, *Music Industry Calls for Better Enforcement of Rights on 10th Anniversary of TRIPS*, June 23, 2004, at <http://www.ifpi.org/site-content/press/20040623.html> (last visited Oct. 2004). The recording industry is urging the European Union to “take action to strengthen enforcement of intellectual property rights,” including the TRIPS agreement.

<sup>74</sup> *Id.* at 110; *See also* June M. Besek, *Digital Rights Management: Protection and Enforcement*, 691 PLI/Pat 893 (2002).

copyright law: the WIPO Copyright Treaty (“WCT”),<sup>75</sup> and the WIPO Performances and Phonograms Treaty (“WPPT”).<sup>76</sup> Indeed, both the DMCA and the European Union Directive on Copyright<sup>77</sup> were adopted in significant part to incorporate provisions of the WIPO treaties.<sup>78</sup>

Both WIPO treaties included provisions for anti-circumvention of technological protection measures and for the protection of rights management (ownership) information. The WCT requires countries joining the treaty to provide adequate legal protection and remedies against the circumvention of technological measures used by copyright owners to protect their proprietary material in digital format.<sup>79</sup> In addition, the treaty contains a provision requiring countries to provide “adequate and effective legal remedies” against persons who: (1) infringe on copyrighted material by removing or altering information without authority; or (2) distribute, import, broadcast or communicate copies of works where digital electronic rights management information has been removed, if the person performing the act knows or has reason to know that it will induce copyright infringement.<sup>80</sup> The WCT extends existing copyright protections to computer programs and data compilations, but stops short of protecting the content of the files themselves.<sup>81</sup>

### 3. *E.U. Copyright Directive (2001)*

Acknowledging the need for stronger enforcement of copyright protections by its member states in the face of developing digital technology and Internet file sharing, the European Union issued a Directive on Copyright and the Information Society (“Copyright Directive”) in 2001.<sup>82</sup> The Copyright Directive incorporates WIPO’s anti-circumvention prohibitions and gives copyright owners exclusive rights to authorize or

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<sup>75</sup> WIPO Copyright Treaty, Dec. 20, 1996, reprinted in Paul Goldstein, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW & PRACTICE* 463 (2001).

<sup>76</sup> WIPO Performances and Phonograms Treaty, Dec. 20, 1996, reprinted in Goldstein, *supra* note 75, at 480.

<sup>77</sup> See discussion p. 237.

<sup>78</sup> See Bauchner, *supra* note 17, at 110 (stating that the WIPO Copyright Treaty “heavily influenced the drafting of the European Union Copyright Directive and served as the impetus behind the DMCA”).

<sup>79</sup> WIPO Copyright Treaty, *supra* note 75, Art. 11 (the WPPT contains a similar provision in Art. 19).

<sup>80</sup> *Id.* at Art. 12 (WPPT Art. 19).

<sup>81</sup> See Bauchner, *supra* note 17, at 110 (citing WIPO Copyright Treaty, *supra* note 76, arts. 4-5).

<sup>82</sup> Council Directive 2001/29/EC of the European Parliament and of the Council Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10.

prohibit communication of their works to the public.<sup>83</sup> These rights include the ability of owners to make works available to the public in a way that allows individuals to access them from a place and time chosen by the individual.<sup>84</sup> Commentators interpret the Copyright Directive's right of availability to include all methods of transmitting music online.<sup>85</sup> Reproduction rights of copyrighted materials under the Copyright Directive follow the same format mentioned above.<sup>86</sup> Distribution rights, however, seem to apply only to material objects and not to online delivery of music.<sup>87</sup>

These rights described in the Copyright Directive help provide a blueprint for member states for affording protections to copyright owners while simultaneously maintaining exemptions for personal, non-commercial use of copyrighted works.<sup>88</sup> While the Copyright Directive does not specifically require private use exceptions, the exceptions are permitted as long as the right-holder receives "fair compensation."<sup>89</sup> This allows member states to maintain private use privileges in their laws at the same time permitting individuals to reproduce copyrighted work for private, noncommercial purposes. Article 6(4) of the Copyright Directive allows member states to take these measures, unless reproduction for private use has already been made possible by copyright holders in a manner that allows the holder to benefit from the exemption.<sup>90</sup> By explicitly allowing for private use exceptions, the directive attempts to provide for some personal use of copyrighted material for Internet users. Moreover, unlike the DCMA, the Copyright Directive does not provide broad protection of liability to ISPs.<sup>91</sup>

#### 4. E.U. Directive on the Enforcement of Intellectual Property Rights (2004)

Most recently, the European Commission introduced a directive which tightens the reigns on digital music piracy and enables the recording industry to attack users in Europe much like the lawsuits in the United States.<sup>92</sup> The Directive on the Enforcement of Intellectual Property Rights

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<sup>83</sup> *Id.* art. 2.

<sup>84</sup> *Id.* art. 3(1).

<sup>85</sup> See Daniel J. Gervais, *Transmissions of Music on the Internet: An Analysis of the Copyright Laws of Canada, France, Germany, Japan, the United Kingdom, and the United States*, 34 VAND. J. TRANSNAT'L L. 1363, 1404 (2001).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* (citing paragraph 18 of the directive preamble, which states that copyright protection under the directive "includes the exclusive right to control distribution of the work incorporated in a tangible article . . .").

<sup>88</sup> *Id.*; See also Besek, *supra* note 74, at 909.

<sup>89</sup> E.U. Directive, *supra* note 82, art. 5(2)(b).

<sup>90</sup> *Id.* art. 6(4); Besek, *supra* note 74, at 909.

<sup>91</sup> Lackman, *supra* note 18, at 1177.

<sup>92</sup> See E.U. IP Enforcement Directive, *supra* note 6. The directive created an uproar in the

("Enforcement Directive") applies to "any intentional violation" of copyright,<sup>93</sup> which necessarily extends to all types of intellectual property violations (including music file-sharing). It was described by critics as the "nuclear weapon of digital rights law,"<sup>94</sup> and, according to opponents, carries the potential for recording industry officials to "raid your house" or "freeze your bank accounts" once any reproduction of music from the Internet is made.<sup>95</sup> Despite the potential for resistance, or perhaps because of it, the Enforcement Directive was approved by the European Parliament in March 2004 on its first reading.<sup>96</sup> It seems likely that this directive was influenced, at least in part, by the recent attacks on Internet music piracy in the United States.

While this new directive has the potential for far-reaching repercussions on music file sharers, proponents maintain that certain limitations prevalent in existing E.U. law will continue.<sup>97</sup> In particular, the Commission states that the Enforcement Directive "aims to strike a fair balance between the interests of right holders and legitimate users of intellectual property," while the protective measures "focus on commercial infringements or those which most damage rightholders' interests."<sup>98</sup> It also seems to provide more of a burden on Internet Service Providers by allowing courts to impose interlocutory injunctions on intermediaries "to desist from participating in infringements."<sup>99</sup> While the deadline for implementation of the Enforcement Directive is close to two years away, it remains to be seen what impact the new law will have on digital music piracy measures in European member states.<sup>100</sup>

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internet community because of its far-reaching scope and "targeting [of] Peer-2-Peer (P2P) file-sharing software and other non-commercial infringements" of copyrights. See Robin Gross, *European Union Poised to Attack p2p File-Sharers*, IP Justice, available at [http://www.ipjustice.org/CODE/update20040214\\_en.shtml](http://www.ipjustice.org/CODE/update20040214_en.shtml) (Feb. 14, 2004). IP Justice is "an international civil liberties organization that promotes balanced intellectual property law in a digital world." See "About IP Justice," at <http://www.ipjustice.org/about.shtml>.

<sup>93</sup> E.U. IP Enforcement Directive, *supra* note 6, art. 2.

<sup>94</sup> Sebastian Rupley, *The Nuclear Weapon of Digital Rights Law: Europe Set to Establish Restrictive Copyright Legislation*, PC MAG., available at [http://abcnews.go.com/sections/scitech/ZDM/EU\\_digital\\_rights\\_pcmag\\_040302.html](http://abcnews.go.com/sections/scitech/ZDM/EU_digital_rights_pcmag_040302.html) (Mar. 3, 2004).

<sup>95</sup> *Id.* (quoting Robin D. Gross, executive director of IP Justice).

<sup>96</sup> If the directive went through a second reading, opponents may have been able to raise substantial issues for debate. Instead the directive was passed on the first try, something usually reserved for "un-controversial" directives or directives to which "there is near unanimous agreement." See Gross, *supra* note 92.

<sup>97</sup> See "Frequently Asked Questions" page from the European Commission press release describing the directive, at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/03/20&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited Sept. 17, 2004).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> However, the recording industry began attacking internet music infringers soon after

The different approaches taken by the European Union and the United States towards providing rights and protections to copyright holders in the digital age have led to conflicting approaches by their respective court systems. The progression of U.S. lawsuits brought by the recording industry to protect digital rights laid a foundation for the individual lawsuits that followed, both in the United States and abroad.

#### IV. THE RECORDING INDUSTRY'S STRUGGLE TO TAKE CONTROL OF DIGITAL COPYRIGHT PROTECTIONS IN THE U.S.

##### A. Attack on Music Download Devices and Internet Service Providers

The RIAA represents record companies and recording artists in the protection of copyrighted materials.<sup>101</sup> The recording industry's attack on copyright infringement in the realm of digital music protections proceeded in much the same way federal law incorporated those protections: slowly at first and then with increasing frequency. The RIAA's attempt to gain a foothold on digital rights became stronger as federal law provided more protections to copyright holders. The following cases provide a historical context of the Recording Industry's move towards the individual Internet user.

##### 1. *The Diamond Multimedia case (1999)*

In 1999, the Ninth Circuit Court of Appeals exposed the loophole in the AHRA which prevented computer hard drive downloading devices from falling under the "digital audio recording device" provision.<sup>102</sup> This case was one of the first attempts by the RIAA to pursue legal remedies against MP3 transport devices.<sup>103</sup> The RIAA sued Diamond Multimedia, a manufacturer of a hand-held MP3 device (the Rio) capable of receiving, restoring and replaying digital audio files stored on personal computer hard drives, alleging a violation of the AHRA.<sup>104</sup> The court held that the MP3 devices did not record directly from "digital music recordings," stating that the devices were not "digital audio recording devices" under the AHRA because they did not reproduce digital music recordings from transmissions.<sup>105</sup> Specifically, the court noted that computers would not

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the directive's approval by the Commission. See discussion, *infra* Part IV.

<sup>101</sup> See Yu, *supra* note 32, at 331-32.

<sup>102</sup> Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1081 (9th Cir. 1999).

<sup>103</sup> MP3 transport devices, like portable CD players and walkmans, allow users to download songs onto a device and carry them where ever they go. Examples include Apple's iPod and Gateway's MP3 carrier.

<sup>104</sup> *Diamond Multimedia Sys.*, 180 F.3d at 1074-75.

<sup>105</sup> *Id.* at 1080.

qualify as “digital audio devices” because their primary purpose is not to make digital audio recordings.<sup>106</sup>

The Ninth Circuit’s decision had obvious repercussions for copyright protections of digital music files. In support of its decision, the court reiterated that the purpose of the AHRA was to ensure the right of consumers to make digital audio recordings for their private, noncommercial use.<sup>107</sup> The holding eliminated the electronic manufacturer, a key player in Internet piracy, from legal attack under the AHRA.<sup>108</sup> Consequently, after the decision, the Rio and other MP3 players were marketed without possibility of copyright infringement and enjoyed considerable sales.<sup>109</sup>

## 2. *The MP3.com case (2000)*

After failing to successfully use copyright law against electronic manufacturers, the recording industry turned to Internet Service Providers and found more help from federal legislation. In September of 2000, several record labels brought suit against MP3.com for its Internet service which allowed users to access their music collections and listen to them anywhere and anytime.<sup>110</sup> MP3.com users logged onto a website and were allowed access to a CD stored in the MP3.com database, provided the user indicated that he or she was already in possession of the CD or agreed to purchase the CD through the website.<sup>111</sup> Users were required only to prove possession of a CD, not ownership, and it was estimated that a large number of users borrowed CDs from others and gained access to the content through MP3.com’s website without ever purchasing the particular CD.<sup>112</sup> At trial, evidence indicated that engineers and managers of MP3.com realized that the website would enable copyright infringement of music.<sup>113</sup>

The District Court ordered MP3.com to pay UMG Recordings, Inc. \$118 million for willful infringement of the copyrights of thousands of CDs.<sup>114</sup> The Court dismissed MP3.com’s argument that its service was protected by private use protections since users were not accessing their

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<sup>106</sup> *Id.* at 1078.

<sup>107</sup> *Id.* at 1079 (citing S. REP. NO. 102-294 at 86 (1992)).

<sup>108</sup> Tamara Milagros-Woeckner, *Karma or Golden Opportunity?: A New Business Model for the Music Industry Launching into Cyberspace*, 30 SW. U. L. REV. 295, 304 (2001).

<sup>109</sup> *Id.* (stating that 813,000 players were sold in 1999 alone).

<sup>110</sup> UMG Recordings v. MP3.com, Inc., No. 00 Civ. 472, 2000 U.S. Dist. LEXIS 13293 (S.D.N.Y. Sept. 6, 2000).

<sup>111</sup> *Id.* at \*7.

<sup>112</sup> *Id.* at \*16.

<sup>113</sup> *Id.* at \*8-9.

<sup>114</sup> *Id.* at \*18.



own personal CD collections.<sup>115</sup> Accordingly, the Court held that fair use does not include music copied onto servers exclusively for commercial use.<sup>116</sup> Moreover, since evidence was offered by the plaintiff that MP3.com knew it was engaging in unlawful activity, the Judge found that MP3.com's copyright infringement was willful.<sup>117</sup>

### 3. *The Napster litigation (2001)*

The litigation against Napster, Inc. ("Napster") is perhaps the most popular and well-publicized victory for the recording industry in its fight to maintain copyright protections for Internet file-swapping. Napster distributed file sharing software from its Internet website, which users could download, free of charge, and use to file share sound recordings (MP3 files) with other users.<sup>118</sup> The District Court held that Napster users directly infringed the copyrights of sound recordings, since "virtually all Napster users engaged in unauthorized downloading or uploading of copyright music," and issued a preliminary injunction to shut down the service.<sup>119</sup> On appeal, the Ninth Circuit upheld the District Court's preliminary injunction with certain modifications.<sup>120</sup> On remand, the District Court modified the injunction and ordered Napster to disable its service until certain conditions were met.<sup>121</sup>

Napster defended its service primarily through the fair use doctrine,<sup>122</sup> which allows individuals to reproduce a copyrighted work for private, noncommercial use. The District Court disagreed, stating that unauthorized downloading of copyrighted music was not personal use.<sup>123</sup> The court also found that the creative nature and the "wholesale copying" of the work opposed a finding of fair use, and found that there was evidence of

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<sup>115</sup> *Id.* at \*10-11.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at \*14. Since the decision, MP3.com removed their music files and the site is currently working to develop a "next generation digital music information service" that makes it easier for users to find the music they want online, the site was subsequently launched in early 2004. See <http://mp3.com/> (last visited Sept. 17, 2004).

<sup>118</sup> *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 901 (N.D. Cal. 2000).

<sup>119</sup> *Id.* at 911.

<sup>120</sup> See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1027 (9th Cir. 2001). The Ninth Circuit upheld the District Court's injunction but put the burden on the plaintiffs to provide notice of the copyrighted works available on the Napster system before the court conferred a duty on Napster to police its service for infringing material.

<sup>121</sup> *A&M Records v. Napster, Inc.*, No. C 99-05183 MHP, MDL No. C 00-1369 MHP, 2001 U.S. Dist. LEXIS 2186 (N.D. Cal. Mar. 5, 2001), the District Court's modified injunction and disabling order were subsequently upheld by the Ninth Circuit. *A&M Records v. Napster, Inc.*, 284 F.3d 1091, 1098 (9th Cir. 2002).

<sup>122</sup> The prototypical analysis of fair use was described in detail in *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 450 (1984).

<sup>123</sup> *A&M Records*, 114 F. Supp. 2d. at 912.

Napster's service harming the market for copyrighted musical works.<sup>124</sup> The Napster litigation blew the door open for the record industry to attack other music downloading and file-sharing service providers.

### B. Turning Towards the Individual User

Even after the litigation against Internet services such as Napster and MP3.com, it seemed unlikely to observers that the recording industry would turn towards individual Internet users.<sup>125</sup> However, it was acknowledged that such a tactic could be used strategically as a deterrent to individual file swapping despite the inevitable public relations problem.<sup>126</sup> Lawsuits against individual users became an even greater possibility after the RIAA served subpoenas to Internet Service Providers ("ISPs") requesting the identities of anonymous users alleged to have participated in illegal file downloading.<sup>127</sup>

In January of 2003, the District Court for the District of Columbia ruled that Verizon Communications could not keep private the names of customers sought in the RIAA subpoenas for online music trading.<sup>128</sup> The court held that the DMCA's provisions clearly allowed for the recording industry to seek out such information from Internet Service Providers. The district court's enforcement of the RIAA subpoenas enabled the recording industry to obtain the information necessary to proceed with individual lawsuits against Internet users participating in illegal downloading.<sup>129</sup> On appeal, the D.C. Circuit reversed the decision, stating that the DMCA's provisions do not allow the RIAA to use special copyright subpoenas to unmask Internet users before filing suit, as long as the ISPs were not engaged in storing infringing material on its servers.<sup>130</sup> The District Circuit relied upon the language of the DMCA (exempting ISPs acting as a "mere conduit" for information) and the overall structure of the act to quash the subpoenas filed by the RIAA.<sup>131</sup> Despite this setback, the RIAA continued its legal attack by filing "John Doe" lawsuits to first determine the names of

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<sup>124</sup> *Id.*

<sup>125</sup> Matthew Fagin et al., *Beyond Napster: Using Antitrust Law to Advance and Enhance Online Music Distribution*, 8 B.U. J. SCI. & TECH. L. 451, 483 (2002) ("No one wants to sue individual users, especially since to do so looks like an exceedingly bad public relations exercise, and no one could sue them all.").

<sup>126</sup> *Id.* at 161.

<sup>127</sup> *In re: Verizon Internet Servs., Inc.*, 240 F. Supp. 2d 24 (D.D.C. 2003).

<sup>128</sup> *Id.* at 44.

<sup>129</sup> *See Egelko, supra* note 5.

<sup>130</sup> *Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1238 (D.C. Cir. 2003).

<sup>131</sup> *Id.* at 1235-38.

individual users.<sup>132</sup> In essence, the Court of Appeals' ruling just made the process more cumbersome for the RIAA without providing a shield for Internet users.<sup>133</sup>

Despite the adverse ruling by the D.C. Court of Appeals, the RIAA has filed over three thousand lawsuits against file sharers to date,<sup>134</sup> and the Department of Justice has empowered a new task force to spearhead the fight against file-sharing through a revamp of federal law.<sup>135</sup> Opponents of such a task force argue that "ordinary file-sharing citizens" are "misleadingly lump[ed] . . . with real pirates profiting from the manufacturer of bootleg CDs and DVDs."<sup>136</sup>

## V. STRUGGLE IN THE EUROPEAN UNION

### A. Case Law

Courts of the European Union's member states, unlike those in the United States, seem to disfavor broadly insulating ISPs from liability.<sup>137</sup> Uniform regulation for digital music protection in the European Union is relatively recent, and there are few decisions that touch on music downloading. More recent cases in Europe, however, discuss copyright protections in the face of digital technology. The E.U. Directive on Copyright of 2001 provides a blueprint for Member States to regulate and many Member States have operative systems by which liability for digital

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<sup>132</sup> John Swartz, *Recording Industry is Accusing 553 People of Music Piracy*, N.Y. TIMES, Jan. 21, 2004, available at <http://www.nytimes.com/2004/01/21/business/21WIREMUSIC.html?ex=1076043600&en=f83483fcb550c246&ei=5070>.

<sup>133</sup> *Id.* Consequently, the RIAA has aggressively pursued individual users directly, rather than through ISPs or vicarious liability for file-sharing programs. See Larry Katz, *Music: Hang onto your iPods; Here Comes Orrin Hatch*, BOS. HERALD, Jun. 30, 2004, at 044, available at <http://theedge.bostonherald.com/musicNews/view.bg?articleid=33825> (By June 2004, the RIAA had filed lawsuits against 3,429 people, including several twelve-year-olds). After final drafting of this comment, the Ninth Circuit further restricted the recording industry, finding no vicarious liability for file-sharing programs Grokster and Streamcast, despite piracy by users, in part because there was no central server for the programs with which to police the operations. *MGM Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154 (9th Cir. 2004).

<sup>134</sup> See Katz, *supra* note 133.

<sup>135</sup> See Vanessa Blum, *Going Hollywood: DOJ Joins File-Sharing Fight*, LEGAL TIMES, May 23, 2004, available at <http://www.law.com/servlet/ContentServer?pagename=OpenMarket/Xcelerate/Preview&c=LawArticle&cid=1087855513203>. Indeed, not too long after this article a new piece of legislation dubbed the "Pirate" Act ("Protecting Intellectual Rights Against Theft and Expropriation"), enabling the Justice Department to file civil copyright infringement cases, passed the Senate. See Katz, *supra* note 133.

<sup>136</sup> *Id.*

<sup>137</sup> See Lackman, *supra* note 18, at 1178.

copying and file-swapping of music may be determined.<sup>138</sup> The courts in Europe have shown more flexibility with interpreting these copyright protections.

### *1. Munich Court of Appeals (2001)*

In March of 2001, the Munich Court of Appeals interpreted Germany's copyright provisions (which accord with E.U. Directives) regarding the liability of Internet Service Providers for making protected music available on the Internet.<sup>139</sup> The Court noted that service providers, acting as a host for subscribers who might upload files from their databases, cannot disclaim liability for copyright infringement simply by providing notices informing subscribers that copyright-protected files should not be uploaded.<sup>140</sup> The court also made a number of interpretations regarding the liability of ISPs for illegal Internet activity. While acknowledging that the uploading and downloading of proprietary works clearly infringed copyright protections, the court noted that it would be illogical for service providers to escape liability simply because they were unaware of the copyright status of files on their own servers.<sup>141</sup> The Court noted that any person who takes part in infringement is liable, provided there is a sufficient causal connection between the conduct and the infringement.<sup>142</sup> In this case, the infringement of uploading and downloading protected files could not have taken place without the Internet connection of the service provider.<sup>143</sup>

### *2. LICRA v. Yahoo! (2000)*

In 2000, an opinion issued by the tribunal court of Paris held that ISPs may be found liable for hosting illegal content or activities on the Internet.<sup>144</sup> The court found that Yahoo!, Inc. ("Yahoo") was required to make efforts to dissuade users from accessing an Internet auction site for

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<sup>138</sup> See Gervais, *supra* note 86, for an analysis of copyright law for digital transmissions on the Internet between E.U. Member States of France, Germany and the United Kingdom.

<sup>139</sup> Hit Bit Software GmbH v. AOL Bertelsmann Online GmbH, OLG 29 Munich [Court of Appeals], E.C.C., 15 (2001), 325 (340). The plaintiff in this case, a large producer of MIDI files (programs for the digital storage of music) in Germany, claimed damages for the distribution of musical recordings over the Internet by a large U.S. and German ISP. A musician was able to reproduce instrumental versions of certain songs for plaintiff, and subsequently uploaded versions of these songs became available for download over the internet.

<sup>140</sup> *Id.* at 342.

<sup>141</sup> *Id.* at 335.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> La Ligue Contre Le Racisme et L'Antisemitisme [LICRA] v. Yahoo!, Inc., TGI Paris, Interim Order no. 00/05308, Nov. 20, 2000, available at <http://www.cdt.org/speech/international/001120yahoofrance.pdf>.

Nazi objects and memorabilia (and make access impossible via yahoo.com).<sup>145</sup> Yahoo argued that it would be virtually impossible to prevent access to the particular website. The Court, however, noted that the company had access to the geographical origin of many user IP addresses and could ask other users to identify nationality in order to identify the French users and block access.<sup>146</sup> The ruling, which imposed liability on the ISP, stands in significant contrast to the safe harbor provisions of the DMCA.<sup>147</sup> Further, the French court's decision was not enforced in the United States because of First Amendment concerns (based on viewpoint-based regulation of a website).<sup>148</sup>

#### B. Turning Towards the Individual Internet File-Sharer

While existing E.U. law leaves a fair amount of discretion to Member States regarding the protection of noncommercial music file downloading off the Internet,<sup>149</sup> there is indication that this may change. After the recent approval of the IP Enforcement Directive, the recording industry wasted no time attacking file-sharers in Europe with the same zeal demonstrated in the United States. In March of 2004, the British Phonographic Industry (British counterpart to the RIAA) announced that it will start issuing "legal warnings" of possible action against music file-sharers.<sup>150</sup> Additionally, the International Federation of the Phonographic Industry (the international counterpart to the RIAA) ("IFPI") filed lawsuits across Europe as part of a "global campaign against Internet copyright theft."<sup>151</sup> With the recent onslaught of enforcement activity in Europe, it appears as though music file-swappers everywhere are on notice that they could be next.

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<sup>145</sup> *Id.* at \*5.

<sup>146</sup> *Id.* at \*14.

<sup>147</sup> See Lackman, *supra* note 18, at 1177.

<sup>148</sup> *Id.*; See *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'antisemitisme*, 169 F. Supp. 2d 1181 (N.D. Ca. 2001), *rev'd*, 379 F.3d 1120 (9th Cir. 2004) (finding that personal jurisdiction was not met where the French group did not "purposefully avail" itself of the United States).

<sup>149</sup> See Lackman, *supra* note 18, at 1177 (noting the Copyright Directive allows member states to apply any or all of the exemptions listed, but no others).

<sup>150</sup> See Scarlet Pruitt, *British Music Industry Fights Pirates: U.K. Recording Association Eyes RIAA Tactics in its Own Search for File-Swappers*, PC WORLD, Mar. 26, 2004, available at <http://www.pcworld.com/resource/printable/article/0,aid,115395,00.asp> (last visited Oct. 2004).

<sup>151</sup> The lawsuits, reportedly close to 250 in number, were issued in Denmark, Germany, Italy and Canada. See *Record Industry File Sharing Suits Filed in Europe*, 5 WARREN'S WASH. INTERNET DAILY 62, Mar. 31, 2004, available at 2004 WL 60517581.

## VI. COMPARING THE COPYRIGHT SYSTEMS FOR DIGITAL PROTECTIONS IN THE UNITED STATES AND THE EUROPEAN UNION

Although copyright law in the United States and the European Union developed along substantially different paths, protections for individual users of Internet files have eroded to the point of virtual nonexistence under both systems. With recent legislation<sup>152</sup> aimed at implementing and harmonizing global copyright law after the WIPO treaties, the United States and the European Union took different approaches to accomplish this goal. The U.S. system evolved from the collaboration between the recording industry and ISP lobbying which compromised to push liability onto individual users. The E.U. system, on the other hand, although developed more recently as a reaction to Internet piracy, seems to provide more opportunity for infringement losses to be shared by those in the best position to police illegal activity.<sup>153</sup>

### A. E.U. Copyright Law Provides Less Protection from Liability for Internet Service Providers

A major difference between developing E.U. and U.S. copyright law is the lack of liability protection afforded ISPs under the E.U. directives.<sup>154</sup> While the DMCA includes specific safe harbor provisions for ISPs to shield them from liability, the E.U. Copyright Directive makes no mention of exemptions specifically for service providers.<sup>155</sup> Additionally, the IP Enforcement Directive allows the courts of member-states to enjoin ISPs and require the providers to get rid of infringing content on their networks.<sup>156</sup> No such affirmative duty is placed on ISPs under the U.S. system.<sup>157</sup> This may be, in part, because of the significant amount of lobbying power used by ISPs to form the DMCA in the U.S.<sup>158</sup>

The European Union's system of copyright law thus provides another

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<sup>152</sup> See discussion of the DMCA in the United States and the European Directives on Copyright and IP Rights Enforcement, *supra* Part II.

<sup>153</sup> See Lackman, *supra* note 18, at 1177; See also Dodes, *supra* note 25, at 295 (discussing the hurdles associated with applying the *Napster* liability analysis in international context).

<sup>154</sup> See discussion of the E.U. Copyright Directive, *infra* p. 239.

<sup>155</sup> Indeed, the exemptions given in the Copyright Directive apply to individual use. See Lackman, *supra* note 18, at 1179 (discussing "fair use exemptions" specifically listed in the Directive). Recent case law has hinted that service providers may not receive such protections. See *id.* at 118-81 (discussing uncertain implications of a recent Amsterdam Court of Appeals decision finding liability for a peer-to-peer file-sharing program).

<sup>156</sup> E.U., IP Enforcement Directive, *supra* note 6, art. 10.

<sup>157</sup> See discussion, *supra* p. 235.

<sup>158</sup> Balaban, *supra* note 45, at 258 (describing the DMCA as a compromise between ISPs and the recording industry).

measure copyright holders can use to protect their rights. Instead of going after individual users, copyright holders can place a burden liability on service providers to provide better police measures and make them responsible for Internet activity.<sup>159</sup> The DMCA's safe harbor provisions allow service providers to claim exemption from liability for illegal downloading activity, and those provisions helped pave the way for the RIAA lawsuits filed against individual Internet users.<sup>160</sup> The absence of ISP protections in the European Union directives might allow copyright holders an additional target for infringement attacks. It remains to be seen whether the recording industry will pursue that route, given their continuing campaign against individual users in Europe.<sup>161</sup>

#### B. Both Systems Break from Traditional Protection of Private Use for Consumers

Regardless of the approaches taken by the United States and the European Union towards digital rights protection, the recent lawsuits against individual users under both systems demonstrate the restructuring, and ultimate erosion, of private use protections like those found in the Copyright Act of the United States. Exemptions for fair use were traditionally applied in U.S. common law,<sup>162</sup> while the Copyright Directive in Europe specifically listed exemptions for infringement liability by consumers.<sup>163</sup> Newer legislation under the DMCA and the IP Enforcement Directive makes little to no mention of traditional private use protections,<sup>164</sup> and it appears as though the separate treatment of fair use protections in European law, compared to the lack of protection in the United States, might be obsolete under the new legislation.

While it is unclear how E.U. courts will apply the new directive, the distinction of private use protections before the directive can be seen in courts' application of the DMCA in the United States and the Copyright Directive in the European Union.<sup>165</sup> In the United States, traditional fair use exemptions, developed through common law and codified in the Copyright Act,<sup>166</sup> have eroded to the point of virtual non-existence.<sup>167</sup> In cases such as

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<sup>159</sup> See, e.g., *LICRA v. Yahoo!, Inc.*, *supra* note 144.

<sup>160</sup> See Yu, *supra* note 32, at 398 (discussing the RIAA's "newfound subpoena power" under the DMCA and the subsequent lawsuits against file swappers).

<sup>161</sup> See e.g. Pruitt, *supra* note 150.

<sup>162</sup> Lackman, *supra* note 18, at 1179.

<sup>163</sup> *Id.*

<sup>164</sup> However, the IP Enforcement Directive does make reference to the Copyright Directive and the rights provided therein. IP Enforcement Directive, *supra* note 6, art. 2.

<sup>165</sup> See discussion of cases, *supra* p. 242.

<sup>166</sup> See discussion of Copyright Act, *supra* p. 232.

<sup>167</sup> Lackman, *supra* note 18, at 1184. "Instead of emphasizing the importance of fair use

*Napster*, U.S. courts focus more on whether use diminishes or interferes with the market, and less on the public interest.<sup>168</sup> In U.S. cases of digital downloading, it seems that the fair use test is “less likely to be used as a test that balances public interests . . . than as a basis for finding and affirming liability.”<sup>169</sup> In essence, private use protections are shrinking in that they no longer seem to protect individual, noncommercial users. Conversely, case law in the European Union before the new directive seemed to stress protections for fair use.<sup>170</sup> The Copyright Directive specifically allowed fair use in teaching, scientific research, and social commentary.<sup>171</sup> Recently, the Amsterdam Court of Appeals extended fair use principles to absolve Kazaa, a peer-to-peer file sharing program, from liability for copyright infringement.<sup>172</sup> The court noted that Kazaa was not exclusively used for the “exchange of music files,” and the program was “very well suited as a communication tool” for businesses and citizens.<sup>173</sup> This decision is in direct conflict with the Ninth Circuit’s analysis in *Napster*.<sup>174</sup>

It is too early to tell whether the IP Enforcement Directive will erode private use protections in Europe to the point that they are in line with the legal restrictions in the United States. However, judging by the absence of any provisions preserving those protections and the recent legal activity of the recording industry against Internet users in Europe,<sup>175</sup> the erosion of fair use in European Union member-states may be well under way.

## VII. GETTING BACK TO BALANCING PRIVATE USE PROTECTIONS AND OWNER’S RIGHTS

The lawsuits filed by the RIAA in the United States and the IFPI in Europe against music file swappers are the latest signal that copyright law in the digital age has shifted from the traditional balancing of public and private rights towards a more restrictive protection of industry. Cases like *Napster* and *Verizon* highlight the judiciary’s deference towards protecting industry piracy at the expense of maintaining traditional public exceptions

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and embracing the positive uses of the new technology, [courts] have generally ignored fair use and focused almost exclusively on the negative uses.”

<sup>168</sup> *Id.* at 1184; *A&M Records v. Napster*, 239 F.3d at 1021.

<sup>169</sup> Lackman, *supra* note 18, at 1184-85.

<sup>170</sup> *Id.* at 1180.

<sup>171</sup> See Copyright Directive, *supra* note 82.

<sup>172</sup> *Noot bij Kazaa/ Buma-Stemra, Hof*, Amsterdam, 28 Mar. 2002, no. 1370/01, translation available at <http://www.steptoec.com/publications/196e.pdf> (last visited Feb. 2004).

<sup>173</sup> *Id.* at \*4.

<sup>174</sup> Lackman, *supra* note 18, at 1183.

<sup>175</sup> See Pruitt, *supra* note 150; WASH. POST DAILY, *supra* note 151.



in the United States,<sup>176</sup> while the shift in direction under the IP Enforcement Directive brings instability to those exceptions in Europe. Despite the deterrent effect the RIAA's lawsuits have had on individual copyright infringement over the Internet,<sup>177</sup> long term erosion of private use exemptions will create a stronger international copyright divide<sup>178</sup> and hinder creative uses of copyright material that may be more beneficial to copyright owners.<sup>179</sup>

A. The Deterrence Effect of Attacking the Individual User and the Need for Greater Harmonization of Copyright Law on an International Scale

Whatever the ultimate consequence of the RIAA's attack on individual Internet users, the lawsuits succeeded in scaring the public into pursuing more legal methods of obtaining sound recordings from the Internet.<sup>180</sup> Web users are hesitant to subscribe to services which lead to possible litigation, regardless of the potential outcome.<sup>181</sup> Although deterring consumers from illegally obtaining music from the Internet may lead to better control over copyrighted material, it may also cost the industry valuable relationships with those consumers. Attacking individual users has already caused a backlash from the public's perception of the record industry.<sup>182</sup> While people seem less likely to illegally downloading copyrighted files, this will not necessarily lead to increased sales of standard industry products such as compact discs.<sup>183</sup>

As an alternative, the recording industry could encourage movement from illegal to legal Internet music access by holding ISPs more accountable for infringement activities, forcing ISPs to clean up the activity

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<sup>176</sup> *A & M Records*, 239 F.3d at 1023; See also Yu, *supra* note 33, at 389 (discussing the court's address in *Napster* of the four fair use factors specified in the Copyright Act); Lackman, *supra* note 18, at 1184.

<sup>177</sup> A new study shows online music file-swapping has dropped by half over the six months after the suits were first filed. See Mark, *supra* note 5.

<sup>178</sup> While E.U. Copyright protections stress specific non-infringing use of copyrighted material, see discussion of Copyright Directive, *infra* Part II, the RIAA has only recently begun its attack on file swappers at the international level.

<sup>179</sup> See Dodes, *supra* note 25, at 315. Dodes argues that the music industry must "embrace the idea behind file sharing technology and develop legal, economic models, which benefit the artists, recording companies, technology developers and the consumer."

<sup>180</sup> Mark, *supra* note 5; Egelko, *supra* note 5; Jeordan Legon, *261 Music File Swappers Sued: Amnesty Program Unveiled*, CNN Sept. 9, 2003, available at <http://www.cnn.com/2003/TECH/internet/09/08/music.downloading/index.html> (last visited Feb. 2004).

<sup>181</sup> Mark, *supra* note 5.

<sup>182</sup> See Gray, *supra* note 130 (pointing to examples of sympathetic targets, like the twelve-year-old honor student sued for downloading nursery rhymes and the reports of people in their seventies sued because of music downloaded by their grandchildren).

<sup>183</sup> Fagin et al., *supra* note 125, at 500 ("consumers are likely to think twice about buying music if they cannot 'move' it from their computer to a portable player and back again").

before it begins. A new push towards digital music cannot be achieved without eliminating the conflict between the record industry and Internet music capabilities prevalent in the current system.<sup>184</sup> The comparative advantages available to consumers who download files legally should be stressed: fewer viruses, better file quality, and knowing that their actions are legal. Also, the benefits of Internet file sharing, such as accessibility and convenience, would be maintained.<sup>185</sup>

Under the current U.S. system, the process of utilizing ISPs to eliminate infringement activity is hindered by the exemptions for ISP liability.<sup>186</sup> If the United States were to move towards a more balanced system of liability infringement, one which does not allow service providers to avoid liability, copyright owners and consumers alike would benefit. Copyright owners would be assured of more accountability while consumers would be encouraged to shift towards legal downloading once illegal sites are better policed and shut down. Under the European Union's current directive proposals, ISPs could be required to aid in protecting Internet copyright interests.<sup>187</sup> While this may not be desirable from a recording industry standpoint (as it shifts the focus away from the recent attack on consumers), such a system requires the enforcement of copyrights on Internet music files to start with service providers most likely to facilitate change to new compensation systems.<sup>188</sup> After all, change takes time. Forcing music consumers to forego the conveniences of illegal Internet file trading while offering those consumers few comparable services that would legally compensate copyright owners in return may take a lot more than the threat of a lawsuit.<sup>189</sup>

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<sup>184</sup> See Hana Ferraris, *A Copyright Strategy for your Business: Important Lessons from the Music Industry—Pictions*, ALL REGIONS, Apr. 26, 2004, Intellectual Property Section. Stating that “the music industry made the mistake of immediately viewing the internet as a threat rather than embracing it as an integral part of our lives and identifying the potentially profitable opportunities it offered.”

<sup>185</sup> *Id.* at 498 (stating that a fee-based service for online music downloading may be more successful than peer to peer services like Kazaa if the service delivers “features lacking in [peer to peer] networks—such as consistent speed, sound quality, and security from viruses”).

<sup>186</sup> See discussion of the DMCA, *supra* Part III.

<sup>187</sup> See analysis of E.U. directives and proposals, *supra* Part III.

<sup>188</sup> See Gervais, *supra* note 85, at 1411 (comparing hypothetical scenarios of internet distribution under different systems of law to analyze the liability of service providers).

<sup>189</sup> Comparable services are fast becoming available. Online music providers such as Napster and OD2, as well as Apple's iTunes Music Store, are now moving into Europe, a move which will increase availability of legally viable digital music on the internet. See Darren Waters, *What's Europe's Download Services Offer*, BBC News Online, June 15, 2002, at <http://news.bbc.co.uk/1/hi/entertainment/music/3794229.stm> (last visited July 2004).

B. Utilizing Technological Advancement and Encouraging Limited Use  
will Benefit the Recording Industry Long Term

While the RIAA defends its attack on individual Internet users as a necessary step to save a faltering industry,<sup>190</sup> the industry's primary concern should be adapting to the new technology instead of fighting to control it.<sup>191</sup> The advance of new technologies and new ways to distribute music files pose a dramatic shift in the ability of consumer demands relating to music services. Consumers now want music faster and more conveniently.<sup>192</sup> If the recording industry continues to push towards restricting the Internet distribution market, technology and innovation may be sacrificed and private use exemptions could become obsolete.<sup>193</sup>

The recording industry maintains that a strong market interest in the distribution of music over the Internet is crucial to its survival.<sup>194</sup> One industry leader comments: "if you had Coke coming out of the kitchen faucet, what would you pay for a bottle?"<sup>195</sup> Disregarding an analysis of the strength of bottled water sales, this line of thinking magnifies two problems with the industry's approach towards recapturing copyright protections over the Internet. First, a number of commentators note that the U.S. legislation and encryption methods create a vicious cycle where the entertainment community and computer hackers engage in a "copy-protection arms race."<sup>196</sup> This technological race shifts focus from compensating owners for their works to developing protections for those works. Second, attacking individual users further inhibits established private use exceptions and may severely restrict technological growth.<sup>197</sup>

While individual Internet users are unquestionably guilty of illegal

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<sup>190</sup> See Takeuchi-Cullen, *supra* note 3; Egelko, *supra* note 5. The recording industry cites a decline in compact disc sales as a product of internet piracy.

<sup>191</sup> In fact, since the lawsuits there has been a shift by consumers towards the "legal file downloading" web sites such as the newly re-launched Napster.com and Apple's iTunes Music Store. See Mark, *supra* note 5 (stating that a growing number of consumers are turning towards the new generation of paid online services).

<sup>192</sup> See Fagin et al., *supra* note 125, at 495 (stating that customers used to the current system "are not likely to willingly let go of the versatility afforded by compressed audio files or the hardware that permits flexible use").

<sup>193</sup> *Id.* at 498; See also Bauchner, *supra* note 17, at 94.

<sup>194</sup> Takeuchi-Cullen, *supra* note 3.

<sup>195</sup> *Id.* (statement of Dough Morris, chairman of Universal Music Group).

<sup>196</sup> Yu, *supra* note 32, at 392. Yu notes that copyright holders must continually upgrade their encryption technology to keep up with hackers who successfully break the coding, and this upgrade in turn would attract more hackers eager to break the new system; See also Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 251.

<sup>197</sup> See Fagin et al., *supra* note 125, at 521.

copyright infringement for file swapping activities,<sup>198</sup> it is the Internet Service Providers that are in the best position to police user activity.<sup>199</sup> Even though it would be difficult for ISPs to determine the content of all individual files on websites, it is not impossible for file-swapping services to adopt an adequate compensation system for users to download protected files, like those used by Apple and MP3.com.<sup>200</sup> Since the adoption of the DMCA, liability for ISPs has been even more limited by the list of exemptions provided for ISPs.<sup>201</sup> This does not prevent ISPs from being liable for copyright infringement for acting as a conduit for illegal activities or for linking and referring users to infringing material.<sup>202</sup> Moreover, although the system in the European Union is less developed, there is indication that ISPs are guilty of infringing activity simply by failing to take adequate measures of prevention.<sup>203</sup> Further, with the approval of the IP Enforcement Directive, courts now have the ability to specifically enjoin ISPs into the fight against infringement.<sup>204</sup>

## VIII. CONCLUSION

Given the current trends in digital copyright protections, the hypothetical situations at the beginning of this comment seem more and more realistic. Internet users are being sued with increasing frequency in both the United States and abroad.<sup>205</sup> Further, new legislation and task forces, which provide more restrictions on users, are developing with increasing frequency.<sup>206</sup> In order for copyright law to progress and grow with the rise of Internet technology, a balance must be struck between ensuring copyright owners incentives for their material and making sure industry restriction over music files does not lead to the extinction of private use sharing by consumers.<sup>207</sup> Many argue that the industry's best

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<sup>198</sup> Under the Copyright Act and subsequent amendments, this activity violates the reproduction rights of copyright holders. See discussion *supra* p. 232.

<sup>199</sup> Milagros-Walker, *supra* note 108, at 310.

<sup>200</sup> In fact, many online service providers have introduced programs like these. Examples include: iTunes Music Store, Rhapsody.com, a revamped MP3.com, and BuyMusic.com. See Takeuchi-Cullen, *supra* note 3, for a comparison of these services.

<sup>201</sup> See DMCA discussion, *supra* Part IV.

<sup>202</sup> *Id.*; Gervais, *supra* note 85, at 1403.

<sup>203</sup> See *Re Copyrighted Materials*, *supra* note 139; *LICRA v. Yahoo!, Inc.*, *supra* note 144.

<sup>204</sup> See IP Enforcement Directive, *supra* note 6, art. 10.

<sup>205</sup> Pruitt, *supra* note 150.

<sup>206</sup> See discussion of the DOJ task force in the United States, *supra* p. 246; IP enforcement Directive in Europe, *supra* p. 241.

<sup>207</sup> Michael B. Gunlicks, *A Balance of Interests: The Concordance of Copyright Law and Moral Rights in the Worldwide Economy*, 11 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 601, 603 (2001) (stating that the "goal of copyright law is to protect the public interest by

option in the face of new distribution methods over the Internet is to change the way it approaches copyright control,<sup>208</sup> a view shared by some insiders in the online industry.<sup>209</sup> After all, consumers presented with legally accessible music files on the Internet will be more likely to accept a new system than if the industry fails to provide those options.<sup>210</sup> Finally, taking away or restricting an individual's legitimate use of copyrighted material may stifle creativity and development by restricting access to crucial information that may be used by future creators.<sup>211</sup>

By restoring the traditional balance of consumer use and ownership protections, the international copyright system can educate consumers on legal use and encourage creativity while adequately compensating copyright owners. In this way, U.S. legislators and record companies can cash in on digital music transfers instead of attacking consumer activity.

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protecting the author's interests").

<sup>208</sup> See Balaban, *supra* note 45; Koenigsburg et al., *supra* note 12; Bauchner, *supra* note 17.

<sup>209</sup> See Takeuchi-Cullin, *supra* note 3, at 44-45 (quoting Steve Jobs, CEO of Apple and Rob Glaser, CEO of RealNetworks).

<sup>210</sup> See Gervais, *supra* note 85, at 1416 (stating that, "if the only option of users is to infringe or not access music at all, many of them will find a way to access the content they want. If, on the other hand, content is accessible but in an organized, properly channeled way, the 'need' to infringe greatly diminishes and copyright survives."); See also Yu, *supra* note 32, at 403. Yu argues that users will not be eager to abide by copyright laws unless they understand why copyrights need to be protected and gain some benefit from these protections.

<sup>211</sup> *Id.* at 422. Yu points to the AHRA as an example. "As a result of this statute and the consumers' uncertainty over the evolution of audio reprographic technology, copyright law successfully prevented a revolutionary change by digital audio recording equipment and technology."