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Litigation as a Tool against Digital Piracy

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I. INTRODUCTION

A difficult and complex problem was created when new technologies such as the compression of digital media files into MP3 format and compression algorithms for images into JPG and GIF files gave consumers the ability to easily upload, download and copy media on computers and digital recording systems.[1] The effects of the infamous Napster file-sharing service were felt in the pockets of the music, film, and publishing industries, from the artists, actors, writers, record labels, film studios and publishing houses to their distributors and retail chains.[2] The music industry estimates that in the United States, total record sales for 2002 were down ten to twelve percent from 2001 (which had dropped ten percent from 2000).[3] Retail sales figures were even worse—down fourteen percent in 2002.[4] Worldwide record sales in 2002 dropped seven percent after a five percent drop in 2001, according to the International Federation of the Phonographic Industry.[5] Research indicates that more teens than ever are burning CDs instead of buying them—"[sixty-one percent] of [twelve to seventeen] year-olds have burned someone else's copy of a CD instead of buying their own copy, a [thirteen percent] increase in one year."[6]

Even after the recording industry litigated Napster into obsolescence, new peer-to-peer file-sharing services such as Kazaa, Scour, Aimster, Grokster, AudioGalaxy, Fast Track, iMesh, LimeWire, BearWare, Gnutella, and others sprang up and proliferated, creating a widespread international movement.[7] In California Senate hearings held in March 2003, Eric Garland, the CEO of Big Champagne LLC, a company that measures activity on peer-to-peer networks, testified that, "In August of 2002, the simultaneous user base [on peer-to-peer networks] topped two million." . . . [A]t this instant, in fact, more than four million Kazaa users are logged on to the network, picking and choosing from a library of hundreds of millions of files."[8] "[S]ong for song, more music was

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1. Marshall Brain, *How MP3 Files Work, at* http://www.howstuffworks.com/mp3.htm (last visited Sept. 14, 2003) (copy on file with the *McGeorge Law Review*).

2. *See, e.g.*, Gwendolyn Mariano, *Execs Look to Lead Anti-piracy Charge, at* http://aol.com.com/2100-11023-933006.html?tag=rn (last visited Sept. 20, 2003) (copy on file with the *McGeorge Law Review*) (discussing the "frustration over the ongoing problem of piracy within the music, film and publishing industries").

3. Martin Edlund, *What's the Future of Music*, N.Y. SUN, Jan. 14, 2003, at 1.

4. *Id.*

5. *Gloom Settles on Global CD Sales*, BBC News, Apr. 9, 2003, *at* http://news.bbc.co.uk/2/hi/entertainment/2931589.stm (last visited Sept. 20, 2003) (copy on file with the *McGeorge Law Review*).

6. Press Release, Edison Media Research, The National Record Buyers Study 3, Why Are Music Sales Falling? Downloading, *available at* http://edisonresearch.com/recordBuyersIIIPress.htm (June 16, 2003) [hereinafter National Record Buyers Study 3 Press Release] (copy on file with the *McGeorge Law Review*).

7. Eric Garland, CEO of Big Champagne, Embracing the Digital Age of Entertainment, Testimony Before the California Senate Select Committee on the Entertainment Industry Informational Hearing on Peer to Peer File Sharing (Mar. 27, 2003), *available at* http://www.bigchampagne.com/BigChampagne_Senate-Testimony.pdf (last visited Sept. 20, 2003) (copy on file with the *McGeorge Law Review*).

8. *Id.*

acquired on peer-to-peer networks last year than through retail sales of compact discs worldwide."[9]

Public perception about downloading media has also changed dramatically. A recent survey of music consumers found that fifty percent of twelve to forty-four-year-olds did not believe that there was anything morally wrong about downloading free music from the Internet.[10] Even more surprising is that fifty-three percent of the general Internet population does not believe that downloading copyrighted music is stealing.[11]

The response by the music and media industries to the widespread digital file-sharing movement has included: 1) pushing through new legislation, such as the Digital Millennium Copyright Act (DMCA);[12] 2) devising technological counter-measures such as encrypted CDs;[13] and 3) aggressively litigating against the most visible of the new copyright offenders.[14] The DMCA was largely an industry-written bill that provided broad language proscribing anti-circumvention of encryptive devices, giving industry lawyers fertile grounds for lawsuits.[15]

Despite the millions of dollars spent by the media industry on litigation and some apparent victories like the Napster litigation, downloaders of illegal media files have not been deterred, and appear to be thriving.[16] In fact, one could argue that the Napster litigation and the publicity surrounding it actually made Napster a household word and engendered curiosity in the uninitiated.[17] The Recording Industry Association of America (RIAA) is now regarded by many consumers as the enemy, as evidenced by websites such as www.Boycott-RIAA.com.[18] Peer-to-

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9. *Id.*

10. National Records Buyers Study 3 Press Release, *supra* note 6.

11. Amanda Lenhart & Susanah Fox, *Downloading Free Music: Internet Music Lovers Don't Think It's Stealing*, Pen Internet & Am. Life Project's Online Music Report, Sept. 28, 2003, *available at* http://www.pewinternet.org/reports/pdfs/pip_Online_Music_Report2.pdf (copy on file with the *McGeorge Law Review*).

12. 17 U.S.C.A. § 1201-05 (West Supp. 2003).

13. *See, e.g., Technology Puts a Lock on CDs*, BBC News, Aug. 15, 2001, *at* http://news.bbc.co.uk/2/hi/science/nature/1489619.stm (last visited Sept. 20, 2003) (copy on file with the *McGeorge Law Review*) (discussing record labels' implementation of CD encryption technology and the potential resultant backlash by consumers).

14. *See infra* Part III (discussing digital copyright enforcement actions).

15. 17 U.S.C.A. §§ 1201-05.

16. *See Peers Are Heirs to Napster's Throne*, MUSIC & MEDIA, Oct. 13, 2001, at 9 (discussing the peer to peer services that "are filling the void left by the demise of Napster," and observing that the music industry is "'seeing more file sharing than ever.'").

17. *See, e.g.*, John C. Dvorak, *Understanding Napster*, Forbes.Com, Oct. 6, 2000, *at* http://www.forbes.com/2000/10/09/dvorak.html (last visited Sept. 20, 2003) (copy on file with the *McGeorge Law Review*) (considering the then-pending Napster litigation, stating that Napster had approximately 100,000 users prior to the litigation, that as a result of the publicity surrounding the litigation, the number of users when the litigation was pending was estimated at thirty-five million, and opining that "Napster ha[d] become a household word from all this attention.").

18. *See generally* Boycott-RIAA.com, *at* http://www.boycott-riaa.com/mission.php (last visited Sept. 20, 2003) (copy on file with the *McGeorge Law Review*) (characterizing conduct of the RIAA and the major record labels as "lock[ing] up our culture and heritage through extensive lobbying, outrageous campaign donations, misleading our political leaders, and lying to the public, while misrepresenting the facts").

peer networks continue to grow and have achieved mainstream popularity with tens of millions of Americans embracing file-sharing in record numbers.[19]

In August 2001, the first criminal indictment under the DCMA was brought by a federal grand jury in California against a Russian national, Dmitry Sklyarov, and the Russia company, Elcomsoft Co., Ltd.[20] In April 2003, the RIAA sued a student at Michigan Technological University for running an alleged "Napster-like" file-sharing network on the campus, seeking to recover $150,000 for each downloaded file.[21] The case settled for $15,000, with the student making payments over three years to pay off the settlement.[22] Recently, the RIAA sent cease and desist letters to five alleged music file-swappers whose identities were discovered as a result of subpoenas ordering Internet service providers (ISPs) Verizon and Earthlink to disclose the identities to the RIAA.[23] Litigation and the threat of litigation continue to be the primary strategies employed by the music and media industries to defeat the distribution and copying of unauthorized media files on the Internet, but it is doubtful that litigation alone will be effective in controlling digital Internet piracy.[24]

II. HISTORY OF DIGITAL COPYRIGHT LITIGATION

The recording industry, movie studios, and other media companies lobbied extensively for the passage of the DMCA in 1998, fearing that the Internet would become a lawless environment for digital piracy because of the ease of downloading high quality digital media.[25] In early 1999, shortly after the passage of the DMCA, Napster hit the Internet.[26] Created by 19-year-old college student

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19. Garland, *supra* note 7.

20. Press Release, United States Department of Justice First Indictment Under Digital Millennium Copyright Act Returned Against Russian National, Company, in San Jose, California (Aug. 28, 2001), *available at* http://www.cybercrime.gov/Sklyarovindictment.htm (last visited Sept. 20, 2003) (copy on file with the *McGeorge Law Review*).

21. Katie Dean, *P2P Whipping Boy: Know the Risks*, WIRED, May 10, 2003, *available at* http://www.wired.com/news/print/0,1294,58783,00.html (last visited Sept. 20, 2003) (copy on file with the *McGeorge Law Review*).

22. *Id.*

23. *Music Traders to Receive and Desist Warnings*, MERCURY NEWS., June 18, 2003, *available at* http://www.bayarea.com/mld/mercurynews/business/6118823.htm (last visited Sept. 20, 2003) (copy on file with the *McGeorge Law Review*).

24. *See, e.g.*, Ryan Narzine, *Roxio to Bundle Napster with CD-Burning Tools*, boston.internet.com, July 28, 2003, *at* http://boston.internet.com/news/article.php/2240801 (last visited Sept. 20, 2003) (copy on file with the *McGeorge Law Review*) (stating that "the threat of litigation has not yet scared off online adults from file-sharing activities).

25. *See, e.g.*, Scarlet Prvitt, *Digital Copyright Law Under Scrutiny*, PC WORLD, Apr. 1, 2002, *available at* http://www.pcworld.com/news/article/0,aid,92164,00.asp (last visited Sept. 21, 2003) (copy on file with the *McGeorge Law Review*) (stating that when it passed the DMCA, Congress "was under heavy pressure from the entertainment industry," and that the RIAA and the Motion Picture Association of America [MPAA] "lobbied hard for new copyright law").

26. *Napster: Then and Now*, Interactive Media Lab, Univ. of Fla. Coll. of Journalism and Communications, *at* hppt://iml.jou.ufl.edu/projects/spring01/Burkhalter/Napster%20history.html (last visited

named Shawn Fanning, Napster was described as "an integrated browser and communications system provided by Napster, Inc., to enable musicians and music fans to locate bands and music available in the MP3 music format."[27] Within months, Napster had spread to college campuses throughout the United States.[28] By fall of 1999, Napster had gained millions of fans, and the ire of the RIAA, and the legal battles began.[29]

A. The Napster Case

On December 6, 1999, A&M Records, Inc., along with seventeen other record companies, filed a lawsuit against Napster, alleging contributory and vicarious copyright infringement and asking the court to issue a preliminary injunction against the fledgling file-sharing service.[30] The Napster case became the first test case to interpret many provisions of the DMCA, including whether Napster could qualify for the safe harbor provisions of section 512 of the DMCA, which exempts an Internet service provider (ISP) if it meets certain requirements.[31] The court determined that Napster did not qualify as an ISP under the DMCA.[32] Then the court went on to reject Napster's fair use defense, which was based on its argument that there were legitimate, non-infringing uses of its service such as providing emerging artists a forum for their music.[33] Following a closely watched hearing in a crowded courtroom, District Court Judge Marilyn Patel of the Northern District of California found that the plaintiffs would most likely prevail against Napster, based on both contributory and direct infringement theories."[34] Napster was ordered to terminate all infringing uses of its service.[35]

Napster appealed the lower court ruling and continued its arguments in the United States Court of Appeals for the Ninth Circuit, which eventually upheld Judge Patel's determination that Napster "knowingly encourage[d] and assist[ed] the infringement of [the record companies'] copyrights."[36] The appellate court

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Sept. 21, 2003) (copy on file with the *McGeorge Law Review*).

27. *Napster Terms of Use*, Interactive Media Lab, Univ. of Fla., Coll. of Journalism and Communications, *at* http://iml.jou.ufl.edu/projects/spring01/burkhalter/napster%20terms%20and%20conditions.html (last visited Sept. 21, 2003) (copy on file with the *McGeorge Law Review*) (providing the terms and conditions for the Napster website).

28. Thomas Hutchison, Ph.D., The Napster Revolution on College Campuses: How Universities and the Recording Industry Are Coping with the Music File-Sharing Sensation, Address at the International Conference on Technology and Education (May 4, 2001), *at* http://www.icte.org/T01_Library/T01_163.PDF (last visited Sept. 21, 2003) (copy on file with the *McGeorge Law Review*).

29. *Id.*

30. A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 900 (N.D. Cal. 2000).

31. *Id.* at 919 n.24; 17 U.S.C.A. § 512 (West Supp. 2003).

32. *A&M Records*, 114 F. Supp. 2d at 919 & n.24.

33. *Id.* at 913-17.

34. *Id.* at 918, 920-21, 925-27.

35. *Id.* at 927.

36. A&M Records, Inc., v. Napster, Inc. 239 F.3d 1004, 1020 (9th Cir. 2001).

ordered the district court to modify its original injunction to specify that contributory infringement could be established only where Napster received reasonable notice of the specific infringing files, knew or should have known the files were available on Napster, and failed to act to prevent the distribution of infringing files.[37] On remand, Judge Patel enjoined Napster "from engaging in, or facilitating others in, copying, downloading, uploading, transmitting, or distributing copyrighted sound recordings. . . ."[38] Finally, on March 25, 2002, the United States Court of Appeals for the Ninth Circuit upheld the district court's modified preliminary injunction and shut down order pending compliance determining that Napster must remain offline until it could remove all infringing material from its website.[39]

The Napster lawsuit continued throughout 2002 until Napster representatives appeared in bankruptcy court on September 13, 2002, when the bankruptcy judge ordered Napster to sell its assets to the highest bidder.[40] The court refused to approve an offer by German media group Bertelsmann AG to purchase Napster's assets with a bid of allegedly $9 million because Napster failed to prove that the bid was made in good faith and at arm's length.[41] Bertelsmann reportedly had previously invested over $60 million into Napster, hoping to convert the Napster technology into a secure and legal file-sharing subscription service.[42] Napster closed all of its operations in September, reaching a deal with the U.S. Trustee's office for the appointment of a Chapter Eleven bankruptcy trustee to manage its estate, and the Napster saga ended.[43] "Software maker Roxio now owns most of Napster's assets."[44]

B. *MP3.com*

On January 12, 2000, a California Internet company known as MP3.com, Inc. launched a personalized digital music service called My.MP3.com that

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37. *Id.* at 1027.

38. A&M Records, Inc. v. Napster, Inc., No. C99-051853 MMP, C 00-1369 MMP 2001 WL 227083, at *1 (N.D. Cal. Mar. 5, 2001).

39. A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1098-99 (9th Cir. 2002).

40. *In re* Napster Inc., No. 02-11573 (Bankr. Del. Sept. 13, 2002); *In re* Napster, Inc., No. 02-11573 (Bankr. Del. 2002); Michael Singer, *Bidding War Heats Up for Napster*, Silicon Valley Internet.com, *at* http://siliconvalley.internet.com/news/article.php/1464391 (last updated Sept. 16, 2002) (copy on file with the *McGeorge Law Review*).

41. *U.S. Court Seals Napster's Fate*, I.T. Matters, *at* http://itmatters.com.ph/news/news_09052002f.html (last updated Sept. 5, 2002) (copy on file with the *McGeorge Law Review*).

42. *See* Jefferson Graham, *There's Still Hope for Napster Despite Stream of Troubles*, USA TODAY, May 23, 2001, at 3D.

43. *Trustee Named in Napster Bankruptcy*, CNETNews.com, *at* http://news.com.com/2102-1023_3-960369.html?tag=ni_print (last visited Sept. 21, 2003) (copy on file with the *McGeorge Law Review*); John Borland, *Napster's Bankruptcy Road Nears End*, CNETNews.com, *at* http://news.com.com/2102-1023_3-455823.html?taaag= (last visited Sept. 21, 2003) (copy on file with the *McGeorge Law Review*).

44. Stefanie Olsen, *Record Labels Sue Napster Investor*, CNETNews.com, Apr. 22, 2003, *at* http://news.com.com/2102-1027-997860.html (copy on file with the *McGeorge Law Review*).

allowed CD owners to accumulate personal music libraries on the MP3.com site.[45] These libraries could then be accessed and played from any Internet connection.[46] Members of the RIAA quickly filed a lawsuit against MP3.com in the United States District Court for the Southern District of New York.[47] The complaint sought declaratory, injunctive and monetary relief against MP3.com, requesting an award of statutory damages for willful infringement of $150,000 per work infringed, for each track on every CD, generating a huge potential damage award.[48] In April 2000, U.S. District Court Judge Jed Rakoff had no difficulty granting a summary judgment to the record companies, ruling that MP3.com infringed on the recording industry's copyrights when it built its My.MP3 service.[49] The judge rejected MP3.com's "fair use" defense, stating that copyright law "is not designed to afford consumer protection or convenience but, rather, to protect the copyrightholders' property interests."[50] Following the court's ruling, MP3.com reached settlements with all of the music industry plaintiffs except Universal Music Group.[51] On September 6, 2000, the court ruled that MP3.com had willfully infringed Universal's copyrights, and ordered defendants to pay damages of $118 million, based on a calculation of an estimated 4,700 disks at $25,000 per disk.[52] MP3.com quickly appealed the decision, arguing that Universal Music Group incorrectly classified 4,700 copyrights as "works for hire."[53] MP3.com eventually settled with all plaintiffs for an amount exceeding $100,000,000.[54]

C. Aimster

An injunction shutting down the file-trading network originally known as "Aimster" was issued on September 4, 2002 by a Chicago federal court, on the same day that "Napster" closed down its website for good.[55] The Aimster service

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

46. *Id.*

47. *Id.*

48. UMG Recordings, Inc. v. MP3.com, Inc., 109 F. Supp. 2d 223 (S.D.N.Y. 2000) (denying plaintiff's request to have the damages computed by song rather than by CD).

49. *UMG Recordings*, 92 F. Supp. 2d at 350 (stating that this case was not a difficult legal issue and that defendant had clearly infringed plaintiff's copyright).

50. *Id.* at 352.

51. *See generally*, Jeffrey Benner, *Record Industry Plays Both Sides*, Wired.com, *at* http://www.wired.com/news/business/0,1367,42426,00.html (Mar. 16, 2001) (copy on file with the *McGeorge Law Review*); *"Works For Hire" on Firing Line*, Wired.com, *at* http://www.wired.com/news/business/0,1367, 39632,00.html (last visited Jan. 30, 2004) (copy on file with the *McGeorge Law Review*).

52. UMG Recordings, Inc. v. MP3.com, Inc., No. 00 Civ. 472JSR, 2000 U.S. Dist. LEXIS 13293, at *18 (S.D.N.Y. Sept. 6, 2000).

53. *Id.*

54. *See generally*, Benner, *supra* note 51 (stating that Universal Music Group was the last of the plaintiffs to settle with MP3.com).

55. Brad King, *Ruling Spells Doom for Aimster*, Sept. 4, 2002, *at* http://www.wired.com/news/business/0,1367,54950,00.html (last visited Jan. 25, 2004) (copy on file with the *McGeorge Law Review*).

was launched in August 2000 by a Rensselaer Polytechnic Institute professor, John Deep.[56] Soon after launching Aimster, Deep was threatened with a trademark infringement suit by America Online (AOL), and Aimster was changed to "Madster."[57] The RIAA filed the lawsuit against Aimster that ended with an injunction shutting it down.[58] The court in Aimster explained that the defendant had "the right and ability to supervise" the infringing conduct because the defendant had the ability to terminate users and control access to the system.[59]

III. A SURVEY OF DIGITAL COPYRIGHT ENFORCEMENT ACTIONS

A. *Cases Seeking to Enforce the DMCA Anti-Circumvention Provisions*

1. RealNetworks, Inc. v. Streambox, Inc.[60]

RealNetworks, Inc. developed "Real Media" technology that enabled content owners to stream content in a non-downloadable form over the Internet.[61] Subsequently, Streambox, Inc. developed the Streambox VCR, a product that overrides the Real Media encrypted security measures to enable users to download the streamed content.[62] As a result, RealNetworks applied for a temporary restraining order to prevent Streambox "from manufacturing, distributing, selling, or marketing the VCR. . . ."[63] After an expedited briefing and a show-cause hearing, the court held that the Streambox VCR violated the DMCA's anti-circumvention provisions and rejected the argument that the product had substantial non-infringing uses.[64]

2. Universal City Studios, Inc. v. Reimerdes[65]

"CSS, or Content Scramble System, is an access control and copy prevention system for DVDs developed by motion picture companies," including Universal City Studios.[66] "DeCSS" software was developed to decrypt these scrambled movies on DVD, allowing users to watch them on Linux-based computers and to

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56. *Id.*

57. *Id.*

58. *Id.*; *see In re* Aimster Copyright Litig., 252 F. Supp. 2d 634 (N.D. Ill. 2002).

59. *In re Aimster Copyright Litig.*, 252 F. Supp. 2d at 654.

60. No. C99-2070P, 2000 U.S. Dist. LEXIS 1889 (W.D. Wash. Jan. 18, 2000).

61. *Id.* at *3 (explaining that "[w]hen an audio or video clip is streamed to a consumer, no trace of the clip is left on the consumer's computer, unless the content owner has permitted the consumer to download the file").

62. *Id.* at *10-11.

63. *Id.* at *2.

64. *Id.* at *25-26; *see* 17 U.S.C.A. §§ 1201-1205 (West 1998 & Supp. 2003); Sony Corp. of Am. v. Universal City Studios, Inc,. 464 U.S. 417 (1984).

65. 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

66. *Id.* at 308.

create and distribute unlimited numbers of digital copies of the movies.[67] In *Universal City Studios, Inc. v. Reimerdes*, major movie studios brought an action to enjoin the publication of the "DeCSS" software.[68] The court granted plaintiff's injunction and determined that "DeCSS" is a "free, effective and fast means of decrypting plaintiffs' DVDs" and that "the availability of DeCSS on the Internet effectively . . . compromised plaintiffs' system of copyright protection for DVDs. . . ."[69]

3. Norway v. Jon Johansen[70]

A Norwegian teenager, Jon Johansen, developed and posted a program on the Internet that defeated Contents Scramble System (CSS).[71] Johansen created "DeCSS" so that he could view his DVDs on his Linux-based computer, but the Motion Picture Association of America (MPAA) quickly urged Norwegian authorities to launch a criminal investigation, after Johansen posted his DeCSS on the Internet.[72] The teen was indicted under Norwegian law, which outlaws breaking into another's locked property to gain access to data to which one has no right.[73] On January 7, 2003, in a closely watched decision, the Oslo court found Johansen not guilty, ruling that there was "no evidence" that he had used the DeCSS code for illegal purposes, nor that he intended to contribute to illegal copying.[74] The prosecution recently filed an appeal of Johansen's acquittal.[75]

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67. *Id.*

68. *Id.* at 303.

69. *Id.* at 315, 346.

70. No. 02-507 M/94 (Oslo First Instance Ct. Jan. 7, 2003) (Nor.), *available at* http://www.eff.org/IP/Video/DeCSS_prosecutions/Johansen_DeCSS_case/20030109_johansen_decision.html (last visited Jan. 25, 2004) (copy on file with the *McGeorge Law Review*).

71. *Id.*

72. *Id.*

73. *Id.* (explaining that the indictment was brought under Norway Penal Code section 145). That section provides as follows:

> He who unauthorised breaks a letter or a closed and written document or in a similar way gains access to the content, or breech the locked keeps of another is to be punished by a fine or prison up till 6 months. [¶] The same applies to he who by breaking a protection or in a similar way unauthorised accesses data or programs stored or communicated by electronic or other technical means.

Id.

74. *Id.*

75. *See* Associated Press, *'DVD Jon' Takes Crack at ITunes* (Nov. 26, 2003), *at* http://www.wired.com/news/technology/0,1282,61387,00.html (copy on file with the *McGeorge Law Review*).

4. 321 Studios v. Metro-Goldwyn-Mayer Studios, Inc.[76]

321 Studios, a small Internet company, distributed and sold "DVD CopyPlus" software, allegedly designed to teach owners of DVD movies how to make backup copies of the contents of a DVD for their personal use.[77] In this latest challenge to the movie industry, 321 Studios filed a complaint for declaratory relief against nine major motion picture studios asking the court to confirm its right to distribute and sell DVD Copy Plus.[78] The complaint asked the court to narrow the "anti-circumvention" provisions of the DMCA, and to declare that 321 Studios' software was protected by fair use principles.[79] MGM Studios counterclaimed, seeking a summary judgment and injunction against 321 Studios, based on the contention that 321 Studios' product was illegal under the DMCA, as interpreted by *Universal City Studios, Inc. v. Reimerdes.*[80]

On February 20, 2004, Northern District Court of California Judge Susan Illston, partially granted MGM Studios' summary judgment, found 321's software violated section 1201 of the Digital Millennium Copyright Act, and enjoined 321 Studios from manufacturing, distributing, or otherwise trafficking in any type of DVD circumvention software as of seven days from the order.[81] In response to the decision, Robert Moore, Founder and President of 321 Studios stated:

> There is no difference between making a copy of a music CD for personal use and making a backup of a DVD movie for personal use. We are so firm in our belief in the principle of fair use that we will appeal this ruling immediately. And we will take our fight all the way to the Supreme Court, if that's what it takes to win.[82]

5. Lexmark Int'l, Inc. v. Static Control Components, Inc.[83]

Lexmark International is a manufacturer of printer ink cartridges that contain copyrighted software enabling communication between the printer and the ink cartridge.[84] Lexmark filed suit in the Eastern District of Kentucky on December 30, 2002, claiming that a competitor's reverse engineering of its software

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76. No. 02-1955 51 (N.D. Cal. filed on Apr. 22, 2002); *see also* 321 Studios, The Lawsuit, 321 Studios Legal Summary, *at* http://www.321studios.com/timeline.htm (last visited Jan. 25, 2004) (copy on file with the *McGeorge Law Review*).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*; Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

81. *321 Studios Will Appeal Court Ruling*, PR Newswire, Feb. 20, 2004, *available at* http://finance.ly cos.com/qc/news/story.aspx?story=200402202309_PRN__CGF044.

82. *Id.*

83. 253 F. Supp. 2d 943 (E.D. Ky. 2003).

84. *Id.* at 946.

violated the DMCA's anti-circumvention provisions.[85] Lexmark succeeded in demonstrating to the court that Lexmark would suffer irreparable harm if Static Control was not enjoined from reverse engineering the software at issue.[86] This result may allow a wide array of manufacturers to use copyrighted software to prevent their customers from using competitive aftermarket parts, a result that could lead to further revision of the anti-circumvention clauses in the DMCA.[87]

B. Cases Seeking Enforcement of Digital Copyright Laws

1. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd. I[88]

On January 9, 2003, a Los Angeles federal judge ruled that record companies and movie studios could proceed with their lawsuit against the parent company of Kazaa, which is currently one of the most widely used online file-sharing services in the United States.[89] Sharman Networks, the parent company of Kazaa, which is incorporated in Vanuatu, a Pacific island nation, with its business headquartered in Australia, argued that the California court lacked jurisdiction based on the company's lack of contacts with California.[90] The court disagreed, however, finding that the Kazaa software had been downloaded more than 143 million times, including by Californians, and that many music and video copyrights are owned by California companies.[91] Sharman Networks then launched a legal counterattack by filing a lawsuit on January 27, 2003 "against the major record labels and Hollywood studios, asserting that they have obscenely abused their copyright powers."[92] Sharman Networks is asking the court "to find the copyright holders guilty of antitrust" violations, "and to bar them from enforcing any of their copyrights."[93]

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85. *Id.* at 947; 17 U.S.C.A. § 1201 (West 1998 & Supp. 2003).

86. *Lexmark Int'l, Inc.*, 253 F. Supp. 2d at 971-72.

87. *See generally id.*; 17 U.S.C.A. § 1201.

88. 243 F. Supp. 2d 1073 (C.D. Cal. 2003).

89. *Id.* at 1079-80.

90. *Id.*

91. *Id.* at 1087; Declan McCullagh, *Judge: Kazaa Can Be Sued in U.S.*, CNETNews.com, Jan. 10, 2003, *at* http://newscom.com/2100-1023-980274.html (last visited Jan. 25, 2004) (copy on file with the *McGeorge Law Review*).

92. John Borland, *Kazaa Strikes Back at Hollywood, Labels,* CNETNews.com, Jan. 27, 2003, *at* http://news.com.com/2100-1023-982344.html (last visited Jan. 25, 2004) (copy on file with the *McGeorge Law Review*).

93. *Id.*

2. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd. II[94]

Grokster Ltd. and StreamCast Networks created Grokster and Morpheus software respectively, which allowed file-sharing by users.[95] MGM studios brought suit against Grokster and StreamCast for copyright infringement.[96] District Court Judge Stephen Wilson of the Central District of California granted summary judgment in favor of Grokster and StreamCast Networks on April 25, 2003.[97] The court refused to order the shutdown of the file-sharing services, declaring that the services did not have direct control over the files swapped on their networks.[98] The judge stated that, without "evidence of active and substantial contribution to the infringement," they could not be held liable.[99] He added, "Grokster and StreamCast are not significantly different from companies that sell home video recorders or copy machines, both of which can be and are used to infringe copyrights."[100]

Judge Wilson's ruling indicates a significant departure from cases such as *Aimster* in that *Aimster* was shut down for file-sharing because it had "the right and ability to supervise" the infringing conduct.[101] This case also presents interesting implications for Internet Service Providers, as it seems to hold that those who have no direct control of the use of their services cannot be held responsible for any misuse of those services.[102] Judge Wilson differentiated Grokster and StreamCast Networks from Napster on the basis of the technological differences, claiming that "Napster's service opened itself to liability for its users' actions" because it actively played a role in connecting users who were downloading and uploading illegal songs.[103] On February 4, 2004, the Ninth Circuit Court of Appeals heard oral arguments in Los Angeles by attorneys representing the entertainment industry and the file-swapping companies.[104] The Electronic Frontier Foundation (EFF) is defending StreamCast Networks, the company behind the Morpheus P2P software, in this important case that may ultimately determine whether technology companies should be

94. 259 F. Supp. 2d 1029 (C.D. Cal. 2003).

95. *Id.* at 1031-32.

96. *Id.*

97. *Id.* at 1043, 1045.

98. *Id.* at 1045-46.

99. *Id.* at 1043.

100. *Id.*

101. *See generally id.*; *In re* Aimster Copyright Litig. 252 F. Supp. 2d 634 (N.D. Ill. 2002).

102. uromole, *RIAA Reacts Badly to Court's File Share Ruling*, THE INQUIRER, Apr. 26, 2003, *at* http://www.theinquirer.net/?article=9163 (last visited Jan. 25, 2004) (copy on file with the *McGeorge Law Review*).

103. John Borland, *Judge: File-Swapping Tools Are Legal*, CNETNews.com, Apr. 25, 2003, *at* http://news.com.com/2100-1027-998363.html (last visited Jan. 25, 2004) (copy on file with the *McGeorge Law Review*); *Metro-Goldwyn-Mayer Studios*, 259 F. Supp. 2d at 1038.

104. John Borland, *Landmark P2P Ruling Back in Court*, CNETNews.com, Feb. 2, 2004, *at* http://news.com.com/2100-1027-5152269.html.

held liable for the illegal acts of people who use their products.[105] As explained in EFF's brief:

> This case raises a question of critical importance at the border between copyright and innovation: when should the distributor of a multi-purpose tool be held liable for the infringements that may be committed by end-users of the tool? Unsatisfied with the absence of an express answer to this question in the Copyright Act, Plaintiffs here ask this Court to fashion a radical new form of technology regulation from the judicially-created doctrine of contributory copyright infringement. Such a transmogrification of the contributory infringement doctrine, however, is foreclosed by Sony Corporation of America v. Universal City Studios, Inc. . . . , the landmark Supreme Court decision that was followed and reinforced by the Ninth Circuit last year in A&M Records, Inc. v. Napster, Inc. . . . That path is foreclosed for good reason: technological innovation depends upon bright line rules defining when the misuse of a new technology by consumers could expose its creator to liability.[106]

Ultimately, this lawsuit may lead to a legislative solution, as Judge Wilson recognized in the first *Metro-Goldwyn-Mayer, Inc.* opinion: "Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the raised permutations of competing interests that are inevitably implicated by such new technology."[107]

3. Arista Records, Inc. v. MP3Board, Inc.[108]

MP3Board, Inc. operates a website that provides links to sites from which users can download infringing copies of sound recordings.[109] This case raises the novel issue of whether providing a hyperlink to pirated material constitutes contributory or vicarious copyright infringement or unfair competition.[110] MP3Board, Inc. "moved for summary judgment on the grounds that its activities are protected by the First Amendment to the United States Constitution. . . ."[111] The court denied MP3Board's motion for summary judgment, because "its

105. Electronic Frontier Foundation, *MGM v. Grokster*, *at* http://www.eff.org/IP/P2P/MGM_v_ rokster/ (last visited Mar. 15, 2004).

106. *Id.*

107. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd., 243 F. Supp. 2d 1073, 1096 (C.D. Cal. 2003).

108. No. 00 Civ. 4660, 2002 U.S. Dist. LEXIS 16165 (S.D.N.Y. Aug. 29, 2002).

109. *Id.* at *3.

110. *Id.* at *4.

111. *Id.*

activities are not protected by the First Amendment and because material issues of fact exist regarding whether MP3Board has engaged in contributory or vicarious copyright infringement."[112]

4. Ellison v. Robertson[113]

Plaintiff Harlan Ellison is the owner of numerous copyrighted works of fiction that were posted on a USENET newsgroup by defendant Stephen Robertson.[114] Ellison filed an action in federal court alleging copyright infringement against America Online (AOL), an ISP which temporarily stored the works on its USENET servers.[115] Ruling on cross-motions for summary judgment, the District Court for the Central District of California granted AOL's summary judgment motion, holding that AOL's storage of posts on its USENET servers for fourteen days came within the scope of the DMCA's safe-harbor provision for "intermediate and transient storage."[116]

5. N.Y. Times Co. v. Tasini[117]

On June 25, 2001, the Supreme Court ruled in favor of six freelance authors who sought the right to control electronic reproduction of their articles written for the *New York Times*, *Newsday* and *Sports Illustrated.*[118] The Court found the publishers liable for infringement of the authors' copyrights when they placed the authors' articles, which were part of a collective work, into three separate electronic databases. [119]

6. Sony Computer Entertainment, Inc. v. Connectix Corp.[120]

Connectix Corp. is a corporation that sells software enabling Sony "Play Station" video games to be played on personal computers.[121] On February 10, 2000, the Ninth Circuit Court of Appeals dissolved an injunction blocking

112. *Id.* The court did grant the RIAA's motion for summary judgment, however, stating that the RIAA's "actions were justified and [that] it did not materially misrepresent that links to infringing material were posted on the MP3Board site." *Id.* at *4-5.

113. 189 F. Supp. 2d 1051 (C.D. Cal. 2002).

114. *Id.* at 1053. USENET is an abbreviation of "User Network" and is an international collection of individuals and organizations connected to each other through their computers. *Id.*

115. *Id.* at 1053-54.

116. *Id.* at 1070.

117. 533 U.S. 483 (2001).

118. *Id.* at 487-89.

119. *Id.* at 488.

120. 203 F.3d 596 (9th Cir. 2000).

121. *Id.* at 598.

privately held Connectix Corp. from selling its software.[122] The court ruled that Connectix's actions in reverse engineering a video-game console's operating system software to produce competing products constituted fair use under the DMCA.[123]

C. *Contributory Infringement Cases Against Financial Backers of Peer-to-Peer Services*

1. Leiber v. Bertelsmann

In February 2003, a group of music publishers, including Jerry Lieber and Mike Stoller, filed a complaint against German media conglomerate Bertelsmann in the district court in New York, alleging that Bertelsmann "'systematically participated in, facilitated, materially contributed to and encouraged' illegal music file swapping."[124] The complaint also charges that Bertelsmann had the ability to stop Napster's services "but instead kept it 'operating in order to preserve Napster's user base for Bertelsmann's own commercial advantage.'"[125] Universal Music Group and EMI joined the $17 billion legal battle, claiming that Bertelsmann perpetuated online piracy by funding Napster.[126]

2. Universal Music Group v. Hummer Winblad Venture Partners

A lawsuit was filed in April 2003 in the District Court for the Southern District of California against Hummer Winblad, its cofounder John Hummer, and general partner Hank Berry, former CEO of Napster.[127] Hummer Winblad was one of Napster's chief financial backers, investing about $13 million in Napster.[128] The complaint alleges that "Hummer Winblad knowingly facilitated infringement of plaintiff's copyrights for its direct financial benefit."[129]

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122. *Id.* at 599.

123. *Id.* at 599, 609.

124. Sandeep Junnarkar, *Lawsuit Targets Bertelsmann over Napster*, CNETNews.com, Feb. 20, 2003, *at* http://news.com.com/2100-1023-985285.html (copy on file with the *McGeorge Law Review*).

125. *Id.*

126. *Id.*; Reuters, *EMI Sues Bertelsmann over Napster*, June 4, 2003, *at* http://news.com.com/2100-1027_3-1013307.html (copy on file with the *McGeorge Law Review*).

127. Stephanie Olsen, *Record Labels Sue Napster Investor*, CNETNews.com, Apr. 22, 2003, *at* http://news.com.com/2100-1027-997860.html (copy on file with the *McGeorge Law Review*).

128. *Id.*

129. *Id.*

D. Cases Involving Interesting Defenses

1. RIAA v. Verizon Internet Services[130]

On January 21, 2003, a federal judge in Washington, D.C. ruled that Verizon Internet Services must turn over to the record industry the name of a subscriber who allegedly downloaded 600 songs from the Internet in a single day.[131] The action was to enforce a subpoena requiring Verizon to turn over the name of the user, but Verizon challenged the subpoena, arguing that the DMCA rules apply only when an Internet provider hosts the infringing works on its own computers.[132] The judge rejected Verizon's arguments as a "strained reading" of the DMCA, ruling that the Act's intent was to create a process for quickly identifying copyright infringement, not shielding it.[133] Verizon and privacy proponents claimed that consumers' privacy would be threatened by the decision because it could permit anyone making an allegation of copyright infringement to gain access to private subscriber information without the normal due process protections provided under the law.[134] The U.S. District Court ruled on April 24, 2003 that Verizon had fourteen days to give up its subscriber's name, but the order was temporarily stayed.[135] On June 4, 2003, the U.S. Court of Appeals for the District of Columbia Circuit rejected Verizon's request for a stay and ordered the ISP to turn over the names of two subscribers suspected of illegally downloading copyrighted music.[136]

Verizon's appeal was heard on September 16, 2003, and on December 19, 2003, the U.S. Court of Appeals for the District of Columbia announced that it had struck down the lower court's ruling that had forced Verizon to reveal the identity of its subscribers.[137] The court stated:

> We are not unsympathetic either to the RIAA's concern regarding the widespread infringement of its members' copyrights, or to the need for legal tools to protect those rights. It is not the province of the courts, however, to rewrite (copyright law) in order to make it fit a new and

130. 240 F. Supp. 2d 24 (D.D.C. 2003).

131. *Id.* at 26.

132. *Id.* at 32 (noting that the downloaded files did not reside on any system it controlled).

133. *Id.* at 32-33; *see also* Dawn Chmielewski, *Verizon Ordered to Name Piracy Suspect*, MERCURY NEWS., Jan. 22, 2003, *available at* http://www.siliconvalley.com/mld/siliconvalley/5000738.htm (copy on file with the *McGeorge Law Review*).

134. *Id.*

135. John Borland, *Verizon Gets 14 Days to ID File-Swapper*, CNETNews.com, Apr. 24, 2003, *at* http://news.com.com/2100-1027-998268.html (last visited Jan. 29, 2004) (copy on file with the *McGeorge Law Review*).

136. RIAA v. Verizon Internet Serv., No. 03-7015, 2003 U.S. App. LEXIS 11250 (D.C. Cir. June 4, 2003).

137. John Borland, *Court: RIAA Lawsuit Strategy Illegal*, CNETNews.com, Dec. 19, 2003, *at* http://news.com.com/2100-1027-5129687.html.

unforeseen Internet architecture, no matter how damaging that development has been to the music industry.[138]

Verizon's spokesperson, Sarah Deutsch stated:

> Today's ruling is an important victory for Internet users and all consumers. . . . This decision removes the threat of a radical, new subpoena process that empowers copyright holders or anyone merely claiming to be a copyright holder to obtain personal information about Internet users by simply filing a one-page form with a court clerk. . . . Copyright holders seeking personal information about Internet subscribers will now have to file a traditional lawsuit. These requests will undergo scrutiny by a judge, thus preserving the privacy, safety and legal rights of every Internet subscriber. . . . Today's decision also confirms that the Digital Millennium Copyright Act strikes a fair and reasonable balance between the rights of consumers and the rights of copyright holders.[139]

2. DVD Copy Control Ass'n v. Bunner[140]

In another case involving "DeCSS" code, defendant Andrew Bunner, who posted code that cracks the content-scrambling system designed to protect DVD movies, claimed that an injunction granted by a California trial court banning the posting of the code violated his free speech rights.[141] The appeals court agreed and reversed the injunction, so DVD Copy Control Association appealed to the California Supreme Court, which heard arguments on May 29, 2003.[142] Bunner argued that he had posted the code on his site to enable people to play their own DVDs on the Linux operating system.[143] He stated that he was not involved in creating "DeCSS" or originally posting the code on the Web.[144] Ultimately the California Supreme Court concluded on August 25, 2003 that the trial court's preliminary injunction against Bunner was an unlawful prior restraint.[145] The court ruled that publication of information regarding the decoding of DVDs merits a strong level of protection as free speech and sent the case back to the appeals court for a decision on whether a court can prevent Bunner from

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138. *Id.*

139. *Verizon Wins Fight to Protect Internet Safety and Privacy,* Press Release, PR Newswire, Dec. 19, 2003, *at* http://biz.yahoo.com/prnews/031219/nyf048_1.html.

140. 75 P.3d 1 (Cal. 2003).

141. *Id.* at 7-9.

142. *Id.* at 8-9.

143. *Id.* at 15-16.

144. *Id.*

145. *Id.*

publishing this information, whether on the Internet, on a T-shirt, or elsewhere.[146] DVD-CCA, a consortium of entertainment and technology companies, had claimed originally that the courts need not consider any First Amendment issues.[147] On January 22, 2004, in a surprising retreat, DVD-CCA sought a dismissal of the lawsuit against Andrew Bunner, apparently giving up on their efforts to have the republication of the DeCSS program declared a violation of trade secret laws.[148]

E. Criminal Prosecutions

On February 12, 2003, a federal grand jury, citing the DMCA, "indicted six people on charges of developing software and hardware designed to . . . unscramble transmission signals sent by satellite TV operators. . . ."[149] Under section 1201 and 1204 of the DMCA, it is unlawful to circumvent technology that limits access to copyrighted work, or to sell a device that will perform that task.[150] Penalties for violation of this statute include a maximum of five years in prison and a $500,000 fine.[151] This was only the second time a grand jury issued an indictment under these provisions, the first time being the ElcomSoft Co. and Dmitry Sklyarov case, discussed below.[152]

The FBI's duties soon may include battling copyright infringement on the Internet. A new bill introduced into the U.S. House of Representatives in June 2003 known as the Piracy Deterrence and Education Act of 2003, sponsored by Representatives Lamar Smith (R-Texas) and Howard Berman (D-Calif.), requests that the FBI formulate a deterrence program, including an FBI "warning label" like those on DVDs that copyright holders could send to alleged infringers.[153] The bill would also require the FBI to hire more computer piracy experts and share information on Internet piracy more freely with other law enforcement agencies.[154]

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146. *California Supreme Court Upholds Free Speech in DVD Case,* Electronic Frontier Foundation Media Release, Aug. 25, 2003, *at* http://www.eff.org/IP/Video/DVDCCA_case/20030825_eff_bunner_pr.php.

147. *Id.*

148. *DVD Descrambling Code Not a Trade Secret,* Electronic Frontier Foundation Media Release, Jan. 22, 2004, *at* http://www.eff.org/IP/Video/DVDCCA_case/20040122_eff_pr.php.

149. Dawn Kawamoto, *Indictments to Test Copyright Law,* CNETNews.com, Feb. 12, 2003, *at* http://news.com.com/2102-1023-984408.html (last visited J an. 29, 2004) (copy on file with the *McGeorge Law Review*).

150. 17 U.S.C.A. §§ 1201, 1204 (West 1998 & Supp. 2003).

151. *Id.*

152. Kawamoto, *supra* note 149; *see generally* United States v. Elcon Ltd., 203 F. Supp. 2d 1111 (N.D. Cal. 2002).

153. Piracy Deterrence and Education Act of 2003, H.R. 2517, 108th Congress (2003).

154. *Id.*

1. United States v. Elcom, Ltd.[155]

On August 28, 2001, a grand jury in San Jose, California issued an indictment against ElcomSoft Co. and Dmitry Sklyarov, 27, of Moscow, Russia, for allegedly circumventing technology designed to protect rights of a copyright owner, in violation of section 1201(b)(1)(C) of the DMCA.[156] Russian programmer Sklyarov and his company ElcomSoft were the first software developers to be prosecuted under the criminal provisions of the DMCA.[157] They were charged with four counts of circumvention offenses under section 1201 of the DMCA (or aiding and abetting those offenses), each of which has a fine of up to $500,000 and/or up to five years in prison.[158] Additionally, a conspiracy charge carried imprisonment for up to five years and a fine of up to $250,000 for an individual, and a fine of up to $500,000 for a corporation.[159] For the five charges, Sklyarov faced fines of up to $250,000 and imprisonment of up to twenty-five years.[160] As a corporation, ElcomSoft faced fines of up to $2,500,000.[161]

Dmitry Sklyarov was arrested after giving a speech about ElcomSoft's software, Advanced eBook Processor, which could crack Adobe Systems' eBooks protections.[162] He was jailed for three weeks and faced criminal prosecution under the DMCA's anti-circumvention provisions.[163] In December 2002, a jury acquitted Sklyarov and ElcomSoft of all counts, because, although the jury found that the product was designed to crack technology controls, it believed that ElcomSoft did not intend to break the law with its product.[164] At the trial, Sklyarov testified that the software was designed to permit people to make backup copies or transfer copies of eBooks that they already owned.[165]

2. United States v. Kah Choon Chay

Software pirating has also become the target of federal prosecution, as in the case of Kah Choon Chay, 26, of Raleigh, North Carolina, who was convicted on

155. 203 F. Supp. 2d 1111 (N.D. Cal. 2002).

156. *Id.* at 1119.

157. Kawamoto, *supra* note 149.

158. *Elcom, Ltd.*, 203 F. Supp. 2d at 1119; 17 U.S.C.A. §§ 1201, 1204 (West 1998 & Supp. 2003).

159. *Id.*

160. *Id.*

161. *Id.*

162. Lisa M. Bowman, *Sklyarov Reflects on DMCA Travails,* CNETNews.com, Dec. 20, 2002, *at* http://news.com.com/2100-1023-978497.html (last visited Jan. 29, 2004) (copy on file with the *McGeorge Law Review*).

163. *Id.*

164. *Id.*

165. *Id.*

July 28, 2001 for trafficking and packaging of counterfeit computer games.[166] Chief Judge Barbara B. Crabb of the United States District Court for the Western District of Wisconsin sentenced Chay to eight months in prison.[167] "Chay will also be required to make a $50,000 restitution payment to the copyright holders of the games that he was found to be pirating. . . ."[168]

F. *Lawsuits Against Individuals*

In September 2003, the music industry began a crackdown against individuals suspected of illegally distributing music files from their computers, filing lawsuits against 261 individuals for "egregious" copyright infringement.[169] Defendants were selected based on the number of files shared, but many were not aware their computers were distributing music in the background, including 12-year-old Brianna Lahara from New York, who claimed that she did not know that file-swapping was illegal because her mother had purchased "Kazaa Plus" for $29.95.[170] The industry used information obtained by subpoenas to ISPs such as Verizon to determine the identify of the individual defendants.[171] By January 22, 2004, the RIAA had obtained 233 settlements, totaling approximately $699,000, from individuals accused of copyright infringment.[172]

On January 21, 2004, the RIAA launched its largest round of lawsuits yet, targeting 532 individuals suspected of illegally swapping copyrighted music over the Internet.[173] The lawsuits, filed in New Work and Washington, D.C. listed "John Doe" defendants by their numeric IP addresses only (originating from only four ISPs) because the *Verizon* decision in December 2003 held that the RIAA could not use subpoenas to obtain the names of individuals merely accused of file-swapping.[174] Instead, the RIAA now must file lawsuits and get an order from the court to require the ISPs to provide the identity of those individuals.[175]

The RIAA launched another round of lawsuits on February 17, 2004, filing separate lawsuits in the federal courts of: Philadelphia, Pennsylvania; Atlanta, Georgia; Orlando, Florida; and Trenton, New Jersey against another 531

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166. Press Release, Interactive Digital Software Association, ISDA Applauds FBI and U.S. Attorney's Office in Wisconsin for Prosecution of Copyright Infringement Case (July 24, 2001), *available at* http://www.idsa.com/piracychaprelease.701.html (last visited Jan. 29, 2004) (copy on file with the *McGeorge Law Review*).

167. *Id.*

168. *Id.*

169. Nate Mook, *RIAA Sues 261, Including 12-Year-Old Girl*, BetaNews, Sept. 9, 2003, *at* http://www.betanews.com/article.php3?sid=1063159635.

170. *Id.*

171. Dawn C. Chmielewski, *RIAA Sues Anonymous File-Sharers*, MERCURY NEWS, Jan. 22, 2004, *available at* http://www.siliconvalley.com/mld/siliconvalley/7769107.htm.

172. *Id.*

173. John Borland, *RIAA Embarks on New Round of Piracy Suits*, CNETNews.com, Jan. 21, 2004, *at* http://msn-cnet.com.com/2100-1027-5144558.html (last visited Mar. 20, 2004).

174. *Id.*

175. Chmielewski, *supra* note 171.

individuals identified only by their IP addresses.[176] RIAA President Cary Sherman stated in a press release,

> Legal online music services are delivering a high-quality, consumer-friendly experience, and they're attracting new fans; but they shouldn't have to compete with businesses based on illegal downloading. That's why we are sending a clear message that downloading or "sharing" music from a peer-to-peer network without authorization is illegal, it can have consequences and it undermines the creative future of music itself.[177]

IV. FUTURE LITIGATION AND THREATS AIMED AT ENFORCEMENT

Fear of alienating consumers has given way to a desire to prosecute the most flagrant and visible copyright abusers. A campaign to threaten campus file-sharing networks has emerged with lawsuits filed against four college students, seeking billions of dollars in damages for copyright infringement.[178] Two of the students attend Rensselaer Polytechnic Institute, one student attends Michigan Technological University, and one attends Princeton.[179] In each case, the student was operating a file-sharing website, which the record industry likened to Napster.[180]

In October 2002, the recording industry sent a letter to 2,300 college presidents, requesting them to "inform students of their moral and legal responsibilities to respect the rights of copyright owners" when using the school computer networks.[181] In April 2003, Penn State University suspended Internet access of 220 students who were using the school's computer network for unauthorized copying of music and video files.[182] Penn State warned its students by e-mail of the penalties for copyright infringement on the university's network, just after the RIAA filed lawsuits against four students at other universities.[183]

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176. David McGuire, *RIAA Sues 531 Suspected Music Pirates*, WASH. POST, Feb. 17, 2004, *available at* http://www.washingtonpost.com/wp-dyn/articles/A48299-2004Feb17.html.

177. *Id.*

178. Atl. Recording Corp. v. Nievelt, No. 2: 03-CV-00064 (W.D. Mich. filed Apr. 3, 2003); Atl. Recording Corp. v. Sherman, No. 03-CV-0416 (N.D.N.Y. filed Apr. 3, 2003); Atl. Recording Corp. v. Peng, No. 03-1441 (D.N.J. filed Apr. 3, 2003); Atl. Recording Corp. v. Jordan, No. 03-CV-0417 (N.D.N.Y filed Apr. 3, 2003).

179. *Id.*

180. *Id.*

181. Michelle Madigan, *Copyright Cops Target Workplace, Schools*, MEDILL NEWS SERVICE, Nov. 14, 2002, *available at* http://www.pcworld.com/news/article/0,aid,106959,00.asp (last visited Jan. 29, 2004) (copy on file with the *McGeorge Law Review*).

182. Ryan Narzine, *Penn State Cuts Off P2P File-Traders*, atnewyork.com, Apr. 22, 2003, *at* http://www.atnewyork.com/news/article.php/2194861 (last visited Jan. 29, 2004) (copy on file with the *McGeorge Law Review*).

183. *Id.*; *see also supra* notes 178-80 and accompanying text.

The record industry started another campaign on April 29, 2003, aimed at simply making people uncomfortable while trading copyrighted material online.[184] "Thousands of people trading copyrighted music online" were sent a message that appeared suddenly on their computer screen, "When you break the law, you risk legal penalties. There is a simple way to avoid that risk. DON'T STEAL MUSIC."[185]

The RIAA, the MPAA, and similar groups have stepped up their anti-piracy efforts, sending warnings to corporations regarding their duties to control their employees or else become liable for contributory infringement.[186] Hundreds of companies received notices entitled "Copyright Use and Security Guide," which requested them to ensure that their computers and Internet systems were not being used for digital piracy.[187]

On June 17, 2003, the RIAA filed lawsuits in Texas, Florida and New York against eighteen retail businesses including gas stations, convenience stores, grocery stores, and small music stores, for allegedly selling pirated CDs.[188] The RIAA claims that it first tried to resolve the claims prior to litigation, but received no response from the eighteen defendants.[189]

One final tactic that the major record labels are now using is a strategy known as "spoofing," an aggressive, guerrilla assault on the peer-to-peer file-sharing networks, which operates by flooding online swapping services with defective or fake copies of popular songs.[190] Although spoofing is not illegal, some countermeasures being considered by the media industries could cross "into a gray area as far as legality. . . ."[191] For example, the industry is evaluating tactics such as scrambling search queries, or adding file attachments that will make files download very slowly.[192] There have even been rumors of clearly illegal tactics such as propagating viruses, crashing hard drives, and other strategies that might be illegal under existing anti-hacking laws.[193]

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184. Amy Harmon, *Music Industry Sends a Message to PC Screens: Sharing Is Theft*, N.Y. TIMES, Apr. 30, 2003, at C1.

185. *Id.*

186. Press Release, IFPI, Recording Industry Advises Large Companies How to Avoid Copyright Theft on Their Computers (Feb. 13, 2003), *available at* http://www.ifpi.org/site-content/press/20030213.html (last visited Jan. 29, 2004) (copy on file with the *McGeorge Law Review*).

187. *Id.*

188. Tamara Conniff, *18 Retailers Hit with RIAA Suits*, June 17, 2003, *at* http://www.hollywood reporter.com.

189. *Id.*

190. Dawn C. Chmielewski, *Music Industry Swamps Swap Networks with Phony Files*, MERCURY NEWS, June 27, 2002, *available at* www.siliconvalley.com/mld/siliconvalley/news/local/3560365.htm (last visited Jan. 29, 2003) (copy on file with the *McGeorge Law Review*).

191. *Id.*

192. *Id.*

193. *Id.*

V. CONCLUSION

The record and media giants' war against digital piracy continues in full force, with the peer-to-peer services, their consumers, and techies fighting back, using legal theories and defenses such as free speech, due process, privacy protection, fair use, and anti-trust, as well as technological measures. The recording and media industries are seeking new financial models that will protect their business interests, while satisfying their consumers, who now have a thirst for unlimited access to online music and videos, and the ability to download and copy music and other digital creations. Despite their litigation efforts, the music and media industries still seem to be one step behind the youthful software designers like Napster's creator, Shawn Fanning, and Norwegian teenager, Jon Johansen, who continue to find new and better technologies to provide peer-to-peer trading. Already, the file-sharing sites are fighting back against the industry's spoofing files by adding software that will detect and isolate the spoofed files.[194] With so much at stake, legislators are holding hearings, listening to testimony, and seeking to legislate solutions to the problems. Dozens of new legislative bills are emerging, some to protect the copyright holders, and others to protect consumers. New digital subscription services like iTunes are popping up daily, but there seems to be no quick cure to digital piracy. No easy answer looms on the horizon as lawyers on both sides of the issue come up with more complicated legal arguments, and the yet unsettled provisions of the DMCA add more fuel for future litigation.

194. *Id.*

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