



“SHAMNESTY” VS. AMNESTY:  
CAN THE RIAA GRANT IMMUNITY TO FILE-SHARERS FROM  
COPYRIGHT INFRINGEMENT LAWSUITS?

NATOSHA CUYLER-SHERMAN

ABSTRACT

The Recording Industry Association of America (RIAA) is the industry trade association for sound and music recordings and represents various music companies, songwriters, and music artists. One of the main functions of the RIAA is to enforce its members' copyrights. The RIAA is currently representing members in copyright infringement lawsuits. As an alternative to being sued, the RIAA announced that it would grant amnesty to file sharers who voluntarily identified themselves and promised to stop illegally sharing music. In reality, non-RIAA members and even RIAA members themselves can still sue file sharers because the organization itself does not have the authority to grant amnesty. In addition, file sharers who sign the amnesty affidavit may expose themselves to criminal prosecution, which could lead to jail time. This comment offers a few solutions in which the music industry and its Internet consumers can reach a middle ground and lessen the pandemonium surrounding the concepts of downloading and uploading copyrighted works.

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NATOSHA CUYLER-SHERMAN<sup>\*\*</sup>

INTRODUCTION

John Sharp sits in his dorm room at Legal University watching music videos on television. His favorite band, Robots, appears on the television in their latest video, singing their new song. John is excited about the new song and decides to download the song onto his computer. John gets on his computer and connects to VAS, an Internet Service Provider that allows peer-to-peer file sharing. He types in the name of the band, Robots, and the name of its new song. John then picks from a list of VAS users that have made this song available to other VAS users and begins downloading his request. Within a matter of minutes, John has Robots' new song on his computer system and now he can listen to the song as often as he likes.

The next day, John is watching the local news on television. While watching the news, John hears the latest announcements of the Recording Industry Association of America (RIAA). The RIAA is now filing suits against individuals who upload<sup>1</sup> and download<sup>2</sup> copyrighted works on the Internet. At the same time, the RIAA is offering a Clean Slate Program<sup>3</sup> for those who want to avoid the lawsuits altogether. John, afraid of being targeted by an RIAA lawsuit because he can neither afford an attorney to represent him in the lawsuit nor afford to pay the recording industry any damages, contemplates applying for the Clean Slate Program. Can the Clean Slate Program really give John amnesty from all copyright infringement lawsuits stemming from the music he downloaded? If so, would it be in John's best interest to sign a declaration admitting his guilt of file sharing?

The RIAA is the industry trade association for sound and music recordings.<sup>4</sup> Its members consist of various major music companies, songwriters, and music artists who produce most of the music sold in the United States.<sup>5</sup> One of the main functions

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<sup>\*</sup> Electronic Frontier Foundation, *Op-Ed: Amnesty for Music File Sharing Is a Sham*, at <http://www.eff.org/effector/16/24.php> (Sept. 29, 2003) (emphasizing the fact that the RIAA's Clean Slate Program is not an offer of amnesty, but is in actuality, a sham) [hereinafter Op-Ed].

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<sup>1</sup> *United States v. Mohrbacher*, 182 F.3d 1041, 1048 (9th Cir. 1999) (quoting Robin Williams, *An Informal Dictionary of Computer Terms* 170–71 (1993), which states that upload means, “to send a file to another computer”).

<sup>2</sup> *Mohrbacher*, 182 F.3d at 1048 (quoting Robin Williams, *Jargon, An Informal Dictionary of Computer Terms*, 170–71 (1993), which states that download means, “to receive information, typically a file, from another computer to one's own computer via a modem”).

<sup>3</sup> Electronic Frontier Foundation, *Recording Industry Announces Lawsuits Against Music Sharers; Electronic Frontier Foundation Warning on 'Amnesty' Program*, at [http://www.eff.org/IP/P2P/20030908\\_eff\\_pr.php](http://www.eff.org/IP/P2P/20030908_eff_pr.php) (Sept. 8, 2003) [hereinafter Warning].

<sup>4</sup> *In re Verizon Internet Servs. Inc.*, 240 F. Supp. 2d 24, 26 n.1 (D.C. Cir. 2003).

<sup>5</sup> *Id.*; see also *In re Aimster Copyright Litigation*, 252 F. Supp. 2d 634, 639 (N.D. Ill. 2002).

of the RIAA is to act on behalf of its members and enforce members' copyrights.<sup>6</sup> For example, when someone infringes an RIAA member's copyright, the RIAA can represent him in legal actions against the copyright infringer.<sup>7</sup> Because the illegal distribution of substantial amounts of copyrighted music on peer-to-peer (P2P) networks is on a rampage, the RIAA currently finds itself representing many of its members in copyright infringement lawsuits.<sup>8</sup>

After a multi-year effort informing the public about the illegality of unauthorized downloading, the members of the RIAA have resorted to litigation.<sup>9</sup> Individuals continue to download copyrighted works on P2P networks, which threatens the jobs of thousands of people in the music industry.<sup>10</sup> RIAA President Cary Sherman was quoted as saying:

[n]obody likes playing the heavy and having to resort to litigation. But when your product is being regularly stolen, there comes a time when you have to take appropriate action. We simply cannot allow online piracy to continue destroying the livelihoods of artists, musicians, songwriters, retailers, and everyone in the music industry.<sup>11</sup>

At the same time, the RIAA announced another option to those who illegally download copyrighted works.<sup>12</sup> The RIAA announced that the music industry would grant amnesty to P2P users who voluntarily identify themselves and stop illegally

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<sup>6</sup> Recording Industry Association of America, at <http://www.riaa.com/about/default.asm> (last visited Jan. 27, 2004).

<sup>7</sup> *Id.*

<sup>8</sup> Electronic Frontier Foundation, available at <http://www.eff.org/IP/P2P/riaa-v-thepeople.php> (last visited Jan. 27, 2004) [hereinafter Complaint] (containing the complaint of Eric Parke against the RIAA). Attached to the complaint is Parke's Exhibit A which consists of an article by RIAA representatives explaining why going after individual file-sharers is so essential to putting a stop to illegal downloading. Complaint, Exhibit A, at 2, available at [http://www.eff.org/IP/P2P/Parke\\_v\\_RIAA\\_Complaint.pdf](http://www.eff.org/IP/P2P/Parke_v_RIAA_Complaint.pdf) (last visited Jan. 27, 2004).

<sup>9</sup> *Id.* at 1. Cary Sherman, RIAA President, said that the RIAA has continually made efforts to educate the public about illegal downloading and its consequences. *Id.* at 2. The RIAA has worked with the university community to discourage uploading and downloading over Internet Service Providers (ISPs). *Id.* Furthermore, the RIAA has sent over four million Instant Messages directly to infringers on various ISPs. *Id.* Within these Instant Messages, the RIAA warned the file-sharers that they could face legal action if they did not stop illegally downloading copyrighted works. *Id.* According to Mr. Sherman, those individuals who have continued to violate the copyright laws, notwithstanding the warnings of the RIAA will be sued for copyright infringement. *Id.*

<sup>10</sup> *Id.* For instance, Courtney Proffitt, Executive Director of the Association for Independent Music, argues that small industry labels are severely hurt by the acts of file-sharers. *Id.* at 6. According to Ms. Proffitt, "[t]he small industry labels are struggling to promote and sell their music, in order to stay in business. *Id.* If they are not getting paid for the music they create, they cannot continue to operate. *Id.* This results in a loss to our overall culture." *Id.* Moreover, RIAA representatives emphasize that file sharing "not only robs the songwriters and recording artists of their livelihoods, it also undermines the future of music itself. . . . In addition, it threatens the jobs of tens of thousands of less celebrated people . . . from engineers and technicians to warehouse workers and record store clerks." *Id.* at 3.

<sup>11</sup> *Id.* at 1.

<sup>12</sup> Warning, *supra* note 3.

sharing music on the Internet.<sup>13</sup> This alternative method to being sued is called, the “Clean Slate Program.”<sup>14</sup> If one promises to stop using P2P networks to illegally download copyrighted works, destroys any copies of downloaded audio files, and fills out a sworn affidavit, the RIAA will not assist in any copyright infringement suits against file-swappers.<sup>15</sup>

At first glance, the Clean Slate Program appears to be an excellent deal. However, according to Attorney Ira Rothken,

[t]he RIAA claims that the amnesty program ‘would provide people with a clean slate,’ but . . . the legal document provides no release of claims, no promise not to sue you . . . The offer is deceptive because the RIAA doesn’t own the copyrights in question . . . So in the end, the person who supplies all their information to the Clean Slate Program will have a dirtier slate than they would have if they never participated.<sup>16</sup>

In reality, the RIAA cannot protect file-sharers from all civil suits.<sup>17</sup> Furthermore, file-sharers who sign the amnesty affidavits may expose themselves to criminal prosecution, which could lead to jail time.<sup>18</sup> In fact, the RIAA does not have the authority to promise that a file-sharer will not be sued.<sup>19</sup> The RIAA does not own any of its members’ copyrights and, furthermore, its member labels are not bound by the arrangement between an individual who signs the affidavit and the RIAA.<sup>20</sup> Critics of the Clean Slate Program warn that the record companies and artists who fund the RIAA can still sue file-sharers.<sup>21</sup> In addition, individual labels and

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<sup>13</sup> Liane Cassavo, *Consumers Strike Back*, Computerworld, available at <http://www.computerworld.com/printthis/2003/0,4814,84845,00.html> (Sept. 12, 2003).

<sup>14</sup> Warning, *supra* note 3.

<sup>15</sup> See Cassavo *supra* note 13; see also Benny Evangelista, *Novato man sues RIAA over amnesty program, Suit says music industry’s plan misleading*, available at <http://www.sfgate.com> (Sept. 11, 2003) (discussing the assertion of RIAA senior vice president for legal affairs, Matthew Oppenheim that the amnesty program will “give people an easy way to avoid a costly lawsuit by the RIAA”).

<sup>16</sup> *Id.*; see also Stefanie Olsen, *RIAA Sued for Amnesty Offer*, CNet News, available at [http://cnet.com.com/2100-1027\\_3-5073972.html](http://cnet.com.com/2100-1027_3-5073972.html) (last modified Sept. 10, 2003). Ira Rothken is the attorney representing California resident, Eric Parke. *Id.* Eric Parke, on behalf of the general public of the state of California, filed suit against the RIAA in the Marin Superior Court of California. *Id.* The charge is that the RIAA’s Clean Slate Program is a deceptive and fraudulent business practice. *Id.*

<sup>17</sup> Electronic Frontier Foundation, *Why the RIAA’s “Amnesty” Offer is a Sham*, available at <http://www.eff.org> (Sept. 9, 2003) [hereinafter Sham]. The article contends that the RIAA’s Clean Slate Program is largely illusory because it only protects file-sharers against RIAA lawsuits. *Id.* Furthermore, by signing the RIAA affidavit, the article declares that file-sharers will expose themselves to criminal liability. *Id.* Finally, the program does not protect individuals from members of the RIAA. *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> See Cassavo *supra* note 13.

<sup>20</sup> *Id.* The article strongly suggests that because the RIAA does not own the disputed copyrights, it cannot promise file-sharers that the actual copyright owners will not subpoena the RIAA for the file-sharers’ personal information and then sue them for copyright infringement. *Id.*

<sup>21</sup> Roy Mark, *RIAA Amnesty: Deceptive Business Practice*, available at <http://www.internetnews.com> (Sept. 11, 2003) (pointing out that the RIAA will likely hand over the

songwriters who are not members of the RIAA can sue anyone who has signed the amnesty affidavit.<sup>22</sup> In the end, where does the amnesty program lead file-sharers? It leads file-sharers to the place they were trying to avoid by signing the affidavit – the courtroom.

This commentary focuses on the problems with the Clean Slate Program offered by the RIAA. First, the major events that gave rise to the RIAA filing suits against individual file-sharers are highlighted. By identifying (1) what P2P file sharing is, (2) the relationship between file-sharers and copyright infringement, and (3) how the RIAA can bring lawsuits against file-sharers, the potential liability individuals face against an RIAA lawsuit will be understood. Although the RIAA may be justified in arguing that copyright holders' rights are being violated by the structure of P2P file sharing, its techniques for achieving satisfaction among copyright holders and music fans are inadequate.

Second, the analysis section identifies the problems with the RIAA's latest fix, the Clean Slate Program. The RIAA does not have the authority to offer amnesty to individuals who apply for the program; the program exposes its participants to more lawsuits; and by participating in the program, individuals expose themselves to possible criminal prosecution.

Finally, if the RIAA wants to keep its Clean Slate Program in operation, it will have to resolve the program's flaws. The copyright holders and various P2P networks must develop alternative solutions, such as charging a reasonable royalty to individuals who download copyrighted works. Furthermore, the conclusion emphasizes why the Clean Slate Program is ineffective and how other solutions can bring about a compromise between the music industry and its Internet consumers.

## I. BACKGROUND

During the summer of 2003, the RIAA announced that it would sue individual users of P2P file-sharing systems for copyright infringement.<sup>23</sup> This announcement signified a change in the RIAA's tactics against illegal downloading. At first, the industry attempted to put pressure on the online song-trading services, like Napster Inc., to stop illegal downloading.<sup>24</sup> However, illegal downloading among file-sharers

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personal information of file-sharers who signed the Clean Slate Program's affidavit in response to a subpoena).

<sup>22</sup> See generally Warning, *supra* note 3 (pointing out that the RIAA wants file-sharers to confess their guilt of copyright infringement, while leaving them vulnerable to RIAA members and non-RIAA members). If the RIAA cannot protect the file-sharers from its own members, it especially cannot protect file-sharers from independent copyright holders not associated with the RIAA. *Id.*

<sup>23</sup> Amplifier, *RIAA threatens lawsuits against individual downloaders*, available at <http://www.amplifier.co.nz/amp/view?itemid=6435> (last visited Oct. 10, 2003). After making the announcement to sue individuals using peer-to-peer software, the RIAA president Cary Sherman said, "[w]e're going to begin taking names and preparing lawsuits against peer-to-peer network users who are illegally making available a substantial number of music files to millions of other computer users." *Id.* In an effort to fight against illegal downloading, the RIAA is hoping file-sharers will be frightened by the fact that the RIAA is seeking damages of up to \$150,000.00 for each copyright violation in its lawsuits. *Id.*

<sup>24</sup> Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 389 (2003). Shawn Fanning, a college student, who wanted to make the search for MP3 files easier to access on Internet servers,

continued to rise.<sup>25</sup> While the number of file-sharers who illegally downloaded copyrighted works increased, the music industry's sales continued to decrease at approximately eight percent annually.<sup>26</sup> Based on the determinant caused by file-sharers to the music industry, the RIAA felt it had no choice but target the users themselves.<sup>27</sup> The RIAA through its new tactic will choose whom to sue by using software that can scan users' publicly available P2P directories.<sup>28</sup> The P2P directories help identify which online song-trading services are being used.<sup>29</sup> After identifying the service, the RIAA will subpoena the service for the user's name, address, and other personal information.<sup>30</sup>

Within the first few weeks of announcing its new strategy against illegal downloading, the RIAA filed 261 lawsuits against individuals.<sup>31</sup> Furthermore, the RIAA filed over 1600 subpoenas against online song-trading services to get the

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started Napster, Inc. *Id.* Napster, Inc. allowed its subscribers to search for music on one another's hard drives and share music files. *Id.* Because Napster facilitated unauthorized copying and downloading of the copyrighted works of others, the Court concluded that the recording companies had established a case of copyright infringement against Napster. *Id.*; see also *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (concluding that Napster allowed its users to infringe at least two of the copyright holders' exclusive rights: the rights of reproduction and distribution); Sarah McWane, *Hollywood vs. Silicon Valley: DeCSS Down, Napster to Go*, 9 COMMLAW CONSPPECTUS 87, 101 (2001) (emphasizing that over 600,000 files were available for sharing on Napster). More than 10,000 music files were shared per second over Napster. *Id.* Furthermore, Napster grew at a rate of 200% per month and there was a projection that by the end of 2000, there would be seventy-five million Napster users. *Id.*

<sup>25</sup> Yu, *supra* note 24, at 390 (emphasizing that sales near college campuses dropped by twelve to thirteen percent); see also Marci A. Hamilton, *Why suing college students for illegal music downloading is right*, CNN, available at <http://www.cnn.com/2003/LAW/08/07/findlaw.analysis.hamilton.music/index.html> (Aug. 7, 2003) (accentuating the fact that there is no such thing as "cost-free downloading"). The author is in favor of the RIAA going after individual file-sharers because in her opinion, it is both legally and morally right to do so. *Id.*

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

<sup>27</sup> *Id.*; see *Palmer v. Slaughter*, No. 99-899-GMS, 2000 U.S. Dist. LEXIS 22118 at 13 (D.Del., July, 13, 2000) (emphasizing the importance of putting infringers on notice that "it costs less to obey the copyright laws than to violate them"); *Broadcast Music, Inc. v. R Bar Manhattan, Inc.*, 919 F. Supp. 656, 660 (S.D.N.Y. 1996) (quoting *Rodgers v. Eighty Four Lumber Co.*, 623 F. Supp. 889, 892 (W.D. Pa. 1985); *JoBete Music Co. v. Hampton*, 864 F. Supp. 7, 9 (S.D. Miss. 1994) (accentuating that "[i]n order to serve as a deterrent to copyright violators . . . it is deemed necessary and reasonable to allow recovery in excess of the license rate . . .").

<sup>28</sup> Electronic Frontier Foundation, *How Not to Get Sued by the RIAA for File Sharing*, at <http://www.eff.org/IP/P2P/howto-notgetsued.php> (last visited Oct. 10, 2003) [hereinafter *File Sharing*]; see also The Associate Press, *Music biz to sue individual users of downloaded music*, available at [http://www.nydailynews.com/front/breaking\\_news/story/95503p-86541c.html](http://www.nydailynews.com/front/breaking_news/story/95503p-86541c.html) (June 25, 2003) (emphasizing the fact that no one is anonymous from being detected as a file-sharer). By searching Internet file-sharing networks to identify users who offer substantial collections of music files for downloading, "the free ride is over." *Id.* With the RIAA's new tactic, file-sharers will no longer remain hidden from the possibility of being sued for copyright infringement. *Id.*

<sup>29</sup> See *File Sharing*, *supra* note 28.

<sup>30</sup> *Id.*

<sup>31</sup> Pail Boutin, *An Offer You Can Refuse: The RIAA's amnesty deal may not keep you from being sued*, available at <http://slate.msn.com> (Sept. 8, 2003); see also Electronic Frontier Foundation, *Federal Court Spurns Recording Industry Enforcement Tactics*, available at [http://www.eff.org/IP/P2P/20030808\\_eff\\_pr.php](http://www.eff.org/IP/P2P/20030808_eff_pr.php) (Aug. 8, 2003) (emphasizing that the RIAA has reportedly filed more than 2,000 subpoenas through the D.C. court alone).

identities of file-sharers it can sue for copyright infringement.<sup>32</sup> To understand exactly how the RIAA process allows the RIAA to bring so many lawsuits against individual users, this section will explain how a P2P works; the relationship between file-sharers and copyright infringement; and how the RIAA can subpoena a user's information from an Internet Service Provider (ISP).

#### A. What is Peer-to-Peer File Sharing?

According to TechTarget,

P2P is a type of transient Internet network that allows a group of computer users with the same networking program to be connected with each other and directly access files from one another's hard drives.<sup>33</sup>

P2P file sharing is like a library in the sense that all file-sharers can bring together their own collections of music, films, games, and pictures and share them with other users.<sup>34</sup> P2P file sharing allows individuals to search through a catalog for a music or media file they want.<sup>35</sup> If it is listed in the catalog, the individuals can copy the electronic file from another person's computer onto their own computer.<sup>36</sup>

So how does the P2P work? When an individual is searching for a file on an online file-sharing service, he must first open the utility.<sup>37</sup> Once there is a

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<sup>32</sup> Warning, *supra* note 3. *see also* Dampier, *RIAA Accelerates Subpoenas; Now 300 Per Week*, at <http://www.zeropaid.com/news/articles/auto/07232003d.php> (July 23, 2003) (emphasizing that the RIAA told reporters its plan to increase the number of subpoena requests from seventy-five per week to three hundred). In addition, before, only file-sharers sharing large numbers of songs were targeted by the RIAA, now, file-sharers "trading just a handful of songs are also within the range of a subpoena request." *Id.*

<sup>33</sup> TechTarget, *available at* [http://searchnetworking.techtarget.com/sDefinition/0,,sid7\\_gci212769,00.html](http://searchnetworking.techtarget.com/sDefinition/0,,sid7_gci212769,00.html) (last visited Oct. 7, 2003); *see* Emelie Rutherford, *The P2P Report*, Knowledge Management Resource Center, at [http://www.cio.com/research/knowledge/edit/p2p\\_content.html](http://www.cio.com/research/knowledge/edit/p2p_content.html) (Dec. 1, 2000) (pointing out that P2P applications "allow users to communicate synchronously, doing things such as instant messaging, working on shared documents and searching each other's computers for files"). The article goes on to stress the fact that "P2P allows computers, and their users, to tap unused resources – such as extra megahertz of processing power, gigabytes of storage and the rare music gems – that would otherwise remain locked up in individual desktops." *Id.*

<sup>34</sup> Cyberpatrol, *Peer-to-peer (P2P) File Sharing*, at <http://www.cyberpatrol.com/resources/p2p.aspx> (last visited Oct. 7, 2003) [hereinafter *Cyberpatrol*]; *see* Bradley Mitchell, *Peer-to-peer, Wireless/Networking*, at <http://compnetworking.about.com/cs/peertopeer/> (last visited Oct. 10, 2003) (accenting the point that peer-to-peer networking "eliminates the need for servers and allows all computers to communicate and share resources as equals"); P2P Transfers, at <http://p2ptransfers.com/whatisp2p.htm> (last visited Oct. 9, 2003). The article highlights the reality that peer-to-peer networking allows Internet users who live on the same street or in two different countries to share files. *Id.*

<sup>35</sup> *Cyberpatrol, supra* note 34.

<sup>36</sup> *Id.*

<sup>37</sup> P2P Transfers, at <http://p2ptransfers.com/whatisp2p.htm> (last visited Oct. 9, 2003). Opening the utility means that either the online song-trading service will check for an Internet connection, or the individual must connect to the Internet itself before being able to open the service. *Id.*



connection, the individual is logged onto the service’s central server.<sup>38</sup> Next, the individual types in the name of the file he is looking for.<sup>39</sup> The central server then queries its index to determine which computers online have the file requested.<sup>40</sup> When a match is found, the central server informs the individual where to find the requested file.<sup>41</sup> Then, the P2P Internet network will display a list of the computers that are connected to the central server.<sup>42</sup> This list will have the specific file requested and subsequently, the individual can click on the file of interest and download the file.<sup>43</sup> Once the individual chooses to make a download, a connection is established between his program and the system hosting the file he selected.<sup>44</sup> If a connection is successful, the file begins downloading.<sup>45</sup> Once the file is downloaded, the host computer breaks the connection with the individual’s system.<sup>46</sup> Within a matter of minutes, the individual has the file he sought and can now access the file from his own system.<sup>47</sup> Thus, the process of P2P file sharing allows users to:

- (1) make MP3 music files stored on individual computer hard drives 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.<sup>48</sup>

#### *B. The Relationship Between File-Sharers And Copyright Infringement From the RIAA’s Perspective*

The RIAA contends that individuals who participate in the illegal distribution of copyrighted works, by sharing copyrighted work files with other users, are guilty of copyright infringement.<sup>49</sup> A copyright is

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<sup>38</sup> *Id.* The main purpose of the central server is to “keep an index of all the users currently online and connect them to each other.” *Id.* The central server itself does not contain any of the sought after files. *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

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

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*; see also Kwansai Gaukin University – School of Policies Studies, *P2P File Sharing*, available at <http://www.ksc.kwansei.ac.jp/researchfair02/03/website/whatis.htm> (last visited Sept. 30, 2003).

<sup>48</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001) (pointing out how a P2P network facilitates the transmission of music files between and among its users).

<sup>49</sup> *In re Aimster Copyright Litig.*, 252 F. Supp. 2d 634, 639 (N.D. Ill. 2002) (concluding that anyone who transferred copyrighted works over the Internet, without the authority of the copyrighted holders themselves, were infringing on the copyright holders’ rights); see generally 17 U.S.C. § 501 (1976) (emphasizing that anyone who violates “any of the exclusive rights of the copyright owner is an infringer of the rights of the author”).

a property right in an original work of authorship (such as literary, musical, artistic, photographic, or film work) fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform, and display the work.<sup>50</sup>

When a person is found guilty of copyright infringement, it is because he reproduced, displayed, or distributed copyrighted (protected) material without the permission of the copyright owner.<sup>51</sup>

As works are made available for the taking, literally at the push of a button, the RIAA fears that the value of the copyrighted works of music labels, artists, and songwriters will plummet.<sup>52</sup> In addition, the RIAA believes that illegal downloading eats away at the money invested for producing new music, which in effect, harms the future of music.<sup>53</sup> The case of *A&M Records, Inc. v. Napster, Inc.*<sup>54</sup> illustrates the harsh effect copyright infringement has on the music industry. In *A&M Records*, the defendant (Napster) designed and operated a system, which allowed the transmission of sound recordings among its users.<sup>55</sup> According to the district court, “as much as eighty-seven percent of the files available on Napster may be copyrighted and more than seventy percent may be owned or administered by plaintiffs.”<sup>56</sup> According to the Court, Napster directly infringed upon the plaintiffs’ copyrighted rights in two ways.<sup>57</sup> By allowing its users to upload file names to its search index for others to

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<sup>50</sup> BLACK’S LAW DICTIONARY, 337 (7th ed. 1999).

<sup>51</sup> University of Albany Residential Network, *Copyright in a Nutshell*, RESNET, available at <http://resnet.albany.edu/rules/copyrightshort.htm> (last visited Oct. 10, 2003). The article attempts to warn individuals, especially college students, who share files over the Internet that what they are doing, under the law, is copyright infringement. *Id.* The point of the article is to try and make students aware of what copyright infringement means and to stop students from file sharing before the RIAA sues them. *Id.*

On another note, it is important to mention the three types of infringement discussed by the courts in cases like *Napster, Inc.* If sued, individual file-sharers will possibly be held liable for direct infringement. Direct infringement is the “act of making, using, selling, offering for sale, or importing into the United States without the patent owner’s permission, a product that is covered by the claims of a valid patent.” BLACK’S LAW DICTIONARY, 785 (7th ed. 1999). ISPs who are sued face not only potential liability for direct infringement, but liability for contributory infringement or vicarious infringement. Contributory infringement is the “act of participating in, or contributing to, the infringing acts of another person.” BLACK’S LAW DICTIONARY, 785 (7th ed. 1999). On the other hand, vicarious infringement is “a person’s liability for an infringing act of someone else, even though the person has not directly committed an act of infringement.” BLACK’S LAW DICTIONARY, 786 (7th ed. 1999).

<sup>52</sup> *In re Verizon Internet Services, Inc.*, 257 F. Supp. 2d at 273; see *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1016–17 (9th Cir. 2001) (Plaintiffs offered a study conducted by Michael Fine, Chief Executive Officer of Soundscan, (the “Fine Report”) to show how file sharing constituted irreparable harm). According to the Fine Report, within the college market, online file sharing caused a dramatic loss in music sales. *Id.* See generally RIAA, *What the RIAA is doing About Piracy*, at <http://www.riaa.com/issues/piracy/riaa.asp> (last visited Jan. 27, 2004) (estimating that illegal downloading costs the music industry 300 million dollars a year “domestically”).

<sup>53</sup> Complaint, *supra* note 8. According to Frances W. Preston, President of BMI, “those who steal music are stealing the future creativity they so passionately crave.” *Id.*

<sup>54</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

<sup>55</sup> *Id.* at 1011–13.

<sup>56</sup> *Id.* at 1013.

<sup>57</sup> *Id.* at 1014.

copy, Napster violated the plaintiffs’ distribution rights.<sup>58</sup> In addition, by allowing its users to download files containing copyrighted works, Napster violated the plaintiffs’ reproduction rights.<sup>59</sup>

Similarly, the Court held that Napster harmed the music market in two ways.<sup>60</sup> First, Napster’s services reduced audio sales among college students due to the increased availability of free downloading, thus replacing CD purchases and robbing copyright holders of royalties for their copyrighted works.<sup>61</sup> Second, Napster’s services made it difficult for the plaintiffs to enter into the market of digital downloading.<sup>62</sup> This means that by allowing its users to download digital works for free, Napster harmed the plaintiffs’ attempt to get into the market and charge for the same downloads.<sup>63</sup>

Furthermore, because Napster had knowledge of infringing activity and materially contributed to the infringing conduct of another, Napster was potentially a contributory infringer.<sup>64</sup> The RIAA informed Napster of the fact that over twelve thousand of its files were infringing files.<sup>65</sup> This evidence, according to the Court, was persuasive in plaintiffs establishing that Napster knew of its users infringement of their copyrights.<sup>66</sup> Moreover, the Court concluded that Napster materially contributed to the infringing conduct of another because without the support services Napster provided, its users could not find and download the plaintiffs’ copyrighted works.<sup>67</sup>

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<sup>58</sup> *Id.*; see 17 U.S.C. § 106(3) (2000).

<sup>59</sup> *Id.*; see 17 U.S.C. § 106(1) (2000).

<sup>60</sup> *Id.* at 1016.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 1016–17.

<sup>63</sup> *Id.* at 1017.

<sup>64</sup> *Id.* at 1020–22; see *Arista Records, Inc. v. MP3Board, Inc.*, No. 00 Civ. 4660, 2002 U.S. Dist. LEXIS 16165, at \*20 (S.D.N.Y., August 29, 2002). The court emphasized that it may not “impute constructive knowledge of infringement to a defendant ‘merely because a technology may be used to infringe plaintiffs’ copyrights where the system is capable of commercially significant noninfringing uses” (citing *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 436, 442–43, (1984)). A plaintiff must then show that the defendant actually knew that infringing activity was occurring on its system instead of just relying on the “technology’s potential.” *Id.*

<sup>65</sup> *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1020–22 n.5 (9th Cir. 2001); see *Arista Records*, 2002 U.S. Dist. LEXIS 16165, at \*26–30. The RIAA sent three letters to the defendant informing the company of the artists whose works were being infringed upon on its services. *Id.* The Court reasoned that the trade association was justified in sending notification of infringement activities to the defendant. *Id.* According to the Court, “when a letter provides notice equivalent to a list of representative works that can be easily identified by the service provider, the notice substantially complies with the notification requirements [of the DMCA].” *Id.* at 26. See also *Palmer v. Slaughter*, No. 99-899-GMS, 2000 U.S. Dist. LEXIS 22118, at \*7 (D. Del. July 13, 2000). Defendant was told to cease and desist the infringing of plaintiffs’ copyrights. *Id.* Because he continued to engage in the infringement activities, the court found him guilty of willful conduct under the Copyright Act. *Id.*

<sup>66</sup> *A&M Records*, 239 F.3d at 1020–22.

<sup>67</sup> *Id.*; see *McWane*, *supra* note 24, at 104 (emphasizing why the court rejected Napster’s fair use defense). There are four factors that must be considered when a court analyzes the fair use defense. *Id.* The four factors are:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a

By examining the decision of the court in *A&M Records, Inc. v. Napster Inc.*, one can identify a parallel between the liabilities of ISPs and individual file-sharers. The Court held that Napster was a direct infringer because its services allowed for the uploading and downloading of copyrighted works.<sup>68</sup> If an ISP can be found guilty of direct infringement simply because it provided access for the transmission of files, imagine what the court will rule against an individual who does the actual downloading and uploading of copyrighted works. If illegal downloading infringes on one's reproduction rights and illegal uploading infringes on one's distribution rights, then under the Copyright Act, individuals can be found guilty of copyright infringement.<sup>69</sup>

Moreover, if an ISP can possibly be found liable for causing irreparable harm to copyright holders, what is to stop the court from finding an individual liable? Irreparable harm occurs when the copyright holder's rights to the exclusive use of their copyrighted material are invaded.<sup>70</sup> If an ISP can be liable for causing irreparable harm because its services reduce sales, surely an individual will be liable for causing harm to the music industry. Similar to the ISP, an individual uploading and downloading copyrighted works for free does reduce audio sales.<sup>71</sup> Without payment to the copyright owner, the RIAA can make a valid argument that individuals copying copyrighted music files to a hard drive or sending copyrighted files to someone else is in violation of the Copyright Act.<sup>72</sup> With decisions such as *A&M Records, Inc v. Napster Inc.* in support of the music industry against copyright

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whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (1992).

According to the Court, the first factor did not apply to Napster because its users were not using the copyrighted works for research nor were they using the works in a "transformative way." *A&M Records*, 239 F.3d at 1014–20. Besides, Napster users were using the copyrighted works to reproduce and distribute the music. *Id.* The second and third factors did not apply to Napster because the music being downloaded was "creative in nature" and the users were downloading the entire songs, not some thirty-second preview of the song. *Id.* at 1018. Finally, the fourth factor did not apply to Napster because the file sharing facilitated by Napster allowed file-sharers to "get for free something they would ordinarily have to buy." *Id.* at 1015. Even though Napster's service was not for profit, it was economic in nature because it allowed its users to reap economic advantages. *Id.* at 1014–20.

<sup>68</sup> *Id.* at 1020–21.

<sup>69</sup> 17 U.S.C. §§ 106(3), 106(1) (2002); see also 17 U.S.C. § 501(a) (2002) (stating that infringement occurs when the alleged infringer engages in the activities listed in sections 106–22).

<sup>70</sup> See *Taylor Corp. v. Four Seasons Greetings*, 315 F.3d 1039, 1041–42 (8th Cir. 2003) (emphasizing that in copyright infringement cases, "the general rule is that a showing of a prima facie case for copyright infringement raises a presumption of irreparable harm"); *In re Aimster Copyright Litig.*, 252 F. Supp. 2d 634, 665 (N.D. Ill. 2002) (pointing out that when a court is considering whether to grant a preliminary injunction, it does so based on a sliding scale: "the more likely the plaintiff will succeed on the merits, the less the balance of irreparable harms need favor the plaintiff's position").

<sup>71</sup> Hamilton, *supra* note 25.

<sup>72</sup> *Baxter v. MCA, Inc.*, 812 F.2d 421, 423 (9th Cir. 1987) (pointing out that for direct infringement cases, plaintiffs must satisfy two requirements: (1) they must show ownership of the allegedly infringed material and (2) they must demonstrate that the alleged infringers violated at least one exclusive right granted to the copyright holder under 17 U.S.C. § 106).

infringement, individuals can find themselves facing serious civil and criminal repercussions.<sup>73</sup>

### *C. The RIAA’s Subpoena of File-sharers’ Personal Information from ISPs*

Before December 2003, the RIAA could subpoena a file-sharer’s personal information from an ISP by way of the Digital Millennium Copyright Act (DMCA).<sup>74</sup> Congress passed the DMCA in 1998 pursuant to the demands of copyright owners (record labels and the movie industry) to allow them the ability to control access to and copying of their digital works.<sup>75</sup> Congress enacted the DMCA because it was concerned that copyright owners would be reluctant to make their works available on the Internet without guarantees of protection against copyright infringement.<sup>76</sup> One

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<sup>73</sup> Hamilton, *supra* note 25; see Yu, *supra* note 24 at 388 (quoting the court in *RIAA v. Diamond Multimedia Systems, Inc.*, 180 F.3d 1072 (9th Cir. 1999) that a copyright, “is not designed to afford consumer protection or convenience but, rather, to protect the copyright holders’ property interests”).

<sup>74</sup> 17 U.S.C. §§ 1201, 1202 (1999); see Skyscraper, *DMCA (Digital Millennium Copyright Act)*, at [http://www.pocketbook.org/sky/3rdeye/access\\_denied/access\\_def\\_DMCA.htm](http://www.pocketbook.org/sky/3rdeye/access_denied/access_def_DMCA.htm) (last visited Oct. 10, 2003). The four main provisions of the DMCA consist of “(1) a prohibition on circumventing access controls; (2) an access control circumvention device ban; (3) a copyright protection circumvention device ban; and (4) a prohibition on the removal of copyright management information.” *Id.*

The first provision prohibits the act of circumventing technological protection systems, the second and third ban technological devices that facilitate the circumvention of access control or copy controls, and the fourth prohibits individuals from removing information about access and use devices and rules. . . the first two provisions focus on technological protection systems that provide access control to the copyright owner, while the third provision prohibits circumvention of technological protections against unauthorized duplication and other potentially copyright infringing activities.

*Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *In re Verizon Internet Services Inc.*, 257 F. Supp. 2d 244, 266 (D. Dist. Col. 2003); see *United States v. Elcom, Ltd.*, 203 F. Supp. 2d 1111, 1132 (N.D. Cal. 2002) (arguing that the extent of copyright infringement of intellectual property over the Internet has reached epidemic proportions). The Court in *Verizon* reasoned that no matter what marginal impact the DMCA subpoena authority had on various rights of file-sharers, the level of copyright infringement occurring over the Internet outweighed these rights. *Verizon*, 257 F. Supp. 2d at 266.

On the other hand, Congress did implement provisions in the DMCA that limit the liability of ISPs to copyright holders. 17 U.S.C. § 512 (1999).

Under § 512(a), if an ISP is merely a passive conduit for the infringing material passing on its service, its liability to the copyright holders will be limited. Under § 512(b), if an ISP does not select, modify or interfere with the information being stored temporarily on its servers by its users, its liability will be limited. Under § 512(c), if the ISP does not have actual knowledge of the infringing activity on its service, its liability will be limited. Finally, under § 512(d), an ISP will not be held liable for referring to or providing links to other Internet locations that contain infringing material. Finally, in order for an ISP to avail itself of the provision of Section 512, an ISP must ‘adopt and reasonably implement a policy that provides for the termination of repeat infringers from the system/network.

McWane, *supra* note 24, at 94–96.

guarantee by the DMCA is that a copyright holder can obtain the identity of an alleged copyright infringer from online song-trading services in order to prevent infringement of their works.<sup>77</sup> The provisions within the DMCA provides copyright owners access to file-sharers' personal information such as their names, telephone numbers, addresses and even their financial records.<sup>78</sup> By simply submitting a sworn declaration, a copyright owner can obtain a great deal of the file-sharers' private information via a subpoena order.<sup>79</sup>

However, after the decision in *RIAA v. Verizon Internet Services, Inc.*,<sup>80</sup> the RIAA will have to do more than submit a sworn declaration to obtain a file-sharer's identity. Now, the RIAA and others will have to seek permission from judges before they can issue subpoenas to ISPs seeking the personal information of file-sharers.<sup>81</sup> In *Verizon*, the Court distinguished between an ISP acting only as a conduit for data transferred between users and an ISP that relies upon a centralized communication.<sup>82</sup> The Court held an ISP that does not store on its servers any infringing material, but simply acts as a transmitter between two users, cannot be subpoenaed via the DMCA.<sup>83</sup> This means that if the RIAA wants to subpoena

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Moreover, even if the ISP does not fall under any of the four provisions, a court may issue a preliminary injunction against the ISP. *Id.* To issue this injunction, a court must find that the plaintiff presented a prima facie case on the merits, there is a possibility of irreparable harm, or that the financial burden on the ISP is outweighed by the harm suffered by the copyright holder. *Id.*

<sup>77</sup> *Verizon*, 257 F. Supp. 2d at 261; see Robert Holleyman, DMCA is Fundamental to the Success of the Net, Network World, available at <http://www.nwfusion.com/forum/2001/1210faceoffno.html>.org (Dec. 10, 2001) (arguing that the DMCA ensures legal protection for copyrighted works online). According to the author, the DMCA encourages talented people to avail their works in a digital manner to a global audience. *Id.*

<sup>78</sup> 17 U.S.C. § 512(h) (1998); see *File Sharing*, *supra* note 28; Cassavo, *supra* note 13.

<sup>79</sup> 17 U.S.C. § 512(h)(2)(c) (1998). Under the DMCA Act, to obtain a subpoena, an association must state under "penalty of perjury" that it has the authority to act on behalf of a particular copyright owner. 17 U.S.C. § 512(c)(3)(A)(vi) (1998).

<sup>80</sup> *RIAA v. Verizon Internet Servs. Inc.*, 351 F.3d 1229 (D.C. Cir. 2003).

<sup>81</sup> *Id.* at 1234.

<sup>82</sup> *Id.* at 1235–36. Verizon argued that the RIAA did not have a right to subpoena its subscriber's personal information. *Id.* Verizon said that § 512(h) of the DMCA Act did not authorize the issuance of a subpoena to an ISP acting as a conduit for communication because others determine the content of what is transferred over the ISP. *Id.* Verizon argued that ISPs acting as conduits allow users to search the files of other users directly without involving the host website. *Id.* Unlike Verizon's users, a Napster user could only download from another user's computer once Napster connected the two users. *Id.* Napster had a direct involvement in what was transmitted between its users. *Id.* The RIAA on the other hand, was of the view that the DMCA subpoena power applied to all service providers (the RIAA's interpretation of § 512(h) of the DMCA) *RIAA v. Verizon Internet Servs. Inc.*, 351 F.3d 1229, 1233 (D.C. Cir. 2003). Under § 512 of the DMCA, a service provider means "an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received." 17 U.S.C. § 512(k) (1999). The RIAA argued that the definition of a service provider supports the fact that Verizon should be subject to a subpoena under the DMCA, but the court disagreed, and favored the position of Verizon. *RIAA*, 351 F.3d at 1239. The author believes that the courts are trying to put more restrictions on the RIAA to prevent the RIAA from abusing the subpoena power given by the DMCA Act.

<sup>83</sup> *Id.* at 1236–37. The Court held that because an ISP acting as a conduit does not store on its servers material that is infringing, the RIAA could not subpoena this type of ISP by way of the DMCA Act. *Id.*

personal information of a file-sharer from an ISP acting as a conduit, it has to play by the same procedural rules like everyone else who goes to court and requests a subpoena. As the Electronic Frontier Foundation emphasizes, “[t]he record labels will have to prove that they have evidence in support of their claims and do a ‘reasonable investigation’ before filing suit, rather than obtaining a subpoena rubber-stamped by a court clerk.”<sup>84</sup>

The RIAA’s President, Cary Sherman, publicly announced the Recording Industry’s disappointment in the *Verizon* holding.<sup>85</sup> However, Mr. Sherman said that the RIAA was not deterred from its goal to put an end to illegal downloading of copyrighted works.<sup>86</sup> In no way does the Court’s decision block the RIAA from continuing its legal actions against illegal file sharing; it simply puts a procedural dent in how the RIAA obtains a subpoena.<sup>87</sup>

## II. ANALYSIS

At the same time of announcing its new strategy to go after individual file-sharers with legal actions, the RIAA announced its other alternative to stop illegal downloading – The Clean Slate Program.<sup>88</sup> The Clean Slate Program proposes amnesty to file-sharers; however, critics argue that for those who apply for it, the program acts as more of a detriment than the help it purports to portray. What is disturbing is that the program exposes its participants to more civil lawsuits from RIAA and non-RIAA members.<sup>89</sup> Yet the most troubling of all is that the program exposes its participants to criminal prosecution.<sup>90</sup>

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<sup>84</sup> Electronic Frontier Foundation, *Recording Industry Announces Lawsuits Against Music Sharers: Seeks Identities of More than 500 Sharing Files Online*, at [http://www.eff.org/IP/P2P/20040121\\_eff\\_pr.php](http://www.eff.org/IP/P2P/20040121_eff_pr.php) (Jan. 21, 2003). According to the EFF, the decision by the Court “offers more due process and privacy protections than the automatic subpoenas.”

<sup>85</sup> RIAA, *RIAA on Verizon Appeals Court Decision*, at <http://www.riaa.com/news/newsletter/121903.asp> (Dec. 19, 2003). According to the President of the RIAA, Cary Sherman, the Court’s decision means that the RIAA will no longer be notifying illegal file-sharers before they file suits against them. *Id.* Without notification, Sherman emphasizes that the opportunity to settle outside of litigation no longer exists. *Id.* Furthermore, Mr. Sherman points out that the Court’s decision makes the legal process “less sensitive” to the interests of file-sharers engaged in illegal downloading. *Id.*

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

<sup>87</sup> See *RIAA v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1238 (D.C. Cir. 2003).

<sup>88</sup> Warning, *supra* note 3; see Mealey’s Litig. Rep., *RIAA sues 261 downloaders, Offers amnesty*, 2-9 MEALEY’S LITIG. REP. COPYRIGHT 6 (2003) (explaining that the Amnesty Program, dubbed the Clean Slate Program, allows file-sharers to avoid lawsuits if they sign a declaration, promising that they will delete all copyrighted music files and refrain from sharing or downloading music illegally in the future).

<sup>89</sup> Warning, *supra* note 3. When one argues that applying for the Clean Slate Program exposes its participants to more civil lawsuits, this means the major record labels that fund the RIAA, songwriters, or any other copyright holders could still sue any of the participants. *Id.*

<sup>90</sup> Mary Hodder, *RIAA offers amnesty*, at <http://journalism.berkeley.edu/projects/biplog/archive/001040.html> (Sept. 4, 2003). Although the Clean Slate Program says the RIAA will not sue those who are eligible for the program, there is nothing in the program’s affidavit to stop the RIAA from turning over participants’ information to the United States Department of Justice. *Id.* Under the NET Act, the government could pursue a criminal case against those who illegally download copyrighted works. *Id.*

*A. What is the Clean Slate Program?*

The RIAA grants amnesty to file-sharers who voluntarily identify themselves and sign an affidavit pledging to stop illegally sharing music (uploading or downloading) over the Internet.<sup>91</sup> The RIAA promises those who participate in the

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<sup>91</sup> Mark, *supra* note 22 (quoting the RIAA President, Cary Sherman, who pledges “[t]he RIAA will guarantee not to sue file sharers who have not yet been identified in any RIAA investigation and who provide a signed and notarized affidavit in which they promise to respect recording company rights”). Complaint, *supra* note 8 at Exhibit C, which provides the affidavit for the Clean Slate Program as:

Exhibit C:

Clean Slate Program Affidavit:

Identifying Information:

Full Name:

Address of Primary Residence (United States only):

Telephone Number:

E-mail Address:

Internet Service Provider:

I, the individual whose name appears above, am executing this Clean Slate Program Affidavit in order to obtain amnesty from copyright infringement litigation supported or assisted by the Recording Industry Association of America (“RIAA”) with respect to my unauthorized noncommercial downloading, copying, or “sharing” (that is, uploading/distributing) as of this date on peer-to-peer networks such as Kazaa, Grokster, iMesh, Morpheus, Bearshare, LimeWire, Gnutella, Blubster, OverNet, Shareaza, Gnucleus, SoulSeek, Earthstation 5, and eDonkey (“P2P Networks”). I represent that I am eligible for this Clean Slate Program and meet all the conditions herein and in the Clean Slate Program Description. I have deleted from my computer(s) and storage devices (including portable devices) all copyrighted sound recordings illegally downloaded, copied or “shared” (that is, uploaded/distributed) using P2P Networks, and have destroyed all copies of those sound recording I have in any format (including CD-R). I agree from today forward to stop any and all illegal downloading, copying, or “sharing” (that is, uploading/distributing) of files of copyrighted sound recordings on P2P Networks. Provided that I have in fact deleted from my computer(s) and storage devices (including portable devices) all copyrighted sound recordings illegally downloaded from P2P Networks, and destroyed all copies of those sound recordings in any format, and do not engage in illegal downloading, copying or ‘sharing’ (that is, uploading/distributing) of copyrighted sound recordings on P2P Networks in the future, I understand that RIAA agrees not to support or assist in any copyright infringement lawsuit against me based on these past activities. I understand that if I am found in the future to have done any illegally downloading, copying, or ‘sharing’ (that is, uploading/distributing) of copyrighted sound recordings using P2P Networks on or after today’s date or if I am found to have not met the conditions of the Clean Slate Program, RIAA may support or assist in an action for willful copyright infringement. I acknowledge that I have signed this Clean Slate Program Affidavit voluntarily and that nothing herein prevents me from consulting with counsel of my own choosing.

Signature: \_\_\_\_\_

Signature of Parent or Guardian if Person Listed

Above is Under 18: \_\_\_\_\_

(Notary Section of the Affidavit):

State of:

County of:

SS:



Clean Slate Program that the organization itself will not cooperate in any lawsuits brought against them.<sup>92</sup> According to Mitch Bainwol, RIAA Chairman and CEO, "for

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I, \_\_\_\_\_, a Notary Public in and for this jurisdiction, certify that \_\_\_\_\_ [name(s) of person signing above] \_\_\_\_\_ [parent or guardian, if necessary], who is known to me to be the person signing this Clean Slate Affidavit, personally appeared before me in this jurisdiction. IN WITNESS WHEREOF, I sign below and set my official seal on this document on \_\_\_\_\_, 20\_\_\_. Signature: \_\_\_\_\_  
Name printed or typed: \_\_\_\_\_.

<sup>92</sup> Mark, *supra* note 21. The RIAA's amnesty agreements state that the RIAA will not support or assist in any copyright infringement lawsuits against individuals who apply for the Clean Slate Program based on their past activities. *Id.* Complaint, *supra* note 8 at Exhibit B, which provides the description and instructions for the Clean Slate Program as:

Exhibit B:

Clean Slate Program Descriptions:

The Recording Industry Association of America ("RIAA") is offering amnesty from copyright enforcement to individuals residing in the United States who have, or who believe that they have, illegally downloaded or distributed copyrighted sound recordings on peer-to-peer networks such as Kazaa, Grokster, iMesh, Morpheus, Bearshare, LimeWire, Gnutella, Blubster, OverNet, Shareaza, Gnucleus, SoulSeek, Earthstation 5, and eDonkey ("P2P Networks"). As part of this Clean Slate Program, RIAA is agreeing not to support or assist in any copyright infringement suits based on past conduct against individuals who meet the conditions outlined below. Only individual persons are eligible for the Clean Slate Program; business, groups and other organization or entities may not participate.

You are eligible for this Clean Slate Program if:

(1) You delete or destroy all copyrighted sound recordings that you or others illegally downloaded to your computer(s) or devices (including all storage and portable devices) using a P2P Network, and all copies you have of those files in any format (including CD-R). (2) In the future you do not illegally download copyrighted sound recordings using a P2P Network, you do not all others to illegally download copyrighted sound recordings to your computer(s), you do not make copies of any such downloaded files in any format, and you do not "share" (that is, upload/distribute) such files on P2P Networks. (3) As of the date your Clean Slate Program Affidavit is received, you have not been sued for copyright infringement by an RIAA member company for the activities that are covered by this Clean Slate Program and RIAA has not begun to investigate you by requesting from an Internet Service Provider ("ISP"), by subpoena or otherwise, identifying information about you. (4) Any downloading or file-distribution that you engaged in was done on a noncommercial basis. Individuals who undertook these activities for commercial purposes or for payment are not eligible for this Clean Slate Program.

Instructions:

In order to take advantage of this Clean Slate Program, please take the following steps. Note that all information sent will be used solely in connection with the Clean Slate Program and will not be used for marketing or other promotional purposes. See our Privacy Policy for further details. (1) Carefully read the Clean Slate Program Affidavit and make sure that you have taken all necessary steps to delete any copyrighted music files you or others illegally downloaded to your computer(s) or devices (including all storage and portable

those who want to wipe the slate clean and avoid potential lawsuits, this is the way to go.”<sup>93</sup>

To participate in the Clean Slate Program, there are four eligibility requirements.<sup>94</sup> First, the file-sharer must delete or destroy all copyrighted sound recordings he illegally downloaded to his computer or other devices, as well as all copies of those files.<sup>95</sup> Second, the file-sharer can no longer illegally download copyrighted sound recordings; make copies of downloaded files; and share his files through uploading or distributing such files over the Internet.<sup>96</sup> Third, as of the date the file-sharer’s Clean Slate Program Affidavit is received, no RIAA member had previously sued the file-sharer for copyright infringement and the RIAA had not begun an investigation of that person.<sup>97</sup> Finally, a file-sharer who downloaded music or distributed his files for payment or other commercial uses is not eligible to participate in the Clean Slate Program.<sup>98</sup>

### *B. Flaws of the Clean Slate Program*

While the RIAA has people believing the Clean Slate Program will clean the slate of a file-sharer, in actuality, there are a number of reasons why the file-sharer will have a “dirtier slate” than he would have if he had never participated in the program.<sup>99</sup>

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devices) using a P2P Network, and to destroy any copies you have of those files in any format. (2) Complete the Clean Slate Program Affidavit, *except for your signature* (since it must be signed in the presence of a notary public to be valid). If there is more than one person in your household who seeks to participate in the Clean Slate Program, each participant in the household must complete a separate Clean Slate Program Affidavit. (3) Take the completed, unsigned form to a notary public, together with identification (such as your driver’s license or passport), which will allow the notary to verify that you are the person whose information is listed on the form. Have the notary witness your signature. If you are under the age of 18 a parent or legal guardian also must sign the Clean Slate Program Affidavit. (4) Make a copy of the Clean Slate Program Affidavit for your own records. Send the original, signed and notarized version of the Clean Slate Program Affidavit to: Clean Slate Program Coordinator, RIAA, 1330 Connecticut Avenue, N.W., Suite 300, Washington D.C. 20036. (For your recordkeeping purposes, you may want to consider sending you Clean Slate Program Affidavit by Federal Express, certified mail, or some other traceable delivery service.)

*Id.*

<sup>93</sup> Gallagher & Dawsey Co., LPA, *Music File Sharers Beware*, available at [http://www.invention-protection.com/ip/publications/docs/Music\\_File\\_Shaers\\_Beware\\_of\\_the\\_RIAA\\_Clean\\_Slate\\_Program.html](http://www.invention-protection.com/ip/publications/docs/Music_File_Shaers_Beware_of_the_RIAA_Clean_Slate_Program.html) (last visited Nov. 7, 2003).

<sup>94</sup> P2P News, *Want into the RIAA Amnesty fiasco?* available at <http://www.p2pnet.net/article/7706> (last visited Nov. 7, 2003). Only individual persons are eligible for the Clean Slate Program. Businesses, other organizations, or entities are ineligible. *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

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

<sup>99</sup> Cassavo, *supra* note 13. Ira Rothken, the Marin County California attorney who filed the consumer lawsuit on behalf of Eric Parke, emphasizes the fact that one who supplies all his information to the Clean Slate Program will not actually be cleaning the slate. *Id.* The individual will in reality, make his slate dirtier than ever because of the potential lawsuits he can face. *Id.*

*1. The Clean Slate Program Does Not Guarantee Immunity from All Potential Copyright Infringement Lawsuits*

In its attempt to stop the illegal file sharing of copyrighted music over the Internet by filing hundreds of lawsuits against individual file-sharers, the RIAA now finds itself being sued for fraudulent business practices.<sup>100</sup> Eric Parke, a California resident, filed suit against the RIAA on behalf of the general public of the State of California.<sup>101</sup> The complaint charged that the RIAA’s Clean Slate Program is an unlawful, misleading, and deceptive business practice.<sup>102</sup> According to Parke’s attorney, Ira Rothken, the offer of amnesty to file-sharers is deceptive because although the RIAA is leading the charge against illegal downloading, it is the music labels that are the actual plaintiffs and not the RIAA itself.<sup>103</sup> Therefore, the RIAA cannot promise not to sue file-sharers when it does not own the copyrights in question.<sup>104</sup>

Although the RIAA may think Parke’s lawsuit is frivolous, Parke’s attorney is definitely correct about one thing – the RIAA does not own the copyrights in question. According to *AbovePeer, Inc. v. RIAA*, the United States Court of Appeals for the Ninth Circuit said specifically,

[t]he Recording Industry Association of America Inc. (“the RIAA”) is a not-for-profit trade organization whose members engage in the creation, manufacture, and sale of musical recordings. The RIAA, although representing the interests of its members, does not own copyrights in any of their sound recordings.<sup>105</sup>

Consequently, the best promise the RIAA can give a file-sharer under the Clean Slate Program is that the RIAA itself will not sue him.<sup>106</sup> The RIAA cannot make any guarantees to file-sharers that others in the recording industry (i.e. songwriters, performers, or record labels) will not sue those who participate in the Clean Slate Program.<sup>107</sup> The RIAA has no authority to guarantee immunity when the organization itself is only a representative and not the actual owner of the copyrights in question.<sup>108</sup>

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<sup>100</sup> Olsen, *supra* note 16. On September 9, 2003, one day after the RIAA filed approximately 261 lawsuits against alleged illegal song swappers, the RIAA found itself being sued over its amnesty program for fraud. *Id.*

<sup>101</sup> Complaint, *supra* note 8, at 2. According to California Business and Professions Code § 17204, one can bring an injunction against another in a fraudulent business practice suit when he is acting in the interests of the general public. Cal Bus & Prof Code §§ 17200, 17204 (2004).

<sup>102</sup> Complaint, *supra* note 8, at 1–2.

<sup>103</sup> Cassavo, *supra* note 13.

<sup>104</sup> *Id.*

<sup>105</sup> *AbovePeer, Inc. v. RIAA*, 166 F. Supp. 2d 655, 656 (N.D.N.Y. 2001) (emphasizing that the RIAA is only a representative of its members’ interests and its members are the actual owners of the copyrights to certain original sound recordings).

<sup>106</sup> See Cassavo, *supra* note 13.

<sup>107</sup> Public Knowledge, *Amnesty or “Shamnesty?”* at <http://www.publicknowledge.org/content/introductions/pp-amnesty/view> (last visited Apr. 7, 2004).

<sup>108</sup> See Mark, *supra* note 21 (quoting the Electronic Frontier Foundation, a digital rights organization).

What are the implications of Eric Parke's lawsuit against the RIAA? Parke's attorney can validly argue that the Clean Slate Program is a fraudulent business practice. Fraud is a "tort arising from a knowing misrepresentation, concealment of material fact, or reckless misrepresentation made to induce another to act in his/her detriment."<sup>109</sup> Moreover, under California's Business and Practice Code § 17200, when proving an individual's conduct was fraudulent, one only has to prove that the individual's conduct was unfair or likely to deceive the public.<sup>110</sup> Parke's complaint alleged that the RIAA is guilty of a fraudulent business practice because its Clean Slate Program does induce the general public to incriminate themselves as copyright infringers.<sup>111</sup> The general public has been deceived by the RIAA because the public believes the RIAA has authority to do what the RIAA cannot do.<sup>112</sup> The RIAA does not own the copyrights at issue.<sup>113</sup> It only represents the music labels and artists who are the "real plaintiffs."<sup>114</sup> Convincing file-sharers to participate in the Clean Slate Program does not grant freedom from all lawsuits.<sup>115</sup> The program hoodwinks people into admitting they illegally downloaded copyrighted music.<sup>116</sup> The program is designed to mislead the public into incriminating themselves and by design alone, arguably qualifies as fraud.

## *2. Participation in the Clean Slate Program Can Make One the Target of A Lawsuit*

Jonathan Lamy, an RIAA spokesman, encourages the general public to read what the Clean Slate Program has to offer.<sup>117</sup> The public should heed to Lamy's advice and closely read the terms of the deal offered by the Clean Slate Program. The only obligation of the RIAA is that it, the organization itself, will not support or assist in copyright infringement suits against those who participate in the program.<sup>118</sup> As Parke's attorney emphasizes, "the RIAA is not guaranteeing amnesty, release, or immunity from copyright lawsuits, but only that, at best, it will not support or assist such lawsuits."<sup>119</sup>

Moreover, one of the clauses regarding the privacy policy of the program says,

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<sup>109</sup> BLACK'S LAW DICTIONARY 670 (7th ed. 1999); see *Teevee Toons, Inc. v. Mp3.COM, Inc.*, 134 F. Supp. 2d 546 (S.D.N.Y. 2001). Defendant tried to argue that the plaintiffs' copyrights were invalid because the plaintiffs allegedly misrepresented that they held ownership of the copyrights as "works made for hire." *Id.* at 549. Because the plaintiffs' ultimate ownership of the copyrights were not an issue, the court concluded that for the defendant to prevail, it would have to show that the "inaccuracies was both material and made in bad faith." *Id.*

<sup>110</sup> See *Loe v. State Farms Ins. Cos.*, 1998 U.S. App. LEXIS 24457, \*4 (9th Cir. Sept. 25, 1998).

<sup>111</sup> Complaint, *supra* note 8, at 1.

<sup>112</sup> *Id.* at 5.

<sup>113</sup> *AbovePeer, Inc. v. RIAA*, 166 F. Supp. 2d 655, 656 (N.D.N.Y. 2001).

<sup>114</sup> *Id.*; see also Cassavo, *supra* note 13.

<sup>115</sup> Benny Evangelista, *supra* note 15. Parke's attorney, Rothken, points out "the fine print of the RIAA's affidavit does not guarantee the signer is free from lawsuits by individual record companies or other copyright owners." *Id.*

<sup>116</sup> *The music download controversy continues*, at <http://www.megabyteinminute.com/features/musiccontroversycontinues.html> (last visited Nov. 7, 2003).

<sup>117</sup> Gallagher & Dawsey, *supra* note 93.

<sup>118</sup> Complaint, *supra* note 8 at 5.

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

Information will not be made public or given to third parties, including individual copyright owners, except if necessary to enforce a participant’s violation of the pledges set forth in the affidavit or otherwise required by law.<sup>120</sup>

This clause alone can be a total shock to any file-sharer who considered participating in the program. The RIAA claims the information from the Clean Slate Program’s Affidavit will be kept solely for its records to determine what persons are exempt from being sued.<sup>121</sup> However, there is no guarantee that a third party cannot successfully subpoena a participant’s information from the RIAA to bring a lawsuit against him.<sup>122</sup> It is important to note that even the RIAA’s members are not bound by the arrangement under the Clean Slate Program.<sup>123</sup> It is necessary for those who consider participating in the program to know that by way of a subpoena, all RIAA members and even non-RIAA members can use their admissions of being file traders against them in copyright infringement lawsuits.<sup>124</sup>

*3. If the RIAA Has Already Subpoenaed A File-sharer’s Personal Information from A P2P Network, the File-sharer Cannot Participate in the Clean Slate Program*

The Clean Slate Program’s offer of amnesty only applies to file-sharers who are not under investigation by the RIAA or those individuals who have not been sued for copyright infringement.<sup>125</sup> According to the Electronic Frontier Foundation, “Unless [an individual is] 100% sure that [he is] not on the RIAA’s hit list, it is extremely

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<sup>120</sup> P2P News, *Want into the RIAA Amnesty fiasco?* at <http://www.p2pnet.net/article/7706> (last visited Nov. 7, 2003); see Complaint, *supra* note 8 at Exhibit B, which provides the privacy policy of the Clean Slate Program.

Exhibit B:

OUR PRIVACY POLICY

Information provided on the Clean Slate Program Affidavit will be used solely in connection with conducting and enforcing the Clean Slate Program. Information will not be used for marketing, promotional or public relations purposes. Information will not be made public or given to third parties, including individual copyright owners, except if necessary to enforce a participant’s violation of the pledges set forth in the Affidavit or otherwise required by law.

*Id.*

<sup>121</sup> Cassavo, *supra* note 13. According to the RIAA’s President, Cary Sherman, the RIAA will not release the data it gets from individual file sharers who are eligible for the Clean Slate Program. *Id.* Sherman specifically stated, “The RIAA wouldn’t release the data to copyright holders that might intend to sue.” *Id.* Sherman further states that the RIAA pledges to keep the participants’ information solely for the organization’s use. *Id.*

<sup>122</sup> Sham, *supra* note 17.

<sup>123</sup> *Id.*

<sup>124</sup> Paul Boutin, *supra* note 31 (pointing out that the Clean Slate Program does not guarantee a third party’s inability to successfully subpoena an individual’s personal information from the RIAA, especially when a third party can use the same legal procedures the RIAA has exercised against P2P Networks).

<sup>125</sup> See Mealey’s Litig. Rep., *RIAA sues 261 downloaders, Offers amnesty*, 2:9 MEALEY’S LITIG. REP. COPYRIGHT 6 (2003).

risky to send them a signed declaration . . . .”<sup>126</sup> The problem with the Clean Slate Program is that a participant really has no absolute way to know whether he is under investigation by the RIAA.<sup>127</sup> If one asks for amnesty by trying to participate in the program and he is already under investigation, even asking for amnesty provides evidence that can be used by the RIAA against him in a lawsuit.<sup>128</sup> Furthermore, by asking for amnesty, the RIAA can use this as evidence that one believed he was violating the law.<sup>129</sup> Consequently, the RIAA will be closer to a lawsuit victory and the file-sharer who asked for amnesty will end up paying perhaps thousands of dollars in damages.<sup>130</sup>

#### *4. Participation in the Clean Slate Program Can Expose a File-sharer to Criminal Liability*

According to the Electronic Frontier Foundation, in addition to civil lawsuits, “a signed admission of guilt could make one a target for criminal prosecution under the No Electronic Theft Act (‘NET Act’).”<sup>131</sup> The NET Act, implemented under the Clinton Administration, imposes sanctions when copyright infringement has occurred in one of three areas.<sup>132</sup> One, copyright infringement is committed for commercial gain.<sup>133</sup> Two, copyright infringement is committed for private financial gain.<sup>134</sup> Or three, copyright infringement is committed by the reproduction or distribution of one or more copies of copyrighted works having \$1000 or more in retail value.<sup>135</sup> Under this act, the federal government could pursue a criminal case against a file-sharer for uploading and downloading copyrighted works having \$1000

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<sup>126</sup> Sham, *supra* note 17; *see* Complaint, *supra* note 8. The requirement that the RIAA has not “begun to investigate you” is also misleading and deceptive according to Eric Parke’s complaint. *Id.* at 6. There is no reasonable way that one can know if he is under investigation by the RIAA, and by signing the Clean Slate Program Affidavit without this knowledge, it can be very damaging to a file-sharer. *Id.* Furthermore, according to Parke’s complaint, “. . .there is no document that the RIAA signs and dates as part of the program to confirm receipt of the affidavit document and confirmation that a member of the general public who submitted such document has in fact met the Clean Slate conditions. . . .” *Id.* Without any type of confirmation, one who submitted such documents has no “real and legally binding peace or amnesty.” *Id.*

<sup>127</sup> *See* Sham, *supra* note 17.

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

<sup>129</sup> Public Knowledge, *Amnesty or “Shamnesty?” available at* <http://www.publicknowledge.org/content/introductions/pp-amentsy/view> (last visited Apr. 7, 2004).

<sup>130</sup> Gallagher & Dawsey Co., *supra* note 93. Under Title 17 of the United States Code, file-sharers can be sued for statutory damages ranging from \$750.00 to \$150,000.00, for each copyrighted work that has been illegally copied or distributed. *Id.* As the article points out, under Title 17, “. . . a file-sharer of 1,000+ titles can quickly become liable for damages in excess of 1 million.” *Id.*

<sup>131</sup> Sham, *supra* note 17.

<sup>132</sup> *Available at* [unr.edu/homepage/jstrauss/prenhall/slides/CHAPTE~1.PPT](http://unr.edu/homepage/jstrauss/prenhall/slides/CHAPTE~1.PPT) (last visited Nov. 6, 2003).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*; *see also* U.S. v. Rothberg, 222 F.Supp.2d 1009, 1018 (N.D. Ill. 2002) (emphasizing that the third area of the NET Act does not require proof of commercial or financial motivation for one to be found in violation of the Act itself).

(U.S. Currency) or more in retail value.<sup>136</sup> In addition, downloading music is considered a financial gain.<sup>137</sup> Therefore, a signed admission under the Clean Slate Program could be used against an individual as evidence that he was a willful infringer.<sup>138</sup> Under the NET Act, one could face up to three years in prison for copyright infringement.<sup>139</sup>

### C. Proposed Solutions

#### 1. Have File-sharers Pay a Downloading Fee

How many times must it be suggested to the music industry to allow consumers to purchase downloadable music over the Internet?<sup>140</sup> The idea of paying a downloading fee seems much easier than filing hundreds of lawsuits, which are very expensive and time-consuming. Individuals could download all the music they want online by paying a fee to their P2P networks. In turn, the collected fees could be paid out to copyright holders based on the number of times their work is downloaded. In the case of *A&M Records, Inc. v. Napster, Inc.*, one of the plaintiffs’ main arguments was that “having digital downloads available for free harms the copyright holders’ attempts to charge for the same downloads.”<sup>141</sup> Having individuals pay for the music takes away the irreparable harm complained about by the copyright holders.<sup>142</sup>

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<sup>136</sup> Available at [unr.edu/homepage/jstrauss/prenhall/slides/CHAPTE~1.PPT](http://unr.edu/homepage/jstrauss/prenhall/slides/CHAPTE~1.PPT) (last visited Nov. 6, 2003); see Michael Landau *Statutory Damages in Copyright Law and the Mp3.com Case*, available at <http://www.gigalaw.com/articles/2000-all/landau-2000-10-all.html> (last visited Feb. 18, 2004). In Sept. of 2000, a student at Oklahoma State University had his computer seized by police after the university was notified by the RIAA of the student’s infringing activities. *Id.* Over 1,000 infringing files were on the student’s computer and he now faces possible criminal copyright charges. *Id.*

<sup>137</sup> Hodder, *supra* note 90.

<sup>138</sup> See Sham, *supra* note 17.

<sup>139</sup> Hodder, *supra* note 90.

<sup>140</sup> This is not the first time one has proposed that the music industry allow consumers to purchase downloadable music online. For instance, McWane argues that record companies should be working to promote online distribution than trying to destroy it. McWane, *supra* note 24 at 107. Furthermore, McWane emphasizes the fact that “online distribution gives artists the chance to reach their audiences directly while recording industry companies have an opportunity to reduce their marginal costs of distribution to almost zero.” *Id.* Instead of bringing lawsuits and having the courts impose harsh sanctions, individuals need to recognize the popularity of online distribution and work together to ensure consumer satisfaction and most of all, give the artists their royalties. *Id.*

<sup>141</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1017 (9th Cir. 2001). In this case, the plaintiffs introduced into evidence a report conducted by expert Dr. David J. Teece. *Id.* The report showed the P2P Networks, in particular, Napster, Inc., “rais[ed the] barriers to plaintiffs’ entry into the market for digital downloading of music.” *Id.* Record companies have spent a great deal of funds to commence Internet sales and licensing for digital downloads. *Id.* However, with digital downloads being made available for free by P2P Networks, the record companies suffer irreparable harm. *Id.*

<sup>142</sup> Warning, *supra* note 3. According to Electronic Frontier Foundation Staff Attorney Wendy Seltzer, “[f]ile-sharing networks represent the greatest library of music in history, and music fans would be happy to pay for access to it, if only the recording industry would let them.” *Id.*

Copyright holders want to be compensated and having individuals pay a downloading fee will allow them to receive compensation for their works.<sup>143</sup>

Recently, a few ISPs have tried to bring about a compromise between the music industry and the music fans. For example, Apple® iTunes® allows its users to download the music they want for 99¢ per song.<sup>144</sup> The users can then take the song they downloaded and burn it onto an unlimited number of CDs for personal use and play the song on up to three Macintosh computers or Windows PCs.<sup>145</sup> Furthermore, before an individual downloads a song, he can preview a thirty-second clip of the song to determine if he wants to purchase it or not.<sup>146</sup> The idea of charging a downloading fee has proven to work very well. Within the first sixteen days of launching its new plan, Apple® sold two million tracks, exceeding the expectations of many industry analysts.<sup>147</sup>

While Apple® iTunes® has proven to work well statistically, there are a number of problems with Apple's® type of service. First, Apple® does not have a large number of music files available in its library.<sup>148</sup> Although Apple® offers over 200,000 songs to download for a fee, many well-liked songs by consumers are not available for

<sup>143</sup> A&M Records, 239 F.3d at 1016–18.

<sup>144</sup> Apple® iTunes®, at <http://www.apple.com/itunes/store> (last visited Jan. 30, 2004). Furthermore, Apple® iTunes® provides parents with an incentive to keep their children from downloading copyrighted works. *Id.* Apple® allows parents to set up a music allowance account, which gives the children access to Apple's® store without requiring a credit card. *Id.* With this incentive, adults as well as children can get the music they want legally. *Id.* Moreover, if a household has more than one child, the parents can set up different allowance accounts for each child with individual spending limits. *Id.*

It is important for parents to keep their children from downloading illegally music because no one, regardless of age, is exempt from being sued by the recording companies. *See* Linda Rosencrance, *P2P group to pay 12-year-old girl's RIAA fine*, at <http://www.computerworld.com/softwaretopics/software/groupware/story/0%2C10801%2C84820%2C00.html?from=imutopicheads> (last visited Feb. 18, 2004). The RIAA filed suit against a 12-year-old girl, Brianna LaHara. *Id.* A settlement was reached between the RIAA and the mother of the child in the amount of \$2,000.00. *Id.* Although copyright infringement is not condoned, the executive director of P2P United, a newly formed trade association, indicated that the RIAA should stop going after children and grandparents and focus its campaign on “someone its own size.” *Id.* While P2P United agreed to pay the settlement on behalf of LaHara, it is in no way promising to do this for children involved in other lawsuits brought by the RIAA. *Id.*

On the other hand, Geoff Gasior argues that the RIAA should not be made to seem like the “Bad Guy” because it sued a 12 year-old child. Geoff Gasior, *RIAA sues 12 year-old*, at <http://techreport.com/ja.zzz?comments=5630> (last visited Feb. 18, 2004). LaHara's mother said, “[i]t's not like we were doing anything illegal. This is a 12-year-old girl, for crying out loud.” *Id.* According to Gasior, this type of comment is the ignorance the RIAA constantly faces when fighting against illegal downloading. *Id.* Simply because one pays an ISP to download music does not make it legal to download and share this music when the rights to do so have not been granted by the copyright holders. *Id.*

<sup>145</sup> Apple® iTunes®, *supra* note 144.

<sup>146</sup> *Id.*

<sup>147</sup> *See* Apple® sells two million songs in 16 days, available at <http://apple.slashdot.org/apple/03/05/14/1845246.shtml?tid=188&tid=141> (last visited Jan. 30, 2004).

<sup>148</sup> *See* Mike Langberg, *Apple's® iTunes® good, not great*, at <http://www.contracostatimes.com/mld/cctimes/business/5782860.htm?template=contentModules/printstory.jsp> (May 4, 2003) (stating that only 200,000 songs are available). This is approximately 100,000 songs less than Napster had. *Downloading Music Legally*, at <http://komar.cs.stthomas.edu/gm425/03f/miller1/htm> (last visited Jan. 30, 2004).



purchase.<sup>149</sup> Many songs are not available for downloading because the artists have not given permission for online distribution.<sup>150</sup> Furthermore, when one purchases the entire CD online, some tracks are missing from the CD because rights for those tracks are not available.<sup>151</sup> While it may seem that Apple® is at fault for not having a larger library, it is not. The problem is that the music companies are not licensing more of the music for online distribution.<sup>152</sup> If the RIAA really wants to stop illegal downloading, then why are its members moving so sluggish to make their music available online? According to Mike Langberg, “The big music companies need to move faster to license more of their huge catalogs if they want to get serious about stopping rampant piracy through file-swapping services.”<sup>153</sup> Regardless of how popular Apple® appears to be, it cannot compete against other ISPs who offer a wider selection of music in their libraries. Many of the ISPs who have a larger library than Apple® do not charge a downloading fee, making it even more difficult for individuals to be motivated to pay for a smaller music selection.

Second, is it really cheaper to pay a downloading fee? One can purchase an entire CD on Apple® iTunes® for \$9.99, making the CD purchase a bargain when the CD consists of over fourteen tracks (priced at 99 cents per song).<sup>154</sup> However, a CD with fewer than ten songs is not a bargain at \$9.99 because the cost of each song is well above 99 cents.<sup>155</sup> Moreover, when one goes to purchase a song off of Apple® for 99 cents, he is not getting the song for only 99 cents.<sup>156</sup> In addition to the charge of 99 cents per song, one must pay taxes for the download.<sup>157</sup> The tax is based on one’s

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<sup>149</sup> Langberg, *supra* note 148. Langberg argued that after getting a magazine suggesting the Top 10 singles at that time, four of the ten top singles were not offered on Apple®. *Id.* Furthermore, when he went on Apple® to download the Top 10 albums, three of the top 10 albums were not available for download. *Id.* Moreover, the No. 10 album was available for download, but only five of the twenty-one tracks were downloadable. *Id.*

<sup>150</sup> *Id.* For example, music from the past like the Beatles, or the Rolling Stones are not available for downloading because permission has not been given for online distribution by the artists or their managers. *Id.* It is important to note that individuals are not just downloading recent music. *Id.* Even many college students download music from the past for their enjoyment. *Id.* Therefore, music from the past should be made available for online distribution for a downloading fee. *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*; see Downloading Music Legally, *supra* note 148 (explaining that even with a downloading fee, music labels will continue to push for CD sales because they want to get as much money as they can out of their music, that is, pushing for CDs as a way to distribute albums). However, as users “grow more and more tired of only one or two standout songs on an album, labels may be forced to sell individual songs over the Internet.” *Id.* See also Stephanie Brauner, *High-Tech Boxing Match: A Discussion of Copyright Theory Underlying the Heated Battle Between the RIAA and MP3ers*, 4 VA. J.L. & TECH. 1, 35 (1999) (emphasizing that the RIAA is representing the commercial interests of record companies and not the artists or composers). Additionally, online distribution will benefit the public interest and not harm it as the RIAA attempts to insinuate otherwise. See generally 4 VA. J.L. & TECH. 1, 30 (1999).

<sup>154</sup> Downloading Music Legally, *supra* note 148; see also Apple® iTunes®, *supra* note 144.

<sup>155</sup> Langberg, *supra* note 148.

<sup>156</sup> See *Id.*

<sup>157</sup> After downloading songs on Apple® iTunes® and then proceeding to pay for the songs, individuals are surprised to learn that they must pay taxes. Telephone Interview with Stephanie Boler, student at The John Marshall Law School (Jan. 27, 2004).

state tax.<sup>158</sup> For instance, if one lived in Chicago, Illinois, and downloaded a song from Apple®, he would pay 99 cents plus 8.25% sales tax. This makes the cost of downloading \$1.08 per song.

Additionally, when one purchases a song from Apple®, it is billed to an Apple® Store account, which requires a major credit card.<sup>159</sup> Apple® then puts a charge on one's credit card once every twenty-four hours.<sup>160</sup> If an individual downloads music on a daily basis, imagine what he will be charged for each purchase by his credit card company in finance charges. In looking at the whole picture, one will be paying well above 99 cents for a song when he calculates all of his expenses (taxes and credit card finance charges).

On another note, one can make the argument that it is better to purchase CDs at a retail store like BestBuy than downloading them off of Apple® iTunes.® When one downloads a CD off of Apple®, he can only play the CD on his computer or iPod®.<sup>161</sup> In order to play the CD in his CD-player or car stereo, he would have to burn the music from his computer onto a blank CD.<sup>162</sup> This process can be costly because one would have to purchase blank CDs and if he does not have the software to burn CDs, he will have to purchase an expensive CD burner.<sup>163</sup> If one purchases the CD at the music store, it will cost him nothing to transfer the tracks off the CD onto his computer.<sup>164</sup> By purchasing the CD at a store, one can listen to the CD in his car, on his CD-player, and computer, all for one price.

Although one will have to weigh the pros and cons himself to determine whether it is better to pay a downloading fee or purchase the music at a retail store, it is in his best interest to pay for the music than illegally download it for free. When one is sued for copyright infringement, he can be liable in damages for not less than \$750.00 or no more than \$30,000.00 (U.S. Dollars) per work infringed upon.<sup>165</sup> If the

<sup>158</sup> *Id.*

<sup>159</sup> Langberg, *supra* note 148.

<sup>160</sup> *Id.*

<sup>161</sup> Apple® iTunes®, *supra* note 144; see, Ian Fried, *Apple's® iPod® Spurs Mixed Reactions*, at <http://news.com.com/2100-1040-274821.html?legacy=cnet> (last modified Oct. 23, 2001) (pointing out that the iPod®, although “the size of a deck of cards,” allows one to download digital audio files and burn CDs from the device).

<sup>162</sup> Justin Becker, *How to: Burn CDs*, at [http://www.askmen.com/fashion/how\\_to/45\\_how\\_to.html](http://www.askmen.com/fashion/how_to/45_how_to.html) (last visited Feb. 18, 2004) (indicating that the term “burning” is where one takes data from his hard drive and saves it to a CD-ROM, also known as a “blank CD”).

<sup>163</sup> *Id.*; see also Nextag, available at <http://www.nextag.com/buyer/> (last visited Feb. 18, 2004) (showing the prices of various CD Burners which could cost anywhere from \$87.00 to \$7,695.00).

<sup>164</sup> Becker, *supra* note 162; see also Michael Landau, *supra* note 136 (emphasizing that buying a CD does not mean that the purchaser owns the content of the CD). Purchasing a CD only gives the purchaser “permission from the legal owners of the material on that CD to listen to it in a noncommercial setting.” *Id.*

<sup>165</sup> 17 U.S.C. § 504(c)(1) (1999). These damages are known as statutory damages. See *Palmer v. Slaughter*, No. 99-899-GMS, 2000 U.S. Dist. LEXIS 22118, \*8-10 (D. Del. July 13, 2000). A plaintiff is entitled to recover statutory damages instead of actual damages and profits in an infringement action. *Id.* An award of statutory damages serves two purposes: “It compensates the plaintiff for the infringement of its copyrights while, at the same time, serving as a deterrent by punishing the defendant for its unlawful conduct.” *Id.* Furthermore, when the courts determine the amount of statutory damages, a number of factors are considered: expenses saved and profits earned by defendant, revenues lost by plaintiff, and the defendant's state of mind. *Id.* See also *UMG Recordings, Inc. v. MP3.COM, Inc.*, 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000) (illustrating how a plaintiff can win a tremendous amount of money in statutory damages for copyright infringement).

court finds that the infringement was committed willfully, the court may hold one liable for up to \$150,000.00 (U.S. Dollars) per work infringed upon.<sup>166</sup> It is better to pay \$9.99 for a CD online than risk paying up to \$150,000.00 for illegally downloading a CD through file sharing. What is more frightening is that a court in addition to making one pay for the actual infringement, can make a defendant pay the plaintiff's attorney fees and court costs.<sup>167</sup> No one would reasonably want to risk having to pay thousands of dollars in damages for copyright infringement when he could avoid a lawsuit altogether for less than twenty dollars.

## 2. A Call for Congress to Legislate

With the rise of new technology, Congress has been forced to protect the rights of copyright holders through legislation.<sup>168</sup> At the same time, Congress encourages new inventions of technology, especially when dealing with the Internet.<sup>169</sup> Therefore,

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Michael Landau, *supra* note 136. The plaintiffs won \$25,000 in statutory damages per CD uploaded on the MP3.COM system. *Id.* The plaintiffs argued that over 10,000 CDs had been infringed upon; while the defendant argued only 4,700 CDs were infringed upon. *Id.* Regardless of the number, “this places the damages between \$118 million and \$250 million.” *Id.* See generally *Engel v. Wild Oats, Inc.*, 644 F. Supp. 1089, 1093 (S.D.N.Y. 1986) (exemplifying how a plaintiff won \$20,000.00 in statutory damages where the defendant only made a \$1,200.00 profit)

<sup>166</sup> 17 U.S.C. § 504(c)(2) (1999). Courts rarely award \$150,000.00 per infringed work. *Palmer* 2000 U.S. Dist. LEXIS 22118 at \*11–12; see *Joe Hand Promotions v. Burg's Lounge*, 955 F. Supp. 42, 44 (E.D. Pa. 1997) (requiring evidence of ‘egregious circumstances’ before awarding the maximum amount of statutory damages); *Home Box Office v. Champs of New Haven, Inc.*, 837 F. Supp. 480, 484 (D. Conn. 1993) (“declining to award the maximum amount of statutory damages since there was no evidence of ‘repeated violations over extended periods of time, substantial unlawful monetary gains or any significant actual damages to the plaintiff’”); *Kenbrooke Fabrics, Inc. v. Holland Fabrics, Inc.*, 602 F. Supp. 151, 155–56 (S.D.N.Y. 1984) (“awarding the maximum amount of damages under the statute because the defendant had been named in a number of similar suits and thus, could not be permitted to ‘continue as one of the ‘bad boys’ of the textile industry’”).

<sup>167</sup> 17 U.S.C. § 505 (1999) (allowing a courts to award attorney's fees to the prevailing party in a copyright lawsuit); see *Playboy Enters., Inc. v. Webworld, Inc.*, 968 F. Supp. 1171, 1177 (N.D. Tex. 1997) (emphasizing that attorney's fees “are the rule rather than the exception and should be awarded routinely”). It is up to the court's discretion to award attorney's fees. *Id.* See also *Micromanipulator Co. v. Bough*, 779 F.2d 255, 259 (5th Cir. 1985); *Palmer* 2000 U.S. Dist. LEXIS 22118 at \*17 (emphasizing that where there appears to be “significant merit” to the plaintiff's case, the court should focus its analysis on “whether the defendant was acting intentionally, willfully, or in bad faith”).

<sup>168</sup> For instance, Congress implemented to Copyright Act of 1976, the Audio Home Recording Act (AHRA), and the DMCA. The AHRA provides restriction on digital audio recording devices. Brauner, *supra* note 153 at n.18.

<sup>169</sup> *McWane*, *supra* note 24, at 105–06 (arguing that the judiciary should be reluctant to expand copyright protection because such decisions threaten the “development of news kinds of Internet technology”); see *The Internet*, available at <http://www.for-internet-info.com/internet.html> (last visited Nov., 7, 2003) (emphasizing the importance of the Internet today). According to the article, the Internet is used for a variety of things. *Id.* The article states:

No longer just for military communication, the Internet is now used for all kinds of information exchange. People display their cultural and artistic contributions, publish books and essays, debate politics, share personal hobbies and interests, and engage in lively discussion, both serious and whimsical. They buy and sell online, offer catalogs of products, and advertise their companies. Purchasing books, music, and airline tickets is common, as is online banking and stock-trading. Educational opportunities abound, in

who better to implement a compromise between the music industry and Internet consumers than Congress itself? The war between the RIAA and the Internet users has gone on far too long without any resolutions.<sup>170</sup> No one seems to be willing to step to the middle and work with the other side. In order to determine what compromise should be implemented, Congress must consider a number of factors.

First, there are individuals who believe access to the Internet should be unlimited and all information on it should be free. Many of these individuals are called hackers and they believe that a free exchange of information over the Internet allows for “overall creativity.”<sup>171</sup> Hackers present a problem for the music industry because if individuals are forced to pay for downloads, hackers will find a way to allow these individuals to download music directly from pirated websites.<sup>172</sup> Therefore, illegal downloading will continue and copyright holders will constantly have their rights violated.

Second, Congress must determine how broad it really wants to extend copyright law. Based on recent court decisions, copyright law is broader than ever.<sup>173</sup> Copyright holders have the ability to restrict individuals from “looking at, listening to, or learning from copyrighted works.”<sup>174</sup> Of course, copyright law should prohibit one from copying copyrighted material for redistribution and sale of another’s creative works. However, the latest restrictions placed by the court may be trampling over the innocent activities one should be able to legally engage in (like listening to music for personal pleasure and not profit).

Moreover, Congress must consider whether the music industry and ISPs can work together efficiently if individuals are charged a downloading fee. While it is necessary for copyright holders to receive royalties, it is not necessary for them to

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the form of free tutorials, paid online classes, and as an adjunct to physical classes held in universities. One will be amazed at the wealth of information available to him/her online.

*Id.*

<sup>170</sup> Complaint, *supra* note 8.

<sup>171</sup> Yu, *supra* note 24, at 381.

Hackers believe that essential lessons can be learned about the systems – about the world – from taking things apart, seeing how they work, and using this knowledge to create new and even more interesting things. They resent any person, physical barrier, or law that tries to keep them from doing this . . . hackers believe strongly in the free flow of information, they mistrust authority and find bureaucracies flawed.

*Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> Brauner, *supra* note 153 at n.4 (arguing that online distribution allows artists “publicity and exposure to a wide range of listeners without having to overcome the hurdle of being signed by a major record label”). Moreover, Brauner emphasizes that digital downloading makes Internet distribution inexpensive. *Id.* She emphasizes,

The large record companies control traditional methods for distribution of recorded music through record stores, and the artists represented by these record companies dominate traditional radio stations. New, smaller record companies can distribute music cost effectively over the Internet, allow new artists a means for their music to be heard. The distribution of MP3 technology may create a platform for which large future profits may be made for artists that might not otherwise be distributed on a national basis through ordinary methods.

*Id.*

have tremendous decision-making power over the ISPs businesses.<sup>175</sup> For instance, who should have the power to decide what a reasonable downloading fee is? Who has the power in deciding what percentage copyright holders are entitled to from the collected fees? Congress must keep in mind that ISPs are not going to step aside and allow the music industry to control the decision-making functions of their businesses.

With all this being said, Congress’ compromise should consist of the following: a fee should be charged for the downloading of copyrighted works. The fee should be determined by the ISPs. Because it is not likely that the music industry and ISPs will reach an agreement on what percentage copyright holders are entitled to, Congress should set the percentage for all to follow. Specifically, the percentage one is entitled to should be based on how often the copyright holder’s work is downloaded.<sup>176</sup> Although hackers present a problem to the compromise, Congress needs to implement a provision giving individuals an incentive to pay for the use of copyrighted works. The incentive should be one that makes individuals realize that there are severe consequences when illegally downloading music, regardless of how beneficial the term “free” appears.<sup>177</sup> Nothing is ever actually free without consequences!

### *3. Fix the Flaws of the Clean Slate Program*

Instead of promoting the current Clean Slate Program, the RIAA should abolish it. The members of the RIAA are not bound by the agreement within the Clean Slate Program.<sup>178</sup> The program insists that the RIAA will not cooperate in any lawsuits against the participants of the program, but it does not promise participants real immunity from all lawsuits.<sup>179</sup> The RIAA could possibly revise the current agreement to ensure possible participants that they will not be sued by any of its members. Because the RIAA’s members actually have authority over their copyrights, agreeing not to sue those who apply to the program will probably guarantee immunity to the participants.

However, there are musicians and other recording labels that are not members of the RIAA.<sup>180</sup> Unless the program can guarantee full immunity from the organization itself, RIAA members, and non-RIAA members, true amnesty can never be granted to those who apply for a clean slate. With the possibility of RIAA members and non-RIAA members being able to obtain subpoenas to sue those who participate in the program, the RIAA is possibly committing an illegal, fraudulent act

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<sup>175</sup> McWane, *supra* note 24, at 108 (pointing out that two record companies struck a deal with Napster to develop a new digital downloading service charging its subscribers downloading fees).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> Sham, *supra* note 17.

<sup>179</sup> MEALEY’S Litig. Rep., *supra* note 88.

<sup>180</sup> Op-Ed, *supra* note \*. According to Senior Electronic Frontier Foundation Staff Attorney, Fred von Lohmann, the RIAA wants file-sharers to admit they are guilty of sharing copyrighted music online leaving them vulnerable to lawsuits from recording companies, music publishers, and bands like Metallica that control independent music rights. *Id.*

by promising amnesty.<sup>181</sup> Because of this deceptive act, the RIAA will likely find itself as a defendant if it chooses to carry on with the Clean Slate Program.

### III. CONCLUSION

Although there is only one case pending against the RIAA for its Clean Slate Program, the Clean Slate Program is a violation of the Justice System.<sup>182</sup> Of course the RIAA can make valid arguments of why the music industry is seeking legal action against individual file-sharers.<sup>183</sup> In fact, the uploading and downloading of copyrighted works does infringe upon the distribution and reproduction rights of the copyright holders.<sup>184</sup> However, providing a potentially fraudulent program in an effort to stop copyright infringement is not the best way to help the music industry or its Internet consumers. In fact, consumers are still illegally uploading and downloading copyrighted works. Moreover, the music industry now finds itself at the other end of lawsuits – as the defendants – because of the Clean Slate Program.

Thus far, the RIAA has not been able to come up with sufficient solutions in its attempt to stop copyright infringement. Whether the RIAA will be able to stop illegal music downloading nationwide is unknown. It is in the best interests of the RIAA and consumers to find a middle ground. That middle ground is for ISPs to charge a downloading fee to its users. By charging a fee, consumers can get the music they want and the music industry can be paid for their copyrighted works. This solution may have its imperfections as well, but compared to the costs and time consumption of lawsuits, a downloading fee may be the best option. And so, to lessen the chaotic circumstances surrounding the music industry and its Internet consumers, a middle ground between the two must be established and put into practice.

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<sup>181</sup> Olsen, *supra* note 16.

<sup>182</sup> *See generally* Op-Ed, *supra* note \*.

<sup>183</sup> Complaint, *supra* note 8.

<sup>184</sup> A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014 (9th Cir. 2001).