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Arrgh! Hollywood Targets Internet Piracy

*Anna E. Engelman*¹ & *Dale A. Scott*²

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[I] *Abstract:* As technology advances, the threat of rampant and unprecedented theft of digital media continues to grow. The music industry has already faced, and continues to face, this threat, but has largely failed in defending musicians' intellectual property.

[II] With the advent and increasing popularity of high-speed Internet connections, Hollywood faces the same dilemma and is fighting back. As a *Time* magazine writer recently noted,

Studio executives, no strangers to melodrama, have begun to talk about movie piracy the way FBI agents talk about terrorism: they watch the Web for "chatter," they embed films with hidden "fingerprints," and they speak without irony about "changing hearts and minds." They even use night-vision goggles. It's not going too far to say they are completely paranoid, which doesn't mean they are wrong.³

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³ Amanda Ripley, *Hollywood Robbery: How Does a Hit Movie Go from the Free Market to the Black Market?* *Time Retraces the Trail*, TIME, Jan. 26, 2004, at 56.

[III] Indeed, the battle rages. But is guerilla warfare the best method to fight a “menace” that may represent Hollywood’s greatest opportunity? To ensure success on ongoing profitability, the movie industry must mind the lessons of the music industry’s failures, forge its own path, and embrace the wonder that is the Internet. This article examines the music industry’s efforts to fight e-piracy, discusses Hollywood’s limited efforts and perhaps Hollywood’s only remaining viable alternative in fighting, or embracing, this growing menace.

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I. INTRODUCTION

[1] The Internet has changed the world. Never before has mankind communicated on such an immense scale or had endless information at its fingertips. But with advancement comes the specter of unprecedented exploitation.

[2] Underscoring the lack, or inadequacy, of Internet regulation, Internet users circumvent established laws, notably the Copyright Act of 1976,⁴ with impunity. Despite the well-publicized litigation in *A&M Records, Inc. v. Napster, Inc.*,⁵ web-surfers in the United States and around the world continue to share copyrighted digital media files such as MP3 files.⁶

[3] The e-pirate's adventure, however, is growing riskier as the music and movie industries are increasingly aiming their cannons away from Internet server providers ("ISPs") and taking aim at minors and unsuspecting parents. As the above quote suggests, e-piracy is prompting the music and movie industries to take drastic measures to fend off this burgeoning threat. Technology has made it possible to pirate both movies and music in little time, with little effort and with little to no quality distortion. According to both industries, ever-changing and advancing technological "innovations" are decreasing sales and costing jobs.⁷ As a result of e-piracy, the music industry lost approximately \$2.4 billion in 2003, and the film industry loses approximately \$3 billion every year.⁸

[4] E-piracy is clearly theft. For many, however, downloading music and movies onto one's private computer does not pain the conscience as does walking out of a store with a CD or DVD under one's coat. Accordingly, the music industry is shifting its attention towards litigation, education and efficient profit-making services. However, convincing Internet users that downloading violates copyright law (a fact lost on many pre-teen or teenaged e-pirates) and is no different than pilfering compact discs from

⁴ 17 U.S.C. §§ 101-810 (2000).

⁵ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

⁶ *Recording Indus. Ass'n of Am. v. Verizon Internet Servs. Inc.*, 351 F.3d 1229, 1231 (D.C. Cir. 2003).

⁷ See Lev Grossman, *It's All Free!; Music! Movies! TV shows! Millions of People Download Them Every Day. Is Digital Piracy Killing the Entertainment Industry?*, TIME, May 5, 2003, at 60, 60-63.

⁸ Ripley, *supra* note 3, at 56; *Study: Music Piracy Has 5 Years of Growth*, CHI. TRIB., Sept. 23, 2003, at 12.

one's favorite music shop, is an immense challenge. The process is slow, and meanwhile the industries and artists continue to lose money.⁹ Fortunately for both industries, Congress is aware of the rampant lawlessness and is acting, albeit limitedly, in response.¹⁰ The music industry (and to a lesser degree Hollywood) is not sitting idly by while its coffer is raided; it continues to materialize its educational and commercial efforts against piracy. The music industry has filed numerous suits against ISPs and individual users in an effort to stop illegal downloading and demonstrate its resolve.¹¹ In contrast, Hollywood's litigation efforts are moving more slowly, perhaps because technological developments have only recently allowed DVD downloading with ease and speed.¹² In 2003, 4.3 million households in North America upgraded to broadband,¹³ and from March 2002 to March 2003, the percentage of American households with high-speed connections rose from 21% to 31%.¹⁴ Currently, 39% of all adult Internet users have high-speed Internet access at home.¹⁵

[5] Hollywood has the opportunity to learn valuable lessons about combating the negative effects of e-commerce, and its potential financial benefits, from the music industry's failed model. Although the movie industry launched nearly 3000 private investigations across the United States in 2003,¹⁶ Hollywood has failed to establish a unified front in the

⁹ See Matthew C. Mousley, Note, *Peer-to-Peer Combat: The Entertainment Industry's Arsenal in its War on Digital Piracy*, 48 VILL. L. REV. 667, 674 (2003).

¹⁰ See generally 17 U.S.C. § 506(a) (2000) (includes criminal offenses, specifically criminal infringement); 17 U.S.C. § 1201 (2000) (includes circumvention of copyright protection systems).

¹¹ See generally *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029 (C.D. Cal. 2003), *aff'd*, 380 F.3d 1154 (9th Cir. 2004).

¹² Christian John Pantages, *Avast Ye, Hollywood! Digital Motion Picture Piracy Comes of Age*, 15 TRANSNAT'L LAW 155, 163 (Winter 2002).

¹³ Larry Dobrow, *Broadband Growth Numbers Spur Contention* (August 6, 2004), at http://www.mediapost.com/dtls_dsp_news.cfm?cb=050942P&newsID=263077&newsDate=08/06/2004 (last visited October 3, 2004).

¹⁴ Beatrice E. Garcia, *More Users Surfing Web at High Speed*, MIAMI HERALD, May 19, 2003, at 3A, available at <http://www.siliconvalley.com/mld/siliconvalley/5892656.htm?template=contentModules/printstory.jsp>.

¹⁵ Press Release, Motion Picture Association of America, MPAA Launches New Phase of Aggressive Education Campaign Against Movie Piracy (June 15, 2004), at http://www.respectcopyrights.com/FINAL_6-15-04_STOPP_%20Press_Release.doc.

¹⁶ See Tom Hays, *Cop Shooting Casts Light on Piracy Battle* (June 19, 2004), at <http://www.infoshop.org/inews/stories.php?story=04/06/21/1528235>.

fight against e-piracy.¹⁷ In order to ensure success, Hollywood must forge its own path while minding the mistakes and missed opportunities of the music industry. Hollywood must view the Internet as an opportunity to be exploited, and not waste valuable resources and squander public goodwill in its jealous effort to protect the property rights of artists.

II. STEMMING THE TIDE: COPYRIGHT LAW

[6] To promote the arts and sciences, the U.S. Constitution provides intellectual property creators with exclusive rights to their works for a limited duration.¹⁸ To further effectuate the Constitution's purpose, the Copyright Act of 1976 ("Copyright Act") provides that a copyright lasts for the artist's lifetime plus seventy years.¹⁹ The copyright owner may control certain uses of his work²⁰ and can bring legal action if this copyright is violated.²¹ Remedies for copyright violations include injunctions, monetary damages and criminal penalties.²² The Copyright Act, however, provides exceptions for uses in fields such as education and research.²³

[7] In the last decade, the Copyright Act has been amended to include provisions that focus on digital piracy.²⁴ In 1997, the aptly-named No Electronic Theft Act ("NETA") imposed criminal liability on providers of free access to copyrighted works.²⁵ Although NETA originally penalized only those who realized commercial advantage or private financial gain, it currently penalizes those who merely provide access.²⁶

[8] The Copyright Act's second amendment, 1998's Digital Millennium Copyright Act ("DMCA"),²⁷ provides greater protection against

¹⁷ See generally *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029 (C.D. Cal. 2003), *aff'd*, 380 F.3d 1154 (9th Cir. 2004) (granting defendant software vendors' motions for summary judgment on claims of copyright infringement).

¹⁸ U.S. CONST. art. I, § 8, cl. 8.

¹⁹ 17 U.S.C. § 302(a) (2000).

²⁰ *Id.* § 106 (listing the exclusive rights of copyright owners).

²¹ *Id.* § 501(b).

²² *Id.* § 506; 18 U.S.C. § 2319 (2000).

²³ 17 U.S.C. §§ 107-08 (2000).

²⁴ Mousley, *supra* note 9, at 678.

²⁵ See 17 U.S.C. § 505(a).

²⁶ Mousley, *supra* note 9, at 678.

²⁷ Pub. L. No. 105-304, 1122 Stat. 2680 (1998) (codified as amended in scattered sections of 17 U.S.C.)

infringement accomplished through encryption circumvention.²⁸ The DMCA enacted following the adoption of the World Intellectual Property Organization Copyright Treaty²⁹ and aids the fight against recent technological developments that provide access to digital media via digital code breaking, including various DVD copying applications.³⁰ The DMCA penalizes efforts to “circumvent a technological measure that effectively controls access to a work protected [by United States Copyright Law].”³¹ Additionally it is unlawful under the DMCA to “manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that . . . is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a [protected] work.”³² For repeat offenders, the DMCA imposes fines of up to \$1 million and prison terms up to ten years.³³ Since its passage, the DMCA has become an important, hotly-litigated, and repeatedly contested weapon against copyright infringement.³⁴

[9] Additionally, the DMCA’s subpoena provision has been used to identify individual copyright violators by commandeering ISPs’ user IP lists.³⁵ However, the *Verizon* decision in late 2003, discussed below, dealt a serious blow to the music industry’s effort to identify and pursue alleged violators.

III. THE MUSIC INDUSTRY FIGHTS BACK

A. Direct Hit! - *A&M Records, Inc. v. Napster, Inc.*

[10] The recording industry began its attack by seeking preliminary injunctions against sites that made copyrighted music available to web

²⁸ See Mousley, *supra* note 9, at 679.

²⁹ World Intellectual Property Organization: Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65; see also *321 Studios v. Metro-Goldwyn-Mayer, Inc.*, 307 F. Supp. 2d 1085, 1093-94 (N.D. Cal. 2004).

³⁰ Mousley, *supra* note 9, at 680.

³¹ 17 U.S.C. § 1201(a)(1)(A) (2000); see also Mousley, *supra* note 9, at 679.

³² 17 U.S.C. § 1201(a)(2)(A) (2000); see also Mousley, *supra* note 9, at 679.

³³ § 1204(a)(2); see also Mousley, *supra* note 9, at 679.

³⁴ See Mousley, *supra* note 9, at 680 (discussing criticism and consumer group opponents of the DMCA).

³⁵ 17 U.S.C. § 512(h) (2000); see also *Recording Indus. Ass’n of Am. v. Verizon Internet Servs. Inc.*, 351 F.3d 1229 (D.C. Cir. 2003) (holding that a subpoena could be issued only to an ISP engaged in storing on its servers material that was infringing or the subject of infringing activity, and not to a mere conduit ISP).

users.³⁶ The first breakthrough was the well-publicized injunction against Napster, Inc.,³⁷ which led to Napster's eventual downfall. Napster's website allowed users to download music from Napster-run "host users" for free.³⁸ Napster's server software enabled users to search and locate the MP3 files of other users.³⁹ It then communicated the Internet address of the "host user" to the requesting user, and this connection allowed users to download directly from the other's computer, a process called "peer-to-peer" ("P2P") networking.⁴⁰ In 2001, A&M Records, Inc. ("A&M") filed suit against Napster, alleging contributory and vicarious copyright infringement, and sought a preliminary injunction.⁴¹

[11] First, A&M claimed that Napster was liable for contributory copyright infringement because Napster not only knew its users were using its software to illegally download copyrighted music, but it facilitated such conduct.⁴² Second, A&M claimed that Napster was vicariously liable for infringement.⁴³

[12] To be contributively liable for infringement, Napster had to "know or have reason to know" of direct infringement" by its users and contribute to such conduct.⁴⁴ The court found that Napster had both actual and constructive knowledge of the illegal activity.⁴⁵ Such "actual" knowledge was based largely on a memo written by co-founder Sean Parker, emphasizing Napster's "need to remain ignorant of users' real names and IP addresses 'since they are exchanging pirated music.'"⁴⁶ Additionally, the Recording Industry Association of America ("RIAA") previously informed Napster that more than 12,000 copyrighted songs were available

³⁶ See generally *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (granting preliminary injunction and preliminarily enjoining defendant from enabling Internet users to copy, download and distribute copyrighted music); see also *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029 (C.D. Cal. 2003), *aff'd*, 380 F.3d 1154 (9th Cir. 2004) (denying plaintiffs' actions for copyright infringement against defendants software vendors due to lack of control over networks and infringing use of users).

³⁷ *Napster*, 239 F.3d at 1004.

³⁸ See *id.* at 1012.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 1019.

⁴³ *Id.*

⁴⁴ *Id.* at 1019-20.

⁴⁵ *Id.* at 1020.

⁴⁶ *Id.*

on Napster's site.⁴⁷ "Constructive" knowledge was demonstrated by both the fact that Napster executives themselves actively downloaded music as well as Napster's promotion of copyrighted works on its site.⁴⁸ Accordingly, the court concluded that Napster had knowledge of direct infringement, and the court found Napster contributively liable for infringement for failing to halt such conduct.⁴⁹ The court noted that without Napster, its users would be unable to find and download copyrighted music it made available, thus satisfying the second element: contributing to the infringing conduct.⁵⁰

[13] To be liable for vicarious infringement, Napster must have possessed the "right and ability" to supervise its users and must have had a financial interest in the activity.⁵¹ The court found that Napster's customers were attracted to free copyrighted music facilitated through its site, and as its customer roster increased, so did its profits.⁵² Thus, Napster benefited financially.⁵³ Additionally, the court found that Napster had the ability to supervise and stop the illegal activity,⁵⁴ despite its "lack of user control" argument.⁵⁵ On its website, Napster affirmed its "right to refuse service and terminate accounts in [its] discretion, including, but not limited to, if Napster believes that user conduct violates applicable law . . . or for any reason in Napster's sole discretion, with or without cause."⁵⁶ Accordingly, Napster was found vicariously liable.⁵⁷

[14] Napster defended its actions through the Copyright Act's "Fair Use Doctrine,"⁵⁸ which allows use of copyrighted works for certain purposes, including criticism, teaching, and research.⁵⁹ In evaluating the doctrine's applicability, courts must examine: (1) the use's purpose and character—whether commercial or educational; (2) the "nature of the copyrighted

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 1021-22.

⁵⁰ *Id.* at 1022.

⁵¹ *Id.*

⁵² *Id.* at 1023.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *See id.* at 1020, 1023.

⁵⁶ *Id.* at 1023.

⁵⁷ *Id.* at 1024.

⁵⁸ *Id.* at 1014.

⁵⁹ 17 U.S.C. §107 (2000).

work”; (3) “the amount and substantiality of the portion of used”; and (4) the effect upon the potential market.⁶⁰

[15] The court rejected Napster’s fair use argument, holding that merely putting a work into a different format (i.e. transforming songs to a downloadable format) is not “fair use.”⁶¹ Moreover, the copyrighted work was used for commercial, rather than personal, purposes.⁶² Additionally, when analyzed with respect to market effect, Napster harmed the market by reducing music sales and preventing the music industry from succeeding online.⁶³ After rejecting Napster’s arguments, and finding it liable for contributory and vicarious infringement, the court enjoined Napster’s operations based on A&M’s showing of likelihood of success and irreparable harm if the conduct continued.⁶⁴

[16] In 2001, the Court of Appeals for the Ninth Circuit upheld the lower court’s decision and ruled that any copyrighted works had to be removed from Napster’s site.⁶⁵ This ruling prompted musicians such as Metallica to file complaints against Napster demanding removal of their music.⁶⁶ Later that year, the once-mighty Napster was forced to shut down its site.⁶⁷

[17] After its shut down in June 2001, Napster collaborated with MusicNet to make its music available through subscription services.⁶⁸ However, in 2002, the company filed for Chapter 11 bankruptcy and was sold to BMG for \$8 million.⁶⁹

[18] While the *Napster* holding appeared to deliver the *coup de grace* to ISPs that store and distribute copyrighted works, in the face of providers that utilize the P2P model, its applicability has been limited.

⁶⁰ *Napster*, 239 F.3d at 1014.

⁶¹ *Id.* at 1015.

⁶² *Id.*

⁶³ *Id.* at 1016.

⁶⁴ *Id.* at 1029.

⁶⁵ *Id.*

⁶⁶ BBC News, *Metallica Joins New Napster Attack* (Mar. 29, 2001), at http://news.bbc.co.uk/1/hi/entertainment/new_media/1249347.stm (last visited June 21, 2004).

⁶⁷ Associated Press, *Napster Still Offline* (July 21, 2001), available at <http://www.cbsnews.com/stories/2001/07/12/tech/main301149.shtml>.

⁶⁸ Michael Singer, *Napster Joins MusicNet Service* (June 6, 2001), at <http://www.Internetnews.com/ec-news/article.php/77981> (last visited June 21, 2004).

⁶⁹ Michael Singer, *Napster Sold for \$8 Million* (May 17, 2002), at <http://siliconvalley.Internet.com/news/article.php/1140801> (last visited June 21, 2004).

B. Return Fire! - *MGM, Inc. v. Grokster, Ltd.*

[19] In *MGM, Inc. v. Grokster, Ltd.*, the court faced essentially the same issue posed in *Napster*: whether the defendants were liable for contributory or vicarious copyright infringement.⁷⁰ However, Grokster, Ltd. (“Grokster”) and StreamCast Networks, Inc. (“StreamCast”), distributors of Morpheus software, avoided liability due to their loose control over users’ conduct.⁷¹

[20] Grokster, like Napster, provides downloadable software.⁷² In contrast to Napster, however, Grokster’s role ends once a user is connected to the network, as the user then shares files via P2P networking.⁷³ Moreover, when users search and transfer files using Grokster software, they do so without utilizing Grokster computers.⁷⁴ Thus, when a user logs off, the user’s music is no longer available.⁷⁵ This severance allows Grokster and StreamCast to remain ignorant as to what music is available at any given time.⁷⁶ If Grokster shuts down, users can still share files with no interruption.⁷⁷

[21] Although the *Grokster* court determined that the defendants purposely ignored user names and IP addresses, it did not hold Grokster liable for contributory infringement, finding that once Grokster distributed the software, it could not control whether the software will be used for unlawful purposes.⁷⁸

IV. RECORDING INDUSTRY’S POST-*GROKSTER* STRATEGIES

[22] The key difference between *Napster* and *Grokster* is centralized control over user conduct. Grokster’s P2P structure prevented centralized control; thus, there was no central Grokster server to indicate which files had been downloaded.⁷⁹ While Napster relied on centralized

⁷⁰ *Grokster*, 259 F. Supp. 2d at 1029.

⁷¹ *Id.*

⁷² *Id.* at 1032.

⁷³ *Id.* at 1040.

⁷⁴ *Id.*

⁷⁵ *Grokster*, 259 F. Supp. 2d at 1045.

⁷⁶ *See id.*

⁷⁷ *Id.* at 1041.

⁷⁸ *Id.* at 1043.

⁷⁹ *Id.* at 1040.

communication architecture to identify available MP3 files, the current generation of P2P programs allows users to search MP3 libraries of others directly through downloaded software with no website involved.⁸⁰

[23] Similarly, the court found that Grokster was not vicariously liable.⁸¹ As noted, vicarious infringement extends liability to those who have a right and ability to supervise infringing activity and a direct financial interest in those activities.⁸² Knowledge is not a requirement.⁸³ Although Grokster derived benefit through advertising, it had no control over its product's use.⁸⁴ Thus, it lacked the ability to supervise.⁸⁵

[24] The *Grokster* decision underscores the importance of control. Without evidence of control over the ability to download copyrighted music, courts will not likely hold a provider liable, regardless of whether it remained ignorant of user activity. Not surprisingly, other operations, like KaZaa and Gnutella, have exploited the de-centralized P2P model.⁸⁶

[25] The Court of Appeals for the Ninth Circuit recently upheld the district court's decision in *Grokster*.⁸⁷ It appears that P2P sharing, from the application provider's perspective, does not violate anti-infringement laws and that these providers are safe barring an appeal and adverse ruling by the Supreme Court or contrary legislation from Congress. The movie industry currently faces a similar attack, and *Napster* and *Grokster* hold important lessons for Hollywood in its effort to stem movie piracy perpetrated via P2P networks.

[26] In light of the *Grokster* failure, as well as the increase of P2P popularity, the RIAA is now pursuing individual users.⁸⁸ In the summer

⁸⁰ Recording Indus. Ass'n of Am. v. Verizon Internet Servs. Inc., 351 F.3d 1229, 1232 (D.C. Cir. 2003) (citing Douglas Litchman & William Landes, *Indirect Liability for Copyright Infringement: An Economic Perspective*, 16 HARV. J.L. & TECH. 395, 403, 408-09 (2003)).

⁸¹ *Grokster*, 259 F. Supp. 2d at 1043.

⁸² *Id.* (citing *Napster*, 239 F.3d at 1022).

⁸³ *Id.* (citing *Adobe Sys., Inc. v. Canus Prods., Inc.*, 173 F. Supp. 2d 1044, 1049 (C.D. Cal. 2001)).

⁸⁴ *Id.* at 1044-45.

⁸⁵ *Id.* at 1045-46.

⁸⁶ See Grossman, *supra* note 7, at 60.

⁸⁷ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004).

⁸⁸ John Borland, *New RIAA File-swapping Suits Filed*, CNET News, (Mar. 23, 2004). at <http://news.com.com/2100-1027-5177933.html>.

of 2003, the music industry commenced a widespread, yet selective, offensive against individual downloaders.⁸⁹ The RIAA has since sued over 1900 users, with more than 400 users paying fines averaging \$3000.⁹⁰ In March 2004, the RIAA brought an additional 532 lawsuits against anonymous users, including eighty-nine individuals from universities.⁹¹ However, the RIAA was recently prohibited from bringing a single action against hundreds of anonymous users.⁹² Instead, it must sue individually using the expensive and tedious “John Doe” method.⁹³ Despite this setback, the RIAA continues its fight.⁹⁴

[27] The RIAA’s efforts have moved beyond U.S. borders to Australia, the home of KaZaa.⁹⁵ In March 2003, the Music Industry Privacy Investigations unit⁹⁶ obtained a court order allowing it to raid KaZaa’s headquarters and executives’ homes.⁹⁷ However, the RIAA was told that it could not review the seized documents until the matter resumed in U.S. federal court in the summer of 2004.⁹⁸ Nonetheless, while the RIAA continues the lengthy process of building its case, KaZaa remains a popular site for downloading music, though Nielsen/Netratings show that the lawsuit has had an effect on usage.⁹⁹

⁸⁹ Nick Wingfield & Ethan Smith, *The High Cost of Sharing*, WALL ST. J., Sept. 9, 2003, at B1.

⁹⁰ Borland, *supra* note 88.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Abby Dinham, *Sharman May Appeal Court Ruling*, CNET News, (Mar. 4, 2004), at <http://news.com.com/2100-1027-5170198.html>

⁹⁶ The MIPI is run by the Australian Recording Industry Association to oversee all music piracy issues in the music industry. Australian Competition and Consumer Commission, *Music Industry Piracy Investigations: Description*, at <http://www.accc.gov.au/content/index.phtml/itemId/288585/fromItemId/340639> (last visited Sept. 4, 2004).

⁹⁷ Sam Varghese, *Kazaa Case: Access to Seized Materials Delayed*, The Age, (Mar. 24, 2004), at <http://www.theage.com.au/articles/2004/03/24/1079939686550.html>

⁹⁸ *Id.*

⁹⁹ “The Kazaa software, the most popular file-trading application, also saw usage fall 15 percent, from 6.5 million to 5.5 million unique users [the week ending June 29, 2004], according to Neilson/Netratings.” John Borland, *RIAA Threat May Be Slowing File Swapping*, CNET News, (July 14, 2003), at http://news.com.com/RIAA+threat+may+be+slowing+file+swapping/2100-1027_3-1025684.html.

[28] While the recording industry continues to combat the still-existing sites that facilitate e-piracy, record sales continue to decline.¹⁰⁰ Although the decline slowed in 2003, retail sales dropped about 4.3%.¹⁰¹ One suggested solution to remedy this decline is offering songs online to users at a low price.¹⁰² Perhaps this is a wise move considering MP3 player sales have increased 56%.¹⁰³

[29] In 2003, Apple launched iTunes, which allows Mac and non-Mac users to download songs for \$0.99 each.¹⁰⁴ Online music stores like iTunes not only give consumers the option to download only the songs they desire without having to buy an entire album, they allow artists to release individual tracks without releasing a complete album.¹⁰⁵ At the conclusion of 2004's first quarter, Apple reported that iTunes sold 50 million songs, with 2.5 million more songs downloaded every week.¹⁰⁶ Following iTunes' success, new competitors, including Roxio's Napster and MusicMatch, have entered the fray.¹⁰⁷

[30] The RIAA is continuing its campaign to educate users concerning the illegality of downloading pirated music. The message is simple: e-pirates are breaking the law and possibly ruining the music industry, and if consumers stop buying albums, the incentive for creativity evaporates (assuming the traditional album is the only available medium of expression). The RIAA's campaign also emphasizes the effect that losses have not just on artists, executives, and producers, but also on "lesser" industry employees whose names never appear on a marquee.¹⁰⁸

[31] The RIAA's efforts appear to be working. According to a July 2004 survey, "64 percent of those surveyed believe it is illegal to make music from the computer available for others to download for free."¹⁰⁹ While

¹⁰⁰ John Borland, *Record Sales Down, But Seen as Stabilizing*, CNET News, (Mar. 4, 2004), at <http://news.com.com/2110-1027-5169904.html>.

¹⁰¹ *Id.*

¹⁰² *See id.*

¹⁰³ *See* Grossman, *supra* note 7, at 64.

¹⁰⁴ Leander Kahney, *Apple Launches Paid Music Service*, (Apr. 28, 2003), at <http://www.wired.com/news/business/0,1367,58656,00.html>.

¹⁰⁵ *Id.*

¹⁰⁶ *See* Ina Fried, *Apple's iTunes Sales Hit 50 Million*, (Mar. 15, 2004), at http://news.com.com/2100-1027_3-5173115.html.

¹⁰⁷ *Id.*

¹⁰⁸ *See generally* Motion Picture Association of America, *supra* note 15.

¹⁰⁹ Grant Gross, *RIAA Files 896 New File-Trading Lawsuits*, (Aug. 25, 2004), at <http://www.thestandard.com/article.php/20040825203958223>.

this figure may indicate a true change in perception, it remains to be seen whether such knowledge equates to any decrease in illegal downloading. Film and music downloading sites and software applications are still quite popular; KaZaa was once downloaded more than 1.9 million times in a single week.¹¹⁰

[32] The “education method” may have another important advantage: avoiding the ire of Internet terrorists. In March 2004, the RIAA’s website shut down for five days due to a “MyDoom” virus attack.¹¹¹ Other attacks have occurred since 2002, when the music industry commenced its robust efforts to combat e-piracy.¹¹²

[33] A final novel anti-piracy strategy is “spoofing.” Spoofing inundates peer-to-peer networks with fake MP3 files that look exactly like valid files.¹¹³ Once downloaded, the user attempts to listen to the music, and the “spoofed” MP3 either plays a damaged recording, an advertisement to buy the track, or nothing.¹¹⁴ The hope is that users will become frustrated and deterred from illegally downloading and instead take advantage of new, legal, downloading options. Despite these efforts, e-piracy continues to be a pervasive problem, and is now approaching the shores of Hollywood in full force.

V. HOLLYWOOD FIGHTS BACK

[34] Though it took some time, high-speed Internet access and e-piracy ingenuity have caught up to the movie industry. Where it was once impractical to download an entire movie, this now can be done much more quickly.¹¹⁵ Using a dial-up Internet connection, a user can download a movie in twenty-four hours, but a high-speed user can acquire a complete full-feature film in as little as one hour.¹¹⁶ The question remains whether

¹¹⁰ John Borland, *New RIAA File-Swapping Suits Filed*, (Mar. 23, 2004), at http://zdnet.com.com/2100-1104_2-5177933.html.

¹¹¹ Alex Viega, *Recording Industry Web Site Apparently Downed for Five Days by Virus*, DETROIT NEWS, (Mar. 23, 2004), at <http://www.detroitnews.com/2004/technology/0403/24/technology-99755.htm>.

¹¹² *Id.*

¹¹³ Katie Dean, *Academics Patent P2P Spoofing*, WIRED NEWS, (May 8, 2004), at <http://www.wired.com/news/digiwood/0,1412,63384,00.html>.

¹¹⁴ *Id.*

¹¹⁵ See Pantages, *supra* note 12, at 156; Ted Greenwald, *Decoding the Codes*, WIRED MAG., (Aug. 1999), available at <http://www.wired.com/wired/archive/7.08/codecs.html> (explaining methods of quicker downloading).

¹¹⁶ See Pantages, *supra* note 12, at 156.

the music industry's tactics (*i.e.*, litigation, education, and even spoofing) will aid the movie industry's battle to reclaim its annual \$3 billion loss to illegal Internet activity.¹¹⁷ Its first line of defense, encryption, has already been breached.

A. Nightmare on E-Street: DeCSS, DivX, DVD-X and DVD-X Copy

[35] The distribution of digital versatile disks ("DVDs") in the mid-1990s subjected the movie industry to an increased threat of digital piracy.¹¹⁸ Foreseeing this possibility, DVD technology inventors Toshiba and Matsushita Electric Industrial Co., Ltd., created the Content Scramble System ("CSS"), an encryption coding system designed to prevent copying.¹¹⁹ Later, the DVD Copy Control Association, Inc., was created to control the licensing of this innovation, but the code was quickly broken.¹²⁰

[36] In 1999, Jon Johansen (a.k.a. "DVD Jon"), a Norwegian teen computer hacker, created a decryption code to counter CSS, known as DeCSS.¹²¹ DeCSS enables individuals to copy DVDs to their hard drives, in a manner similar to music downloads.¹²² Johansen claimed he developed the code solely for non-infringing purposes, *i.e.*, play-back of already purchased DVDs.¹²³ He subsequently made the technology available on the web, providing widespread access to digitized movies.¹²⁴ Although the widespread availability of DeCSS has sparked litigation spurred by the movie industry, these actions have had seemingly little effect on its disbursement.

¹¹⁷ Motion Picture Association of America, Statement on Anti-Piracy, at <http://www.mpa.org/anti-piracy/index.htm> (last visited Sept. 21, 2004).

¹¹⁸ Pantages, *supra* note 12, at 162-63.

¹¹⁹ DVD Copy Control Ass'n. v. Bunner, 75 P.3d 1, 6 (Cal. 2003), *rev'd*, 10 Cal. Rptr. 3d 185 (Cal. Ct. App. 2004).

¹²⁰ Bunner, 75 P.3d at 7.

¹²¹ *Id.*

¹²² Pantages, *supra* note 12, at 163.

¹²³ See generally John Leyden, *DVD Jon Is Free – Official*, THE REGISTER (Jan. 7, 2003) (discussing the holding of the Norwegian court on the charges filed by the Norwegian Economic Crime Unit against Jon Johansen for producing the DeCSS DVD decryption utility), at <http://www.theregister.co.uk/content/4/28749.html>.

¹²⁴ See Bunner, 75 P.3d at 7 (discussing the posting of the DeCSS software by Jon Johansen on the Internet to enable users to distribute movies).

[37] After his trial in Norway, urged partially by the Motion Picture Association of America (“MPAA”),¹²⁵ Johansen was acquitted of all charges, including charges that DeCSS was an illegal technology and its distribution over the Internet was illegal.¹²⁶ Today, this decryption technology is available on nearly one million Internet sites.¹²⁷

[38] Adding to the ease of downloading, DivX, a new file compression technology, allows a DVD to fit on a single CD that can be downloaded within hours.¹²⁸ DivX was copied from Microsoft by two hackers, and is available through movie downloading sites.¹²⁹ Although movie downloading was originally difficult because of time and size,¹³⁰ that is no longer the case.

B. Decryption Technology Sparks Litigation

[39] The development and dissemination of DeCSS and DivX subjects the movie industry to rampant piracy.¹³¹ It is estimated that approximately 400,000 to 600,000 movies are downloaded illegally each day.¹³² In response, the MPAA, like the RIAA, has attacked DeCSS distributors in court.¹³³

[40] In two similar cases, *Universal City Studios, Inc. v. Reimerdes* and *Universal City Studios, Inc. v. Corley*, the MPAA sought to enjoin distributors from posting DeCSS and from creating hyperlinks to sites where the software could be obtained.¹³⁴ These cases were brought

¹²⁵ The Motion Picture Association of America, Inc. (MPAA) serves as the voice and advocate of the American motion picture, home video and television industries from its offices in Los Angeles and Washington, D.C. These members include Buena Vista Pictures Distribution, Metro-Goldwyn-Mayer Studios Inc., Paramount Pictures, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal Studios, and Warner Bros. Entertainment, Inc. See generally Motion Picture Association of America, *supra* note 15.

¹²⁶ Leyden, *supra* note 123.

¹²⁷ Pantages, *supra* note 12, at 164.

¹²⁸ *Id.*

¹²⁹ *Id.* at 164-65.

¹³⁰ *Id.* at 162.

¹³¹ *Id.* at 165.

¹³² Grossman, *supra* note 7, at 60.

¹³³ See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001); *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

¹³⁴ See *Corley*, 273 F.3d at 429; *Reimerdes*, 111 F. Supp. 2d at 294.

pursuant to the newly enacted DMCA,¹³⁵ which explicitly provides that a court “may grant temporary or permanent injunctions on such terms as it deems reasonable to prevent or restrain a violation”¹³⁶

[41] Under the DMCA, an effort to “circumvent a technological measure” is defined as an effort “to descramble a scrambled work, decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner.”¹³⁷ Universal argued that DeCSS fell within the DMCA’s purview since it was designed for the sole purpose of descrambling,¹³⁸ thus violating the DMCA.¹³⁹ Agreeing with Universal, the court in both cases granted injunctions,¹⁴⁰ finding that “DeCSS, a computer program unquestionably within the meaning of the statute . . . is a means of circumventing a technological access control measure,” and thus, violates the DMCA.¹⁴¹

[42] DeCSS distributors responded by challenging the DMCA’s validity, asserting their First Amendment free speech right to post DeCSS information on the web.¹⁴² More specifically, in *Reimerdes* and *Corley*, these distributors claimed computer code is a form of expression deserving constitutional protection.¹⁴³ Although the court agreed that code is an expression to those able to read it, the court found the restriction (*i.e.*, the injunction) was narrowly tailored so as to not impermissibly infringe on the speaker’s constitutional rights.¹⁴⁴

[43] In evaluating this claim, the Court of Appeals for the Second Circuit and the District Court for the Southern District of New York had to first determine whether an injunction would be content-based or content-neutral.¹⁴⁵ A content-based injunction precludes speech based on its substance, whereas a content-neutral injunction precludes speech

¹³⁵ See 273 F.3d at 429; 111 F. Supp. 2d at 294.

¹³⁶ 17 U.S.C. § 1203(b)(1) (2000).

¹³⁷ 17 U.S.C. § 1201(a)(3)(A) (2000).

¹³⁸ *Reimerdes*, 111 F. Supp. 2d at 319.

¹³⁹ *Id.*

¹⁴⁰ See 273 F.3d at 429; 111 F. Supp. 2d at 294.

¹⁴¹ 111 F. Supp. 2d at 317.

¹⁴² See generally *Corley*, 273 F.3d at 429; *Reimerdes*, 111 F. Supp. 2d at 294.

¹⁴³ *Corley*, 273 F.3d at 436; *Reimerdes*, 111 F. Supp. 2d at 304.

¹⁴⁴ *Corley*, 273 F.3d at 455; *Reimerdes*, 111 F. Supp. 2d at 330.

¹⁴⁵ *Reimerdes*, 111 F. Supp. 2d at 327; see also *Corley*, 273 F.3d at 450.

regardless of substance.¹⁴⁶ The two courts found the injunction on decryption technology to be content-neutral, thus the decision on whether it violated First Amendment rights required the court to balance the distributors' interest in providing the technology against the studio's interest in enjoining the action.¹⁴⁷ Stated differently, the court had to determine whether the injunction restricted no more First Amendment freedoms than necessary to serve a significant government interest (*i.e.*, copyright protection).¹⁴⁸

[44] Focusing on the DMCA's purpose, the two courts determined that the injunction would not regulate expression, but would regulate DeCSS's function as technology that promotes e-piracy.¹⁴⁹ The *Reimerdes* court accordingly stated that:

[a]s Congress' concerns in enacting the anti-trafficking provision of the DMCA were to suppress copyright piracy and infringement and to promote the availability of copyrighted works in digital form, and not to regulate the expression of ideas that might be inherent in particular anti-circumvention devices or technology, this provision of the statute properly is viewed as content neutral.¹⁵⁰

[45] The court further noted that the consequences of allowing such expression in the digital age would mean that such information could be sent to Internet users all over the world in a short time, thus regulation is necessary to further a substantial government interest.¹⁵¹

[46] Accordingly, the *Reimerdes* and *Corley* courts, and subsequent decisions, determined that injunctions concerning DeCSS dissemination are content-neutral restrictions necessary to further a substantial government interest, and that the DMCA is sufficiently narrowly tailored to regulate as little speech as necessary.¹⁵² Finally, satisfying the final

¹⁴⁶ *Reimerdes*, 111 F. Supp. 2d at 327.

¹⁴⁷ *See generally Corley*, 273 F.3d at 454.

¹⁴⁸ *Reimerdes*, 111 F. Supp. 2d. at 327-28.

¹⁴⁹ *Reimerdes*, 111 F. Supp. 2d at 329.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 331.

¹⁵² *See generally Corley*, 273 F.3d at 429; *Reimerdes*, 111 F. Supp. 2d at 294.

element in the determination of whether to issue injunctions, the courts found that irreparable harm would result should the injunctions not be issued, primarily for two reasons.¹⁵³ First, DeCSS effectively eliminates DVD copyright protection, and thus without an injunction the studio would be forced to either accept piracy or expend resources innovating.¹⁵⁴ Second, the ability to download movies and then transfer and store the media decreases studio revenue.¹⁵⁵

[47] In February 2004, DVD-X and DVD-X COPY, popular decryption programs similar to DeCSS and DivX, were also found to violate the DMCA's anti-circumvention provisions.¹⁵⁶ In *321 Studios v. MGM*, a DVD-X and DVD-X COPY distributor¹⁵⁷ sought a declaration that its product did not violate the DMCA.¹⁵⁸ MGM counterclaimed, seeking the opposite.¹⁵⁹

[48] After citing and discussing *Reimerdes* and *Corley* at length, the court held that the software "avoided" and "bypassed" the DVD encoding scheme, CSS, within the meaning of the DMCA's provision proscribing such circumvention.¹⁶⁰ The court also rejected 321's argument that purchasers had permission to copy DVDs from the producers,¹⁶¹ and its argument that copying merely constituted fair use.¹⁶² Accordingly, as DVD-X and DVD-X COPY were held to violate the DMCA, the court enjoined 321's distribution of DVD-X and DVD-X COPY, and ordered that the company stop manufacturing, distributing, or otherwise trafficking

¹⁵³ *Reimerdes*, 111 F. Supp. 2d at 315.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *321 Studios v. Metro-Goldwyn-Mayer, Inc.*, 307 F. Supp. 2d 1085 (N.D. Cal. 2004).

¹⁵⁷ 321 Studios is no stranger to controversy. Hollywood has had it under scrutiny since the 2001 launch of its first product, DVD Copy Plus, which makes lesser-quality CD copies of DVD movies. In April [of 2002], fearing the MPAA's wrath, 321 Studios preemptively sued nine major Hollywood movie studios. The suit asks the court to rule that selling DVD Copy Plus does not violate the DMCA. Tom Spring, *New Tool Makes DVD Copying Easy; 321 Studios Challenges Hollywood, DMCA Again with Release of DVD X Copy*, PC WORLD (Dec. 3, 2002), available at <http://www.pcworld.com/news/article/0%2Caid%2C107637%2C00.asp> (last visited Sept. 4, 2004).

¹⁵⁸ *321 Studios*, 307 F. Supp. 2d at 1089-90.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1098; 17 U.S.C. §1201(b)(1).

¹⁶¹ *321*, 307 F. Supp. 2d at 1096.

¹⁶² *Id.* at 1101-02.

DVD circumvention software within seven days of its February 19, 2004, order.¹⁶³

[49] Despite the *Reimerdes*, *Corley* and *321 Studio* rulings, it appears e-pirates have not been deterred. As history has shown, once the “genie is out” (or once millions of copies of DeCSS, DivX, DVD-X and DVD-X COPY are themselves available for illegal download), it is nearly impossible to wrestle back into the lamp.¹⁶⁴ Hollywood must find other ways to fight e-piracy.

C. Preventive Measures

[50] To prevent losses resulting from premature dissemination of potential hit movies, studios are taking drastic measures.¹⁶⁵ In an effort to stop Tom Cruise’s latest film, *The Last Samurai*, from making its way to the Internet before the sneak preview, Warner Brothers hand-delivered copies to projection rooms, searched theaters for recording devices, installed metal detectors, searched for and seized cameras and camera phones, and hired staff to walk the aisles with night-vision goggles.¹⁶⁶ Though drastic, these measures proved effective — somewhat. Just days after its theatrical release, bootleg copies began surfacing on the web.¹⁶⁷

[51] Warner Brothers investigated and determined that the copy was filmed via camcorder in a U.S. theater.¹⁶⁸ An embedded tracking code indicated the theater from which it originated, but the studio released no specific information.¹⁶⁹ Nonetheless, *The Last Samurai*’s release was a success; however, as Warner Brothers later emphasized, its early web availability indicates how pervasive e-piracy has become.¹⁷⁰ Moreover, the studio’s protective efforts underscore the frightening speed and efficiency with which movies can find their way to the web.¹⁷¹

¹⁶³ *Id.* at 1105.

¹⁶⁴ *See* Grossman, *supra* note 7, at 61.

¹⁶⁵ Ripley, *supra* note 3.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 58.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 57.

¹⁷¹ *Id.*

[52] It is estimated that Hollywood lost \$3.5 billion to illegal DVD downloading in 2003.¹⁷² This loss is projected to increase to \$5.4 billion this year as the industry faces further technological development, which is rapidly diminishing the time it takes to download a movie.¹⁷³ Relatedly, blank CD sales in 2001 were up 40% from the previous year, indicating that blank CD demand has grown along with increased downloading capabilities.¹⁷⁴

[53] Despite technological “advances,” many of those engaged in movie piracy feel that Hollywood has little to lose from this illegal downloading compared to the effects endured by the recording industry.¹⁷⁵ However, with the continual improvement of downloading technology, Hollywood studios will soon face the same problems.¹⁷⁶ Hollywood should take action now, perhaps something similar to the recording industry’s remedial measures, to prevent the same lost revenues faced by the recording industry.¹⁷⁷ As discussed, the measures include litigation, education, and “spoofing,” or lesser explored methods which espouse (rather than combat) the technology.¹⁷⁸ However, Hollywood must also look to the enemy within.¹⁷⁹

D. The Enemy Within – *Oscar*TM Implicated

[54] An AT&T study published on September 13, 2003, *Analysis of Security Vulnerabilities in the Movie Production and Distribution Process*, examined the top fifty films in U.S. theaters that appeared online between January 1, 2002, and June 27, 2003.¹⁸⁰ The report evaluated web versions of movies, analyzing both sound and picture quality, as well as other effects of illegal copying and downloading.¹⁸¹ Further, the report examined the dates when movies first appeared online in comparison with

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Grossman, *supra* note 7, at 61.

¹⁷⁵ Ripley, *supra* note 3.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Grossman, *supra* note 7, at 62.

¹⁷⁹ Ripley, *supra* note 3, at 59.

¹⁸⁰ Simon Byers et al., *Analysis of Security Vulnerabilities in the Movie Production and Distribution Process* 7, (Sept. 13, 2003), at <http://lorrie.cranor.org/pubs/drm03-r.pdf>.

¹⁸¹ *Id.* at 8.

theatrical and home DVD/video release dates.¹⁸² The report then hypothesized as to the online copies' origins.¹⁸³

[55] The study found that 77% of illegal copies originated within the industry, seven films appeared on the Internet prior to their theatrical release date, and 163 were available before the DVD/video release date.¹⁸⁴ The study also identified time periods when most leaks occurred: the two-week period surrounding the movie's theatrical release and the three-week period leading to DVD/video release.¹⁸⁵

[56] The results were shocking; the most privileged members of the film industry were perhaps its biggest threat. But with a materialized threat comes an acquirable target. In early 2004, the FBI made its first movie bootlegging arrest.¹⁸⁶ The twist—the accused, Russell William Sprague, received “screeners” from actor and Academy of Motion Pictures Arts and Sciences (“the Academy”) member Carmine Caridi.¹⁸⁷ The movies Caridi sent Sprague included *The Last Samurai*, *Something's Gotta Give*, and *Big Fish*.¹⁸⁸ Caridi sent the movies to Sprague, who copied them to DVD and returned the original movies to Caridi.¹⁸⁹

[57] Last year, in anticipation of bootlegging, the MPAA banned screener DVDs.¹⁹⁰ However, the ban was lifted after a court granted a temporary injunction to independent production companies that claimed the ban left them disadvantaged because their movies are not widely distributed.¹⁹¹ In response, the Academy now requires *Oscar*TM voters to agree to keep the screeners for their private viewing, threatening expulsion from the Academy as a consequence for a violation.¹⁹²

¹⁸² *Id.* at 8.

¹⁸³ *Id.* at 9.

¹⁸⁴ *Id.* at 9.

¹⁸⁵ *See id.* at 10.

¹⁸⁶ Linda Massarella, *FBI Makes Arrest in Internet Piracy Case*, USA TODAY, Jan. 23, 2004, available at http://www.usatoday.com/tech/news/2004-01-23-film-piracy-bust_x.htm.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Massarella, *supra* note 186.

E. If you can't beat 'em, join 'em – Hollywood Goes On-Line

[58] To combat e-piracy and cash-in on the Internet, Hollywood has entered the online marketplace.¹⁹³ One distributor, Movielink, offers downloadable movies to pay-per-view members for \$4-\$5.¹⁹⁴ Once a user chooses a movie, he can view it at any point during the next thirty days, but once the file is opened, it must be watched within twenty-four hours or it will be automatically deleted.¹⁹⁵ In addition, the downloaded film is encrypted¹⁹⁶ to prevent a customer from burning the movie to DVD.

[59] The industry must now consider whether this alternative will convert current *illegal* downloaders. Today, a movie can be downloaded in hours, for free, and burned onto DVD before it is in theaters.¹⁹⁷ While such acts are illegal, the movie industry, unlike the music industry, has yet to prosecute illegal downloaders or create effective and profitable online alternatives. For the time being there appears to be nothing stopping e-pirates from taking advantage of free movies. The only advantage to the “legal” on-line consumer over using a pay-per-view service is an earlier release date. Thus, Movielink and others may find themselves in direct competition with video stores, while offering little benefit to traditional movie rental (other than not having to leave one's house).¹⁹⁸

[60] Other “for-pay services” have entered the online market. However, the services available continue to restrict what members can do with the media.¹⁹⁹ To keep pace with illegal downloading, the music and movie industries must create better pay services.

F. Education - “Movies: They're Worth It”

[61] In an effort to avoid the declining sales faced by the recording industry, the MPAA is striving to educate consumers about the effects of

¹⁹³ See generally Katherine L. Race, *The Future of Digital Movie Distribution on the Internet Antitrust Concerns with the Movielink and Movies.com Proposals*, 29 RUTGERS COMPUTER & TECH. L.J. 89 (2003) (discussing movie studios' plans to offer digitized movies on the Internet for paying customers).

¹⁹⁴ *Id.* at 92.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ See Grossman, *supra* note 7, at 60.

¹⁹⁸ See Race, *supra* note 193, at 92-93.

¹⁹⁹ Grossman, *supra* note 7, at 64.

illegally downloading movies.²⁰⁰ Such efforts include the creation of two MPAA websites, www.respectcopyrights.org and www.mpa.com/anti-piracy, and various trailers shown at theaters portraying e-piracy's collateral effects.²⁰¹

[62] The MPAA's site, www.respectcopyrights.org, covers four effects of illegal movie downloading: direct harm to consumers if movies fail to make money, the effect movie decline will have on off-screen employees, computer vulnerability, and criminal risk.²⁰²

i. You are cheating yourself!

[63] First, the MPAA highlights the effects on the consumer.²⁰³ The MPAA claims bootlegged movies lack quality, since they are often recorded by a camcorder.²⁰⁴ Poor quality, the MPAA believes, should deter illegal downloading since the movie loses the "real movie experience."²⁰⁵

[64] Moreover, if illegal downloading continues, fewer people will go to the movies and the number of profitable movies will decline.²⁰⁶ As a result, studios will be forced to make fewer films, which, in turn, will harm consumer options.²⁰⁷ Even now, according to the MPAA, only four out of every ten films make a profit.²⁰⁸

[65] This sympathy-garnering effort, from an industry earning billions of dollars a year, appears to be receiving only a lukewarm reception. It is suggested that while users might agree that studios could stop making movies to cover their losses, studios will lack sympathy from consumers as long as top stars continue to earn millions of dollars per film.

²⁰⁰ See Motion Picture Association of America, Statement on Anti-Piracy, at <http://www.mpa.org/anti-piracy/index.htm> (last visited Sept. 21, 2004); see also Press Release, Motion Picture Association of America, MPAA Launches New Phase of Aggressive Education Campaign Against Movie Piracy (June 15, 2004), at http://www.respectcopyrights.com/FINAL_6-15-04_STOPP_%20Press_Release.doc.

²⁰¹ See *supra* note 200.

²⁰² *Id.*

²⁰³ *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

ii. You are threatening the livelihood of thousands!

[66] As the MPAA suggests, people other than actors, directors and producers are involved in the movie-making process.²⁰⁹ Although illegal downloading may not be deterred by the studios or the major players—actors, executives and directors—losing money, the MPAA hopes that for the harm e-piracy causes, consumers will appreciate that workers behind-the-scenes are at risk.²¹⁰

[67] Accordingly, the MPAA has produced several theatrical trailers, exhibiting various behind-the-scene workers discussing their jobs and the effects movie piracy will have on themselves and over 500,000 others in the field if illegal downloading continues.²¹¹ These workers include a stunt man, a set painter, and a make-up artist.²¹² Obviously, these trailers are another attempt to garner sympathy from consumers who may otherwise feel justified in downloading movies, considering the fortunes made by some in the industry. The trailers' effects remain to be seen.

iii. Your computer is vulnerable!

[68] Movie downloading, like music downloading, can be accomplished through P2P networking.²¹³ Though convenient and free, P2P networking has risks, including virus and worm susceptibility.²¹⁴ Personal information, such as bank records and social security numbers, may be compromised.²¹⁵ Also, once a user downloads a file, he may himself, perhaps unknowingly, become a pirated movie distributor and expose himself to civil and criminal liability.²¹⁶

[69] This fear factor, however, is unlikely to be a deterrent. Arguably, users know the risk of viruses and worms, but accept it by merely logging onto the web everyday. If Hollywood continues to be uncommitted to prosecuting violators civilly and criminally, its empty admonitions will continue to fall on deaf ears.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

iv. You are breaking the law!

[70] If caught, an e-pirate is subject to stiff penalties and fines; possibly years in prison and thousands of dollars in fines.²¹⁷ However, there is not yet a set precedent for enforcement of pirated movies that would lead individuals to believe such conduct has real consequences.

[71] In addition to the MPAA's four claimed effects, www.respectcopyrights.org also includes information regarding a new campaign sponsored by the MPAA and headed by Junior Achievement, Inc., entitled *What's the Diff?*, which is available to middle school students.²¹⁸ Its purpose is to educate young people about the need to protect copyrights and to attach a stigma to illegal downloading.²¹⁹ The MPAA also provides links to profit-making websites where users can download movies legally, for a fee, including Cinemanow, Ifilm, Movieflix, and Movielink.²²⁰

VI. RECENT E-PIRACY LEGISLATION

[72] The MPAA currently backs proposed legislation designed to impose strict penalties on e-piracy.²²¹ One proposal, an expansion of the No Electronic Theft Act, the Artists' Rights and Theft Prevention Act ("ARTPA"), would increase fines and prison sentences.²²² ARTPA specifically imposes harsher penalties on those who create or obtain movies prior to their theatrical release.²²³ Hollywood's profits come from a carefully choreographed timing of distribution of the film across a variety of media, anchored by a film's theatrical release; thus, the incentive to curb illegal pre-release dissemination.²²⁴

²¹⁷ *Id.*

²¹⁸ JUNIOR ACHIEVEMENT INC. & MOTION PICTURE ASS'N OF AM., *WHAT'S THE DIFF?* (2003) at http://www.respectcopyrights.org/CG_FINAL.pdf (last visited Oct. 5, 2004).

²¹⁹ *See id.* at 2.

²²⁰ Motion Picture Association of America., *supra* note 15.

²²¹ *See* Ryan Singel, *Calls to Burn Broadcast Flag*, WIRED NEWS (Mar. 11, 2004), at <http://www.wired.com/news/politics/0,1283,62619,00.html>; *see also* *Movie Piracy: New Movie Piracy Bill Ups the Ante Considerably*, at http://server1.msn.co.in/Computing/antipiracy/new_movie_piracy.html (last visited Sept. 2, 2004).

²²² *See* *Movie Piracy*, *supra* note 221.

²²³ *Id.*

²²⁴ *Id.*

[73] Additionally, “starting in July 2005, all digital video-recording devices—including digital VCRs and digital tuners—will recognize a ‘broadcast flag’ encoded in the digital television stream. Recorders must then encode a flagged program so it cannot be shared from machine to machine or over the Internet.”²²⁵ This regulation is partially aimed at curbing the MPAA’s problem of illegal redistribution of broadcast television.²²⁶ For now, the MPAA backs the federal regulation, but opponents suggest the measures are constitutionally over inclusive and could include benign activities such as taping a show for a friend.²²⁷ Finally, the proposed Piracy Deterrence and Education Act, would “ban unauthorized recording in movie theaters and includes harsh penalties if pre-released movies are swapped on P2P networks.”²²⁸

VII. RECENT LITIGATION – *RIAA v. VERIZON INTERNET SERVICES, INC.*

[74] To pursue apparent copyright infringers, the RIAA must individually identify the users using P2P programs who share and trade files.²²⁹ The RIAA can easily find a user’s screen name and trace the user to his ISP with his associated IP address.²³⁰ But only the ISP can link the IP with a name and address. Once the link is made, the RIAA can contact, or even sue, the person.²³¹

[75] Prior to *Verizon*, the RIAA frequently used the DMCA’s subpoena provision²³² to “compel ISPs to disclose the names of subscribers whom the RIAA believed were infringing its members’ copyrights.”²³³ Some ISPs complied with the RIAA’s subpoenas and identified subscribers’ names, and using the acquired information, the RIAA sent letters to and filed lawsuits against several hundred infringing individuals, “each of whom allegedly made available for download hundreds or in some cases

²²⁵ See Singel, *supra* note 221.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ Declan McCullagh, *House Panel Approves Copyright Bill*, CNET News (Mar. 31, 2004), at <http://news.com.com/2100-1028-5182898.html>.

²²⁹ See *Verizon*, 351 F.3d at 1232.

²³⁰ *Id.*

²³¹ *Id.*

²³² 17 U.S.C. § 512(h)(1) (2000) (copyright owner may “request the clerk of any United States district court to issue a subpoena to [an ISP] for identification of an alleged infringer”).

²³³ *Verizon*, 351 F.3d at 1232.

thousands of .mp3 files.”²³⁴ One such targeted ISP was Verizon Internet Services. Verizon, however, drew a line in the sand, and in the summer of 2002 refused to comply with an RIAA subpoena.²³⁵

[76] In defending its actions, Verizon argued that the DMCA precludes issuance of subpoenas to ISPs that merely act as conduits for P2P communications, since the subpoena request could not meet the requirement that such subpoenas contain “a copy of a notification [of claimed infringement, as] described in § 512(c)(3)(A).”²³⁶ In particular, Verizon maintained that the RIAA’s two subpoenas did not meet the requirements since Verizon is not storing the infringing material on its server, and it could not identify material “to be removed or access to which is to be disabled.”²³⁷ Since § 512(h)(4) makes satisfaction of the notification requirement a condition precedent to issuance, Verizon’s argument continued, the subpoenas were deficient.²³⁸

[77] The Court of Appeals for the District of Columbia Circuit, following the *Napster* and *Grokster* logic, agreed with Verizon and held that DMCA subpoenas may only be issued to ISPs engaged in storing infringing material, and not to those merely acting as conduits.²³⁹ As the court explained, the subpoena validity depends upon the copyright holder having given the ISP effective notification under § 512(c)(3)(A).²⁴⁰ Thus, a subpoena may not be issued to a provider acting as a conduit for P2P sharing, which does not involve media storage.²⁴¹

[78] As the court sympathetically noted, the problem for the RIAA (and presumably the MPAA) lies in the language of the DMCA itself.²⁴² Congress did not likely foresee the application of § 512 to P2P file sharing when the DMCA was drafted, and had it foreseen P2P’s development, it may have drafted the DMCA more broadly.²⁴³ For the time being,

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at 1234.

²³⁷ *Id.* at 1235.

²³⁸ *Id.* at 1234-36.

²³⁹ *Id.* at 1236-38.

²⁴⁰ *Id.* at 1236.

²⁴¹ *Id.* at 1236-37.

²⁴² *Id.* at 1238.

²⁴³ *Id.*

however, issuance of § 512 subpoenas to an ISP acting as a P2P conduit is barred.²⁴⁴

[79] Hollywood is losing its war against P2P conduits on two fronts. According to *Grokster*, ISP activities that facilitate P2P sharing are lawful²⁴⁵ and, according to *Verizon*, their IP lists are secure.²⁴⁶ So what now for Hollywood? Wait for Congress to act? Perhaps, such action was all but urged by the *Verizon* court:

The stakes are large for the music, motion picture, and software industries and their role in fostering technological innovation and our popular culture. It is not surprising, therefore, that even as this case was being argued [September 16, 2003], committees of the Congress were considering how best to deal with the threat to copyrights posed by P2P file sharing schemes.²⁴⁷

[80] Unfortunately, Congressional action will always be a step behind technological innovation. Rather, Hollywood must stop sailing against the wind and view the Internet for what it is: an opportunity. Hollywood must continue its educational efforts and provide superior online alternatives to illegal downloading, or hope that Congress acts to protect its shores. It must become the innovator.

VIII. CONCLUSION AND RECOMMENDATIONS – HIDDEN TREASURE

[81] To date, Hollywood's efforts to fight illegal downloading have not matched those of the recording industry—perhaps a wise move. It is difficult to foresee whether, and to what extent, the recording industry's litigation efforts will pay off. What is apparent is the increasing popularity of legal music and movie downloading operations, perhaps a result of the recording industry and Hollywood's education efforts. For example, Apple's iTunes has sold millions of songs, and other competitors are entering the market.²⁴⁸ Also, a recent report indicated that traditional music sales were up 9.1% over the first three months of 2004, compared with the first three months of 2003.²⁴⁹

²⁴⁴ *Id.*

²⁴⁵ See generally *Grokster*, 259 F. Supp. 2d at 1029.

²⁴⁶ See generally *Verizon*, 351 F.3d at 1229.

²⁴⁷ *Id.* at 1238-39.

²⁴⁸ Fried, *supra* note 105.

²⁴⁹ Alex Veiga, *Music Sales Strong Despite Digital Piracy*, (Apr. 12, 2004), at <http://www.phillyburbs.com/pb-dyn/news/81-04122004-281107.html>.

[82] Unlike the recording industry, Hollywood's main focus appears to be consumer education. On June 14, 2004, the MPAA announced that it was launching a new phase of "aggressive education" concerning movie piracy.²⁵⁰ According to an MPAA press release:

The new phase will feature ads in daily newspapers and consumer magazines across the country, as well as in more than 100 college newspapers. It will also include reaching out to parents, students and local groups to explain why movie piracy is illegal, how it impacts jobs and the economy and the consequences of engaging in illegal trafficking. Additionally, in the coming months, anti-piracy messages will appear in motion picture theaters across the country.²⁵¹

[83] MPAA president Jack Valenti further noted:

We hope this ramped-up information/educational campaign will cause those who are taking films without permission to stop their illegal activity. But we will keep all of our options open, including legal action. If we don't react promptly to an ascending curve of illegal uploading and downloading soon to be reinforced with dazzling speeds rising from file-trafficking networks, we will live with an intense regret. We have to do more to convince that minority of people who are engaged in this unlawful and infringing activity of the wrongness of their conduct. We have to stem the tide of film theft online before it is too late, before it puts to peril the creative energy of the industry and the jobs of the nearly one million Americans who work within the movie industry.²⁵²

[84] Valenti is correct; hackers and e-pirates will continue to circumvent and distribute. But he may be incorrect about stemming the tide before it is too late—it may be too late. As mentioned previously, 400,000 to 600,000 movies are illegally downloaded each day, and 39% of all adult Internet users (24% of all adult Americans) have high-speed Internet access at home.²⁵³

²⁵⁰ Motion Picture Association of America, *supra* note 15.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

[85] Along with its educational efforts, Hollywood must focus on capitalizing on the Internet's potential, perhaps using iTunes as a model. It is still unclear whether users will be affected by trailer warnings concerning illegal downloading, but consumers will always be interested in receiving a superior product. Hollywood, however, must address its continuing inability to release online movies sooner and concentrate on education as well as capitalization. With such access and seemingly ineffective litigation efforts, the MPAA's difficulty in deterring illegal downloading is not surprising. Thus, Hollywood must remain focused on both education and capitalization.

[86] To capitalize on the online phenomenon, Hollywood must innovate and distribute faster, must offer better services, and should not waste valuable resources and damage public goodwill by pursuing e-pirates in court. So far the MPAA has wisely refused to join the legal offensive, perhaps hoping to reap the benefits associated with high-profile music lawsuits without having to take the heat from outraged parents and consumers.²⁵⁴ This decision may be doubly wise since *Verizon*, as Hollywood would now find great difficulty in acquiring large numbers of individual targets for infringement lawsuits.²⁵⁵ If Hollywood wishes to litigate, however, it should attack those responsible for the initial dissemination: the scrupulous insiders discussed above.

[87] Meanwhile, while Hollywood refuses to modernize and capitalize on the goldmine at their fingertips, technology continues to decrease download time, and the number of computers flying the Jolly Roger grows.

²⁵⁴ Patrick Goldstein, *The Big Picture Patrick Goldstein; Hollywood Deals with Piracy, A Wary Eye on CDs*, L.A. TIMES, Sept. 9, 2003, at E1, available at 2003 WL 2433042.

²⁵⁵ See generally *Verizon*, 351 F.3d at 1229.