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Nicholas M. Menasche

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Recording Industry Missteps: Suing Anonymous Filesharers as a Last Resort

Nicholas M. Menasché*

Introduction

Taking shape in the mid-1990s, the clash between copyright owners and filesharing technology proponents released a torrent of contentious courtroom battles, culminating in a series of lawsuits filed against anonymous individuals. In hindsight, this conflict may have been inevitable. Copyright law, by design, bestows in authors and artists certain exclusive rights as incentive for the creation of original works that ultimately enrich the public domain.¹ Ostensibly threatening the vitality of the incentive-based approach, rapidly emerging peer-to-peer (“P2P”) filesharing applications encroach on those exclusive rights by facilitating the near-anonymous exchange of unauthorized copies of copyrighted works, thus prompting the content industry’s fierce resistance to such technology.² The copyright owners’ initial legal strategy centered on suing P2P entities providing the capacity and access for online filesharing,³ however, their action spurred the development of restructured P2P architecture, which, until recently, offered shelter from

* J.D. Candidate 2006, Pace University School of Law; B.A. Political Science, *summa cum laude*, 1999, Drew University. The author is grateful to his parents, Mary and Maurice, for their constant support and encouragement, and to Melissa for her patience and love throughout this process. Additionally, the author thanks the *Pace Law Review* staff, in particular Lynn Javier for her thoughtful comments on early drafts, and Jessica Sibrizzi, Matthew Walsh, and Maryam Afif for their editing assistance before publication.

1. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 154-56 (1975) (“[T]he ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”).

2. See generally ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 496-97, 505 (3d ed. 2003) (discussing the evolution of digital technology, its convergence with traditional content through, *inter alia*, filesharing software, and the content industry’s resistance to the digital platform).

3. See, e.g., *A&M Records, Inc. v. Napster, Inc. (Napster I)*, 239 F.3d 1004 (9th Cir. 2001) (representing one of the first major cases in which the recording industry challenged the distributors of filesharing technology); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154 (9th Cir. 2004), *vacated and remanded*, 125 S. Ct. 2764 (2005); *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003).

legal liability.⁴ Without the ability to hold P2P entities liable, copyright owners predictably refocused their efforts on the more risky pursuit of those directly reproducing and distributing the works at issue – the “end users.”⁵

As illustrated by *Sony Music Entertainment Inc. v. Does 1-40*,⁶ one of the latest suits brought against direct copyright infringers, individuals anonymously downloading and distributing unauthorized copies of copyrighted works on the Internet will likely lose the majority of future courtroom battles. Courts have dismissed their claims to anonymity⁷ and left targeted individuals with little recourse other than settlement.⁸ However, while copyright owners maintain a significant legal advantage in the courtroom, suing anonymous filesharers is a flawed long-term strategy. By prosecuting individual infringers in an attempt to discourage illegal filesharing, copyright owners are disregarding the utility of P2P applications, gradually marginalizing the very customers upon whom they rely for profit generation, and possibly creating the ingredients for a backlash against the industry.⁹ There is no easy solution to this problem. Copyright owners unquestionably must safeguard their intellectual property rights, but stymieing the filesharing movement through costly litigation lacks the visionary sensibility required for a permanent solution in a robust technological age.

4. See *Grokster Ltd.*, 380 F.3d 1154.

5. See *Recording Indus. Ass'n of Am. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1232 (D.C. Cir. 2003) (explaining that “[t]he RIAA now has begun to direct its anti-infringement efforts against individual users of [P2P] file sharing programs”); see also Electronic Frontier Foundation, *RIAA v. The People*, <http://www.eff.org/IP/P2P/?f=riaa-v-thepeople.html> (last visited Sept. 7, 2005) (collecting cases brought against “Doe” defendants alleged to have illegally downloaded copyrighted works).

6. 326 F. Supp. 2d 556 (S.D.N.Y. 2004).

7. See, e.g., *id.*; *Elektra Entm't Group, Inc. v. Does 1-9*, No. 04 Civ. 2289, 2004 WL 2095581 (S.D.N.Y. Sept. 8, 2004); *Motown Record Co. v. Does 1-252*, No. 1:04-CV-439-WBH (N.D. Ga. Aug. 16, 2004), available at http://www.eff.org/IP/P2P/RIAA_v_ThePeople/JohnDoe/20040818_Motown_Opinion_re_Quash.pdf.

8. John Schwartz, *Music Industry Returns to Court, Altering Tactics on Filesharing*, N.Y. TIMES, Jan. 22, 2004, at C1.

9. See generally G. Richard Shell, *Suing Your Customers: A Winning Business Strategy?*, Knowledge@Wharton, Oct. 22, 2003, <http://knowledge.wharton.upenn.edu/index.cfm?fa=viewArticle&id=863>. Some fans are so opposed to this legal strategy that they have created websites both organizing online grassroots movements to boycott further CD sales and offering public forums to discuss action that can be taken against the recording industry. See, e.g., *Boycott-RIAA.com*, *Take a Stand Against the Recording Industry of America*, <http://www.boycott-RIAA.com> (last visited Sept. 7, 2005) (listing boycotted companies, following current legal cases, and providing message board for discussion).

This Note surveys the courts' treatment of online copyright infringement via P2P applications and suggests litigation alternatives that encourage copyright protection without impeding on the public's interest in seizing the promise of the Internet. Part I provides a general discussion on copyright law and filesharing technology. Part II reviews case law representing the confrontation between copyright owners and filesharing entities. Part III discusses *Sony Music Entertainment Inc.* and its impact on the legal options for copyright owners and infringing filesharers. Part IV evaluates a selection of litigation alternatives and proposes a model with the potential to maintain the incentive-based approach without stifling the public's demand to explore new forms of technology.

I. Copyright Law and the Growth of Digital Technology

A. Copyright Law Background

Recognizing the profound importance of a strong copyright regime, the United States Constitution grants Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹⁰ Copyright owners' exclusive rights include the right to both “reproduce the copyrighted work in copies or phonorecords”¹¹ and “distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.”¹² Behind this grant of authority lies the rationale that “the rights conferred by copyright . . . assure contributors to the store of knowledge a fair return for their labors.”¹³ Thus, copyright law represents a *quid pro quo*, offering legal protection in exchange for a contribution of original creative material into the public commons.¹⁴

10. U.S. CONST. art. I, § 8, cl. 8.

11. 17 U.S.C. § 106(1) (2002).

12. § 106(3).

13. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985) (citing *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1976)); see also *Eldred v. Ashcroft*, 537 U.S. 186, 227 (2003) (Stevens, J., dissenting) (“these twin purposes of encouraging new works and adding to the public domain apply to copyrights. . .”).

14. Although beyond the scope of this Note, there are other philosophical justifications for copyright protection aside from the United States' incentive-based approach. For a thorough collection of sources reviewing these justifications, ranging

B. P2P Architecture and its Disruption of Content Control Mechanisms

Within the past decade, the swift progression of digital technology has confronted increasingly the traditional boundaries of copyright law causing federal legislation and case law to rapidly adapt to meet these new digital realities.¹⁵ Professor Peter Menell explains that “by . . . empowering anyone with a computer and an Internet connection to flawlessly, inexpensively, and instantaneously reproduce and distribute works of authorship, [the digital revolution] represents possibly the greatest set of challenges to the copyright law.”¹⁶ Consequently, much of the content industry continues to believe that copyrighted works remain inadequately protected.¹⁷

The filesharing-copyright dilemma is particularly acute for sound recording owners and artists due to the medium for their content, the audio compact disc (“CD”). Through a computer process called “ripping,” sound recordings can be substantially compressed into a digital audio format called MPEG-3 (“MP3”) and transferred from CDs onto computer hard drives with ease.¹⁸ The ripping technology is available without cost through software applications, such as Apple’s iTunes and Microsoft’s Windows Media Player, which even provide user-friendly tutorials.¹⁹ Once sound recordings are compressed into

from personhood to natural rights theories, see MERGES, *supra* note 2, at 324-26.

15. Peter S. Menell, *Can Our Current Conception of Copyright Law Survive the Internet Age?: Envisioning Copyright Law’s Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 65 (2002) (“More pages of copyright law have been added to the U.S. Code in the past decade than in the prior 200 years of the republic, dating back to the first U.S. Copyright Act adopted in 1790.”).

16. *Id.* at 64.

17. *Id.* at 162.

18. A&M Records, Inc. v. Napster, Inc. (*Napster I*), 239 F.3d 1004, 1011 (9th Cir. 2001); see also Rio Audio, Rio Audio Glossary, <http://www.digitalnetworksna.com/shop/glossary.html#mp3> (last visited Sept. 21, 2005) (defining MP3s as “[a] standard technology and format for compressing a sound sequence into a very small file (about one-twelfth the size of the original file) while preserving the original level of sound quality when it is played”); Marshall Brain, *How Mp3 Files Work*, HOWSTUFFWORKS, <http://computer.howstuffworks.com/mp31.htm> (last visited Sept. 7, 2005) (providing technical explanation of MP3 format). Alternative compression formats include “WMA,” a Windows Media Audio format, and “AAC,” a format developed by the same institute that developed MP3 technology. Melanie Seibert, *Beyond MP3? Comparing Digital Audio Formats*, CRUTCHFIELD ADVISOR, Sept. 2, 2003, http://www.crutchfieldadvisor.com/reviews/ISEOrgbtcsdpd/20030902/audio_codecs.html.

19. Apple’s website offers free downloads of iTunes and emphasizes the ease of use stating, “You can set up iTunes to automatically add tunes from a CD to your library when you insert a disc into your computer. iTunes will even eject the disc when it’s done.” Apple, iTunes—Import Music, <http://www.apple.com/itunes/import.html> (last

MP3 format, high speed internet connections enable rapid transmission of reproduced copyrighted works, via P2P filesharing applications, to the detriment of copyright owners.²⁰

Filesharing poses a substantial threat to copyright owners because it circumvents conventional internet architecture, thereby complicating copyright enforcement strategies. Ordinarily, the Internet operates hierarchically, meaning an Internet Service Provider (“ISP”) supplies digital information from servers to clients.²¹ The client requests information and the server responds in kind, providing a predominantly downward flow of content, such as streaming video, music, and online games.²² Hierarchical structures allow ISPs the capacity to maintain substantial control since they determine the availability of downstreamed content.²³ This system is well-suited to copyright owners’ employment of a “gatekeeper regime,” which focuses legal enforcement of their rights on a finite number of intermediaries controlling the distribution of copyrighted works.²⁴ In stark contrast, pure P2P technology strips the Internet of a controlled hierarchical structure between server and client, allowing individual computers to take on both roles acting as “separate and equal entit[ies] in the sharing of information.”²⁵ Because the controlling intermediary is entirely eliminated, the distribution mechanism for copyrighted works is decentralized and copyright owners are forced to pursue, inefficiently, a vast and scattered group of infringing individuals.²⁶

visited Sept. 7, 2005); *see also* Microsoft, Windows Media – Quickly Rip Your CDs to Your Computer, http://www.microsoft.com/windows/windowsmedia/knowledgecenter/howto/rip_how_to.aspx (last visited Sept. 21, 2005) (providing a one-page tutorial on compressing audio CDs).

20. *Napster I*, 239 F.3d at 1011.

21. Sonia K. Katyal, *The New Surveillance*, 54 CASE W. RES. L. REV. 297, 310 (2003).

22. *Id.*

23. *Id.*

24. *See* Tim Wu, *When Code Isn’t Law*, 89 Va. L. Rev. 679, 711-717 (2003) (“[C]opyright law achieved compliance through the imposition of liability on a limited number of intermediaries—those capable of copying and distributing works on a mass scale.”).

25. Katyal, *supra* note 21, at 311; *see also* Wu, *supra* note 24, at 718 (“This design, as the name suggests, makes a P2P network one of equals, or peers. This network architecture should, usually, be distinguished from a ‘client-server’ network in which one computer (the server) specializes in serving the needs of others (the clients).”).

26. *See* Wu, *supra* note 24, at 719 (“The closer a network comes to a pure P2P design, the more disparate the targets for copyright infringement and the greater the threat to a gatekeeper system.”).

To illustrate this principal, assume computers X, Y, and Z each operate on the same P2P network. X initiates a request for file A which is promptly received by Y. The action triggers Y to search its hard drive for any matching files. Y's failure to locate the file causes it to relay the request to Z. Following the same process, Z successfully locates A and begins sending it to X. While A is being sent, Z searches X's available files, and locates a file of interest, B. Z may then download B from X at the same time that X is downloading A from Z. Each computer in the P2P chain begins to function both as server and client through "direct connections."²⁷ Absent from this chain is a centralized entity or intermediary regulating the content passing between X, Y, and Z. Thus, pure P2P network users may freely communicate ideas and exchange files with each other virtually undisturbed by controlling government and private entities.²⁸

Notwithstanding P2P applications' capacity to operate as a secure public forum for the exchange of ideas, representatives of the recording industry argue that these networks' beneficial characteristics are outweighed by the potential degradation in the value of copyrights through the unauthorized exchange of copyrighted works. For example:

Time Warner CEO Richard Parsons has said, in regard to the proliferation of peer-to-peer music sharing networks, "This is a very profound moment historically. This isn't about a bunch of kids stealing music. It's about an assault on everything that constitutes the cultural expression of our society. If we fail to protect and preserve our intellectual property system, the culture will atrophy. And corporations won't be the only ones hurt. Artists will have no incentive to create. Worst-case scenario: The country will end up in a sort of cultural Dark Ages."²⁹

While Richard Parson's abysmal prediction may be exaggerated, trade associations documenting recent losses in relation to filesharing offer some validation of his outlook.³⁰ At least in theory, if the recording

27. Katyal, *supra* note 21, at 311-12.

28. *See id.*

29. SIVA VAIDHYANATHAN, *THE ANARCHIST IN THE LIBRARY: HOW THE CLASH BETWEEN FREEDOM AND CONTROL IS HACKING THE REAL WORLD AND CRASHING THE SYSTEM* 22 (2004) (citing JESSICA LITMAN, *DIGITAL COPYRIGHT: PROTECTING INTELLECTUAL PROPERTY ON THE INTERNET* 151 (2001)).

30. According to the International Federation of the Phonographic Industry ("IFPI"), a worldwide trade group representing the record industry, illegal filesharing was a key factor in a 25% five-year decline in music sales between 1999 and 2004. IFPI, *Facts on File-sharing*, <http://www.ifpi.org/site-content/press/20041007c.html> (last visited Sept. 7, 2005). In 2003 alone, illegal filesharing resulted in a \$2.4 billion loss in U.S. sales, accounting for 75% of the total losses. *Id.* Comparing sales figures from 2001

industry continues to suffer substantial losses, the economic incentive for the creation of new works will diminish. The question remains, however, whether the recording industry's adversarial response to this copyright "crisis" has been either effective or appropriate in addressing this concern.

II. P2P in the Courts: Shaping a Legal Strategy

The Recording Industry Association of America ("RIAA"), a trade association representing roughly ninety percent of all sound recordings within the United States, has been described as fighting "a well-nigh constant battle against Internet piracy, monitoring the Internet daily, and routinely shutting down pirate [w]ebsites by sending cease-and-desist letters and bringing lawsuits."³¹ Nevertheless, despite its strenuous efforts to halt copyright infringement on P2P networks, conflicting reports of current filesharing usage suggest both that RIAA litigation tactics have produced mixed results and that litigation alternatives would be more effective.³² Before discussing such alternatives, it may be helpful to review how the most notable cases in filesharing have influenced the legal options of the filesharing players and triggered the outgrowth of lawsuits against anonymous individuals. The first high-profile suit filed against a P2P program began with *A&M Records, Inc. v.*

with the first half of 2004, the top 50 albums shipped 16.7% less and the top one hundred albums shipped 19.7% less. Press Release, RIAA, Record Industry Announces Mid-Year 2004 Shipment Numbers (Oct. 20, 2004) (report reflecting that a rebound in sales may be taking place, but that the industry is still suffering from digital piracy losses), available at <http://www.riaa.com/news/newsletter/102004.asp>. Additionally, an August 2004 Forester Research survey found that 36% of Europeans buy fewer CDs because they can download music for free; only 10% said they buy more. IFPI, Facts on File-sharing, <http://www.ifpi.org/sitecontent/press/20041007c.html> (last visited July 26, 2005). Please note, however, that this statistic fails to present a comprehensive picture of the impact of filesharing since the total number of sales *gained* or *lost* from these consumer predispositions is absent. For example, the sales generated from the 10% of consumers buying more CDs could offset the entire number of sales lost from the 36% of consumers that buy less.

31. Katyal, *supra* note 21, at 321 (internal quotations omitted).

32. Compare Pew Internet Project Study, The Impact of Recording Industry Suits against Music Swappers (Jan. 2004), http://www.pewinternet.org/pdfs/PIP_File_Swapping_Memo_0104.pdf (nationwide phone survey conducted in early 2004 revealing that since RIAA began filing suits, percentage of Internet users downloading music has fallen from about 29% to 14%), with John Borland, *Survey: Movie-swapping up; Kazaa down*, CNET NEWS.COM, July 13, 2004, http://news.com.com/Survey+Movieswapping+up+Kazaa+down/21001025_35267992.html (explaining that various studies have found no decline in filesharing activity).

*Napster, Inc.*³³

A. *Centralized P2P: A&M Records, Inc. v. Napster, Inc.*

Napster, the first filesharing program to receive national attention, enabled users to: “(1) make MP3 music available for copying by other Napster users; (2) search for MP3 music files stored on other users’ computers; and (3) transfer exact copies of the contents of other users’ MP3 files from one computer to another via the Internet.”³⁴ Napster’s free MusicShare software and its system of servers enabled this process.³⁵ In 2000, at the peak of its popularity, Napster boasted approximately sixty million registered users sharing an estimated forty million songs.³⁶ Simultaneously, Napster’s success drew the ire of the music industry, which quickly filed suit arguing that the program jeopardized copyright integrity and the industry’s vitality.³⁷

Due to Napster’s unique system architecture, the plaintiffs encountered an insurmountable obstacle in proving Napster directly liable for copyright infringement.³⁸ Ordinarily, direct infringement is proven by (1) establishing ownership of alleged infringing material and (2) demonstrating that the alleged infringer violated at least one exclusive right under section 106 of the Copyright Act, such as copying or distributing copyrighted material.³⁹ Although the plaintiffs could establish ownership with ease, Napster’s servers violated no exclusive rights.⁴⁰ Instead, the servers incorporated a fluid centralized index, which monitored and recorded the names of MP3 files available on its

33. 239 F.3d 1004 (9th Cir. 2001); MARJORIE HEINS, “THE PROGRESS OF SCIENCE AND USEFUL ARTS”: WHY COPYRIGHT TODAY THREATENS INTELLECTUAL FREEDOM 35 (Free Expression Policy Project 2d ed. 2003) (“Since the late 1990s, ‘peer-to-peer’ sharing of popular music has been the copyright industry’s most visible concern and the Napster case was its first big attempt to stop it.”), available at <http://www.fepproject.org/policyreports/copyright2d.pdf>.

34. *A&M Records, Inc. v. Napster, Inc.* (*Napster I*), 239 F.3d 1004, 1011 (9th Cir. 2001).

35. *Id.*

36. HEINS, *supra* note 33, at 35 (This popularity also encouraged venture capitalists to support Shawn Fanning, Napster’s 19 year old creator, with a fifteen million dollar cash infusion into the company).

37. *See id.*

38. Kevin Michael Lemley, Comment, *Protecting Consumers from Themselves: Alleviating the Market Inequalities Created by Online Copyright Infringement in the Entertainment Industry*, 13 ALB. L.J. SCI. & TECH. 613, 625 (2003).

39. *Napster I*, 239 F.3d at 1013; *see also* 17 U.S.C. § 501(a) (2002).

40. Lemley, *supra* note 38, at 625.

logged-in users' computer systems.⁴¹ An individual would search for a specific song by entering the information into Napster's MusicShare software.⁴² The MusicShare software then communicated with a central server, prompting a scan of its index for a match to the request.⁴³ If a match was found, the server software obtained the Internet address of the host user (i.e. the user computer offering the file for download) and relayed the address back to the requesting user.⁴⁴ By providing this information, Napster enabled the requesting user's computer to download an identical copy of the file (often a copyrighted work) *directly* from the host user's computer.⁴⁵ Thus, only the Napster users committed direct infringement.

Without the direct infringement claim against Napster, the plaintiffs sought a preliminary injunction based on theories of contributory and vicarious copyright infringement.⁴⁶ Under either theory, a third party must directly infringe the rights of a copyright holder.⁴⁷ The plaintiffs satisfied this requirement by showing that Napster users were likely downloading their copyrighted songs in high volume.⁴⁸ After evaluating the strength of the plaintiffs' claims, the district court "enjoined Napster 'from engaging in, or facilitating others in copying, downloading, uploading, transmitting, or distributing [the] plaintiffs' copyrighted musical compositions and sound recordings . . .'"⁴⁹ The Ninth Circuit affirmed the district court's holding that the plaintiffs would likely succeed in establishing that Napster was liable for contributory and vicarious infringement, but reversed on the scope of the order.⁵⁰

41. *Napster I*, 239 F.3d at 1012. For a technical overview of the strength of Napster's centralized index system and its influence over the development of modern P2P technology, see Clay Shirky, *Listening to Napster*, PEER-TO-PEER: HARNESSING THE BENEFITS OF A DISRUPTIVE TECHNOLOGY 21, 26-30 (Andy Oram ed., 2001).

42. *Napster I*, 239 F.3d at 1012.

43. *Id.*

44. *Id.*

45. *Id.* The communication between the requesting computer and the host computer embodied the P2P aspect of the Napster technology.

46. *Id.* at 1011.

47. Jennifer Norman, Note, *Staying Alive: Can the Recording Industry Survive Peer-To-Peer?*, 26 COLUM.-VLA J.L. & ARTS 371, 372 (2003).

48. *Napster I*, 239 F.3d at 1013-14 (The plaintiffs demonstrated ownership by showing that as much as 70% of the files available on Napster were the plaintiffs' copyrighted works, and that Napster users violated the plaintiffs' exclusive rights of reproduction and distribution when these works were downloaded.)

49. *Id.* at 1011 (quoting *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 927 (N.D. Cal. 2000)).

50. *Id.* at 1022-29.

On the issue of contributory infringement, a defendant must (1) have knowledge of the infringing activity and (2) induce, cause, or materially contribute to the conduct of the infringer.⁵¹ In *Napster I*, the Ninth Circuit followed the precedent set by *Sony Corp. v. Universal Studios, Inc. (Sony-Betamax)*,⁵² a seminal copyright case which struck a balance between protecting copyright and technological innovation.⁵³ Since the technology held the capacity for commercially significant noninfringing uses, the Ninth Circuit refused to impute Napster with constructive knowledge of infringing activity “merely because peer-to-peer file sharing technology may be used to infringe plaintiffs’ copyrights.”⁵⁴ However, Napster possessed actual knowledge of specific infringing activity since (1) its central server stored a fluid index of its users’ available files, many of which were infringing and (2) the plaintiffs notified Napster of the presence of the infringing material.⁵⁵ Further, Napster materially contributed since it “provide[d] ‘the site and facilities’ for direct infringement.”⁵⁶ Thus, the plaintiffs could show that Napster satisfied both elements of a contributory infringement claim.

On the issue of vicarious infringement, a defendant is liable if he or she (1) “has the right and ability to supervise the infringing activity” and (2) “a direct financial interest in such activities.”⁵⁷ In deciding whether Napster met that standard, the Ninth Circuit noted that the application “ha[d] the *ability* to locate infringing material listed on its search indices, and the *right* to terminate users’ access to the system.

51. *Id.* at 1019.

52. 464 U.S. 417, 419-20 (1984).

53. In *Sony-Betamax*, the plaintiffs held copyrights in certain television programs aired publicly and the defendant manufactured and marketed the Betamax recorder, a predecessor to the video cassette recorder. *Id.* at 419. The plaintiffs sued the defendant for contributory copyright infringement alleging that the defendant’s devices allowed customers to record the plaintiffs’ television programs in violation of copyright law. *Id.* at 420. The Court held that the defendant could not be imputed with the required knowledge of infringing activity because the Betamax recorder was also capable of commercially significant noninfringing uses, such as recording a personal copy of a television program to watch at a later time (“time-shifting”). *Sony-Betamax*, 464 U.S. 417 (1984).

54. *Napster I*, 239 F.3d at 1020-21. Although the Ninth Circuit failed to detail any noninfringing uses, transferring either public domain works unprotected by copyright law or copyrighted works with the consent of the copyright owner are examples of noninfringing uses.

55. *Id.* at 1021-22.

56. *Id.* at 1022-23 (quoting *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996)).

57. *Id.* at 1022 (quoting *Fonovisa, Inc.*, 76 F.3d at 262).

The file name indices, therefore, are within the ‘premises’ that Napster has the ability to police.”⁵⁸ Since the service neither located such material nor blocked infringing users despite the plaintiffs’ complaints, it improperly failed to exercise “the right and ability to police its system.”⁵⁹ Additionally, Napster gained a clear financial benefit by allowing the availability of infringing material to attract a larger customer base to its service.⁶⁰ Consequently, the plaintiffs could show that the program also met both elements of a vicarious liability claim.

On remand, the Ninth Circuit’s decision prompted the district court to modify its injunction and order Napster to police its servers if notified of the specific infringing activity.⁶¹ The difficulty in policing the activities of millions of members quickly proved overwhelming and Napster voluntarily shut down its service, ending its reign as the leading P2P program.⁶² Nevertheless, the program’s demise became only the first of many courtroom confrontations between copyright owners and the filesharing community.⁶³ If the *Napster* plaintiffs sought to end the filesharing revolution through the case, their efforts can only be characterized as an abject failure. *Napster, Inc.*’s inadvertent message to the developers of nascent P2P applications was unequivocal: “[b]ecause copyright owners have relied on secondary liability theories to shut down file-sharing services, a decentralized file-sharing service would be more difficult for copyright owners to shut down than a centralized ‘Napster-like’ system.”⁶⁴ Accordingly, Napster functioned as a hi-tech guinea pig, triggering a metamorphosis in P2P architecture as programs adapted to operate within the technical bounds of the law:

Napster was not the only file-sharing program out there, and several others popped up to take its place. These programs, like LimeWire and Bearshare (both work with the far-flung Gnutella file-sharing network), do not use a central server. Instead they rapidly pass along search queries from machine to machine along the network—making it legally difficult to stop since

58. *Id.* at 1024 (emphasis added).

59. *Id.* at 1023.

60. *Id.* (“Ample evidence supports the district court’s finding that Napster’s future revenue is directly dependent upon ‘increases in [Napster’s] userbase’ . . .”).

61. *See* *A&M Records v. Napster, Inc. (Napster II)*, 284 F.3d 1091, 1095-96 (9th Cir. 2002).

62. HEINS, *supra* note 33, at 36 (Napster agreed to settle with plaintiffs for twenty-six million dollars, and Senator Orrin Hatch expressed disapproval that an enterprise with a community of over fifty million users was destroyed without a trial.).

63. *See id.*

64. Norman, *supra* note 47, at 383-84.

there is *no one computer in charge*. What's more, some peer-to-peer programs now encrypt shared files to protect users.⁶⁵

P2P programs were entering a stage of growth and technological maturity.⁶⁶ Without hesitation, copyright owners returned to the courts to fight P2P in its decentralized form or "pure" P2P.

B. Decentralized P2P: Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.

In 2001, an alliance of twenty-eight media entities sued the distributors of several decentralized P2P programs, including Grokster and StreamCast Networks, Inc.⁶⁷ Similar to *Napster, Inc.*, the plaintiffs sued based on theories of secondary liability.⁶⁸ This time, however, the district court granted partial summary judgment for the defendants.⁶⁹ Adhering to the analysis adopted in *Napster, Inc.*, the Ninth Circuit affirmed, holding that the defendants were not liable since they (1) lacked the knowledge and material contribution components necessary for a contributory infringement claim and (2) could not exercise the right and ability to supervise direct infringers necessary for a vicarious infringement claim.⁷⁰

The Ninth Circuit identified three categories of P2P programs utilizing different indexing architecture:

- (1) a centralized indexing system, maintaining a list of available files on

65. J.D. Biersdorfer, *Napster's Descendants; His Beyonce, Her Beatles: A Primer on Trading*, N.Y. TIMES, Sept. 18, 2003, at G7 (emphasis added).

66. The vacuum left by Napster allowed for healthy competition among several varieties of decentralized filesharing networks. One high-profile filesharing program since Napster's demise has been KaZaa, a program that has been downloaded more than 270 million times as of June, 2003. See Amy Harmon, *Music Labels Coming to Grips with Web Piracy*, INT'L HERALD TRIBUNE, June 10, 2003, at p. 1. Recently however, BitTorrent has overtaken KaZaa's leadership position and accounts for over 53% of total P2P traffic. John Borland, *Survey: Movie-swapping Up; Kazaa Down*, CNET NEWS.COM, July 13, 2004, http://news.com.com/Survey+Movieswapping+up+Kazaa+down/2100-1025_3-5267992.html. For a collection of *no less than fifty* filesharing programs currently available to the online community, see Fresh Noise, *The Beat Goes On*, <http://www.afternapster.com> (last visited Sept. 7, 2005).

67. HEINS, *supra* note 33, at 35.

68. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1158 (9th Cir. 2004), *vacated and remanded*, 125 S. Ct. 2764 (2005).

69. *Id.*

70. *Grokster Ltd.*, 380 F.3d 1154. The Ninth Circuit did not provide a detailed discussion of whether there was direct infringement by the users of the defendants' software, rather they simply noted that it was "undisputed." *Id.* at 1160, 1164.

one or more centralized servers; (2) a completely decentralized indexing system, in which each computer maintains a list of files available on that computer only; and (3) a “supernode” system, in which a select number of computers act as indexing servers.⁷¹

Unlike Napster, which fell into the first category, the defendants each initially operated under the “supernode” model employing “FastTrack” technology developed by KaZaa BV.⁷² The software dynamically selected a number of user computers to function as indexing servers or “supernodes.”⁷³ Each time a computer connected to the network, it randomly operated either as a “node,” simply sending out requests and receiving files, or as a “supernode,” indexing those computers connected to it and providing file search results to requesting computers.⁷⁴ This novel adaptation allowed the defendants’ software to operate without a permanent centralized server, thus begging the question, how does decentralized technology impact a contributory or vicarious liability infringement analysis? In response, the court unambiguously ruled in favor of the redesigned P2P applications.⁷⁵

On the contributory infringement claim, the court again followed *Sony-Betamax*.⁷⁶ Since the defendants’ software was capable of commercially significant noninfringing uses,⁷⁷ the plaintiffs were required to establish that the defendants had reasonable knowledge of

71. *Id.* at 1158-59.

72. *Id.* at 1159. StreamCast eventually adopted its own “Morpheus” version of the Gnutella open-source code after a licensing dispute with KaZaa, thus becoming a more “pure” decentralized technology under category two. After the dispute arose, a software upgrade offered to KaZaa and Grokster users prevented Morpheus users from communicating with those using the FastTrack network. *Id.* at 1159 n.5.

73. *Id.* at 1159. For a more detailed discussion on how “supernode” technology works, see *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 259 F. Supp. 2d 1029, 1039-40 (C.D. Cal. 2003).

74. *Grokster Ltd.*, 259 F. Supp. 2d at 1040 (“[T]he technical process of locating and connecting to a supernode—and the FastTrack network—currently occurs essentially independently of . . . Grokster.”).

75. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154 (9th Cir. 2004), *vacated and remanded*, 125 S. Ct. 2764 (2005).

76. *Id.* at 1160-61.

77. *Id.* at 1161-62. As an example of a noninfringing use, the court pointed out that the band Wilco sparked interest in its latest album by releasing its songs for download on its own website and through the defendants’ software. While the band’s record label previously informed the band that the album was not commercially viable, the band’s unconventional tactic generated such interest that it secured a new recording contract. *Id.* at 1161. Further, the court explained that even if only 10% of the use is legitimate, this would mean that “*hundreds of thousands of legitimate files*” were being exchanged through the defendants’ software. *Id.* at 1162 n.10 (emphasis added).

specific infringing files (i.e. actual knowledge) and failed to act on such information.⁷⁸ Unlike Napster's architecture, however, the defendants' software operated *without* a centralized index of its users' files.⁷⁹ Arguably, the absence of the index prevented the defendants from maintaining control over the files shared.⁸⁰ The court noted that even if the defendants were to shut down their servers, the users of their software could continue operating on the network with "little or no interruption."⁸¹ Thus, the plaintiffs were unable to prove that the defendants possessed the knowledge of infringing uses required for a finding of contributory infringement liability.⁸²

On the vicarious liability claim, the court distinguished the defendants' technology from Napster.⁸³ According to the Ninth Circuit, "the 'right and ability to supervise' describes a relationship between the defendant and the direct infringer."⁸⁴ While Napster possessed the right and ability to monitor its users through its control of the centralized index and user registration requirements, the defendants maintained no such index and could not terminate or block individual user access to its filesharing network.⁸⁵ Aside from a nominal licensing agreement, no other formal agreements existed between Grokster and its users.⁸⁶ Without a log-in or registration process to identify and block users, the defendants could not prevent the continued use of their network.⁸⁷ Consequently, the defendants did not possess the right and ability to supervise its users as demanded under a vicarious copyright infringement theory.⁸⁸

78. *Id.* at 1161-62.

79. *Id.* at 1163.

80. *Id.*

81. *Id.* (internal quotations omitted).

82. *Id.* Further, even if the court had found that the defendant's possessed the requisite knowledge component, their software also fell short of making a material contribution. *Id.* Since the defendants did not maintain infringing materials or indices on their servers, as Napster did, they did not "provide the 'site and facilities' for infringement." *Id.*

83. *Id.* at 1165.

84. *Id.* at 1164.

85. *Id.* at 1165.

86. *Id.* (Grokster reserved right to block access, but reservation insignificant since it could not prevent users from gaining access in any meaningful way).

87. *Id.* Even if the defendants possessed the capacity to alter their files or shut down root nodes to prevent further access, this would not be equivalent to excluding *individual users* and would reach beyond the "monitoring and supervisory relationship that has supported vicarious liability in the past." *Id.*

88. *Id.* at 1166.

Evading traditional contributory and vicarious copyright infringement analysis, the decentralization of P2P networks prompted the plaintiffs' demand for a "re-examination of the law" in the name of public policy.⁸⁹ However, the Ninth Circuit refused to expand the secondary liability doctrines, choosing instead to reflect on the natural market resolution of past clashes between technological innovation and traditional business models:

[W]e live in a quicksilver technological environment with courts ill-suited to fix the flow of internet innovation. The introduction of new technology is always disruptive to old markets, and particularly to those copyright owners whose works are sold through well-established distribution mechanisms. Yet, history has shown that time and market forces often provide equilibrium in balancing interests, whether the new technology be a player piano, a copier, a tape recorder, a video recorder, a personal computer, a karaoke machine, or an MP3 player. Thus, it is prudent for courts to exercise caution before restructuring liability theories for the purpose of addressing specific market abuses, despite their apparent present magnitude.⁹⁰

Although the court's reminder presented an opportunity for the sides to step back and begin anew, perhaps by accommodating the profit potential of filesharing programs and their broad user bases, the plaintiffs petitioned the United States Supreme Court, pointing to a conflict in legal interpretation between the Ninth Circuit ruling and a similar case decided the previous year by the Seventh Circuit.⁹¹

Shortly before this Note went to print, the Supreme Court vacated and remanded the Ninth Circuit's decision.⁹² Applying a new inducement theory of liability to copyright law, the Court held that "one who distributes a device with the *object of promoting its use to infringe copyright*, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by

89. *Id.*

90. *Id.* at 1167 (internal citation omitted).

91. Tom Zeller, Jr., *Entertainment Industry Asks Justices to Rule on File Sharing*, N.Y. TIMES, Oct. 12, 2004, at C4 [hereinafter Zeller I]. The Seventh Circuit disagreed with the *Napster I* court's reading of *Sony-Betamax*, adding that courts must consider "how 'probable' the noninfringing uses of a product are." *Grokster Ltd.*, 380 F.3d at 1162 n.9 (quoting *In re Aimster Copyright Litig.*, 334 F.3d 643, 653 (7th Cir. 2003)). However, the Ninth Circuit declined to "read *Sony-Betamax*'s holding as narrowly as does the Seventh Circuit," instead adhering its own precedent. *Id.*

92. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2783 (2005).

third parties.”⁹³ While recognizing the fine balance that *Sony-Betamax* struck between those favoring greater copyright protection and those favoring greater protection of technological innovation, the Court found that the Ninth Circuit misapplied *Sony-Betamax* by holding that the defendants could not be held liable without both specific knowledge of the infringement and a failure to act on that knowledge, “even when an actual purpose to cause infringing use is shown by evidence independent of design and distribution of the product.”⁹⁴ According to the Court, *Sony-Betamax* narrowly addressed liability based on imputing intent for product design and distribution and “did not displace” all other theories of secondary liability.⁹⁵ The Court explained that “where evidence goes beyond a product’s characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, [*Sony-Betamax*]’s . . . rule will not preclude liability.”⁹⁶ Consequently, since the Court found evidence that Streamcast and Grokster went beyond simply providing access to filesharing technology and acted with, “a purpose to cause and profit from third-party acts of copyright infringement,” it remanded the case for trial.⁹⁷

Although extraordinarily damaging to the *Grokster Ltd.* defendants’ case, the Court’s holding was neither an absolute victory for copyright owners nor an absolute defeat for filesharing entities. Notably, the Court addressed only the most egregious situations where programmers create filesharing networks with the intent to induce infringement and left for another day discussion of filesharing networks created *without* such a purpose. On one hand, if programmers designed a filesharing network purely for the purpose of exchanging public domain works, the question of whether those programmers could be held liable for their users’ infringing activity remains unanswered. On the other hand, innovation may still be discouraged since any new product with the capacity for infringement raises the specter of liability exposure under the auspices of alleged inducement, regardless of the legitimacy of the claims. Given this ambiguity, the recording industry cannot shutdown all filesharing entities with impunity and filesharing entities are not free from liability simply by announcing their good intentions. By the time the Court addressed these issues, however, decentralized filesharing had already

93. *Id.* at 2770 (emphasis added).

94. *Id.* at 2775-78.

95. *Id.* at 2778.

96. *Id.* at 2779.

97. *Id.* at 2782-83.

left its mark, prompting an aggressive campaign to obtain the identities of individual direct infringers.⁹⁸

C. Procuring End User Identities via the DMCA: RIAA v. Verizon Internet Services, Inc.

On February 4, 2003, in a move to obtain the identities of alleged direct infringers, the RIAA served Verizon Internet Services, Inc. (“Verizon”) with a subpoena pursuant to section 512(h) of the Digital Millennium Copyright Act of 1998 (“DMCA”).⁹⁹ Because section 512(h) permits obtaining ISP subscriber identities without filing a lawsuit, the RIAA used the provision to deal with unwarly filesharers absent the negative publicity that a lawsuit might bring.¹⁰⁰ Specifically, the RIAA was interested in the identities of two Verizon subscribers who were allegedly offering large collections of copyrighted MP3 files on filesharing programs.¹⁰¹ Verizon challenged section 512(h) on statutory and constitutional grounds, but the district court rejected those arguments and ordered disclosure of the subscribers’ identities in compliance with the subpoena.¹⁰² Appealing the order, Verizon argued:

(1) § 512(h) does not authorize issuance of a subpoena to an ISP acting solely as a conduit for communications the content of which is determined by others; if the statute does authorize such a subpoena, then the statute is unconstitutional because (2) the district court lacked Article III jurisdiction to issue a subpoena with no underlying “case or controversy” pending before the court; and (3) § 512(h) violates the First Amendment because it lacks sufficient safeguards to protect an internet user’s ability to speak and associate anonymously.¹⁰³

Without reaching the second or third argument, the D.C. Circuit agreed

98. See generally Matt Richtel, *File-Sharing Sites Found Not Liable for Infringement*, N.Y. TIMES, Aug. 20, 2004, at C1.

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

100. See Robert D. Brownstone et al., *Identified Plaintiff Seeking Disclosure of Identity of Anonymous Defendant*, in KEVIN P. CRONIN & RONALD N. WEIKERS, DATA SEC. & PRIVACY LAW: COMBATING CYBERTHREATS § 9:107.30 (Supp. 2004) (“In an entirely new procedural context, copyright owners appear to have gained the ability—at least in some circumstances—to obtain from [ISPs] the identities of alleged infringers without necessarily even having to file a lawsuit.”).

101. *Verizon Internet Servs., Inc.*, 351 F.3d at 1231.

102. *Id.*

103. *Id.*

with Verizon and reversed the lower court's order.¹⁰⁴

Surveying prior courts' treatment of online filesharing, the court openly recognized the RIAA's need to refocus its energies on the pursuit of individual filesharers.¹⁰⁵ While both the filesharers' login names and the Internet Protocol ("IP") addresses associated with those names could easily be obtained, this information would only allow names to be traced back to the filesharers' ISP.¹⁰⁶ Thus, the RIAA had been subpoenaing various ISPs for their subscribers' names and addresses to either threaten to sue or actually sue identified infringing subscribers.¹⁰⁷ However, the court disagreed with this tactic, "invalidat[ing] the use of § 512(h) subpoenas as applied against ISP customers engaged in 'filesharing' of copyrighted works on peer-to-peer . . . networks like Napster, KaaZaa [sic], and Grokster."¹⁰⁸

According to the court, section 512(h) provides for issuance of a subpoena to "an ISP engaged in storing on its servers material that is infringing or the subject of infringing activity."¹⁰⁹ Since filesharers keep infringing material on their computer hard drive, Verizon was not engaged in storing infringing material on its servers.¹¹⁰ Instead, it was merely "acting as a conduit for P2P communications."¹¹¹ Thus, Verizon was not obligated under section 512 to surrender the identities of its subscribers to the RIAA.¹¹² Although the RIAA argued that the DMCA should be read to include P2P, the court explained that the drafters of the DMCA had not anticipated such a technological development:

We are not unsympathetic either to the RIAA's concern regarding the widespread infringement of its members' copyrights, or to the need for

104. *Id.* Although the court found it unnecessary to address Verizon's constitutional arguments, similar arguments for anonymous speech and association later appeared and were answered in *Sony Music Entertainment Inc.*

105. *Id.* at 1232.

106. *Id.* at 1232; see also Peter J. Pizzi, 'Doe' Defendants: The RIAA's New Front in the Battle Against 'P2P' Filesharers, N.Y.L.J. 5, June 8, 2004 (explaining that RIAA, using "packet-sniffing" software, could "trace file-sharing activity to particular IP addresses.").

107. *Verizon Internet Servs., Inc.*, 351 F.3d at 1232 ("The RIAA has sent letters to and filed lawsuits against several hundred such individuals, each of whom allegedly made available for download by other users hundreds or in some cases even thousands of .mp3 files of copyrighted recordings.").

108. Pizzi, *supra* note 106.

109. *Verizon Internet Servs., Inc.*, 351 F.3d at 1233.

110. *Id.* at 1235.

111. *Id.* at 1234.

112. *Id.* at 1233.

legal tools to protect those rights. It is not the province of the courts, however, to rewrite the DMCA in order to make it fit a new and unforeseen internet architecture, no matter how damaging the development has been to the music industry or threatens being to the motion picture and software industries.¹¹³

Therefore, any solution to the copyright owners' problem would have to be addressed by Congress.¹¹⁴

Verizon Internet Services, Inc. signaled a substantial setback to the RIAA and copyright owners generally since section 512 of the DMCA offered a "streamlined process . . . to demand the names of copyright violators from Internet companies."¹¹⁵ Copyright owners now must seek alleged infringers' identities through traditional means by filing a lawsuit against the anonymous user.¹¹⁶ Perhaps reticent because of the risks associated with filing lawsuits against anonymous infringers, the RIAA had attempted to avoid this posture.¹¹⁷ Nevertheless, music industry officials announced that while they would adjust their legal strategy according to *Verizon Internet Services, Inc.*, the pursuit of direct infringers would continue.¹¹⁸ Accordingly, the music industry took its boldest step yet and began filing "John Doe" lawsuits against alleged direct infringers.¹¹⁹

113. *Id.* at 1238.

114. *Id.* at 1238-39.

115. Schwartz, *supra* note 8.

116. *Id.*

117. See Jane C. Ginsburg, *Putting Cars On The "Information Superhighway": Authors, Exploiters, and Copyright in Cyberspace*, 95 Colum. L. Rev. 1466, 1488 (1995) ("Copyright owners have traditionally avoided targeting end users of copyrighted works. This is in part because pursuing the ultimate consumer is costly and unpopular."); see also Norman, *supra* note 47, at 394 (explaining that until *Verizon Internet Services, Inc.*, RIAA obtained users' identities, sent out warning letters, and settled matters without the publicity of a time-consuming lawsuit).

118. Schwartz, *supra* note 8. Despite the music industry's assurances, the holding of *Verizon Internet Services, Inc.* has since been tested. Under a similar fact-pattern, Judge Kermit Bye of the Eighth Circuit reaffirmed the D.C. Circuit's opinion, denying the recording industry use of section 512 to identify anonymous filesharers. See *In re Charter Commc's, Inc.*, 393 F.3d 771 (8th Cir. 2005).

119. Schwartz, *supra* note 8. It should be noted that Verizon never contested the use of such a tactic. During the ongoing litigation, Verizon argued that the RIAA could bring a "John Doe lawsuit" against anonymous infringers as a legitimate alternative to using section 512 and then seek out their identity using a Rule 45 subpoena issued under the Federal Rules of Civil Procedure. See *In re Verizon Internet Servs., Inc.*, 240 F. Supp. 2d 24, 39-40 (D.D.C.), *rev'd on other grounds*, Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc., 351 F.3d 1229 (D.C. Cir. 2003).

III. Sony Music Entertainment Inc. v. Does 1-40

Early in 2004, the recording industry initiated four “John Doe” lawsuits against 532 individuals throughout the country.¹²⁰ The lawsuits, filed in New York and the District of Columbia, consolidated the anonymous individual filesharers into four groups of defendants.¹²¹ Described only by their IP address, each defendant was accused of sharing an average of over eight hundred copyrighted sound recordings.¹²² As fall approached, the estimated number of individual filesharers sued by the recording industry increased to roughly three thousand nine hundred.¹²³ Since such lawsuits are brought against large numbers of consolidated defendants, constitutional issues relating to anonymous free speech and association as well as procedural and administrative issues arise. *Sony Music Entertainment Inc.* addressed these concerns.

In *Sony Music Entertainment Inc.*, the plaintiffs, seventeen record companies, filed suit in the Southern District Court of New York against forty anonymous defendants, alleging that the defendants had “illegally downloaded and distributed” the plaintiffs’ copyrighted works using the FastTrack filesharing network.¹²⁴ The plaintiffs then sought to identify the defendants by serving a subpoena on their ISP, Cablevision Systems Corporation (“Cablevision”), a non-party.¹²⁵ Using a publicly available database on the Internet, the plaintiffs had traced the defendants’ IP addresses to Cablevision.¹²⁶ In its service agreement with its users, Cablevision explicitly prohibited transmission of illegal material and also reserved the right to disclose subscriber information when required by law.¹²⁷

On January 26, 2004, the court granted the plaintiffs’ *ex parte* application to serve Cablevision with a subpoena seeking the defendants’ “name, address, telephone number, email address, and Media Access Control address.”¹²⁸ On February 3, after receiving a letter from the

120. Schwartz, *supra* note 8.

121. *Id.*

122. *Id.*

123. See Richtel, *supra* note 98.

124. *Sony Music Entm’t Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 558 (S.D.N.Y. 2004).

125. *Id.* at 558.

126. *Id.*

127. *Id.* at 559.

128. *Id.* The plaintiffs justified the need for this *ex parte* expedited discovery

Electronic Frontier Foundation (“EFF”), Public Citizen, and the ACLU objecting to the subpoena on First Amendment grounds, Judge Chin amended his order to allow Cablevision time to notify its subscribers that they had a window to quash the subpoena.¹²⁹ Cablevision did so, notifying its subscribers that it would disclose their information by February 20 if objections were not raised.¹³⁰ Although Cablevision eventually complied with the subpoena and provided information for thirty-six defendants, four defendants moved to quash the subpoena on First Amendment, personal jurisdiction, and joinder grounds.¹³¹ The plaintiffs argued that the motion to quash was moot because the defendants’ information had already been provided, but Judge Chin disagreed explaining that courts are empowered to suppress evidence or require that it be returned.¹³² The court then set out to discuss the merits of the case.¹³³

Beginning with the defendants’ First Amendment claim, Judge Chin divided his analysis into two issues: “(1) whether a person who uses the Internet to download or distribute copyrighted music without permission is engaging in the exercise of speech; and (2) if so, whether such a person’s identity is protected from disclosure by the First Amendment.”¹³⁴ At the outset, the court recognized that the Supreme Court has established that anonymous speech is protected by the First Amendment.¹³⁵ Further, such protection extends to speech on the Internet.¹³⁶ However, the protection for anonymous speech is not absolute.¹³⁷ The court emphasized that copyright infringement is not

request on the grounds that it was necessary to maintain a record of the infringers’ identities. *Id.* ISPs often use a system of assigning “dynamic” IP addresses to their subscribers which change each time the subscriber logs on, but since the logs quickly build up a substantial catalogue of information, the ISP erases the information on a regular basis. Pizzi, *supra* note 106.

129. *Sony Music Entm’t Inc.*, 326 F. Supp. 2d at 559.

130. *Id.* at 559-60.

131. *Id.* at 559-61.

132. *Id.* at 561.

133. *Id.*

134. *Id.* at 562.

135. *Id.*

136. *Id.* (citing *Reno v. ACLU*, 521 U.S. 844, 870 (1997); *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 259 (D.D.C. 2003), *rev’d on other grounds*, *Recording Indus. Ass’n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003); *Columbia Ins. Co. v. Seescandy.Com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999); *ACLU v. Johnson*, 4 F. Supp. 2d 1029, 1033 (D.N.M. 1998), *aff’d*, 194 F.3d 1149 (10th Cir. 1999)).

137. *Sony Music Entm’t Inc.*, 326 F. Supp. 2d at 562-63.

subject to First Amendment protection, explaining that “[p]arties may not use the First Amendment to encroach upon the intellectual property rights of others.”¹³⁸

Addressing the issue of “whether the use of P2P file copying networks to download, distribute, or make available for distribution copyrighted sound recordings without permission, is an exercise of speech,” the court held that such conduct is protected speech but only to a limited degree subject to other considerations.¹³⁹ A person downloading files through a filesharing program is not engaging in “true expression” since there is no attempt to communicate thoughts or ideas.¹⁴⁰ Instead, according to the court, filesharers only seek to acquire free music.¹⁴¹ While the court acknowledged that filesharers may be attempting to make either a statement through their unauthorized activity or an expression through choice of musical downloads, which deserves *some* First Amendment protection, downloading files is denied the broader protection of the political speech category.¹⁴²

Given this interpretation, the First Amendment does little to bar the disclosure of the identities of anonymous filesharers.¹⁴³ According to the court, when determining whether the filesharers’ First Amendment interests are outweighed by the need for disclosure of their identities as parties to the litigation, five factors must be considered: “(1) a concrete showing of a *prima facie* claim of actionable harm; (2) specificity of the discovery request; (3) the absence of alternative means to obtain the subpoenaed information; (4) a central need for the subpoenaed information to advance the claim; and (5) the party’s expectation of privacy.”¹⁴⁴ The district court’s application of these factors, however, illustrates the relative ease by which copyright owners can now bypass filesharers’ First Amendment anonymity defense.

First, the plaintiffs made a concrete showing of a *prima facie* claim for actionable harm since they established ownership of the recordings, provided a partial list of the copyrighted recordings allegedly infringed upon, submitted evidence listing copyrighted songs downloaded by the defendants, including the dates and times of each download, and

138. *Id.* at 563.

139. *Id.* at 564.

140. *Id.* (citing *Reno*, 521 U.S. at 870).

141. *Id.* at 564.

142. *Id.*

143. *Id.* at 565.

144. *Id.* at 564-65 (citations omitted) (emphasis added).

provided the IP addresses assigned to the “Doe” defendants.¹⁴⁵ Second, the plaintiffs’ request was “sufficiently specific to establish a reasonable likelihood that the discovery request would lead to identifying information that would make possible service upon particular defendants who could be sued in federal courts.”¹⁴⁶ Third, the plaintiffs showed that they could not obtain the defendant’s identities by other means.¹⁴⁷ Fourth, without the identities of the defendants, the plaintiffs could not continue their lawsuit, thus there was a central need for the information.¹⁴⁸ Finally, the court reasoned that the defendants had a “minimal expectation of privacy” because they had agreed to Cablevision’s service agreement and they had made their computer information available for others to see through the use of a P2P application.¹⁴⁹ Therefore, given these particulars, the urgent need for the disclosure of the filesharers’ identities outweighed the limited First Amendment protection.¹⁵⁰

The five-factor analysis is impressive on form but weak on substance. Assuming a plaintiff brings a lawsuit against an anonymous defendant, makes the requisite showing of copyright ownership, and presents a list of allegedly infringed files, the remaining factors will be boiler plate arguments in nearly every case. Plaintiffs will be able to provide an infringing IP address by using packet-sniffing software, demonstrate that there is no viable alternative to the subpoena since there is no publicly available method of obtaining the filesharer’s information, confirm the central need for the information because without the filesharer’s identity, a lawsuit cannot continue, and explain that filesharing creates a minimal expectation of privacy since every filesharer naturally makes designated portions of their hard drive available to other P2P users. Thus, limited protection subject to these considerations creates a *carte blanche* for the recording industry that destroys the viability of filesharers’ First Amendment anonymity defense.

In addition to dismantling the First Amendment defense, the court also quickly dismissed the defendants’ other subpoena quashing

145. *Id.* at 565.

146. *Id.* at 566 (citing *Columbia Ins. Co. v. Seescandy.Com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999)).

147. *Id.*

148. *Id.*

149. *Id.* at 566-67.

150. *Id.* at 564-67.

arguments.¹⁵¹ Holding that the issue of personal jurisdiction was premature, Judge Chin reasoned that the court “has the discretion to allow discovery to determine the basis for personal jurisdiction,” and that “without identifying information sought by plaintiffs in the Cablevision subpoena, it would be difficult to assess properly the existence of personal jurisdiction over the Doe Defendants.”¹⁵² Although the defendants argued that available research techniques reveal the “likelihood” that many of the defendants are not New York residents, the court emphasized that “likelihood” does not determine personal jurisdiction.¹⁵³ Further, on the issue of joinder, the court held that the remedy for improper joinder is not to quash a subpoena, but severance under the Federal Rules of Civil Procedure.¹⁵⁴ Accordingly, the district court denied the defendants’ motion to quash the subpoena.¹⁵⁵

With filesharing activity holding steady,¹⁵⁶ the broader issue regarding the wisdom of suing individual filesharers remains debatable. As a consequence of earlier case law and *Sony Music Entertainment Inc.*’s methodical analysis, copyright owners may proceed confidently in court against centralized P2P entities, entities promoting infringement, and infringing filesharers.¹⁵⁷ In particular, the proper procedural roadmap for suing direct infringers is now clear and copyright owners likely believe that singling out certain filesharers deters the filesharing community as a whole.¹⁵⁸ The First Amendment stands as a virtually non-existent defense to preserving filesharing anonymity, and personal jurisdiction arguments fail as premature. However, copyright owners must think beyond their courtroom advantage and evaluate the efficacy and drawbacks of suing individual filesharers in the long-term.

151. *Id.* at 567-68.

152. *Id.* at 567.

153. *Id.* at 567-68.

154. *Id.* at 568 (citing FED. R. CIV. P. 21).

155. *Id.*

156. John Borland, *Survey: Movie-swapping Up; Kazaa Down*, CNET NEWS.COM, July 13, 2004, http://news.com.com/Survey+Movie-swapping+up+Kazaa+down/2100-1025_3-5267992.html (“By June, an average of 8 million users were online at any given time, sharing a petabyte (10 million gigabytes) of data.”).

157. Shortly after *Sony Music Entm’t Inc.*, in another lawsuit against “John Doe” filesharers, Judge Sweet of the Southern District of New York reinforced the decision by repeating the First Amendment holding and adopting the same five-factor analysis for weighing the subpoena against these considerations. *See Elektra Entm’t Group, Inc. v. Does 1-9*, No. 04 Civ. 2289, 2004 WL 2095581 (S.D.N.Y. Sept. 8, 2004).

158. *See* Richard Raysman & Peter Brown, *Copyright and Filesharing: Identifying Anonymous Defendants*, N.Y.L.J. 3, July 13, 2004 (“Identifying anonymous infringers in the pursuit of civil damages is the first major step towards such deterrence.”).

First, consider the argument that current P2P activity indicates that these lawsuits do little to deter filesharing. Notwithstanding reports that the filesharing movement has diminished since the initiation of lawsuits, millions of people continue to exchange files.¹⁵⁹ Deterring conduct may be more difficult where divergent but equally valid perspectives exist on the same issue:

The rise of peer-to-peer technology highlighted . . . cultural habits in a way that threatened the powerful companies that invest billions in production, distribution, and marketing. . . . While many users insist that music is special to the human community and thus deserves special rules and considerations, those who invest time and money in the industry insist that a product is a product. In their view music deserves a high level of protection against unauthorized exploitation.¹⁶⁰

In essence, many filesharers continue their resistance not due to ignorance or an inclination towards lawlessness but because they disagree with the premise that sharing music is wrong. Absent a recognition of these perspectives, no solution will properly balance the desires and needs of both the filesharing community and recording industry. Further, lost amid litigation victories and defeats is the fact that the filesharing community is comprised of an overabundance of dedicated music fans, many of whom actually purchase *more* CDs after sampling copyrighted tracks through P2P applications.¹⁶¹ Accordingly, litigation alternatives are better-suited to acknowledge these core value differences and bridge the gap through compromising initiatives, rather than combative postures which polarize the sides and alienate fans.

Second, aside from the possibility that the filesharing lawsuit barrage has failed to deter the activity,¹⁶² suing otherwise law-abiding citizens conjures up images of a gluttonous industry and creates a considerable flow of bad publicity. For example, the recording industry recently found itself embroiled in a nightmarish public relations scenario when it sued a twelve year old girl in New York City and forced a two

159. VAIDHYANATHAN, *supra* note 29, at 59.

160. *Id.* at 43.

161. *See id.* at 43-49 (“31 percent of music consumers download music and burn CDs often. These same digital music users buy 36 percent of all CDs. Downloaders are the music industry’s best customers.”).

162. By now, it should be evident that each legal step taken by the music industry has been followed by a technological adjustment to facilitate continued filesharing. One critic of the RIAA’s strategy has noted, “[N]o legal rule is strong enough to overcome a radical technical innovation. Courts can delay progress but they cannot stop it.” Shell, *supra* note 9.

thousand dollar settlement.¹⁶³ Though RIAA public relations officials used the opportunity to remind parents to monitor their children's Internet activity, the settlement appeared to receive more negative attention for the trade association's heavy-handed willingness to pursue minors.¹⁶⁴ Envisioning a favorable outcome from such tactics is exceedingly difficult. Instead, the recording industry should explore real out-of-court solutions that serve to protect copyrights without marginalizing music fans or stifling technological growth and ideas. By assuming a new tack, the recording industry will relieve itself of the onerous legal costs associated with continued litigation,¹⁶⁵ discover new ways to profit, and win back old customers.

IV. Litigation Alternatives: Finding the Ideal Solution

Between the filesharing community and the recording industry, a number of litigation alternatives have been explored; some already implemented to a limited degree, others quickly met by strong opposition. This part discusses a selection of the most prominent alternatives and evaluates their viability as a solution to the recording industry's problem.

A. Technological Attacks

Probably the most controversial alternative financed by copyright owners has been the use of technological countermeasures to combat illegal online filesharing.¹⁶⁶ Ranging from relatively innocuous to somewhat aggressive in nature, these measures include: (1) "spoofing" which involves distributing decoys of copyrighted works en masse throughout the filesharing networks; (2) using P2P "chat" features to send out network-wide messages reminding users that copyright infringement is theft carrying severe legal consequences; (3) installing a slightly invasive Trojan horse program onto filesharers' computers which redirects filesharers seeking copyrighted works to websites where they

163. CNN, *12-year-old Settles Music Swap Lawsuit*, Feb. 18, 2004, <http://www.cnn.com/2003/TECH/internet/09/09/music.swap.settlement/index.html>.

164. *Id.*; see also, e.g., Shell, *supra* note 9 (questioning the benefit of the RIAA's recent lawsuits, including the one against a 12 year old girl).

165. See, e.g., Lemley, *supra* note 38, at 629 (estimating the high cost of continued litigation over filesharing).

166. See Andrew Ross Sorkin, *Software Bullet is Sought to Kill Musical Piracy*, N.Y. TIMES, May 4, 2003, at A1.

can legitimately purchase songs; (4) employing “freeze,” an extraordinarily aggressive program that locks the user’s computer system for a limited duration whenever the user attempts to download copyrighted works; (5) using “silence,” a program designed to scan the user’s computer and delete illegally downloaded files; and (6) performing “interdiction,” a technique which attacks a P2P user’s internet connection.¹⁶⁷

While such measures may be technically effective, they also carry obvious drawbacks. First, many of these measures may not be legal.¹⁶⁸ Lawrence Lessig, a Stanford Law School copyright expert, explains that the legality of these programs, “depends on if they are doing a sufficient amount of damage. The law has ways to deal with copyright infringement. Freezing people’s computers is not within the scope of copyright laws.”¹⁶⁹ Second, if the recording industry’s goal is to protect its copyrights *without* alienating a large sector of its consumer base, attacking their home computers may not be the ideal solution. Instead, it may just exacerbate the already great divide between copyright owners and the filesharing community. For example, in a recent effort to combat illegal filesharing, Madonna uploaded decoy tracks from her latest release onto filesharing networks.¹⁷⁰ On the tracks, Madonna could be heard asking, “What the f*** do you think you are doing?”¹⁷¹ Rather than deterring filesharers, Madonna’s aggressive response emboldened them as hackers retaliated by temporarily overtaking her website and offering her latest album for download.¹⁷² Given their illegal nature and potential for consumer backlash, these measures, while somewhat effective, should be avoided.

B. Legislation

Another alternative under review has been an effort to supplement existing copyright law with legislation targeting filesharing technology.

167. *Id.*; see also Sabra Chartand, *A Technique to Help Combat the Online Piracy of Music Uses Decoy Files that Deliver Noise and ‘Gotcha’ Scoldings*, N.Y. TIMES, May 17, 2004, at C1 (discussing a patented software technology that enables “decoying,” a species of “spoofing”).

168. Sorkin, *supra* note 166.

169. *Id.*

170. BBC News, *Madonna Swears at Music Pirates*, April 22, 2003, <http://news.bbc.co.uk/1/hi/technology/2962475.stm>.

171. *Id.*

172. *Id.*

In particular, the Senate Judiciary Committee's consideration of the Inducing Infringement of Copyright Act of 2004 ("Induce Act") has drawn considerable criticism and controversy.¹⁷³ Growing out of the recording industry's unhappiness with the *Grokster Ltd.* decision and introduced by Republican Senator Orrin G. Hatch, the Induce Act would hold anyone liable for intentionally aiding, abetting, inducing, or procuring copyright infringement.¹⁷⁴ Unfortunately, the broad language of the proposed statute would not only chill future innovative technology possessing noninfringing uses, such as P2P networks, but would also implicate already accepted forms of existing technology from VCRs to MP3 players.¹⁷⁵ Those manufacturers providing technology capable of substantial non-infringing uses would be left to wonder whether the Induce Act renders *Sony-Betamax* obsolete.

Consequently, diverse groups such as the EFF and the Consumer Electronics Association have united in vigorous opposition to the Induce Act, while trade groups such as the RIAA have actively lobbied for the bill's passage.¹⁷⁶ Although drawing bi-partisan support in Congress,¹⁷⁷ the Induce Act is misguided. While copyright owners have a right to protect their works, their exercise of that right should not be permitted to adversely affect the growth of innovative and beneficial technology. Accordingly, the current proposed legislation should be avoided in favor of less draconian alternatives.

C. Public Relations, Product Enhancements, and Online Music Services

In terms of public relations, the RIAA is already reaching out to educate the public on the ills of illegally downloading copyrighted material.¹⁷⁸ Educational efforts have run the gamut from seeking to "educate" universities through letters of warning identifying students engaging in illegal filesharing¹⁷⁹ to crafting websites aimed at a younger

173. Tom Zeller, *Senate Bill Aims at Makers of File-Sharing Software*, N.Y. TIMES, Sept. 30, 2004, at C1 [hereinafter Zeller II].

174. *Id.* In summer 2003, Senator Orin Hatch also proposed finding a way to destroy the computers of those engaging in illegal filesharing. Katyal, *supra* note 21, at 299.

175. Zeller II, *supra* note 173.

176. *Id.*

177. *Id.*

178. RIAA, Issues—Copyright, <http://www.riaa.com/issues/education/default.asp> (last visited Sept. 14, 2005) (collecting links on various educational campaigns related to copyright infringement).

179. Janelle Brown, *MP3 Crackdown*, SALON.COM, Nov. 19, 1999, <http://>

audiences that relate copyright issues in a simple way.¹⁸⁰ This is a commonsensical step forward since many people may not even know that what they are doing is wrong.¹⁸¹ However, such initiatives are not themselves sufficient. The recording industry should also enhance their products to create a more attractive alternative to downloading MP3s of lesser quality.¹⁸² For example, by offering complementary items as part of a CD purchase, the product may induce a conscious choice over copyright infringement.¹⁸³ Either a free t-shirt with every three CD purchases or a chance at free concert tickets are promotions that fans appreciate. Free downloads cannot replace such items.¹⁸⁴ Not only would these incentives dissuade illegal filesharing in a positive way, but the recording industry would gain back some of the goodwill lost from suing anonymous direct infringers.

Finally, online music services represent a practical alternative to litigation by generating substantial revenue for the recording industry. For example, Apple launched the iTunes Music Store in early 2003, allowing consumers to download music for ninety-nine cents per song.¹⁸⁵ Only two years later, Apple announced that “music fans have purchased and downloaded more than 250 million songs from the iTunes[] Music Store. iTunes users are now downloading one and a quarter million songs per day, which is an annual rate of almost half a billion songs per year.”¹⁸⁶ Thus, based upon the cost of each song, iTunes should generate an estimated five hundred million dollars in annual revenue for the recording industry. Other available pay services include the re-released Napster and Pressplay service.¹⁸⁷ The early success of these services reveals that music enthusiasts are willing to pay for affordable music

archive.salon.com/tech/log/1999/11/17/riaa.

180. See, e.g., What’s the Download.com, Find Out What Are Legal and Illegal Online Music Downloads, http://www.whatsthe-download.com/whats_the_controversy/index.aspx (last visited Sept. 14, 2005).

181. Norman, *supra* note 47, at 404.

182. *Id.* at 408-409.

183. *Id.*

184. See *id.*

185. VAIDHYANATHAN, *supra* note 29, at 58-59. For an overview of the service, see Apple, Apple— iPod + iTunes, <http://www.apple.com/itunes> (last visited Sept. 7, 2005).

186. Press Release, Apple, iTunes Music Store Downloads Top a Quarter Billion Songs (Jan. 24, 2005), available at <http://www.apple.com/pr/library/2005/jan/24itms.html>.

187. J.D. Biersdorfer, *supra* note 65. The “new” Napster boasts access to over one million tracks for a flat monthly fee. See Napster, Napster.com Tutorial, <http://www.napster.com/tutorial/overview3.html> (last visited Sept. 14, 2005).

online.¹⁸⁸ However, the current services' track selection remains more limited than catalogues offered through the collective efforts of the filesharing community.¹⁸⁹ Until these catalogues become all-inclusive, computer users will continue to turn to filesharing entities to fill the gap. Accordingly, these services are only a solid intermediate step. The filesharing-copyright dilemma still needs a more comprehensive approach that compensates artists without discarding the unique capabilities of P2P.

D. Voluntary Collective Licensing Arrangement

Recently, the EFF released a white paper proposing a voluntary collective licensing arrangement as a favored solution.¹⁹⁰ Under this regime, filesharers would pay a monthly fee to a music industry "collecting society" in exchange for the privilege to share copyrighted music on *any* available P2P application.¹⁹¹ The proceeds would then be divided among copyright owners according to the popularity of their music among filesharers.¹⁹² Instead of stifling P2P technology, this proposal would encourage active filesharing and competition among various P2P applications.¹⁹³ The more users agreeing to be bound by such an agreement, the greater the profit for the recording industry.¹⁹⁴ Through cases such as *Sony Music Entertainment Inc.*, the conditions have become ripe for collective licensing. Filesharers can no longer hide safely behind the veil of anonymity. Thus, they have ample motivation to avoid legal liability by binding themselves to a collective licensing

188. See EFF, Making P2P Pay Artists, <http://www.eff.org/share/?f=compensation.html> (last visited Sept. 7, 2005).

189. See EFF, A Better Way Forward: Voluntary Collective Licensing of Music File Sharing 1 (Feb. 2004), available at http://www.eff.org/share/collective_lic_wp.pdf ("Apple's iTunes Music Store brags about its inventory of over 500,000 songs. Sounds pretty good, until you realize that the fans have made millions of songs available on KaZaA [sic]."). On a personal note, this author realized quickly the significant selection limitations of current online music services. After searching three different legitimate online music services, including iTunes, for the "A River Runs Through It" soundtrack, this author was disappointed to learn that it was unavailable. However, a quick search on Soulseek, a lesser known P2P program, revealed at least one available copy of the soundtrack.

190. See *id.*

191. *Id.* (Those paying the licensing fee would be immunized from infringement suits for sharing copyrighted recordings.).

192. *Id.*

193. *Id.* at 2.

194. *Id.*

agreement.¹⁹⁵ Those refusing to be bound risk the continued threat of being sued. Further, the choice could be avoided altogether by bundling the monthly licensing fee directly into ISP users' invoices.¹⁹⁶ Based upon the size of the current filesharing community, this arrangement could generate more than three billion dollars in profit *annually*.¹⁹⁷ The recording industry has everything to gain by implementing collective licensing. Artists would be properly compensated and users would gain the benefit and convenience of legitimate filesharing technology. Further, the recording industry would relieve itself of substantial legal expenses, allowing it to redirect these funds into the promotion of new artists. Consequently, the recording industry's current litigation strategy should be disregarded in favor of the voluntary collective licensing agreement.

Conclusion

A cursory review of filesharing case law prompts two interrelated observations. First, at least certain forms of decentralized P2P architecture may remain legitimate and viable, escaping secondary liability copyright infringement claims. Second, the recording industry's position on suing anonymous direct infringers rests on a firm legal foundation. Given the former observation, it is unsurprising that the recording industry increasingly relies upon the latter. However, the availability of litigation tools at the recording industry's disposal does not dictate their use. Suing anonymous filesharers should be the metaphorical nuclear option for the copyright industry—one that is threatened but never used. Litigation against direct infringers destroys more than it accomplishes by potentially alienating a serious music fan base while discouraging the use of promising technology. Thus, courtroom solutions are best held at bay in favor of litigation alternatives. Although the recording industry has tacitly acknowledged this reality through increased public relations efforts and online MP3 services, it continues to seek remedies through the courts. The filesharing phenomenon demands a more comprehensive "outside the box" solution. More than just another idealistic notion, adoption of a voluntary

195. See EFF, *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing 2* (Feb. 2004), available at http://www.eff.org/share/collective_lic_wp.pdf.

196. *Id.*

197. *Id.* Note that the collective licensing fee could be increased if the estimate of 60 million people is too large.

collective licensing regime meets this urgent need. Through a voluntary collective licensing agreement, artists will be fairly compensated for their work and the public's appetite for P2P technology will be satisfied. Therefore, this Note recommends the immediate abandonment of lawsuits against anonymous filesharers and the adoption of a voluntary collective licensing agreement.