

**This American Copyright Life:  
Reflections on Re-equilibrating Copyright for the Internet Age**

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ABSTRACT

This article calls attention to the dismal state of copyright's public approval rating. Drawing on the format and style of Ira Glass's "This American Life" radio broadcast, the presentation unfolds in three parts: Act I – How did we get here?; Act II – Why should society care about copyright's public approval rating?; and Act III – How do we improve copyright's public approval rating (and efficacy)?

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Following my presentation of the Brace Lecture, I had the opportunity to reprise the lecture at Cardozo Law School, George Washington Law School (and the D.C. Chapter of the Copyright Society), Indiana University, the Northern California Chapter of the Copyright Society, Sony Pictures, U.S. Copyright Office, University of California at Berkeley, University of California at Davis, University of California (Hastings), University of Pennsylvania, and the USC Intellectual Property Conference Speakers' Dinner. I thank Shyam Balganes, Bob Brauneis, Ben Depoorter, Kristelia Garcia, Naomi Jane Gray, Justin Hughes, Linda Joy Kattwinkel, Mike Mattioli, David Morrison, Maria Pallante, Madhavi Sunder, Aimee Wolfson, Felix Wu, Christopher Yoo, and the numerous law students and copyright professionals who shared their reactions.

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I am deeply honored to deliver the Brace Lecture, which has long served as a platform for celebrating, understanding, and addressing the challenges of the copyright system.<sup>1</sup> I dare say that at no time in the Brace Lecture's 42 year history, or for that matter, copyright law's 300 year history, has the copyright system been more severely criticized as being out of touch and out of date.

We are now 13 years since Napster's revolutionary appearance – what seems like an eternity in the rapidly evolving Internet Age. My law students have come of age in the post-Napster era. Netizens who were in high school when peer-to-peer functionality went viral are now beyond the age at which no one should be trusted.<sup>2</sup> We have since seen the rise of enumerable file-sharing and cyberlocker services. The emergence of the Internet as a principal platform for distributing works of authorship has focused public opinion on copyright law like at no other time in copyright's long history. And as last year's cataclysmic battle over the Stop Online Piracy Act (SOPA) revealed, the glare of public opinion can be harsh.<sup>3</sup>

For those reasons, I would like to begin this year's Brace Lecture by calling attention to a topic that has not attracted much attention at such staid gatherings: copyright's public approval rating. For reasons that I will explain, the public's perception of the copyright system has become increasingly central to its efficacy and vitality. I believe that copyright's role in promoting progress in the creative arts, freedom, and democratic values depends critically upon

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<sup>1</sup> Prior Brace lecturers include many of the most influential copyright jurists, practitioners, and academics. I have had the honor to learn from and, in two cases, collaborate with prior Brace lecturers – David Nimmer, Paul Goldstein, Mark Lemley, and Jane Ginsburg. I also want to recognize special debts to the Honorable Stephen G. Breyer and the Honorable Jon O. Newman. I had the opportunity to write my first article on copyright law – Tailoring Legal Protection for Computer Software, 39 Stan. L. Rev. 1329 (1987) – in a seminar led by then-Judge, now Justice, Breyer. His economic and policy orientation resonated with my graduate studies in law and economics and has provided a valuable foundation throughout my career. Following law school, I had the privilege to clerk for Judge Newman on the U.S. Court of Appeals for the Second Circuit. His deep interest in copyright jurisprudence and legislative history very much influenced my own understanding, appreciation, and interest in this extraordinary and dynamic field.

<sup>2</sup> The 1960s phrase “Don't Trust Anyone Over 30” was first uttered by Jack Weinberg, a UC Berkeley student involved with the Free Speech Movement, in an interview with the San Francisco Chronicle in 1964. See “Don't Trust Anyone Over 30, Unless It's Jack Weinberg,” Berkeley Daily Planet (Apr. 6, 2000) <<http://www.berkeleydailyplanet.com/issue/2000-04-06/article/759>>

<sup>3</sup> See ARAM SINNREICH, THE PIRACY CRUSADE: HOW THE MUSIC INDUSTRY'S WAR ON SHARING DESTROYS MARKETS AND ERODES CIVIL LIBERTIES (2013).

restoring public support for its purposes and rules.

Rather than approach this lecture as merely an opportunity to present an academic paper, I have chosen a more personal and confessional approach. I hope that this will be more entertaining than a traditional lecture. But more importantly, I hope that my journey will better communicate the difficult challenges confronting the copyright system and reveal key insights for sustaining and improving it.

The confessional aspect of my story revolves around my struggle with what I will call technology-content schizophrenia<sup>4</sup> – a disorder that has not yet been recognized by the American Psychiatric Association.<sup>5</sup> From my earliest memories, I was drawn to both technological innovation and artistic creativity. As an adolescent, rock ‘n roll music inspired “My Generation,”<sup>6</sup> providing an outlet and voice for our frustrations and desire to rebel against the injustice that surrounded us. Bob Dylan’s anthems brought the values of the civil rights and anti-war movements into popular culture. How better to understand the Nixon years than through Pete Townshend’s “Won’t Get Fooled Again”<sup>7</sup>?

At the same time, rock ‘n roll fueled my interest in the technology for reproducing and performing music. Movies, television shows, and books transported me from a drab, homogeneous suburban New Jersey neighborhood to all parts of the globe, historical moments, diverse cultures, and futuristic and distant planets. Calculators and primitive computers were the most tantalizing toys. Creative arts and technology coexisted without conflict during my formative years. I enjoyed tinkering with technology and art, from building stereo amplifiers to making mix tapes, as much as I loved the music that blasted from my home-made stereo speakers and customized car stereo. Both music and technology shaped my values and interests.

As a graduate student, my frustration with the exorbitant cost of IBM’s Personal Computer led me to the economics of network technologies and intellectual property and antitrust law. I came to see that expansive copyright protection for computer software could

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<sup>4</sup> The AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE defines “schizophrenia” as “[a] situation or condition that results from the coexistence of disparate or antagonistic qualities, identities, or activities.”  
<<http://education.yahoo.com/reference/dictionary/entry/schizophrenia>>

<sup>5</sup> See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5<sup>th</sup> ed. 2013).

<sup>6</sup> See My Generation, Wikipedia <[http://en.wikipedia.org/wiki/My\\_Generation](http://en.wikipedia.org/wiki/My_Generation)>. Pete Townshend’s anthems would prominently in my formative years. He told *Rolling Stone* magazine that “‘My Generation’ was very much about trying to find a place in society.” See id.

<sup>7</sup> “Won’t Get Fooled Again” appeared as the final track on The Who’s 1971 album *Who’s Next*. It captured the frustration, hypocrisy, and cynicism of the power structures defining our era – “We were liberated from the fall that’s all, But the world looks just the same”; “meet the new boss, same as the old boss” – punctuated by the greatest scream in rock ‘n roll history (in my humble opinion).

undermine both rapid innovation and network externalities.<sup>8</sup> These experiences led me, more than two decades ago, to lay the groundwork for a research, teaching, and public policy center focused on law and technology at the University of California at Berkeley. We envisioned the Berkeley Center for Law & Technology (BCLT) as a place to support both technological innovation and expressive creativity.<sup>9</sup>

Shortly after BCLT's formation, students approached me about expanding the curriculum to include entertainment law. BCLT had recently hosted one of the first conferences on "Digital Content" and it was increasingly clear that the future of the Internet would be as much about the content that flowed through this extraordinary network as the network itself. Although my intellectual property research up until that time had focused on software protection, I embraced the students' suggestion and began teaching a course exploring the role of intellectual property in the entertainment industries.

Things were chugging along well. The dot com explosion enabled BCLT to build a strong foundation with connections to both Silicon Valley and Hollywood. Yet growing rancor over the Commerce Department's White Paper<sup>10</sup> and the WIPO Copyright Treaties<sup>11</sup> created controversy, although it was largely confined to industry experts and policy wonks. Even the passage of the Digital Millennium Copyright Act<sup>12</sup> did not register significantly in the public consciousness.

This calm would change suddenly mid1999. The release of Napster's file-sharing software would bring the two pillars of my life into conflict. By the first session of my Introduction to Intellectual Property class in January 2000, nearly all of my students had been swept up by the Napster tsunami. When I posed the question of how this technology might affect the flow of creative works, my students were incapable of seeing past the euphoria of gaining access to nearly any sound recording at zero cost through Napster's charismatic

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<sup>8</sup> See Peter S. Menell, Tailoring Legal Protection for Computer Software, 39 Stanford L.Rev. 1329 (1987).

<sup>9</sup> BCLT's mission statement has been "to foster the beneficial and ethical understanding of intellectual property (IP) law and related fields as they affect public policy, business, science and technology." Berkeley Center for Law & Technology <<http://www.law.berkeley.edu/5065.htm>>.

<sup>10</sup> See Bruce A. Lehman, U.S. Patent and Trademark Office, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights (1995) (hereinafter cited as "IPNII White Paper") <<http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf>>.

<sup>11</sup> See WIPO Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 65 (1997); WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 76 (1997).

<sup>12</sup> Pub L. No. 105-304, 112 Stat. 2860.

technology.<sup>13</sup> And I would have to admit that 16 year old me would have found this technology comparably irresistible.

Digital technology would bring about more than merely easy (and free) access to popular music, movies, and television shows. Digital advances enabled the population at large to easily and seamlessly remix or mash-up copyrighted works, appealing to a universal human desire to engage, connect to, and personalize creative works. Sixteen year old me would have adored these tools, just as the current version of me has embraced digital technology for teaching, entertainment, and self-expression.

This lecture shares my struggle to make sense of these apparently conflicting ideals – juxtaposing the importance of intellectual property protection for promoting creative arts with the inherent human desire to gain access to and engage creative works. It uses remix tools and transformative appropriation to illuminate the copyright system’s difficult adaptation to the Internet Age.

Drawing on the format and the style of Ira Glass’s “funny, dramatic, surprising, and true” “This American Life” radio broadcast,<sup>14</sup> I have fashioned “This American Copyright Life” into a three part story: Act I – How did we get here?; Act II – Why should society care about copyright’s public approval rating?; and Act III – How do we improve copyright’s public approval rating (and efficacy)?

### **Act I: How Did We Get Here?**

It is useful to ask why copyright’s public approval rating has not, until the past decade and a half, attracted much attention. The answer lies largely in the evolution of technologies for distributing creative works. I offer a perspective which, judging from the age profile of the audience, might spark some nostalgia. Many of us first experienced the copyright system during an era in which the options for accessing copyrighted works were limited. Films were released to motion picture theaters and eventually broadcast on television. Television shows were available at designated times through television broadcasts. Recorded music was available at record stores or broadcast on radio. Books could be found in bookstores or libraries.

In that bygone era, consumers had relatively little awareness of, or interaction with, the copyright system. We did not think much about the copyright system because we largely lacked the technological capacity to do much with copyrighted works beyond experience them. We anxiously awaited new films, albums, novels, magazines, comic books, and television shows. To the extent that we considered the “copyright system” as such, our views largely paralleled our enjoyment of the works that content industries produced. If we liked the content, the system was working.

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<sup>13</sup> See Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks*, 89 Va. L. Rev. 505 (2003).

<sup>14</sup> See *This American Life* <<http://www.thisamericanlife.org/>>

In my own case, the products of the content industries were deeply engaging and inspiring. I still vividly remember seeing my first episode of the original Star Trek series while at a sleep-over with my much older (a few years) cousins. Gene Roddenberry's extraordinary voyages of the Starship Enterprise – “to boldly go where no man has gone before” – had a profound influence on my social values and interest in technology. Rebellious rock 'n roll music spoke to “My Generation”<sup>15</sup> – fueling our innate adolescent desire to question authority and think independently. I don't know how I would have survived the anxieties, indulgences, and contradictions of “teenage wasteland” without Pete Townshend's rock ballads<sup>16</sup> or Bob Dylan's forthright poetry. If the copyright system promoted this art, then I was a fan. But frankly, I had little reason to think much about the connection between copyright and the inspiring music, film, literature, and art that captivated and shaped me.

This is not to say that I did not seek to use technology as a means to gain greater access to and enjoyment of copyrighted works. Popular music and Hollywood's visions of a just technological/digital future fueled my precocious techie tendencies. I sought out the latest in recording technology, experimented with primitive computers, and repaired and reconstructed bicycles (and later a very used, abused, and largely rusted out Fiat). Along with a friend, I built stereo amplifiers and high fidelity speakers and designed and installed home and car stereo systems. I subscribed to Stereo Review and many a record club (only to quit as soon as I surpassed the minimum requirements needed to secure the heavily discounted albums). I spent a lot of time in record, stereo, hardware, and electronics shops with my close friend and partner in mischief Chris Kendrick. We experimented with the primitive recording technologies of the time, producing quite a few mix tapes.

It was not entirely surprising, therefore, when Robby Beyers, a high school classmate who was an avid photographer, approached me about “mixing” the soundtrack for a multi-screen slide show that he was planning for our high school graduation. Copyright infringement never crossed my mind as Chris and I spliced together popular, copyright-protected musical compositions and sound recordings. We recorded this early “mash-up” – featuring a clip from the soundtrack of the then-popular television series Mash – on one track. Robby used a primitive computer to place dissolve commands for the six carousel projectors on the other track. The

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<sup>15</sup> “My Generation” is the title of The Who's classic 1965 anthem. See My Generation, <[http://en.wikipedia.org/wiki/My\\_Generation](http://en.wikipedia.org/wiki/My_Generation)> It was named the 11<sup>th</sup> greatest song by Rolling Stone magazine. Although I was too young to have been in the original audience for this song, it became a favorite as my appreciation for The Who's music grew.

<sup>16</sup> “Teenage wasteland” is the most resonant refrain from The Who's classic “Baba O'Riley.” See “Baba O'Riley” <[http://en.wikipedia.org/wiki/Baba\\_O%27Riley](http://en.wikipedia.org/wiki/Baba_O%27Riley)>. It was released on The Who's “Who's Next,” one of the two most memorable albums of my youth.

The Who's rock opera Quadrophenia, released in 1973, offered a deeper, more personal, sociological, and psychological perspective for my generation. The use of the “quadrophonic” metaphor and story-telling device (four distinct and contradictory voices) resonated with confused teens struggling to find their our identity in a world defined by conventional molds.

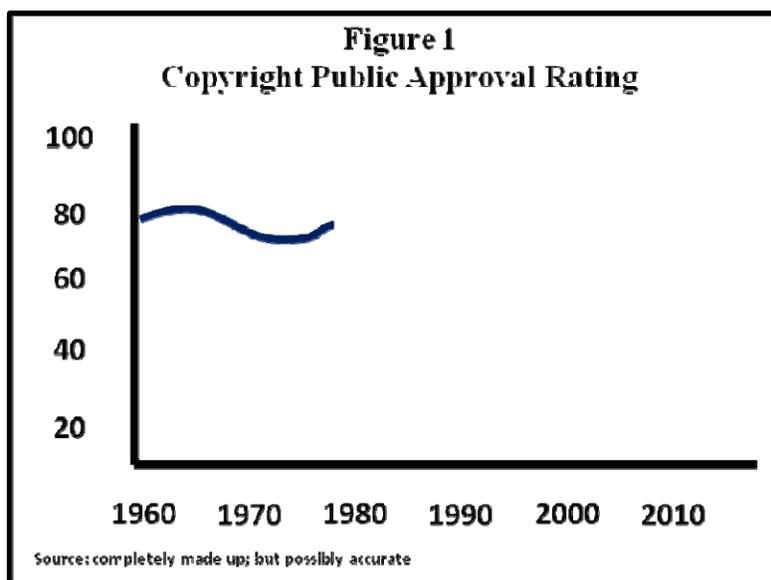
resulting show was a great success, bringing tears to parents, graduating seniors, and teachers alike. I don't recall anyone suggesting that we had violated copyright law – and in any case, the statute of limitations has long since passed.<sup>17</sup> The overwhelming sentiments were admiration for youthful ingenuity and the wonders of “modern” technology – a “computerized” slide show. And perhaps that extraordinary show – owing principally to Robby's vision and talent – helped some of our classmates better appreciate those of us who avoided the high school spotlight.<sup>18</sup>

Thus, if one were to have gauged my opinion as well as public opinion of “My Generation” regarding the copyright system at that time, it would no doubt have been neutral to overwhelmingly positive, as depicted in Figure 1. “My Generation” did not see copyright as an oppressive regime. We thrived in ignorant bliss well below copyright's enforcement radar and were inspired by content industry products.

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<sup>17</sup> See 17 U.S.C. § 507.

<sup>18</sup> Robby would go on to earn his B.S. in Chemical Engineering and M.S. and Ph.D. in Materials Science at Stanford, where he became the photographer for Stanford's irreverent marching band. We would reconnect for two years while I pursued a Ph.D. in economics at Stanford. Robby would go on to author more than forty technical papers, including invited review articles for *Solid State Physics* and the *Annual Review of Materials Science* and lead a group at IBM's Almaden Research Center, becoming a co-inventor on several patents, including the basic patent on single-wall carbon nanotubes. Although I had him pegged for a Nobel Prize, his career took a surprising turn in the mid 1990s when he enrolled at Santa Clara University's night law school. Robby completed his J.D. in 2000 and M.B.A. in 2001. He is now a partner in a leading Silicon Valley technology law practice where he prosecutes Apple's patents among other matters.



The situation could not be more different for adolescents, teenagers, college students, and netizens today. Many perceive copyright to be an overbearing constraint on creativity, freedom, and access to creative works.<sup>19</sup> Although they might recognize copyright’s role in producing works that they enjoy, they consider copyright laws to be punitive, chilling, backward, and poorly attuned to the needs of their generation. I don’t, at this juncture of the lecture, want to evaluate their perceptions and emotions but rather to examine the reasons for this shift in perceptions. As the foregoing personal history suggests, I relate to my students and my teenage/twenty something sons in their passion for copyrighted works and their desire to use technology to enhance their enjoyment of creativity and to express themselves. I am moved by some of Hollywood’s releases, anxiously await broadcasts of *The Big Bang Theory* and *Modern Family*, cherish great novels, and hope for new Foo Fighters releases.

This Act sets the stage for understanding why the post-Napster generations perceptions of the copyright system are far more important to the functioning of the copyright system than were the perceptions of “My Generation.” The story begins with the development of the copyright enforcement regime during the Analog Age – a period in which copyright enforcement played a relatively modest role in the overall functioning of the copyright system. We will then trace how the rules and institutions that developed in the Analog Age backfired in the Internet Age.

### **A. Copyright Enforcement in the Analog Age**

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<sup>19</sup> See JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* (2008); LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004); SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS, THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* (2001); LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (2000).

For much of the last century, the technology of reproducing works of authorship as well as business practices made enforcement manageable. It was costly to reproduce books and relatively easy to detect large-scale piracy. Book sellers had ongoing relationships with publishers. Hence they would have a lot of explaining to do if their competitors were selling large amounts of best sellers and they had no sales. Purchasing supplies from unauthorized sources exposed the renegade book seller, thereby jeopardizing their critical business relationships. Without the ability to hit substantial volume, book piracy was a marginal business at best in developed economies with copyright laws.

Motion picture studios had an even tighter grip over their distribution chain. They did not sell their product. Rather they leased film reels to theaters and were paid based on box office revenues. The major problem that the industry experienced was “bicycling”<sup>20</sup> – unscrupulous theater owners who would “bicycle” films around the corner to another venue and sneak in some off-the-books shows. The film industry hired investigators to look for advertisements of such showings. The impact on the industry was modest.

The music industry faced two substantial enforcement issues – compliance with the public performance right and, much later, record piracy. Music composers and publishers formed the American Society of Composers, Authors and Publishers (ASCAP) in 1914 to protect public performance rights. Through a series of test cases, ASCAP established broad protection for musical compositions.<sup>21</sup> It was able to attract many of the leading composers and music publishers of the day, enabling them to offer a “blanket” license scaled to the business and institutions publicly performing ASCAP compositions.<sup>22</sup> The idea was to charge a relatively modest percentage fee across a large base of entities performing copyrighted musical compositions in ASCAP’s growing inventory and use sampling methods to divvy up the pool. The blanket system greatly economized on enforcement costs, but entailed a large education and enforcement campaign. The model began to generate substantial net revenue for distribution as the radio industry took off in the 1930s.<sup>23</sup>

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<sup>20</sup> See KERRY SEGRAVE, *PIRACY IN THE MOTION PICTURE INDUSTRY* (2003); See Bernard R. Sorkin, A Geriatric View of Motion Picture Piracy, 51 *J. Copyright Soc’y U.S.A.* 237, 237 (2003).

<sup>21</sup> See, e.g., *Herbert v. Shanley*, 242 U.S. 591 (1917) (holding that hotels and restaurants which performed music must compensate composers even if patrons are not charged separately for the musical entertainment); *Jerome H. Remick & Co. v. General Electric Co.*, 16 F.2d 829 (S.D.N.Y. 1926) (radio broadcasts); *Buck v. Lester*, 24 F.2d 877 (E.D.S.C. 1928) (motion picture theaters); *Buck v. Milam*, 32 F.2d 622 (D. Idaho 1929) (dance hall); *Buck v. Jewell-La Salle Realty Co.*, 283 U. S. 191 (1931) (hotels).

<sup>22</sup> See Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 *Calif. L. Rev.* 1293, 1328-40 (1996).

<sup>23</sup> After initially offering the nascent industry low rates, ASCAP ramped up its rates over 400% between 1931 and 1939. See American Society of Composers, Authors and Publishers, Wikipedia

Like book stores, record stores were disinclined to vend unauthorized pirated goods. The record labels had long-term relationships with distribution channels and could detect substantial variations in sales.

It was against this backdrop that Congress set out to draft comprehensive copyright reform – what would eventually become the Copyright Act of 1976 – in the mid 1950s. In 1955, Congress authorized appropriations over the next three years for comprehensive research and preparation of studies by the Copyright Office as the groundwork for general revision. It was expected that this reform would be completed by the early to mid-1960s. The bulk of the reform was completed by 1965, but controversy over the treatment of the nascent cable television industry delayed passage. The end of the story is well-known – the long and complex Copyright Act of 1976.

A significant part of the copyright system’s pathology relates to the statutory damages regime, so it will be worthwhile tracing the development of those provisions. From the nation’s founding, Congress has provided for the award of statutory damages for copyright infringements.<sup>24</sup> As Congress would explain in the lead-up to the 1976 Copyright Act, the “need for this special remedy arises from the acknowledged inadequacy of actual damages and profits in many cases” due to the inherent difficulties of detecting and proving copyright damages.<sup>25</sup> What Congress had in mind was the public performance of music. The Register of Copyright’s 1961 Report noted that

[i]n many cases, especially those involving public performances, the only direct loss that could be proven is the amount of a license fee. An award of such an

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<[http://en.wikipedia.org/wiki/American\\_Society\\_of\\_Composers,\\_Authors\\_and\\_Publishers](http://en.wikipedia.org/wiki/American_Society_of_Composers,_Authors_and_Publishers)>. When ASCAP sought to double its rates again in 1940, radio broadcasters formed a boycott of ASCAP music and formed the rival performance rights organization, Broadcast Music Inc. (BMI), to compete with ASCAP. See Russell Sanjek, *Pennies From Heaven: The American Popular Music Business in the Twentieth Century* (1996). By that year, the broadcasting industry was bringing in over \$200 million in gross revenues, of which \$4 million or about 2 percent was being paid out to ASCAP. See Marcus Cohn, *Music, Radio Broadcasters and the Sherman Act*, 29 *Geo. L.J.* 407, 412-13 (1941). Radio royalties comprised about two-thirds of ASCAP revenues at that time.

<sup>24</sup> See William S. Strauss, Study No. 22, *The Damage Provisions of the Copyright Law*, (Oct. 1956), as reprinted in 1 *Omnibus Copyright Revision Legislative History* ix-32 (George S. Grossman ed., 2001) (summarizing the development of copyright damages law through the 1909 Act); see also Stephanie Berg, *Remedying the Statutory Damages Remedy for Secondary Copyright Infringement Liability: Balancing Copyright and Innovation in the Digital Age*, 56 *J. Copyright Soc’y U.S.A.* 265 (2009).

<sup>25</sup> See U.S. Copyright Office, *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, at 102 (July 1961) (hereinafter cited as “Register’s 1961 Report”).

amount would be an invitation to infringe with no risk to the infringer.<sup>26</sup>

Based on these considerations, the Register concluded that the principle of statutory damages appropriately serves to assure adequate compensation for harm *and* “to deter infringement.”<sup>27</sup> The Register further explained that

the courts should, as they do now, have discretion to assess statutory damages in any sum within the minimum and maximum [ranges]. In exercising this discretion the courts may take into account the number of works infringed, the number of infringing acts, the size of the audience reached by the infringements, etc. But in no case should the courts be compelled, because multiple infringements are involved, to award more than they consider reasonable.<sup>28</sup>

Accordingly, Congress ultimately retained, with some updating and revision, statutory damages for copyright infringement.<sup>29</sup>

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<sup>26</sup> See *id.*

<sup>27</sup> See *id.* at 103.

<sup>28</sup> See *id.* at 105.

<sup>29</sup> See Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. § 504). The 1976 Act provided that

(c) Statutory Damages.

(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$250 or more than \$10,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$50,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$100. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within

This deterrent regime worked relatively well throughout copyright law's long history. The risk of incurring large fines channeled restaurants, bars, dance halls and other establishments publicly performing copyrighted works into licensing arrangements with the collecting societies. It also discouraged commercial infringement enterprises. The problem of non-commercial infringement rarely arose because of the inherent difficulties of reproducing high quality copies of records, books, and films and finding scalable commercial outlets for counterfeit goods in the analog age. Copyright industries rarely if ever needed to pursue consumers for copyright infringement. For these reasons, the deterrent damages regime tempered by judicial discretion garnered broad support in the deliberations over the 1976 Act and did not galvanize significant public opposition before the Internet Age.

Serious concerns about record piracy would not emerge until the advent of home taping equipment in the 1970s.<sup>30</sup> As "My Generation" learned, vinyl was a successful technological protection measure.<sup>31</sup> Reel to reel decks were cumbersome and even a high quality Teac™ cassette deck introduced substantial distortion. And copies of copies were awful. Tape piracy simply did not scale. The main usage of home taping was for music portability – car stereos and the Sony Walkman, which did not reach the market until 1980.

## **B. The Gathering Copyright Storm**

Copyright enforcement would become a more salient issue shortly after I graduated from high school as a result of a startling new consumer technology: the video cassette recorder

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the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in subsection (g) of section 118) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

17 U.S.C. § 504 (1976).

<sup>30</sup> See British Phonographic Industry launched an anti-infringement campaign in the 1980s with the slogan "Home Taping Is Killing Music." See Home Taping Is Killing Music, Wikipedia <[http://en.wikipedia.org/wiki/Home\\_Taping\\_Is\\_Killing\\_Music](http://en.wikipedia.org/wiki/Home_Taping_Is_Killing_Music)>. The logo portrayed a cassette-shaped skull and cross bones with the words "And It's Illegal." It is unclear whether the campaign discouraged home taping, but it did generate some amusing ridicule. The Dead Kennedys left the back side of their "In God We Trust Inc." cassette blank. The caption read: "Home taping is killing record industry profits! We left this side blank so you can help." Other parodies included: "Home Sewing Is Killing Fashion" and "Home Taping Is Killing the Music Industry, and It's Fun."

<sup>31</sup> See Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. Sch. L. Rev. 63, 103-06 (2002).

(VCR).<sup>32</sup> The Sony Betamax would for the first time allow consumers to record a show on one channel while they watched a show on another. Instead of embracing the VCR, Universal Studios became concerned about how this new consumer technology might affect one of its technology business ventures – a multi-million dollar, but still nascent, investment in videodisc technology. Videodisc promised to create a market for pre-recorded video content, much like phonorecords. As conceived at the time, however, videodisc technology would not have recording capability.

As a result, Universal sought to persuade Sony, with whom it had other business dealings, to drop its VCR business plans. When Sony declined, Universal sued for copyright infringement with the support of much of Hollywood. The litigation, which would drag on for eight years and two arguments to the Supreme Court raised serious questions for the public over Hollywood’s exertion of power over consumer electronics innovators and the consuming public. The ultimate resolution – rejecting Universal’s lawsuit – quelled public concerns and the copyright system once again faded from public consciousness.

Such concerns would surface again surrounding the introduction of Digital Audio Tape (DAT) technology into the United States in the late 1980s. I had just finished my clerkship with Judge Newman and was embarking on an academic career when the Office of Technology Assessment (OTA), a research arm of the U.S. Congress, invited me to serve on the Copyright and Home Copying Advisory Panel.<sup>33</sup> Our charge was to study the prevalence of home copying of copyrighted works and to assess policy options. A consumer survey conducted for our panel in 1988 determined that approximately 40% of Americans over the age of 10 had taped recorded music in the past year – principally for the purpose of “space shifting” (listening to compact discs on car cassette players). Most of those surveyed considered this to be an acceptable behavior. Although music copyright owners expressed concern about the prevalence of home taping and that the introduction of DAT technology into the United States would result in rampant piracy, concerns subsided with the passage of the Audio Home Recording Act (AHRA)<sup>34</sup> a short time later. This legislation largely insulated consumers from liability while requiring modest technological restrictions on devices and providing for new revenue streams for copyright owners (levies on media and devices). When the DAT format failed to gain favor in the commercial marketplace, the relatively low level public expressions of concern subsided.

Ongoing advances in computer technology combined with the rollout of the Internet in

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<sup>32</sup> See generally Peter S. Menell & David Nimmer, *Unwinding Sony*, 95 Cal. L. Rev. 941 (2007) (chronicling the litigation over the VCR). Tensions between the technology and content were playing out within Washington circles, see, e.g., Nat’l Comm’n on New Technological Uses of Copyrighted Works, *Final Rep.* (1978) (photocopying and computers), but those debates were far removed from average consumers.

<sup>33</sup> U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, *COPYRIGHT AND HOME COPYING: TECHNOLOGY CHALLENGES THE LAW*, OTA-CIT-422 (Washington, DC: U.S. Government Printing Office, October 1989)

<sup>34</sup> See Pub. L. No. 102-563, 106 Stat. 4237 (1992) (codified at 17 U.S.C. §§ 1001-10).

the early to mid 1990s gradually raised tensions over copyright policy. Much of the debate, however, took place in international fora and among the cognoscenti – content industry organizations, consumer electronics manufacturers, and a nascent group of digital media and Internet companies and coalitions.

After the unsuccessful 1994 criminal prosecution of David LaMacchia, an MIT student who had allegedly facilitated massive piracy by operating a free online bulletin board service widely used for sharing copyrighted computer software and videogames, Congress enacted the No Electronic Theft (NET) Act in 1997.<sup>35</sup> The NET Act expanded criminal copyright infringement to encompass receipt (or expectation of receipt) of anything of value, including other copyrighted works, and reproduction or distribution in any 180 day period of copyrighted works with a total retail value of more than \$1,000. In addition, the NET Act ramped up penalties. The House Report highlighted the economic and employment costs of software piracy to the software industry and the expanded piracy threats posed by the Internet.<sup>36</sup> Congressional hearings emphasized the need to confront the non-economic motivations of self-aggrandizing “Robin Hood”-like computer hackers.<sup>37</sup> The NET Act passed without attracting much public attention outside of a relatively small circle of computer scientists.

### C. The Perfect Copyright Storm

The legislative sentiments expressed during the NET Act deliberations in combination with new copyright legislation and a surprising Supreme Court decision would soon create conditions for the “Perfect (Copyright) Storm.”<sup>38</sup>

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<sup>35</sup> No Electronic Theft (NET) Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997); see Eric Goldman, A Road to No Warez: The No Electronic Theft Act and Criminal Copyright Infringement, 82 Or. L. Rev. 369, 373-77 (2003).

<sup>36</sup> See H.R. Rep. No. 105-339, at 4 (1997); see also Rep. Howard Coble, The Spring 1998 Horace S. Manges Lecture – The 105th Congress: Recent Developments in Intellectual Property Law, 22 Colum.-VLA J.L. & Arts. 269 (1998) (reprinting the House Report with some additional commentary by Rep. Coble).

<sup>37</sup> See 143 Cong. Rec. S12689, S12691 (daily ed. Nov. 13, 1997) (statement of Sen. Kyl) (targeting software pirates who seek notoriety instead of money); 143 Cong. Rec. H9883, H9886 (daily ed. Nov. 4, 1997) (statement of Rep. Cannon) (targeting “Robin Hood” types); 143 Cong. Rec. H9883, H9885 (daily ed. Nov. 4, 1997) (statement of Rep. Frank) (the Act aims at “seriously maladjusted” individuals who infringe not for profit but to show their smarts and get attention).

<sup>38</sup> I borrowed the title from the infamous Halloween Nor’easter of 1991 – the confluence of a seasonal North Atlantic storm system that combined with Hurricane Grace to bring about a devastating storm off the New England coast. Sebastian Junger’s best-selling novel, *THE PERFECT STORM* (1997), chronicled the destruction of the *Andrea Gail* and loss of its fishing crew. George Clooney and Mark Wahlberg would star in Warner Bros’s 2000 dramatization of the story. The film’s release coincided with copyright law’s perfect storm.

Copyright lobbyists were hard at work in the early to mid-1990s laying the groundwork for a new copyright regime for the digital age. President Clinton established the Information Infrastructure Task Force (“IITF”) in 1993 to develop a comprehensive framework. The IITF produced a “white paper” calling for strengthening copyright protections and prohibiting circumvention of technological protection measures put in place by copyright owners.<sup>39</sup> The nascent ISP industry organized opposition to the draft 1995 legislation, resulting in the bills stalling in committee. The Clinton Administration took its proposals to the World Intellectual Property Organization’s (WIPO) diplomatic conference the following year. A compromise was achieved with negotiators agreeing to the anti-circumvention provision in conjunction with safe harbors for Internet service providers (ISPs).<sup>40</sup> Congress would implement the WIPO copyright treaties in the Digital Millennium Copyright Act of 1998 (DMCA).<sup>41</sup>

Meanwhile, in a decision driven by forces unrelated to the digital age that would significantly affect digital copyright enforcement, the Supreme Court ruled in *Feltner v. Columbia Pictures Television, Inc.*<sup>42</sup> that the 7th Amendment required that the determination of statutory damages fell within the province of the jury in copyright cases in which a party had requested a jury trial. This had the practical effect of thwarting Congress’s intent to have experienced jurists exercise discretion in awarding statutory damages<sup>43</sup> and increasing the uncertainty surrounding statutory damage awards. Congress would compound this effect by enacting the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999,<sup>44</sup> ramping up the statutory damage range to \$30,000 per infringed work and up to \$150,000 per infringed work for willful infringement.

These developments set the stage for the “Perfect Copyright Storm” – a strong deterrent copyright regime with potentially massive civil penalties administered by lay jurists, expanded criminal liability, and new and untested safe harbors. The storm’s catalyst came from rapid advances in digital and Internet technology and broadband rollout.

The Internet storm struck with unprecedented ferocity in mid 1999.<sup>45</sup> Napster’s peer-to-peer file sharing service captivated America’s youth, providing nearly instantaneous, convenient, and free access to an unprecedented collective archive. Anyone with a computer and access to the Internet could share and access just about any sound recording. Prior to Napster, the Internet was a useful curiosity. After Napster, the Internet was exciting. For that reason, I view

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<sup>39</sup> See IPNII White Paper, *supra* n. \_\_; cf. Pamela Samuelson, The Copyright Grab (Jan. 1996) <[http://www.wired.com/wired/archive/4.01/white.paper\\_pr.html](http://www.wired.com/wired/archive/4.01/white.paper_pr.html)>.

<sup>40</sup> See WIPO Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 65 (1997); WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 76 (1997).

<sup>41</sup> Pub L. No. 105-304, 112 Stat. 2860.

<sup>42</sup> 523 U.S. 340 (1998).

<sup>43</sup> See Register’s 1961 Report, *supra* n. \_\_, at 105.

<sup>44</sup> Pub. L. No. 106-160, 113 Stat. 1774.

<sup>45</sup> See Napster, Wikipedia <<http://en.wikipedia.org/wiki/Napster>>.

Napster's arrival as the birth of the digital copyright. Peer-to-peer technology would quickly encompass all manner of works of authorship.

The perfect copyright storm would unfold over more than a decade as copyright owners sought to protect their works amidst the battering waves of a dynamic promiscuous distribution platforms unlike anything seen before or anticipated. As bandwidth, storage capacity, and computer speed continued to improve, the challenges of enforcing copyright law continued to grow.<sup>46</sup> All of the storm planning that went into the WIPO Copyright Treaties, the DMCA, and ramping up of statutory damages did little to prepare netizens, online service providers, and copyright owners for the onslaught. The storm surge knocked out much of the music copyright system in one fell swoop. The next decade would reveal many insights about the interplay of copyright enforcement and public perceptions of the copyright system.

#### **D. The Copyright Enforcement Saga**

Most of my students found file-sharing irresistible and wonderful. Professor Lawrence Lessig warned of content owners locking down the Internet and freedom of expression.<sup>47</sup> Several other scholars called upon Congress to establish compulsory licenses for file-sharing.<sup>48</sup> Hollywood looked to invoke copyright law's deterrence regime and to cash in on its investments in stronger remedies. Napster sought to test the DMCA's online service provider safe harbor and *Sony's* staple article of commerce doctrine.

The RIAA won the initial battle, resulting in Napster's demise by July 2001. But the war was only just beginning as more versatile file-sharing networks had emerged.<sup>49</sup> Of perhaps greater import, the RIAA was suffering heavy casualties in the court of public opinion. Their most effective spokespersons – recording artists – were divided<sup>50</sup> and angered by record labels'

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<sup>46</sup> See Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. Sch. L. Rev. 63 (2002-03).

<sup>47</sup> See LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 200 (2001).

<sup>48</sup> See WILLIAM W. FISHER III, *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT* (2004); Neil Weinstock Netanel, *Impose a Noncommercial Use Levy To Allow Free Peer-to-Peer File Sharing*, 17 Harv. J.L. & Tech. 1 (2003).

<sup>49</sup> See Brad King, *While Napster Was Sleeping Wired* (Jul. 24, 2001) (noting that "Napster's chief rivals – Kazaa, Bearshare, Audiogalaxy and iMesh – have seen significant upswings in their traffic") <<http://www.wired.com/news/mp3/1,1285,45480,00.html>>.

<sup>50</sup> See Courtney Love, *Courtney Love Does the Math: The Controversial Singer Takes on Record Label Profits, Napster and "Sucka VCs,"* Salon (Jun. 14, 2000) <[http://www.salon.com/2000/06/14/love\\_7/](http://www.salon.com/2000/06/14/love_7/)>; Janis Ian, *The Internet Debacle - An Alternative View*, *Performing Songwriter Magazine* (May 2002) <<http://www.janisian.com/reading/internet.php>>; John Borland, *Rapper Chuck D Throws Weight Behind Napster* (May 1, 2000) (seeing Napster as a unique promotional tool for lesser known artists) <<http://news.com/2100-1023-239917.html>>.

latest machinations to undermine their interests.<sup>51</sup> The litigation between the RIAA and Napster produced a steady flow of news reports fanning the flames of discontent over the recording industry's enforcement efforts.<sup>52</sup>

Most file-sharers did not perceive their actions to be immoral.<sup>53</sup> Even those netizens who recognized that file-sharing treated artists unfairly wondered why the recording industry was unable to roll-out use-friendly authorized music websites. Although the major record labels had been planning their own online music stores before Napster's emergence,<sup>54</sup> their efforts lacked the variety, functionality, and flexibility of peer-to-peer networks.<sup>55</sup> By the time that the major labels opened their catalogs up to Apple's iTunes Music Store in April 2003,<sup>56</sup> many music fans

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<sup>51</sup> See David Nimmer & Peter S. Menell, Sound Recordings, Works For Hire, and the Termination-of-Transfers Time Bomb, 49 J. Copyright Soc'y U.S.A. 387, 388-93 (2001) (chronicling the RIAA's backroom deal-making that resulted in a "technical amendment" to the Copyright Act cutting off recording artists' right to terminate transfers of copyrights; and the decision to rescind the amendment when it came to light just as Napster emerged and labels needs artists' support); Lital Helman, When Your Recording Agency Turns into an Agency Problem: The True Nature of the Peer-to-Peer Debate, 50 IDEA 49, 51 (2009) (observing that "the anti-file-sharing course adopted by the music industry is best understood as an agent-principal problem. It is aimed at strengthening the control for the agents, namely the record companies' control over the market, to the detriment of the principals, namely the artists."); Note, Exploitative Publishers, Untrustworthy Systems, and the Dream of a Digital Revolution for Artists, 114 Harv. L. Rev. 2438 (2001) (highlighting the historic subjugation of creators by publishers and record labels).

<sup>52</sup> See Declan McCullagh, Napster's Million Download March, Wired News, at <http://www.wired.com/news/politics/0,1283,42676,00.html> (Mar. 28, 2001); Amy Harmon, Napster Users Mourn End of Free Music, N.Y. Times, Nov. 1, 2000, at C1; Amy Harmon, The Napster Decision: The Reaction; Napster Users Make Plans for the Day the Free Music Dies, N.Y. Times, Feb. 12, 2001, at C1; Amy Harmon, "Online Davids vs. Corporate Goliaths" N.Y. Times (Aug. 6, 2000) <<http://www.nytimes.com/library/review/080600napster-review.html>>; Declan McCullagh, Digital Copyright Law on Trial, Wired News (Jan. 18, 2000), at <http://www.wired.com/news/politics/o,1283,33716,00.html>.

<sup>53</sup> See Ram D. Gopal, & G. Lawrence Sanders, Digital Music and Online Sharing: Software Piracy 2.0?, 46 Communication of the ACM 107, 116 (2003) (finding "no significant deterrent effect on music piracy through legal and education campaigns"); John Leland, Praise God and Pass the Music Files, N.Y. Times (Apr. 25, 2004) (quoting a Christian rock music downloader opining: "[i]f the money went into the artist's pocket, I'd have more of a dilemma. But the companies make enough money.") <<http://www.nytimes.com/2004/04/25/weekinreview/ideas-trends-praise-god-and-pass-the-music-files.html>>; Geoffrey Neri, Note: Sticky Fingers or Sticky Norms? Unauthorized Music Downloading and Unsettled Social Norms, 93 Geo. L.J. 733, 742 (2005).

<sup>54</sup> See infra < >.

<sup>55</sup> See Menell, supra n. \_\_, at 172-73. <Envisioning>

<sup>56</sup> See iTunes Store, Wikipedia <[http://en.wikipedia.org/wiki/iTunes\\_Store](http://en.wikipedia.org/wiki/iTunes_Store)>.

had become accustomed to file-sharing.

Soon after Napster's demise, the RIAA targeted the next wave of file-sharing services – Grokster, Morpheus, and KaZaA – filing suit in the Central District of California in October 2001. In April 2003, Judge Stephen Wilson held that even though these defendants “may have intentionally structured their business to avoid secondary liability for copyright infringement, while benefitting from the illicit draw of their wares,” they nonetheless fall with the *Sony* staple of commerce safe harbor because their file-sharing services were capable of substantial non-infringing use.<sup>57</sup> The RIAA vowed to appeal Judge Wilson's decision, but an appeal could take years and might well result in the judgment being affirmed. Thus, the RIAA faced a difficult decision – whether to sue file-sharers.<sup>58</sup>

Like many intellectual property scholars, I was thrust into public debate over these difficult issues. I had been invited to prepare a paper on the question “Can Our Current Conception of Copyright Law Survive the Internet Age?” in honor of the Honorable Jon O. Newman, the judge for whom I had clerked, at the celebration of his thirty years on the Federal bench.<sup>59</sup> I was invited to moderate a panel at the April 2002 Computers, Freedom & Privacy (CFP) Conference on “Copyright and Innovation: The P2P Experience.”<sup>60</sup> And perhaps most challenging of all, my older son Dylan, who was nearing his twelfth birthday, couldn't understand why I was not as enthusiastic as he and his friends about file-sharing technology. Did I not support his love of technology and music? Of course I did, but I also worried about incentives for the next generations of creators – including him. Let's just say that this was not the response he was looking for.

Whereas many in the academy had quickly taken sides and formulated solutions, I was genuinely conflicted about the larger policy issues. The Internet was developing rapidly and I did not feel that we had enough information about the interplay of the Internet and creative ecosystems to make definitive judgments about the proper course. It would take some time to see how the online marketplace responded. My hope was that competition and technological advance would bring about a balanced solution, but it was clear that competing with free was complicating the task of start-ups, like emusic.com, to gain a foothold while pushing the major labels to explore licensing. I was teaching a course on intellectual property in the entertainment industries and was disheartened by the changes unfolding in the Bay Area music community. My colleagues working in the music field were moving to other pursuits as funding for “baby

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<sup>57</sup> See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F.Supp.2d 1029, 1046 (C.D. Cal. 2003).

<sup>58</sup> See Justin Hughes, *On the Logic of Suing One's Customers and the Dilemma of Infringement-Based Business Models*, 22 *Cardozo Arts & Ent. L.J.* 725 (2005).

<sup>59</sup> See Symposium – Judge Jon O. Newman: A Symposium Celebrating His Thirty Years on the Federal Bench and an Occasion to Reflect on the Future of Copyright, Federal Jurisdiction, and International Law Symposium, 46 *N.Y.L. Sch. L. Rev.* 1 (2002-2003).

<sup>60</sup> See *Computers, Freedom and Piracy 12<sup>th</sup> Conference, Program* (Friday, Apr. 19, 2002) <<http://www.cfp2002.org/program/friday.shtml>>.

bands” dried up. I had started an annual conference on “Digital Music” at the Berkeley Center for Law & Technology and was dismayed by the deep and growing rifts between Silicon Valley and Hollywood, labels and artists, and law students and copyright law. I was passionately in the middle, perhaps the loneliest place of all.

This angst prompted me to explore the larger institutional forces shaping copyright law in my contribution to the symposium honoring Judge Newman. The resulting article<sup>61</sup> – then the longest of my career at 105 pages – avoided the simple answers and advocacy that many were offering. It systematically examined the technological changes, industry structures, legal environment, and evolving social and political landscape. Notwithstanding the dynamism of these forces, the article concluded that the digital revolution could be seen increasingly to shift resources and pressure for reform toward copyright enforcement, new business models and platforms, antitrust concerns, and a more general transformation of copyright law from a property rights system toward a regulatory regime. The best that I could foresee was an uncertain enforcement war of attrition in which technology, markets, politics, and social norms would determine the path forward.

The CFP conference panel would delve directly into that abyss. The conference posed the following topics:

The P2P lawsuits are piling up: Napster, Scour, Aimster, Morpheus. Although the rhetoric is about piracy, the litigation is about technology. In every P2P case to date, copyright owners have targeted the technologists, instead of the end-users doing the infringing. What does this mean for the peer-to-peer industry, and what lessons should be drawn by other technology innovators? Are we entering a world where technologists will be held liable for the activities of their end-users?

The panel comprised Fred von Lohmann from the Electronic Frontier Foundation, Sarah Deutsch from ISP Verizon, and Frank Hausmann from Centerspan, a company developing a walled (digital rights management), authorized, content distribution platform<sup>62</sup>. Fred began the discussion by noting that he was co-counsel on behalf of Morpheus in the large file-sharing litigation case unfolding in Los Angeles.<sup>63</sup> He then sketched the state of litigation involving peer-to-peer technology, summarizing the Napster, Scour, Grokster/Morpheus/KaZaA, ReplayTV, MP3Board.com, and ISP-related notice and take-down and repeat infringer

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<sup>61</sup> See Menell, *supra* n. \_\_. <Envisioning>

<sup>62</sup> See Panel on Copyright and Innovation: the P2P Experience, Association for Computing Machinery (ACM), 12<sup>th</sup> Annual Computers, Freedom & Privacy Conference, San Francisco, California (April 19, 2002) <http://www.cfp2002.org/program/>. An audio recording of the panel is available on the ACM’s website under the “Source Materials” tab: <  
<http://dl.acm.org/citation.cfm?id=543482.564564&coll=DL&dl=ACM&prelayout=tabs>> (hereinafter cited as “CFP 2002 Panel Recording”).

<sup>63</sup> That litigation would eventually result in the Supreme Court’s decision in *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

termination litigation. He concluded with the following observation:

Finally the last category, and strangely enough, the empty category is any lawsuits or legal action against end-users. We have not yet seen, at least I have not heard, any public, publicly disclosed lawsuits against actual peer-to-peer users, end-users of peer-to-peer software, even though everyone admits it's really they who are infringing copyright. Everyone else on this list that we see on this list, the most that you can say about them, is perhaps that they have some secondary or indirect liability because of their involvement. In none of the cases involved here, well with the exception of ReplayTV for some weird reasons that are not really that important, but all of these cases use copyright theories that involve so-called contributory or vicarious liability. In other words, you're going to be held responsible for what your end-users are up to. We have not seen any litigation yet against the actual end-users who are sharing "Blackhawk Down" or whatever it might be that is causing all this trouble.<sup>64</sup>

After Frank described Centerspan's technology and Sarah discussed service providers' perspectives regarding peer-to-peer issues, I probed Fred's comment about it being "strange" that content owners had not yet sued end-users over peer-to-peer activity. I began by noting the three words animating the conference: "computers, freedom, privacy." I then proceeded:

I can interpret his presentation as, well, the problem is people [content owners] are aiming at the deeper pockets, the intermediaries, the creators or inventors/innovators, and perhaps they should direct their energy down to the bottom or the decentralized. But from a societal standpoint, I mean that is in some ways the greatest threat to privacy in that it would require discovery, it would require invading the household. And so it's not as if privacy problems could be solved. There's another side, perhaps a more cynical interpretation of your comment which is we dare them because we think that will shift the political balance and we'll be able to push some other objectives. But if I took your suggestion literally, it would be a disaster for personal privacy and could potentially, especially in this post-terrorism world, dramatically shift what we do consider our most sacred places. I don't feel so exposed with regards to our ISP, but I do feel very exposed with regards to my hard drive. And how do you resolve that?<sup>65</sup>

After acknowledging that this was a "fair point,"<sup>66</sup> Fred proceeded to explain that content owners "are hunting the wrong target and in the course of doing so are going to cause enormous collateral damage" by chilling technology innovators. He analogized suing peer-to-peer enterprises to holding Detroit automobile manufacturers "liable for every person that speeds in

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<sup>64</sup> See CFP 2002 Panel Recording, *supra* n. \_\_ beginning at 17:22 (time signature).

<sup>65</sup> See *id.* at 57:21.

<sup>66</sup> See *id.* at 58:54.

America because they sell cars capable of speeding.” Fred then addressed what he termed the “harder question”: whether content owners should “be going after end-users?”

Well, you know frankly that is not in my mind such a radical statement – right, that’s always been the rule in copyright. If there are pirates, you find and, you know, go after the pirates. And that’s always been the rule and it’s certainly been true to have someone singled out and sued, whether criminally or civilly, for copyright infringement is absolutely an enormous invasion in that person’s life. However, it’s an invasion that has always been contemplated under the law.<sup>67</sup>

I was surprised to see him go down this path. I shifted to another angle – what did the panel think about a system whereby enforcement focused on the “middle layers [of the content distribution ecosystem] so that we as individuals in our homes don’t worry about the specter of government coming in and searching our files.”<sup>68</sup> Frank jumped in to talk about the importance of educating children not to steal copyrighted content, while noting that “if you are a thief, [the government] can get an order and come and search your hard drive and prosecute you for that, as Fred was saying. I personally believe that the end-user should be prosecuted. I don’t think that the service provider should be dragged into this . . .”<sup>69</sup>

Fred then responded to my suggestion that suing end-users was a cynical strategy aimed at generating a political backlash at the cost of substantial invasion of privacy interests and disruption:

And I’ll say in response to Peter I do have what he refers to as the more cynical view. I’m sure that I actually think of it as the more democratic view, which is that, you know, the last surveys that I have seen suggested that there are upwards of 40 million Americans are using the various file-sharing, you know, software products that are available. And I first want to say let’s not leap to the conclusion that they’re all guilty of copyright infringement because I think that’s unfair as well. There are perfectly legitimate uses for technologies like this. There are. Small publishers have reasons to want access to this kind of efficiency as much as big publishers do. So, yeah, sure, a large number of them are probably infringers. Now, if we actually lived in a world where content owners had to decide – do I sue 40 million Americans or do I come with some other solution that more adequately balances my business needs with, you know, the reality of technology, I am pretty confident that either they would go and innovate as they did when the VCR arrived and find a way to deliver content that is compelling to consumers, that drives the pirates essentially out of business, which they did effectively with the VCR. And frankly, I think that they are in the midst of doing that with the DVD right now. Warner Home Video has said they’re going to sell all of their

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<sup>67</sup> See id. at 1:00:11.

<sup>68</sup> See id. at 1:02:00.

<sup>69</sup> See id. at 1:04:09.

DVDs for less than \$10 per title, at that moment I don't think there's going to be as much need to spend eight hours downloading a low quality film from a peer-to-peer file-sharing network. You know, there are ways to do this and I'm confident that if the choice was to sue 40 million Americans or go out there and do the work to come up with compelling product, they would find compelling products.<sup>70</sup>

Fred then noted that there are other solutions, such as compulsory licenses, to consider.<sup>71</sup> He then returned to the political catalyst theme: "I do think that the notion that 40 million Americans are nothing better than common thieves, you know, copyright law is a statute that is decided upon by a majority of our representatives in Congress. And, you know, it can be changed."<sup>72</sup> Sarah interjected that content owners "rarely ever sue the end-user. Even just a few targeted suits, not that I would like to see this, but I think that it would at least send the message to 40 million people that it's illegal."<sup>73</sup> Fred concurred that "a few targeted suits would certainly clarify the message."<sup>74</sup>

It was perhaps not that surprising that Sarah and Frank deflected attention from their clients and mentioned the possibility of suing end-users. But when EFF's senior copyright attorney publicly calls attention to the "strangely" "empty category" of lawsuits against end-users, comments that content owners "are hunting the wrong target," observes that suing end-users would not be "such a radical statement" in view of the fact going after the pirates has "always been the rule" in the copyright field, expresses that the privacy invasion of suing end-users is "an invasion that has always been contemplated under the law," acknowledges that a "large number [of 40 million American file-sharers] are probably infringers," and notes that "a few targeted suits would certainly clarify the message," the press takes notice.<sup>75</sup> As a copyright policy scholar, I was rather surprised by these statements. Just as I was not as quick as many of my academic colleagues to jump on the Napster bandwagon, I was deeply skeptical about the wisdom of suing end-users.

My third challenge – dealing with my older son's desire to use file-sharing technology to quench his thirst for music – proved the most fulfilling. Everyone in the family received iPods for Chanukah that year. We spent our vacation ripping our massive CD collection onto the

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<sup>70</sup> See *id.* at 1:04:31.

<sup>71</sup> See *id.* at 1:06:28.

<sup>72</sup> See *id.* at 1:06:06.

<sup>73</sup> See *id.* at 1:07:33.

<sup>74</sup> See *id.* at 1:08:19.

<sup>75</sup> See Copyright, Washington Internet Daily (Apr. 23, 2002) (quoting Fred's statement that search of alleged infringers devices is "an invasion that's contemplated in the law . . . A few targeted lawsuits would get the message across" ); see also Brian Garrity, Victory Eludes Legal Fight Over File Swapping The Music Industry May Win a Few Battles While Losing Multiple Logistical Wars, *Billboard* 86 (Apr. 13, 2002) (quoting Fred von Lohmann stating "[i]f this fight were really about stopping piracy, you would have expected some pirate to actually be sued").

family computer and filling in gaps in the catalog at record stores. And by the following spring, the iTunes Music Store opened. The kids got part of their allowance in iTunes. It turns out that an iPod and iTunes were even better than Grokster – at least to 9 and 12 year old kids. Crisis averted . . . just in time.

By September 2003, four months after Judge Wilson’s *Grokster* decision and the opening of the iTunes Music Store, the RIAA filed its first suit against end users of file-sharing technology. Although our family was spared, the RIAA targeted 261 file-sharers in its first action,<sup>76</sup> prompting the Electronic Frontier Foundation to initiate a new campaign: “RIAA v. The People.”<sup>77</sup> The record companies intended to test copyright law’s deterrence theory, eventually suing 35,000 defendants.

The lawsuits managed to scare the bejesus out of the recipients, friends, and acquaintances of the many recipients. But it did not achieve compliance with copyright law. Figure 2 tracks per capita record sales in the United States from 1973 through 2008. The average number of albums purchased per person in the United States steadily rose – with some dips due to economic downturns and the disco era (good for dance clubs; bad for record sales) – from 1973 through 1999, doubling from just under three albums per year to nearly six albums per year. Over the ensuing decade, sales would drop more than half to below 1973 levels. Although some economists contend that the precipitous decline in record sales following 1999 had nothing to do with file-sharing,<sup>78</sup> most empirical studies indicate otherwise.<sup>79</sup>

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<sup>76</sup> See Amy Harmon, *The Price of Music: The Overview: 261 Lawsuits Filed on Music Sharing*, N.Y. Times, Sept. 9, 2003, at A1.

<sup>77</sup> See Electronic Frontier Foundation, *RIAA v. The People: Five Years Later* <<https://www.eff.org/wp/riaa-v-people-five-years-later>>.

<sup>78</sup> See Felix Oberholzer-Gee & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. Pol. Econ. 1 (2007).

<sup>79</sup> See Stan J. Liebowitz, *The Metric is the Message: How Much of the Decline in Sound Recording Sales Is Due to File-Sharing?* 9 (2011) (reviewing the major studies of file-sharing and concluding that more than half attribute all of the decline in record sales to file-sharing and the much of the remainder attribute half of the decline to file-sharing) <<http://jindal.utdallas.edu/files/filesharing-metrics-11-2.pdf>> ; Stan J. Liebowitz, *File Sharing: Creative Destruction or Just Plain Destruction?*, 49 J.L. & Econ. 1 (2006).

**Figure 2**  
**Albums Sales (per capita/annum)**



**Note: Singles are converted to album equivalents at 14:1**

**Source: Stan Liebowitz (based on RIAA data)**

Furthermore, the litigation proved to be especially costly in term of legal fees, legal doctrine, and most importantly, public opinion. Although the overwhelming majority of defendants settled with payments of \$3,000 to \$5,000,<sup>80</sup> several defendants sought to defeat these lawsuits by arguing that it is not enough for the copyright owners to prove that a forensic investigator hired by the copyright owner had located one of its sound recordings in the defendant's share folder and downloaded the file. Rather, they maintained that the Copyright Act's distribution right cannot be established without proof that a third party – i.e., someone other than an authorized forensic investigator – had actually downloaded the file from that defendant's share folder. Given the architecture of the Internet and privacy concerns, such proof would substantially raise the cost of pursuing enforcement against end users.

<sup>80</sup> See Copy-wrong! Unpacking the \$1.92M Downloading Verdict, WSJ Blog (Jun. 27, 2009) <<http://blogs.wsj.com/law/2009/06/27/copy-wrong-unpacking-the-192m-downloading-verdict>>.

The first wave of cases to address this defense held that merely making copies of copyrighted works available without authorization violated the distribution right.<sup>81</sup> In 2008, the pendulum swung in the opposite direction. *Atlantic Recording Corp. v. Brennan* cast doubt on the “making available” theory, observing that “without actual distribution of copies ... there is no violation [of] the distribution right.”<sup>82</sup> A little more than a month later, Judge Gertner issued a detailed analysis of the scope of the distribution right. *London-Sire Records, Inc. v. Doe I* inclined toward a requirement of actual distribution, observing that “[m]erely because the defendant has ‘completed all the steps necessary for distribution’ does not necessarily mean that a distribution has actually occurred.”<sup>83</sup> Shortly after the *London-Sire decision*, Judge Wake squarely rejected the “making available” theory.<sup>84</sup>

More significantly, the record industry became a pariah among its prime consumer demographic in the most important court – the court of public opinion. Litigation against a high school cheerleader,<sup>85</sup> grandparents,<sup>86</sup> and many other sympathetic defendants<sup>87</sup> took a heavy toll on the recording industry’s public approval.<sup>88</sup> Even after the record industry reversed course and

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<sup>81</sup> See, e.g., *Universal City Studios, Prods., LLP v. Bigwood*, 441 F. Supp. 2d 185 (D. Me. 2006); *Warner Brothers Records, Inc. v. Payne*, No. W-06-CA-051, 2006 WL 2844415 (W.D. Tex. Jul. 17, 2006); *Motown Record Co., LP v. DePietro*, No. 04-CV-2246, 2007 WL 576284 (E.D. Pa. Feb. 16, 2007).

<sup>82</sup> 534 F. Supp. 2d 278, 282 (D. Conn. 2008).

<sup>83</sup> 542 F. Supp. 2d 153 (D. Mass. 2008).

<sup>84</sup> See *Atlantic Recording Corp. v. Howell*, 554 F. Supp. 2d 976 (D. Ariz. 2008).

<sup>85</sup> See David Kravets, Threat Level: RIAA Litigation – Former Teen Cheerleader Defies RIAA Over \$7,400 File Sharing Tab, *Wired* (Oct. 20, 2008) <<http://www.wired.com/threatlevel/2008/10/riaa-seeks-7400/>>.

<sup>86</sup> See The 14 Most Ridiculous Lawsuits Filed by the RIAA and the MPAA, *brainz* <<http://brainz.org/14-most-ridiculous-lawsuits-filed-riaa-and-mpaa/>>.

<sup>87</sup> See *id.*

<sup>88</sup> See Ben Depoorter, Alain Van Hiel, & Sven Vanneste, Copyright Backlash, 84 *S. Cal. L. Rev.* 1251, 1283-89 (2011) (arguing that enforcement-based strategies seeking disproportionate sanctions are counterproductive for deterring file-sharing of copyrighted works); Måns Svensson & Stefan Larsson, Social Norms and Intellectual Property: Online Norms and the European Legal Development 59 (2009) <<http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1510388&fileId=1515776>> (reporting that no social norms hinder illegal file sharing); Jason R. Ingram & Sameer Hinduja, Neutralizing Music Piracy: An Empirical Examination, 29 *Deviant Behavior* 344, 359 (2008) (finding that “almost 90 percent of sample respondents believed that downloading unauthorized music files was an appropriate behavior”); Yuval Feldman & Janice Nadler, The Law and Norms of File Sharing, 43 *San Diego L. Rev.* 577 (2006); Ben Depoorter & Sven Vanneste, Norms and Enforcement: The Case Against Copyright Litigation, 84 *Or. L. Rev.* 1127 (2005); Steven A. Hetcher, The Music Industry’s Failed Attempt to Influence File Sharing Norms, 7 *Vand. J. Ent. L. & Prac.* 10 (2004)

halted new direct enforcement actions,<sup>89</sup> the hemorrhaging continued as the industry continued to pursue two cases already in the pipeline through trial.

Capitol Records accused Jammie Thomas of sharing more than 1,000 copyrighted songs through the KaZaA file-sharing network in 2005. Dickens foretold how the litigation would turn out.<sup>90</sup> After Ms. Thomas declined the RIAA's settlement offer, Capitol Records filed suit for willful violation of copyright law. The case pitted the RIAA seeking \$150,000 for each of twenty-four copyrighted sound recordings against a defiant single mother of modest means represented by pro bono counsel. After the jury returned a verdict of \$9,250 per work, totaling \$222,000, Judge Davis ordered a new trial on the ground that he misinstructed the jury as to the scope of the distribution right.<sup>91</sup> Following retrial, the jury found Ms. Thomas-Rasset<sup>92</sup> liable for willful copyright infringement of all twenty-four sound recordings at issue and awarded the plaintiffs statutory damages of \$80,000 per song, resulting in a total award of \$1.92 million. On post-trial motions, Judge Davis determined that the damage award was "monstrous and shocking" and remitted the jury award to \$54,000 (treble the minimum willful statutory damage level (\$750 per work) times twenty-four works).<sup>93</sup> The plaintiffs offered Ms. Thomas-Rasset the opportunity to settle the matter by donating \$25,000 to a musician's charity of her choosing, which she declined.<sup>94</sup> The jury in the third trial awarded \$1.5 million in statutory damages, which Judge Davis again reduced to \$54,000 as the "maximum award consistent with due process."<sup>95</sup> The Eighth Circuit Court of Appeals reversed the District Court's reduction of the award and reinstated the award of \$222,000, the amount awarded by the jury in the first trial.<sup>96</sup>

The second end-user file-sharing trial took place in Judge Gertner's courtroom in July 2009.<sup>97</sup> Like the *Thomas* case, this case attracted tremendous publicity as Joel Tenenbaum, a graduate student at Boston University, and his appointed counsel, Harvard Law School Professor

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<sup>89</sup> See Sarah McBride & Ethan Smith, Music Industry to Abandon Mass Suits, Wall St. J. (Dec. 19, 2008), <http://online.wsj.com/article/SB122966038836021137.html>.

<sup>90</sup> See Charles Dickens, *Bleak House* (1853) (telling a story of long-running litigation depleting a vast estate). Dickens' classic was modeled in part on his own frustrations seeking to enforce copyright protection on his earlier books. See *Bleak House*, Wikipedia <[http://en.wikipedia.org/wiki/Bleak\\_House](http://en.wikipedia.org/wiki/Bleak_House)>.

<sup>91</sup> See *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1216-25 (D. Minn. 2008).

<sup>92</sup> Ms. Thomas was married in the interim.

<sup>93</sup> See *Capitol Records, Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045, 1049 (D. Minn. 2010).

<sup>94</sup> See Greg Sandoval, *Jammie Thomas Rejects RIAA's \$25,000 Settlement Offer*, CNET (Jan. 27, 2010) <[http://news.cnet.com/8301-31001\\_3-10442482-261.html](http://news.cnet.com/8301-31001_3-10442482-261.html)>.

<sup>95</sup> See *Capitol Records, Inc. v. Thomas-Rasset*, 799 F. Supp.2d 999 (D. Minn. 2011) (holding that an award above three times the statutory damages minimum of \$750 per work violates the Due Process Clause of the U.S. Constitution).

<sup>96</sup> See *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899 (8th Cir. 2012).

<sup>97</sup> See Greg Sanoval, *Joel Tenenbaum Follows in Jammie Thomas' Footsteps*, C|Net News (Jul. 28, 2009) <[http://news.cnet.com/8301-1023\\_3-10298079-93.html](http://news.cnet.com/8301-1023_3-10298079-93.html)>.

Charles Nesson, sought to turn the trial into a referendum on copyright policy. I came to see this drama as *Legally Blonde 3*,<sup>98</sup> an even more farcical account of Harvard Law School than the Hollywood prequels.<sup>99</sup> During pretrial proceedings, Mr. Tenenbaum denied any wrongdoing and even suggested that the files in question might have been shared by others, including a visitor to the family home, family friend (possibly a visitor from Burkina Faso), foster son, or burglar.<sup>100</sup> After much jockeying over the scope of the distribution right, the fair use defense, and a slew of other issues, Mr. Tenenbaum ultimately confessed to uploading and downloading copyrighted sound recordings on various peer-to-peer networks.<sup>101</sup> As a result, Judge Gertner directed a verdict on liability, leaving for the jury only the issue of statutory damages.<sup>102</sup> The jury awarded \$675,000 (based on \$22,500 for each of the thirty works litigated). Judge Gertner later reduced the amount to \$67,500 on the grounds that the jury award violated due process.<sup>103</sup> The First Circuit reversed.<sup>104</sup> On remand before Judge Rya Zobel,<sup>105</sup> the court reinstated the \$675,000 award,<sup>106</sup> which the First Circuit affirmed.<sup>107</sup>

These cases poured salt into the wounds opened by the mass litigation campaign. They reinforced the perception that copyright law disserves the public: it deprives consumers of easy access to a broad catalog of music, imposes grossly disproportionate penalties on those caught file-sharing, and does little to support the artists.

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<sup>98</sup> See *Legally Blonde* (2001), IMDb <<http://www.imdb.com/title/tt0250494/>>; *Legally Blonde 2: Red, White & Blonde* (2003), IMDb <<http://www.imdb.com/title/tt0333780/>>.

<sup>99</sup> See Peter S. Menell, *File-Sharing Copyrighted Works Without Authorization: A Misguided Social Movement*, Media Institute (Feb. 17, 2010) <[http://www.mediainstitute.org/new\\_site/IPI/021710\\_FileSharingCopyrighted.php](http://www.mediainstitute.org/new_site/IPI/021710_FileSharingCopyrighted.php)>.

<sup>100</sup> See Affidavit in Support of Motion to Dismiss and in Support of Motion for Summary Judgment at 2, *Sony BMG Music Entm't v. Tenenbaum*, Civil Action No.07-CV-11446 (D. Mass.) (filed Nov. 16, 2007) <<http://joelfightsback.com/wp-content/uploads/487.pdf>>.

<sup>101</sup> See Ben Sheffner, *Tenenbaum Takes the Stand: I Used P2P and Lied About It*, *ars technica* (July 30, 2009) <<http://arstechnica.com/tech-policy/news/2009/07/tenenbaum-takes-the-stand-i-used-p2p-and-lied-about-it.ars>>.

<sup>102</sup> See Ben Sheffner, *Copyrights & Campaigns, Plaintiffs Win Tenenbaum Case; Court Considers Rule 50 Ruling; Grants Directed Verdict on Copyright Liability*, *Hollywood Rep.* (July 31, 2009) <<http://thresq.hollywoodreporter.com/2010/03/new-litigation-campaign-targets-tens-of-thousands-of-bittorrent-users.html>>.

<sup>103</sup> See *Sony BMG Music Entm't v. Tenenbaum*, 721 F. Supp.2d 85, 116 (D. Mass. 2010).

<sup>104</sup> See *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487 (1st Cir. 2011) (holding that district court violated principle of constitutional avoidance and inappropriately bypassed issue of common law remittur).

<sup>105</sup> Judge Gertner retired from the bench in the interim.

<sup>106</sup> See *Sony BMG Music Entertainment v. Tenenbaum*, 2012 WL 3639053 (D. Mass. 2012).

<sup>107</sup> See *Sony BMG Music Entertainment v. Tenenbaum*, 719 F.3d 67 (1<sup>st</sup> Cir. 2013).

Other copyright enforcement actions fueled public and computer researcher animus toward the copyright system. In 2001, the Federal government arrested and jailed Dmitry Sklyarov, a Russian computer programmer visiting the United States to give a presentation on “eBook’s Security – Theory and Practice” for allegedly violating the anti-circumvention provision of the DMCA.<sup>108</sup> The prosecution confirmed concerns in the computer field that the DMCA threatened researchers and free speech. Within days of the arrest, the “Free Dmitry” movement gained salience, leading to a boycott of Adobe products, the commercial entity behind the arrest. The government dropped all charges against Sklyarov on the condition that he testify against ElcomSoft, his employer. A jury in San Jose, California found ElcomSoft not guilty of all four charges under the DMCA.<sup>109</sup>

Litigation over YouTube’s video-sharing service added further fuel to the public’s ire over copyright law. Like Napster before it, YouTube quickly emerged following its 2005 launch as one of the most charismatic, popular, and viral websites in history.<sup>110</sup> Consumers could now share and enjoy all manner of engaging, amusing, informative, and entertaining videos at the touch of their computer for free. And although much of what YouTube hosted was truly “user-generated” content, users were also uploading clips from their favorite television shows and motion pictures. I came to learn of Comedy Central’s *The Daily Show with Jon Stewart* through YouTube.

YouTube would enter the realm of not just public acclaim but also financial jackpot when Google acquired the start-up for \$1.65 billion in November 2006.<sup>111</sup> Within a few months, Viacom would file a lawsuit seeking \$1 billion for “brazen” copyright infringement,<sup>112</sup> producing yet another Dickensian copyright battle aimed at an incredibly popular Internet service. The potential for further disproportionate remedies may well have led the courts to distort copyright law.<sup>113</sup> The litigation continues to drag on like *Jarndyce v Jarndyce*.<sup>114</sup>

Content industry efforts to takedown YouTube videos that qualify as fair use has further

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<sup>108</sup> See United States v. ElcomSoft and Sklyarov, Wikipedia <[http://en.wikipedia.org/wiki/United\\_States\\_v.\\_ElcomSoft\\_and\\_Sklyarov](http://en.wikipedia.org/wiki/United_States_v._ElcomSoft_and_Sklyarov)>.

<sup>109</sup> See Matt Richtel, Russian Company Acquitted of Digital Piracy, N.Y. Times (Dec. 18, 2002) <<http://www.nytimes.com/2002/12/18/technology/18DIGI.html>>.

<sup>110</sup> See Youtube Serves up 100 Million Videos a Day Online, USA Today (Jul. 16, 2006) <[http://usatoday30.usatoday.com/tech/news/2006-07-16-youtube-views\\_x.htm](http://usatoday30.usatoday.com/tech/news/2006-07-16-youtube-views_x.htm)>.

<sup>111</sup> See Andrew Ross Sorkin & Jeremy W. Peters, Google to Acquire YouTube for \$1.65 Billion, N.Y. Times (Oct. 9, 2006) <[http://www.nytimes.com/2006/10/09/business/09cnd-deal.html?\\_r=0](http://www.nytimes.com/2006/10/09/business/09cnd-deal.html?_r=0)>.

<sup>112</sup> See Viacom International Inc. v. YouTube, Inc., Wikipedia <[http://en.wikipedia.org/wiki/Viacom\\_International\\_Inc.\\_v.\\_YouTube,\\_Inc.](http://en.wikipedia.org/wiki/Viacom_International_Inc._v._YouTube,_Inc.)>.

<sup>113</sup> See Peter S. Menell, Judicial Regulation of Digital Copyright Windfalls: Making Interpretive and Policy Sense of *Viacom v. YouTube and UMG Recordings v. Shelter Capital Partners*, Media Institute (May 3, 2012) <<http://www.mediainstitute.org/IPI/2012/050212.php>>.

<sup>114</sup> See Bleak House, Wikipedia <[http://en.wikipedia.org/wiki/Bleak\\_House](http://en.wikipedia.org/wiki/Bleak_House)>.

undermined the copyright system's legitimacy. Take the case of Stephanie Lenz, a young parent who posted a 29 second clip of her adorable baby boogeying to a nearly unrecognizable song on YouTube.<sup>115</sup> Her intention was merely to share this adorable camcorder video with friends and family. It turns out that the song in the background was Prince's "Let's Go Crazy." The audio quality of the video was so poor that I did not even recognize the background music. It is difficult to see how this posting was not fair use. It is even more difficult to understand why Prince would object.

Nonetheless, Prince ordered his record label, Universal Music Group (UMG), to file a takedown notice.<sup>116</sup> YouTube removed the "Dancing Baby" video and notified Ms. Lenz of the removal based on UMG's infringement allegation. The controversy came to EFF's attention and they agreed to fight UMG's takedown request. Ms. Lenz sent YouTube a DMCA counter-notification<sup>117</sup> asserting that the video made fair use of the Prince sound recording and requesting that the video be reposted, which YouTube did several weeks later. Thereupon Prince threatened to sue.<sup>118</sup>

Stephanie Lenz and EFF decided to take matters into their own hands and filed a lawsuit seeking declaratory relief that the video was not infringing and seeking damages for misuse of the DMCA takedown process.<sup>119</sup> Like the *Viacom v. YouTube* litigation, *Lenz v. UMG* continues to drag on more than six years after the case was filed. The "Dancing Baby" video remains available on YouTube and has attracted more than one million views. The infant depicted in the video is now seven years old. I periodically visit the website to see the comments. Here is a recent collection:

Shit! I was just going to Best Buy and purchase this very Prince CD . . . when suddenly the song came on YouTube! I'm Saved! Now I won't buy the CD and just listen to this one instead, and keep my money in my pocket. Thanks piracy! (29 thumbs up)

Copyright laws are garbage. We need a new system that protects small fry and forces the big businesses to back the fuck off. (12 thumbs up)

I wonder if your [sic] a [sic] still fan of Prince after he did this

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<sup>115</sup> See "Let's Go Crazy" #1, YouTube  
<<http://www.youtube.com/watch?v=N1KfJHFWlhQ>>.

<sup>116</sup> See *Lenz v. Universal Music Corp.*, Wikipedia  
<[http://en.wikipedia.org/wiki/Lenz\\_v.\\_Universal\\_Music\\_Corp.](http://en.wikipedia.org/wiki/Lenz_v._Universal_Music_Corp.)>.

<sup>117</sup> See *id.*

<sup>118</sup> See Mike Collett-White, Prince to Sue Youtube, Ebay over Music Use, Reuters (Sep. 13, 2007) <<http://www.reuters.com/article/2007/09/14/us-prince-youtube-idUSL1364328420070914?>>.

<sup>119</sup> See *Lenz v. Universal Music Corp.*, 572 F.Supp.2d 1150 (N.D. Cal. 2008).

I can't even tell what artist that is, let alone what song. UMC must've put forensic specialists on it to even figure out it [sic] they owned it. Strange days.

Stephanie Lenz is a hero. I wish she'd taken UMC for \$10 million.

In 2010, Righthaven LLC joined the digital copyright enforcement lottery by entering into agreements with news organizations to scour the Internet for copies of their stories and file lawsuits demanding \$75,000 and surrender of the domain name.<sup>120</sup> Like Prince and UMG, Righthaven paid little heed to concepts like fair use. Even more troubling, Righthaven lacked legal authority to pursue some of its cases. The scheme began to unravel when Judge Roger Hunt ruled that Righthaven lacked standing to sue for copyright infringement because the news organizations retained control of the copyrights.<sup>121</sup> Judge Hunt ordered Righthaven to pay sanctions. Other problems ensued, driving Righthaven into insolvency.<sup>122</sup> The adverse publicity surrounding this campaign further denigrated the public's view of copyright protection<sup>123</sup> and distorted the law.<sup>124</sup>

If you thought that the digital copyright enforcement saga could not get any more sordid, you would be mistaken. Beginning in 2010, enterprising copyright enforcement lawyers came up with a new shakedown scheme. File lawsuits against thousands of porn file-sharers and threaten to disclose their identity unless they paid hefty settlements.<sup>125</sup> Like the RIAA file-

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<sup>120</sup> See Dan Frosch, *Enforcing Copyrights, for a Profit*, N.Y. Times, May 3, 2011, at B1 <<http://www.nytimes.com/2011/05/03/business/media/03righthaven.html?>>; Righthaven, Wikipedia <<http://en.wikipedia.org/wiki/Righthaven>>.

<sup>121</sup> See Steve Green, *Judge: Righthaven Masquerading as a Company*, Vegas Inc. (Jul. 14, 2011) <<http://www.vegasinc.com/news/2011/jul/14/judge-fines-righthaven-5000-misleading-court-over/>>.

<sup>122</sup> See Mike Masnick, *Righthaven Loses Again; Told To Pay \$34,045.50 In Legal Fees*, techdirt (Aug. 16, 2011) <<http://www.techdirt.com/articles/20110815/17441215537/righthaven-loses-again-told-to-pay-3404550-legal-fees.shtml>>; Righthaven, supra n. \_\_.

<sup>123</sup> See Nate Anderson, *Law & Disorder/Civilization & Discontents: Copyright Troll Righthaven Finally, Completely Dead*, arstechnica (May 9, 2013) (quoting defense counsel: ““Copyright law exists to protect the creative process, and to reward authors – not to create illegitimate shakedown schemes.”) <<http://arstechnica.com/tech-policy/2013/05/copyright-troll-righthaven-finally-completely-dead/>>.

<sup>124</sup> See Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. Cal. L. Rev. 723, 742 (2013) (noting that when courts “realized their inability to curb Righthaven under other principles, a few courts – desperate for a solution and finding none [] – began to interpret fair use in extremely liberal terms. These courts effectively exempted conduct that would have been considered infringement in relation to any other plaintiff.”)

<sup>125</sup> See Sarah Jacobsson Purewal, *Copyright Trolls: 200,000 BitTorrent Users Sued Since 2010*, PC World (Aug. 9, 2011); Eriq Gardner, *New Litigation Campaign Quietly Targets Tens of Thousands of Movie Downloaders*, Hollywood Rep. (Mar. 30, 2010),

sharing cases, the porn file-sharing cases have inundated the federal courts,<sup>126</sup> leading some judges to express revulsion at the tactics. Judge Otis Wright II has seen enough of these lawsuits to become an expert in their underlying economic structure:

The Court is familiar with lawsuits like this one. These lawsuits run a common theme: plaintiff owns a copyright to a pornographic movie; plaintiff sues numerous John Does in a single action for using BitTorrent to pirate the movie; plaintiff subpoenas the ISPs to obtain the identities of these Does; if successful, plaintiff will send out demand letters to the Does; because of embarrassment, many Does will send back a nuisance-value check to the plaintiff. The cost to the plaintiff: a single filing fee, a bit of discovery, and stamps. The rewards: potentially hundreds of thousands of dollars. Rarely do these cases reach the merits.<sup>127</sup>

This disturbing pattern led him to declare that:

[t]he federal courts are not cogs in a plaintiff's copyright-enforcement business model. The Court will not idly watch what is essentially an extortion scheme, for a case that plaintiff has no intention of bringing to trial. By requiring Malibu to file separate lawsuits for each of the Doe Defendants, Malibu will have to expend additional resources to obtain a nuisance-value settlement—making this type of litigation less profitable. If Malibu desires to vindicate its copyright rights, it must do it the old-fashioned way and earn it.<sup>128</sup>

Somewhat like the Righthaven actions, Malibu lacked the rights to bring these infringement actions, leading Judge Wright to impose sanctions on the law firm bringing the case and referring them for possible criminal prosecution.<sup>129</sup>

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<http://thresq.hollywoodreporter.com/2010/03/new-litigation-campaign-targets-tens-of-thousands-of-bittorrent-users.html>.

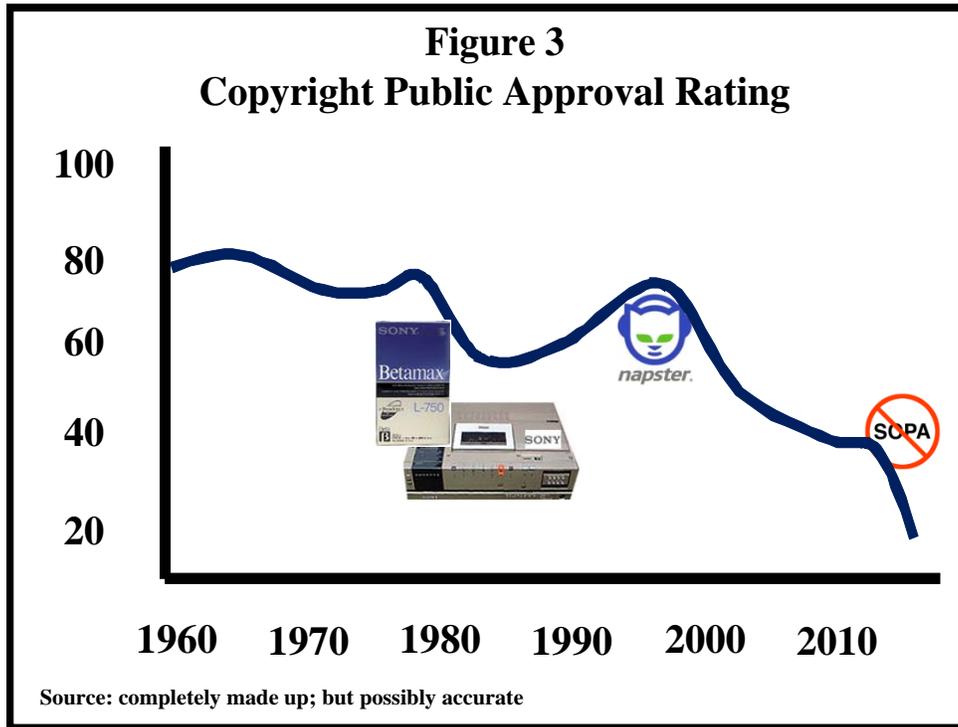
<sup>126</sup> See Rachel Storch, *The Adult Film Industry and the New Wave of Peer-to-Peer Copyright Suits* (manuscript May 2013) (on file with author).

<sup>127</sup> *Malibu Media, LLC v. John Does 1 through 10*, 2012 WL 5382304 \*3 (C.D.Cal. 2012).

<sup>128</sup> *Id.* at \*4.

<sup>129</sup> See *Ingenuity 13 LLC v. John Doe*, 2013 WL 1898633 (C.D.Cal. 2013) (beginning sanction opinion with a quotation from Spock in *Star Trek II: The Wrath of Khan* (1982): “The needs of the many outweigh the needs of the few.”); Joe Mullin, *Law & Disorder/Civilization & Discontents – Prenda Hammered: Judge Sends Porn-trolling Lawyers to Criminal Investigators Lawyers Who Obfuscated for Years Face Disbarment and an \$81,000 Fine*, arstechnica (May 6, 2013) <<http://arstechnica.com/tech-policy/2013/05/prenda-hammered-judge-sends-porn-trolling-lawyers-to-criminal-investigators/>>; Mike Masnick, *Bad Day For Prenda Continues: Judge Rejects Stay, Adds \$1k Per Day For Each Day They Don't Pay Up*, techdirt (May 21, 2013)

The public's disenchantment with the copyright system reached a record low in the lead up to congressional consideration of the Stop Online Piracy Act (SOPA)<sup>130</sup> – draft legislation aimed at combating foreign rogue websites. The outrage culminated in concerted blackouts and demonstrations of opposition of many popular websites (Wikipedia, Reddit, Mozilla, Google) that



contributed to Congress shelving the legislation.<sup>131</sup> Here is my perception of copyright law's public approval rating over the course of my life:

<<http://www.techdirt.com/articles/20130521/15164823159/bad-day-prenda-continues-judge-rejects-stay-adds-1k-per-day-each-day-they-dont-pay-up.shtml>>.

<sup>130</sup> H.R. 3261, 112th Cong. (2011).

<sup>131</sup> See Amy Goodman, The SOPA Blackout Protest Makes History: an Unprecedented Wave of Online Opposition to the SOPA and PIPA Bills Before Congress Shows the Power of a Free Internet, The Guardian (Jan. 18, 2012)

<<http://www.theguardian.com/commentisfree/cifamerica/2012/jan/18/sopa-blackout-protest-makes-history>>.



## **Act II – Why Should Society Care about Copyright’s Public Approval Rating?**

Copyright law played a behind the scenes role in the formative years of “My Generation” largely because “we” – America’s teenagers of the 1970s – lacked the technological tools and where-with-all to access, remix, and share copyrighted works on any substantial scale. Vinyl operated as an effective technological protection measure. Sneaking into movie theaters did not liberate the film for all to see. Video capture technology was science fiction.

That is not to say that we did not try to use technology to express ourselves (and circumvent control). As much as we tried, however, the quality of mix tapes was not nearly as good as the originals – and we cared about fidelity as well as “free.” The attraction of mix tapes had more to do with playing disc jockey, assembling favorite songs by mood, and space shifting – recording music for car stereos and portable cassette music devices (the Sony Walkman).

Thus, copyright’s public approval rating did not much matter in that primitive technological era. If “My Generation” wanted music, film, and books, we had to go through a market. Advances in digital technology have dramatically changed that ecosystem. What separates “My Generation” from the “Post-Napster Generations” is not values or tastes; rather it is their technological ability to personalize, customize, remix, and transform copyrighted works and their ability to operate outside of content market gatekeepers. Today’s youth as well as everyone else has alternatives to theater box offices, television networks, music stores, and book stores. As a result, the efficacy of the copyright depends critically upon its public approval rating.<sup>132</sup> For the first time in the more than 300 year history of copyright protection, consumers have choices and power.

### **A. Content Governance: From the Analog Age to the Internet Age**

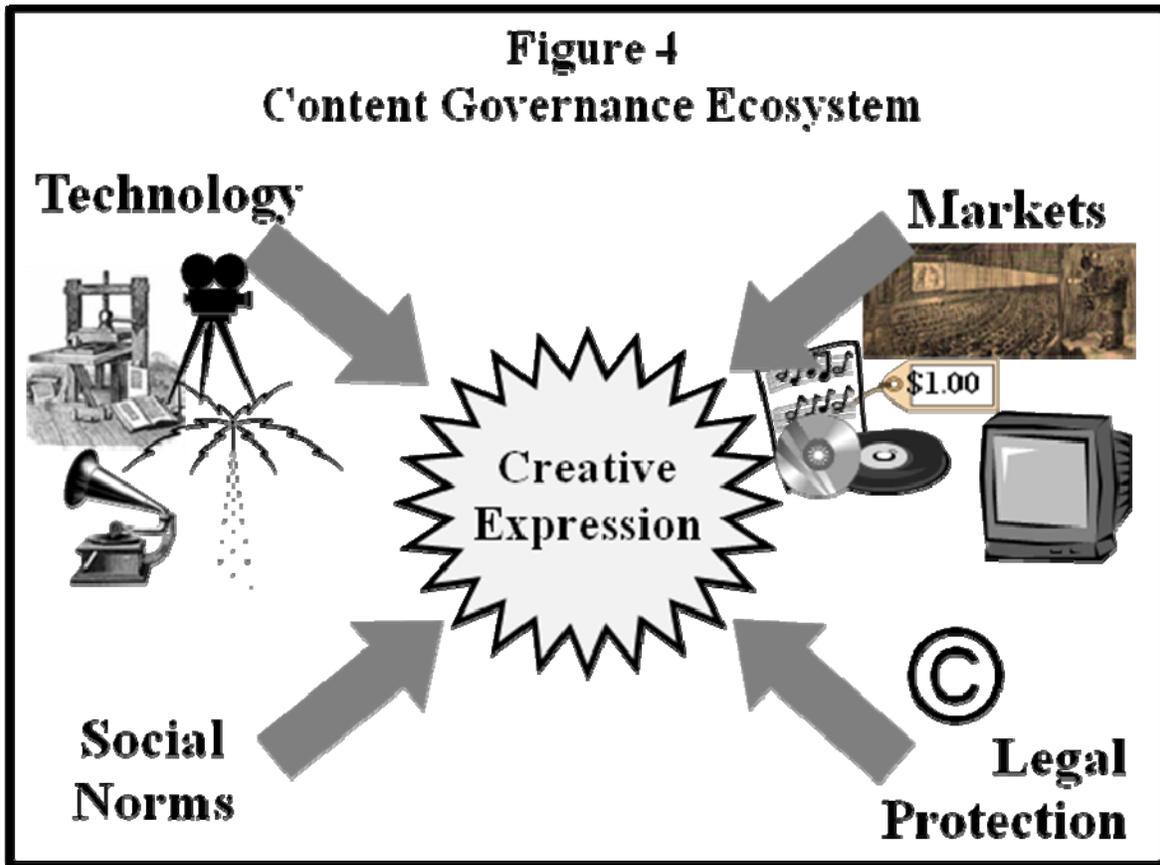
Throughout history, content industries have functioned in response to technological and institutional forces. The development of all of the major content industries trace back to key technological innovations that made possible the instantiation and dissemination of expressive works. The printing press enabled publishing, leading eventually to the development of copyright protection as a means for authors and publishers to appropriate a return on their investment in writing, typesetting, and distributing manuscripts.

At any point in time, the level of creative expression depends on the interplay of the technology for creating, reproducing, and disseminating works of authorship, the ability of businesses to commercialize such works, legal protections for creative works (including enforceability conditions), as well as social norms. Figure 4 illustrates these forces.

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<sup>132</sup> As Professor Lessig suggested long ago, “West Coast Code” can trump “East Coast Code.” See LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 53 (1999).

**Figure 4**  
**Content Governance Ecosystem**



For much of the past century, these forces made for a relatively robust ecosystem for numerous forms of creative expression. The publishing, film, and sound recording industries prospered in the 20<sup>th</sup> century. The printing press enabled publishers to reproduce books at relatively low marginal cost; a large network of book sellers brought these products to markets; and copyright law effectively discouraged book piracy. The film industry could protect their products by controlling exploitation through leases to theaters; copyright law played a relatively small role given the difficulty of gaining access to films. And the sound recording industry thrived in part because of the difficulty of making copies of sound recordings until well into the twentieth century. Federal copyright law did not even protect sound recordings until 1971. Yet protections for musical compositions, the relative unavailability of consumer copying technology until the 1970s, the loss of fidelity through copying, and the monitoring of record stores supported a robust marketplace.

Even without copyright protection, a content industry can flourish if technological means (encryption) or market means (contract, reputation) can limit unauthorized distribution of creative expression. And even if copyright protection exists, creative expression can be stunted to the extent that works can be copied and distributed without detection or effective enforcement.

Through my formative years, the technological and institutional conditions effectively channeled even “My [rebellious] Generation” into content markets. Many of us would have relished the free access to our favorite albums, movies, and books. But technological and market realities stood in our way. Social norms had little effect on the content governance equilibrium.

The digital revolution has activated the social norms quadrant of the content governance ecosystem. Bittorrent and cyberlockers provide an inexhaustible, nearly universal repository of copyrighted works for the post-Napster generations. That’s not to say that other forces exert no force. Technological protection measures continue to serve various content industries, such as video games. And online market places (such as iTunes, Amazon, Netflix, Spotify, and Hulu) have gained salience. But there is little question that the functioning of the content governance ecosystem depends more on social norms than at any other time in copyright history. If that ecosystem is to function well not just for access but also as an engine of creative expression, then we will need to understand social norms.<sup>133</sup>

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<sup>133</sup> See Ben Depoorter, Alain Van Hiel, & Sven Vanneste, Copyright Backlash, 84 S. Cal. L. Rev. 1251, 1283-89 (2011) (arguing that enforcement-based strategies seeking disproportionate sanctions are counterproductive for deterring file-sharing of copyrighted

## B. Reflections on Popular Music and Independent Film in the Internet Age

The contours of social norms are notoriously difficult to assess. They are suffused across enumerable age, regional, social, and economic communities.<sup>134</sup> We talk about baby boomers (those born after World War II through the early 1960s),<sup>135</sup> Generation X (those born between the early 1960s and the early 1980s),<sup>136</sup> and Millennials, also known as Generation Y<sup>137</sup> (those born between the early 1980s and the early 2000s). As a late Baby Boomer, I must draw on exposure to my students and children – bona fide Millennials – as well as a variety of professional experiences to understand the forces shaping the post-Napster content governance ecosystem.

### 1. Popular Music: Creators Caught in a Dual Vise

As noted previously,<sup>138</sup> I was struck by the speed at which many academics reached clear

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works); Måns Svensson & Stefan Larsson, Social Norms and Intellectual Property: Online Norms and the European Legal Development 59 (2009) <<http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1510388&fileId=1515776>>; Jason R. Ingram & Sameer Hinduja, Neutralizing Music Piracy: An Empirical Examination, 29 Deviant Behavior 344, 359 (2008) (finding that “almost 90 percent of sample respondents believed that downloading unauthorized music files was an appropriate behavior”); Yuval Feldman & Janice Nadler, The Law and Norms of File Sharing, 43 San Diego L. Rev. 577 (2006); Ben Depoorter & Sven Vanneste, Norms and Enforcement: The Case Against Copyright Litigation, 84 Or. L. Rev. 1127 (2005); Tom R. Tyler, Compliance with Intellectual Property Laws: A Psychological Perspective, 29 N.Y.U.J. Int’l L. & Pol. 219, 220, 234 (1997) (observing that the difficulties concerning gaining compliance with intellectual property law are typical of the problems involved in a wide variety of areas; and that “reliance upon threats of punishment to enforce intellectual property laws is a strategy that is likely to be ineffective”); see generally Tom R. Tyler, *Why People Obey the Law* (1990) (explicating a multi-faceted psychological framework for understanding compliance with law).

<sup>134</sup> See Edward Cheung, *Baby Boomers, Generation X and Social Cycles, Volume 1: North American Long-waves* (2007); Neil Howe & William Strauss, *Generations: The History of Americas Future, 1584 to 2069* (1991).

<sup>135</sup> See Baby Boomer, Wikipedia <[http://en.wikipedia.org/wiki/Baby\\_boomer](http://en.wikipedia.org/wiki/Baby_boomer)>; LANDON JONES, *GREAT EXPECTATIONS: AMERICA AND THE BABY BOOM* (1980).

<sup>136</sup> See Generation X, Wikipedia <[http://en.wikipedia.org/wiki/Generation\\_X](http://en.wikipedia.org/wiki/Generation_X)>; cf. Douglas Coupland, *Generation X: Tales for an Accelerated Culture* (1991).

<sup>137</sup> See Generation Y, Wikipedia <[http://en.wikipedia.org/wiki/Generation\\_Y](http://en.wikipedia.org/wiki/Generation_Y)>; JEAN M. TWENGE, *GENERATION ME: WHY TODAY’S YOUNG AMERICANS ARE MORE CONFIDENT, ASSERTIVE, ENTITLED—AND MORE MISERABLE THAN EVER BEFORE* (2006); WILLIAM STRAUSS & NEIL HOWE, *MILLENNIALS RISING: THE NEXT GREAT GENERATION* (2000); *Generation Y*, Ad Age 16 (Aug. 30, 1993).

<sup>138</sup> See supra <Section I(D)>

and firm conclusions about how Napster would affect the music industry.<sup>139</sup> Perhaps due to my training as an economist (emphasizing that there is no such thing as a free lunch) or knowing how 16 year me would have responded to free music, I was more cautious in judging the broader ramifications of the digital revolution than many of my academic colleagues. On the one hand, the allure of online access to a universal catalog was hard to resist. Furthermore, MP3.com demonstrated that new artists could reach vast audiences without the need for record labels. On the other hand, it was difficult to see how songwriters and recording artists could recoup the time, energy, and costs – albeit reduced by advances in digital technology – of creating and marketing their creativity. I was deeply conflicted and felt that we needed some time to see how these technological shocks would reverberate through, and likely alter, the ecosystem.

The reality was literally brought home when my older son, then a precocious adolescent, arrived home from school one day to tell me about this great technology called Napster. Dylan had been brought up listening to the great music of my youth – The Who, Bob Dylan, The Beatles, Led Zeppelin, The Rolling Stones, Eric Clapton, Boston – and was developing his own interests (Green Day) and learning to play guitar. He also loved computers and the Internet. It was only natural that he would see Napster as a dream come true.

Whereas most parents worry about the “sex” talk with their children, intellectual property professionals have an additional worry – the file-sharing talk. Although Dylan seemed to understand the logic of what I had to say, he was not too happy when I indicated that we were going to resist the Napster temptation. I promised that we would come up with a solution. As noted previously,<sup>140</sup> Steve Jobs came to my rescue (as well as the rescue of the recording industry).

While this moral dilemma was avoided in our family, it was clear from discussions with my law students and music industry trends that most Millennials were drawn to file-sharing like bees to honey. At first, there were few online alternatives to Napster and the other file-sharing services that would follow in its wake. But even as authorized online services like iTunes emerged, the music industry witnessed unprecedented annual declines in record sales (including digital revenue streams). Attorneys and music industry professionals whom I had gotten to know were increasingly pessimistic. The San Francisco Bay Area’s baby band marketplace – which had nurtured dozens of bands from the Jefferson Airplane through Green Day – was drying up.

It was about this time (2006) that I received an inquiry from a Bay Area antitrust lawyer with whom I was acquainted. He asked if I could assist his son, a Brown University

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<sup>139</sup> See Lessig, *supra* n.43; Netanel, *supra* n. 44; Fisher, *supra* n. 44; see also Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 *Stan. L. Rev.* 1345 (2004); Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 *U. Chi. L. Rev.* 263 (2002); Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 *Va. L. Rev.* 813 (2001).

<sup>140</sup> See *supra* <Section I(D)>

undergraduate who was lead singer, songwriter, and guitarist for an up-and-coming New England-based band called Zox. In particular, he was hoping that I could help the band land a major record label deal. He also knew that Eli was thinking about law school. I offered to help. His dad sent me their latest CD (“The Wait”) and Eli’s contact information.

I was immediately struck by Zox’s violin-laced Reggae rock and imaginative songwriting. Moreover, my sons – who were 13 and 16 at the time and avid musicians and music fans – were also taken with Zox’s music. Eli joined us for dinner over the winter break and we came to appreciate his extraordinary musical talent first-hand as well as the challenges faced by budding popular musicians.

I spent the following week reaching out to contacts in the music industry, which confirmed what I had been hearing. Major record labels were in free fall since Napster’s emergence and there was little funding for “baby bands.” I was sorry to pass along the disappointing news to Eli. I offered to help him in thinking about career paths – music and law – and we agreed to stay in touch.

Zox would continue creating music for another year. They had an independent record label deal with SideOne Dummy Records. Their record sales were anemic (by pre-Napster standards), but they were filling clubs in New England and getting positive reviews for their recorded music and live shows. Eli would visit my IP in the Entertainment Industries class that winter to discuss the challenges of pursuing a music career as an independent band – having to be a jack-of-all-trades (songwriting, performance, artwork, marketing, roadie, merchandise).

Zox was approaching an important career decision. It’s third album (*Line in the Sand*) was nearing release. Eli was in his last year of college and had been accepted to top law schools; Zox’s drummer had been accepted to a top business school. They hoped that Zox could break through, but also recognized that time was running out if they were to retain other career options. They decided to defer graduate school for a year to see if they could get to the next level as a band. If it worked, they would stick with it. If it did not pan out, then they would confront the fork in the road.

*Line in the Sand* received glowing reviews,<sup>141</sup> but the year on the road proved difficult. The band more than covered their costs, but the financial and emotional toll of touring were significant.

Eli would enroll at Stanford Law School in fall 2008. Midway through the year, he

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<sup>141</sup> See, e.g., Tony Sclafani, *Zox: Line in the Sand*, PopMatters (Feb. 14, 2008) <<http://www.popmatters.com/review/zox-line-in-the-sand/>>; Hey Mr. Light Man, Sputnik Music, *Zox: Take Me Home* Sputnik Music (Jan. 14, 2005) (“They sound like Sublime meets Dave Matthews; mixing punk, reggae, rock and classical; which adds up to a very unique sound.”); Zox <<http://www.jambase.com/Artists/15677/Zox/Bio>>; Zox, Leeds Music Scene <<http://www.leedsmusicscene.net/article/7497/>>

mentioned that Zox would be doing a reunion show back in Providence on Memorial Day weekend and suggested that our family might want to see the performance. It just so happened that Dylan would be finishing his first year of college in Boston and my spouse's 25<sup>th</sup> college reunion at Brown University was taking place that very weekend. We purchased flight and concert tickets. I asked Eli if we might drop by the club earlier in the day to see the band set-up.

As much as I had grown to appreciate Zox's music, I perceived, based on Eli's modesty and Zox's modest record sales, that the band had a moderate-sized fan base. I was expecting that the reunion concert would take place at a medium-sized club – perhaps a few hundred people. Imagine our surprise when we arrived at Lupo's – one of Providence's premier concert venues – to a marquee announcing: "Zox – Sold Out Show."

When we returned that evening, the crowd – approximately 2,000 raucous fans packed into a large converted theater – exploded when Zox took the stage. It felt like a Springsteen concert. From the band's opening note, the crowd joined in singing the lyrics of every song. The energy grew throughout the evening as the band renewed a deep bond with an appreciative fan base. Crowd surfers hovered above the mosh pit throughout the evening as the theater expressed its admiration. The evening flew by.

My kids emerged from the mosh pit drenched in sweat and the feeling that mild-mannered Eli was a rock star. I left the theater wondering how a band could bestow so much joy and yet struggle to survive. When I returned to Berkeley, I explored reviews of Zox's music<sup>142</sup>

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<sup>142</sup> Writing in PopMatters, an online cultural magazine, reviewer Tony Sclafani summed up *Line in the Sand* as "both memorable and significant, stellar musicianship, and an overall impassioned tone." See Tony Sclafani, Zox: Line in the Sand, PopMatters (Feb. 14, 2008) <<http://www.popmatters.com/review/zox-line-in-the-sand/>>. He compared Eli's voice to "a more down-to-earth version of Bono," noting "the band's top-flight songwriting . . . that puts the group over the top. Whether writing personal anthems like "Line in the Sand" or tear-jerking ballads like "The Wait (Part II)", Miller sounds like he's firing on all cylinders this time around, filling every verse, chorus and bridge with memorable hooks and lyrics. It helps that Miller has Swain to weave sinewy violin lines around his melodies and guitar work. The innovative combo of Swain fiddling while Miller burns is what pushes ZOX out of the category of revivalists and into the realm of innovators." He notes, somewhat prophetically, that "[m]aybe the band knew it had to push itself with this release or risk second-tier status forever. Miller's lyrics on the title track show him casting about for a change in his life: 'People keep on saying that I've got potential / Lately I haven't been feeling all that special / How I'm gonna turn it around'. ZOX may just start to feel special when the CD's first single, 'Goodnight', hits college radio. An acoustic ballad of the highest order, it reworks the cynical kiss-off vibe of Green Day's "Time of Your Life" into a more positive message of also finding something better ahead. The mix of minor and major chords is gorgeous, and its laundry list of descriptive phrases as evocative as the Jam's transcendent 'That's Entertainment'. Swain's violin sounds like it's sobbing during its solo, and there's a synth line that glues together the verses that's as unexpected as it is catchy. Judging from a clip on YouTube, it's already a concert favorite."

and surfed the countless fan comments posted on Zox's YouTube videos. Not surprisingly, most of the fan comments were unabashedly positive: "you conquer all"; ":) love it"; "Absolutely an amazing video and song. Thanks for making some original music to listen to!"; "WHY ISN'T ZOX FAMOUS?!?!?!?"

As I was scrolling through the love fest, one comment jumped off my computer screen: "Does anyone have this mp3?" My jaw dropped. Here was a celebration of the Zox fans in which one of the participants had no qualms about asking other fans how to get a copy of a song – which was available through iTunes, Amazon, and the band's website – without paying. In essence, "can another fan help me to rip off the band?"

I was initially encouraged by AngryFuriousMonkey's response: "Hey, here's an idea: BUY THE DAMN CD ALEADY!" To which the requester recommended "ANGER MANAGEMENT." AngryFuriousMonkey relented: "There's nothing wrong with downloading. I do it constantly. If you look harder, you might be able to find the mp3. But, you can also BUY THE DAMN CD!"

It was then that I realized that the post-Napster generations might not even perceive the moral or economic dimensions of file-sharing.<sup>143</sup> This was not a situation – as in the early Napster days – where an authorized digital version of a song might not be available at all. And even the fan who questioned the requester acknowledged that he or she downloaded "constantly." Yet in perusing other Zox video pages, one sees fans bemoaning that the band no longer performs and has not released new music: "They're putting on a 10 year reunion show in RI August 13th [2011]@ Lupos. Its going to be their only show this year, possibly their last show for a very long time.. : \ i LOVE zox!"; "One of the best bands I've seen live! Hope they come out with new music SOON!"; "They've been on the mainstream circuit (at least to some degree) since around '04. I first heard them at a small concert at DePauw in Indiana. They're definitely one of the best bands out there... unfortunately they seem to have gone into hiding since? mid-'09."

This story captures a key aspect of the pathology affecting creative industries in the Internet Age: Fans don't perceive a connection between file-sharing and the economic challenges facing creative artists.

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<sup>143</sup> See Jason R. Ingram & Sameer Hinduja, Neutralizing Music Piracy: An Empirical Examination, 29 Deviant Behavior 344, 359 (2008) (finding that "almost 90 percent of sample respondents believed that downloading unauthorized music files was an appropriate behavior"); Måns Svensson & Stefan Larsson, Social Norms and Intellectual Property: Online Norms and the European Legal Development 59 (2009) <<http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1510388&fileOId=1515776>> (reporting that no social norms hinder illegal file sharing); Ben Depoorter & Sven Vanneste, Norms and Enforcement: The Case Against Copyright Litigation, 84 Or. L. Rev. 1127 (2005).

Internet pundits and even some recording artists have contributed to this perception. In 2008, Wired Editor Chris Anderson foretold the triumph of “freeconomics”: “the trend lines that determine the cost of doing business online all point the same way: to zero.”<sup>144</sup> He proclaimed that “[a] decade and a half into the great online experiment, the last debates over free versus pay online are ending. In 2007 The New York Times went free; this year, so will much of The Wall Street Journal.”<sup>145</sup> Whereas “free” was once a “marketing gimmick” or a cross-subsidy, the Internet has produced a “full-fledged economy” that rewards those who give away creative works. Anderson noted that “[o]ffering free music proved successful for Radiohead, Trent Reznor of Nine Inch Nails, and a swarm of other bands . . . that grasped the audience-building merits of zero. The fastest-growing parts of the gaming industry are ad-supported casual games online and free-to-try massively multiplayer online games. Virtually everything Google does is free to consumers, from Gmail to Picasa . . .”<sup>146</sup> Andersen’s 2009 book, *Free: The Future of a Radical Price*, expounded on this theme to much fanfare and acclaim.<sup>147</sup>

These assertions contribute to the file-sharing social norm – *free* is not just good for me, but good for the artists and the economy. Like those generations that preceded it, the post-Napster generations possess the incredible human capacity for rationalizing their self-interest. In fact, some sociologists suggest that Millennials may have a heightened capacity for being “entitled.”<sup>148</sup> But I don’t need that added contributing factor. 16 year old me would have been drawn to that rationalization.

There are good reasons, however, to question Andersen’s celebration of *free*.<sup>149</sup> Even though the cost of distributing expressive creativity has fallen precipitously in the Internet Age, the cost of producing compelling content remains significant. And although concert revenue has risen significantly during the past decade, the majority of that revenue goes to a relatively small

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<sup>144</sup> See Chris Anderson, Free! Why \$0.00 Is the Future of Business, Wired Magazine: 16.03 (02.25.08) <[http://www.wired.com/techbiz/it/magazine/16-03/ff\\_free?currentPage=all](http://www.wired.com/techbiz/it/magazine/16-03/ff_free?currentPage=all)>

<sup>145</sup> See id.

<sup>146</sup> See id.

<sup>147</sup> It should be noted that Thom Yorke (Radiohead), Trent Reznor, the New York Times, and the Wall Street Journal would later bemoan the “Free” model. <cites>

<sup>148</sup> Based upon personality surveys, Professor Jean Twenge sees Millennials as possessing a greater sense of entitlement and narcissism than prior generations. See Jean M. Twenge, *Generation Me: Why Today’s Young Americans Are More Confident, Assertive, Entitled – and More Miserable Than Ever Before* (2007).

<sup>149</sup> See Tim Kreider, *Slaves of the Internet, Unite!*, N.Y. Times SR1 (Oct. 27, 2013) <<http://www.nytimes.com/2013/10/27/opinion/sunday/slaves-of-the-internet-unite.html>>; Robert Levine, *How Digital Parasites Are Destroying the Culture Business, and How the Culture Business Can Fight Back* (2011); Mark Helprin, *Digital Barbarism: A Writer’s Manifesto* (2009); *Free Ride*; Malcolm Gladwell, *Priced to Sell: Is Free the Future?* New Yorker (Jul. 6, 2009); Peter S. Menell, 2014: Brand Totalitarianism, U.C. Davis. L. Rev. (forthcoming).

pool of megastars and legacy bands.<sup>150</sup> The next wave of artists struggles mightily to make ends meet. Conveying that message to Millennials is not easy.

In 2009, I came across a video entitled “How’s the Album Selling?”<sup>151</sup> that captured the moral aspects of file-sharing in a way that spoke comically and honestly to the post-Napster generation. The video opens with Scotty Iseri finishing his set at the “Dive Bar.” Following some tepid applause, a colloquy unfolds:

Male Fan (coolly): Dude . . . awesome show.  
Scotty (modestly): Thanks, thanks very much.  
Male Fan: So how much for your CD?  
Scotty: It’s six bucks.  
Male Fan (outraged): DUDE, SIX BUCKS. BRO, COME ON!  
Scotty (apologetically): Dude, it’s six bucks.  
Male Fan (outraged): BRO, RADIOHEAD GAVE AWAY THEIR ALBUM FOR FREE.  
Scotty (incensed): DO I LOOK LIKE FUCKING RADIOHEAD TO YOU?  
Male Fan (exasperated): OK, calm down, here’s your six bucks, Jesus. . . . Hey, I got a buddy who’d be into this. Do you mind if I burn him a copy?  
Scotty (sheepishly): Kind of  
Male Fan: Seriously  
Scotty: Kind of, yea . . . but what am going to do about it?  
Male Fan (arrogantly): THAT’S RIGHT, WHAT ARE YOU GOING TO DO ABOUT IT?  
Scotty: I mean that I would like anyone who wants to listen to it get a copy, but . . .  
Male Fan (arrogantly): BUT WHAT?  
Scotty: You know, I mean it cost me three bucks to burn the CD and print out a label and put it in a case. And then, you know, I wrote the songs and played all the instruments and recorded the music and spent many a Saturday night hunched over my laptop getting the EQ on the ukelele just right instead of having sex with my fiancé . . . so I figure that’s worth about three bucks too.  
Male Fan (geekly): But, OK, but Chris Andersen in *Wired* said the future of music is free and you can make a living by touring and giving away your music online . . .

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<sup>150</sup> See Alan B. Krueger, *The Economics of Real Superstars: The Market for Rock Concerts in the Material World*, 23 *J. Labor Econ.* 1 (2005).

<sup>151</sup> The video was produced by and featured Scotty Iseri.

Scotty (outraged): CHRIS ANDERSEN CAN BITE MY TINY, TATTOOED, HALF-JAP ASS. YOU TELL CHRIS ANDERSEN TO GIVE HIS BOOKS AWAY FOR FREE<sup>152</sup> AND MAKE HIS MONEY PLAYING IN SHITTY CLUBS IN PROVO, UTAH WHERE THE FOUR DOLLAR COVER CHARGE GOES STRAIGHT TO THE BAR AND THE ONLY WAY TO MAKE GAS MONEY TO THE NEXT TOWN IS IF SOME DRUNK PICKS UP A COPY OF THE CD.

Male Fan (geekly): Hang on. It says Creative Commons on the back. So . . . doesn't that mean that I can just give this away for free.

Scotty (frustrated): No, that . . . You're awfully well-informed for a drunk frat guy in a bar.

Make Fan: I was a hipster my freshman year of college.

Scotty: Got it.

Male Fan (geekly): OK, but what about this recent article by Kevin Kelly that Cory Doctorow put up on boingboing that said for an artist to make a living in the 21<sup>st</sup> century you only need one

Scotty (interrupting, exasperated, and with rising anger): Look, look . . . just take this CD. Just take it. I hope you like it. Burn copies for your friends. Put it up on Bittorrent. It's fine, it's fine, it's fine. AND YOU OUT THERE (pointing at camera), YOU OUT THERE ON THE INTERNET. YOU WANT A CD, EMAIL ME, EMAIL "I DON'T HAVE SIX BUCKS @ GMAIL.COM" WITH A SUBJECT LIKE CHRIS ANDERSEN SAYS YOU'LL GIVE ME FREE SHIT. AND I'LL SEND YOU THE GOD DAMNED CD.

Male Fan (sheepishly): Maybe it's not very good.

Scotty (frustrated): That's entirely possible and probably more likely. Do you want the CD or not?

Male Fan (confidently): Nah, I'll just download it later. Thanks Bro. (Walks away)

Female Fan walks up (in valley girl accent): Oh my God, Oh my God, that was so funny . . . I totally saw you last year in Salt Lake City and I totally bought your CD.

Scotty (modestly, cringing): Thanks, thanks very much.

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<sup>152</sup> Note: Chris Andersen did make his book available for free for a short time; but later went on to sell several hundred thousand copies.

Female Fan: Is this the new one (CD)?  
Scotty: Yep, it is. It's six dollars.  
Female Fan: Cooool. Thaaaaanks. I'm gonna post this one online too.  
My friends just loved it . . .  
Scotty: (looking quizzically into the camera)

Scotty Iseri's video captures critical aspects of the social norms affecting music industry: the rationalization ("Chris Andersen in *Wired* said the future of music is free and you can make a living by touring and giving away your music online"), the indignance (WHAT ARE YOU GOING TO DO ABOUT IT?), and the cluelessness ("I'm gonna post this one online too").

The video also captures aspects of the policy debate. When I first saw this video, it reminded me of conversations that I periodically had with Fred von Lohmann, formerly of the Electronic Frontier Foundation (EFF) and now employed by Google. I would articulate economic and moral justifications for channeling file-sharing into markets, to which Fred would essentially say – file-sharing is here to stay: WHAT ARE COPYRIGHT OWNERS GOING TO DO ABOUT IT? While I could understand his response as a prediction of how self-interest might play out in the highly promiscuous Internet ecosystem, I struggled to see how this was good for promoting creative expression. I could not understand why EFF did not use its considerable bully pulpit within the post-Napster generations to encourage ethical behavior as digital content channels emerged.

I would have to admit, however, that even more robust digital content markets might not transmit market demand effectively to creative artists. The entertainment field has long been plagued by content industry intermediaries short-changing artists through accounting practices and backroom legislative deals.<sup>153</sup>

In mid 2008, I received an inquiry that would bring this aspect of the content governance ecosystem into clearer focus. A transactional entertainment lawyer representing F.B.T. Productions, which was in the midst of litigation regarding Eminem's digital royalties, called to see if I would advise them about the custom and practice in the music industry. Jeff and Mark Bass discovered Marshall Mathers (better known as Eminem, his stage name) as a teenager and signed him to a production deal before he was known outside of the Detroit rap scene.<sup>154</sup> Jeff would co-write several of Eminem's biggest hits and F.B.T. – short for "Funky Bass Team" – produced his break through albums "The Slim Shady LP" (1999), "The Marshall Mathers LP" (2000), "The Eminem Show" (2002), and "8 Mile" (2002). As a result, F.B.T. had a financial stake in Eminem's record contract and music publishing royalty streams. Eminem's career took

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<sup>153</sup> See supra n. \_\_ <47>.

<sup>154</sup> See Eminem, Wikipedia <<http://en.wikipedia.org/wiki/Eminem>>; Anthony Bozza, *Whatever You Say I Am: The Life and Times of Eminem 14-24* (2003); Gary Eskow, *The Bass Brothers and Eminem, Mix* (Aug. 2, 2000).

off just as the digital revolution unfolded. He had been the top selling artist of the decade at the time of the litigation.<sup>155</sup>

The dispute related to digital revenues (such as iTunes downloads and ringtones) owed to F.B.T. My initial reaction after reviewing the pertinent contracts was that F.B.T. did not need my assistance. The royalty provision provided a rate in the 18 to 20 percent range based on the “full price records sold . . . through normal retail channels,” with volume escalations. The provision then stated:

Notwithstanding the foregoing: . . . On masters licensed by [the record label] to others for their manufacture and sale of records or for any other uses, your royalty shall be an amount equal to fifty percent (50%) of our net receipts from the sale of those records or from those other uses of the masters.”<sup>156</sup>

Since Apple and other digital retailers must have had licenses to reproduce and distribute digital copies of the sound recordings – otherwise, they would be infringing the sound recording and musical composition copyright – it was clear that the “Masters Licensed” clause applied and the labels should have been paying 50% of net receipts on digital transactions through Apple and other digital licensees. I advised F.B.T.’s counsel that this was a clear contractual provision under which F.B.T. should have been paid under the “Masters Licensed” clause for digital downloads and indicated that they did not my assistance on such a clear question.

Nonetheless, F.B.T.’s counsel requested that I work with them to respond to the aggressive litigation and expert barrage that they were facing. As I delved into the case, I came to realize why Universal Music Group – the world’s largest record label – waged such an unrelenting fight. The 1998 Eminem-Aftermath contract reflected standard industry practice at the time, with the label paying a relatively low royalty rate on albums manufactured and sold by the label (the “Records Sold” clause) and 50/50 split of net receipts on licenses to third parties (the “Masters Licensed” clause).<sup>157</sup> The economic logic was straightforward: where the label did

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<sup>155</sup> See Best of the 2000s: The Decade in Charts and More, *Billboard* (citing Eminem as the best-selling artist of the 2000s) <<http://www.billboard.com/articles/news/266420/artists-of-the-decade>> As of 2012, Eminem placed third on the list of top-selling digital artists of all time at 42.29 million digital tracks, behind Rihanna (47.5 million), and the Black Eyed Peas (42.4 million). See Rihanna Now the Biggest Digital Artist of All Time, ABC News Radio (Jan. 6, 2012) <<http://abcnewsradioonline.com/music-news/2012/1/6/rihanna-now-the-biggest-selling-digital-artist-of-all-time-1.html>>

<sup>156</sup> See Memorandum of Points and Authorities in Support of Plaintiffs’ Motion for Summary Judgment, *F.B.T. Productions, LLC v. Aftermath Records*, Case No. CV 07-03314 PSG (Dec. 3, 2008) at p.1 (hereinafter cited as “F.B.T. MSJ Brief”); Donald S. Passman, *All You Need to Know About the Music Business* 176 (4<sup>th</sup> ed. 2000) (stating that “[t]he royalty on coupled product that’s licensed to someone else by your record company is usually 50% of the company’s licensing receipts”).

<sup>157</sup> See Passman, *supra* n. \_\_\_, at 108, 176.

more work in manufacturing, distributing, and marketing the recording, it derived a larger share of the proceeds. The principal master licenses had been for films and television programming and greatest hits albums, but there was no reason why this clause – on the record label’s form contract – should not apply to revenue from iTunes transactions.

By 1998, UMG had opened a specialized unit to plan entry into the emerging digital marketplace.<sup>158</sup> It would eventually launch Pressplay, a joint venture with Sony Music Entertainment.<sup>159</sup> As an owner of this service, UMG could arguably treat digital download transactions under the “records sold” clause of its record deals. Napster’s rapid emergence disrupted this game. Pressplay limped out of the starting gate and failed to gain traction in the marketplace,<sup>160</sup> eventually providing Steve Jobs with the leverage to persuade UMG and the other major record labels to license their sound recordings to the iTunes Music Store.<sup>161</sup> In

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<sup>158</sup> It initially called the Electronic Commerce and Advanced Technologies (eCAT) and renamed eLabs in 2000. See DataPlay Board of Directors Elects Universal eLabs President Lawrence Kenswil, Business Wire (Aug. 1, 2000) <<http://www.thefreelibrary.com/DataPlay+Board+of+Directors+Elects+Universal+eLabs+President+Lawrence...-a063798201>> In a 2012 interview, Mr. Kenswil would comment that “there was a general reluctance to outsource by licensing if you could do it yourself.” See Aram Sinnreich, *The Piracy Crusade: How the Music Industry’s War on Sharing Destroys Markets and Erodes Civil Liberties* 51 (2013) <<http://mediacommons.futureofthebook.org/mcpress/piracycrusade/>>

<sup>159</sup> See Technology Briefing Internet: Pressplay To Start Today, N.Y. Times (Dec. 19, 2001); Lori Enos, Online Music Service Duet Renamed ‘Pressplay’ Amid Talk of Sony Exit, E-Commerce Time (Jun. 12, 2001) <<http://www.ecommercetimes.com/story/11174.html>>; Pressplay offered consumers 300 streams and 30 downloads per month for \$9.95 a month, or 1,000 streams, 100 downloads and 20 songs that could be burned onto a CD or transferred to a portable player, for \$24.95 a month. See Catherine Greenman, BASICS; Streaming Fishing: A Guide to Net Radio N.Y. Times (Apr. 18, 2002) <<http://www.nytimes.com/2002/04/18/technology/basics-stream-fishing-a-guide-to-net-radio.html?pagewanted=all&src=pm>>

<sup>160</sup> Pressplay and MusicNet, the other label-owned and developed online service failed for a variety of reasons, including the challenge of competing with Napster and other “free” peer-to-peer services as well as technological limits on consumer autonomy, limited catalog selection, and low-quality audio. See Dan Tynan, *The 25 Worst Tech Products of All Time*, PCWorld (May 26, 2006) <[http://www.pcworld.com/article/125772-3/the\\_25\\_worst\\_tech\\_products\\_of\\_all\\_time.html](http://www.pcworld.com/article/125772-3/the_25_worst_tech_products_of_all_time.html)>; See Adam Lashinsky, Saving Face at Sony, *Fortune*, Feb. 21, 2005, at 79 (reporting that Pressplay “initially failed to license music from competing labels and as a result never attracted many users” and was eventually abandoned); Menell, *supra* n. \_\_, at 172-74 <Envisioning>; Fred Goodman, Will Fans Pay for Music Online? *17 Rolling Stone* (Jan. 31, 2002) (noting notable limits on consumer autonomy).

<sup>161</sup> See Chris Taylor, *Invention of the Year: iTunes Music Store*, *Time* (Nov. 16, 2003) <[http://www.time.com/time/specials/packages/article/0,28804,1935038\\_1935059\\_1935086,00.html](http://www.time.com/time/specials/packages/article/0,28804,1935038_1935059_1935086,00.html)>; Thomas K. Grose, Sing When You’re Winning, *Time* (Feb. 18, 2006) (noting that “the big breakthrough came from Apple, which finally convinced millions of consumers to

conjunction with the popular iPod device,<sup>162</sup> iTunes succeeded in selling millions of downloads, which would precipitate the battle over digital revenues.

By licensing their catalogs to Apple's iTunes Music Store, UMG and the other major record labels exposed themselves to artists contending that download sales should be treated under the more favorable "Masters Licensed" clause of the standard agreements. Nonetheless, they contended that the "Records Sold" clause applied to digital downloads through licensee-third party online vendors<sup>163</sup> while at the same time undertaking a campaign to renegotiate active catalog artist agreements to exclude digital downloads from the "Masters Licensed" clause.<sup>164</sup>

Eminem's record deal put F.B.T. in an unusually favorable position to challenge UMG's royalty payments. Dr. Dre's UMG sub-label Aftermath Records signed Eminem through F.B.T. Productions to a record deal in 1998. A 2000 novation placed Eminem in a direct contractual relationship with Aftermath Records while retaining F.B.T.'s royalty stream and accounting right. With Eminem's career skyrocketing following chart-topping records and a starring role in the autobiographical film *8 Mile*, Aftermath sought a new, longer term agreement in 2003.

By that time, UMG had entered into an agreement with Apple Computer authorizing sale of UMG recordings through the iTunes Music Store. Consequently, UMG (and its affiliated sub-labels) sought to require all new and renegotiated recording agreements with artists to contain a provision excluding digital downloads from the "Masters Licensed" clause. Recognizing Eminem's strong bargaining position, his attorney declined to alter that clause and it carried over to the 2003 agreement.<sup>165</sup>

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pay for downloadable music") <<http://www.time.com/time/magazine/article/0,9171,1161172-2,00.html>>.

<sup>162</sup> Steven Levy, *The Perfect Thing: How the iPod Shuffles Commerce, Culture, and Coolness* (2006)

<sup>163</sup> See Letter to Heads of the Major Record Labels from 27 Artist Attorneys (Mar. 24, 2004) (stating that "[r]ather than recognize the arrangements between the major labels and independent electronic distributors as licensees, for which we feel there can be no *bona fide* legal dispute, and paying our clients according to the applicable ["masters licensed"] provision of their contracts, all five major record labels have adopted the position that paid downloads are equivalent to sales of CDs through retailers").

<sup>164</sup> See Donald S. Passman, *All You Need to Know About the Music Business* 158-59 (6th ed. 2006) (stating that "[a]fter a lot stumbling arounds, the industry has settled into a routine. Under all the deals made in the last few years, and in the renegotiations of older deals, [the recording artist] get[s its] royalty rate applied to the amount received by the company [for digital downloads, streaming-on-remand, ring tones and ring backs, non-interactive webcasting, satellite radio, and podcasting].").

<sup>165</sup> There were some inconsequential alterations, such as renumbering paragraphs. See F.B.T. MSJ Brief, *supra* n. \_\_\_, at 4-5.

Following an accounting that revealed that UMG was not compensating F.B.T. at the 50/50 rate, F.B.T. filed suit. In an ironic twist, the attorneys representing both sides of the 2003 contract – Gary Stiffelman on behalf of Eminem and Peter Paterno on behalf of Aftermath Records<sup>166</sup> – had signed a letter to the heads of the major record labels stating that the standard “Masters Licensed” clause covered digital downloads from third parties. Nonetheless, UMG did all that it could to fight their partners over this issue. They succeeded at trial,<sup>167</sup> but lost resoundingly at the Ninth Circuit:

the agreements unambiguously provide that “notwithstanding” the Records Sold provision, Aftermath owed F.B.T. a 50% royalty under the Masters Licensed provision for licensing the Eminem masters to third parties for any use. It was undisputed that Aftermath permitted third parties to use the Eminem masters to produce and sell permanent downloads and mastertones.<sup>168</sup>

The bulk of active artists were forced to give up this provision, meaning that they see precious little from digital downloads. Moreover, they have been pushed into so-called “360 Deals” which will make it more difficult for them to gain artistic and commercial independence.<sup>169</sup>

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<sup>166</sup> The explanation for this unusual circumstance was that Dr. Dre – who began his music career as a recording artists – chose to use his attorney (Peter Paterno) rather than UMG attorneys to negotiate Aftermath deals. Peter Paterno’s career centered around artist representation, with the band Metallica as one of his chief clients. See Music Fans Must Rebel Against Greedy Record Labels, FoxNews.com (Feb. 26, 2002) (stating that “Music industry attorney Peter Paterno has become the first guy to call when doing a Napster-related story. Metallica and Dr. Dre are among his clients. . . . Twice in the past week, Paterno has lashed out at those who exchange music on the Internet. . . . ‘If I was running a record company, as opposed to the wimps that are running one, I’d say, “You know what, I have no interest in compromising, and I’m going to go sue Little Johnny who’s downloading this stuff.’”) <<http://www.foxnews.com/story/2002/02/26/music-fans-must-rebel-against-greedy-record-industry/>>

<sup>167</sup> See Amy Kaufman, Eminem Loses Case to Universal Music Group, The Wrap (Mar. 6, 2009) <<http://www.thewrap.com/media/article/eminem-loses-case-universal-music-group-1750>>

<sup>168</sup> See F.B.T. Productions, LLC v. Aftermath Records, 621 F.3d 958, 967 (9<sup>th</sup> Cir. 2010); Sharon Waxman, Updated: Eminem Wins Royalties from Universal, UMG Will Fight It, The Wrap (Sept. 3, 2010) <<http://www.thewrap.com/media/column-post/breaking-eminem-wins-royalties-universal-appeal-20615>>;

<sup>169</sup> See Daniel J. Gervais, Kent M. Marcus, and Lauren E. Kilgore, The Rise of 360 Deals in the Music Industry, Landslide (Mar./Apr. 2011). This is not to say that some established artists have not done well through 360 deals. Madonna and Jay-Z have obtained large advances for signing these contracts. It is less clear than less known acts, which do not see large advances, will ultimately benefit from these arrangements. See *id.*

Many back catalog artists – those not releasing new records – who were not pressured to renegotiate are seeking higher royalties on digital downloads.<sup>170</sup>

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These experiences revealed the dire ecosystem facing songwriters and performing artists in the Internet Age. As depicted in Figure 5, they are being squeezed by two powerful and determined forces. Fans came to see recorded music as essentially a free good. They have little compunction about downloading and sharing digital files. They rationalize “freeconomics” as good for artists as well as themselves. On the other side of the vise, and compounding the file-sharing rationalization,<sup>171</sup> record labels were willing to go to extraordinary lengths to short-change recording artists<sup>172</sup> – losing sight of how such machinations would undermine the marketplace for music as well as copyright’s legitimacy among consumers and recording artists.

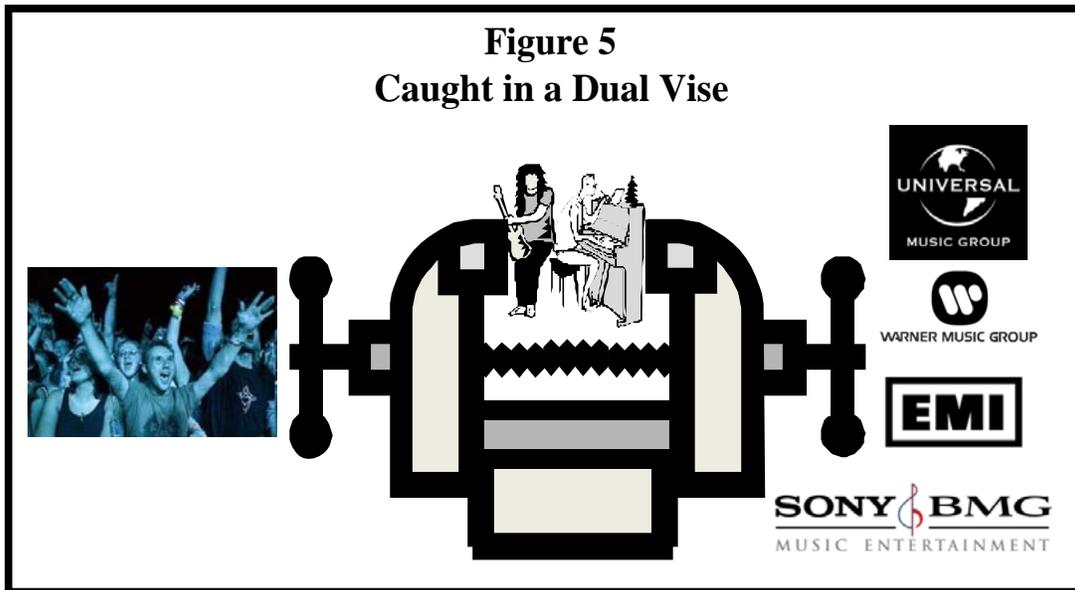
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<sup>170</sup> See Eriq Gardner, Judge Declines Universal Music Group’s Bid to Dismiss Class Action Over Digital Revenue, *Billboard* (Nov. 2, 2011) (citing a study by the Future of Music Coalition that “estimated that the difference in interpretation just for music downloaded off of iTunes alone could be \$2.15 billion”) <<http://www.billboard.com/biz/articles/news/1162202/judge-declines-universal-music-groups-bid-to-dismiss-class-action-over>>; Christopher Morris, F.B.T. settles with UMG, Aftermath: “Eminem Case” Cited as Precedent for Other Digital Royalty Suits, *Variety* (Oct. 29, 2012) (noting that “[t]he F.B.T. case had been closely watched, for several class actions and individual suits had been launched in the wake of the appellate decision by artists – most of them heritage acts with contracts dating in many cases back to the ’70s – who claimed they were also entitled to higher digital royalties. In nearly all cases, the actions cited the appellate decision as a precedent.”) <<http://variety.com/2012/music/news/f-b-t-settles-with-umg-aftermath-1118061395/>>.

<sup>171</sup> Many fans wonder why they should pay for music if artists are just getting ripped off by their labels anyway. See *supra* <Section I(D)>.

<sup>172</sup> See *supra* <Section I(D)>.

**Figure 5**  
**Caught in a Dual Vise**



## **2. Popular Films: Anytime, Anywhere, and Free**

The effects of file-sharing and social norms on the film industry unfolded later than the music industry due to the large size of feature length digital motion picture files and the use of DVD encryption in digital release of film products. They would, however, reach dramatic proportions in 2009. That was the year in which Kathryn Bigelow's acclaimed independently produced film, *The Hurt Locker*, garnered six Academy Awards including Best Picture and Best

Director at the Academy Awards yet underperformed any prior Best Picture winner. The staggered theatrical distribution played a role, but unauthorized distribution through BitTorrent swarms and cyberlockers unquestionably hurt *The Hurt Locker*.<sup>173</sup>

A short time later, I would gain a first-hand account of the challenges facing independent filmmakers from a UC-Berkeley colleague. Ellen Seidler is an experienced broadcast journalist and filmmaker with ties to UC-Berkeley's Graduate School of Journalism. Her directing credits include the award-winning "Fighting for Our Lives – Facing AIDS in San Francisco," narrated by Linda Hunt and appearing on PBS. Ellen would become an unlikely crusader for copyright enforcement.<sup>174</sup> Her story about producing an independent film illustrates the opportunity and challenges for artists in the Internet Age.

In 2007, Ellen and Megan Siler set out to pursue a dream that they shared – producing a lesbian romantic comedy. Any film project entailed involved risk, but a project of this nature was especially challenging. It would not gain widespread theatrical distribution and hence would need to rely upon alternative distribution channels. Ellen and Megan believed that the digital marketplace (DVDs and authorized Internet streaming and downloads) in conjunction with film festival showcases could provide a viable means for recouping the substantial investment. They scraped together the financing from their own savings and mortgaging assets and handled many of the production tasks themselves. Their film, *And Then Came Lola*, premiered to a sold-out audience at the San Francisco Frameline LGBT Film Festival and was screened at dozens of film festivals around the world. It garnered glowing reviews: "A lesbian film done right. . . . Fast-paced, energetic and fund!"<sup>175</sup> "A sugar rush of a lesbian movie. . . . Funny, campy and wildly imaginative."<sup>176</sup> They were on track to repay their debts.

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<sup>173</sup> A substantial contributing factor to the theatrical shortfall was that *The Hurt Locker* was publicly released in Italy and elsewhere more than six months before its U.S. theatrical release. See *The Hurt Locker*, Wikipedia <[http://en.wikipedia.org/wiki/The\\_Hurt\\_Locker](http://en.wikipedia.org/wiki/The_Hurt_Locker)>. Copies made their way onto unauthorized channels long before it was available through key authorized markets. See *The Hurt Locker Producers to Take on Pirates*, News.com.au (May 13, 2010) (observing that "*The Hurt Locker* made just \$18 million in the US and \$47m worldwide after being leaked onto the internet more than five months before its US release") <<http://www.news.com.au/technology/the-hurt-locker-producers-to-track-down-pirates/story-e6frfo0-1225865968935>>

<sup>174</sup> See Schuyler Velasco, *Pop-Up Piracy: Indie Filmmaker Speaks Out*, Backstage: The Actor's Resource (Jul. 6, 2010) <<http://www.backstage.com/news/pop-up-piracy-indie-filmmaker-speaks-out/>>

<sup>175</sup> See Jim Teit, *Off to the Cinema; Q-Fest Arrives in Philly*, NBC Philadelphia (Jul. 10, 2009) <<http://www.nbcphiladelphia.com/the-scene/archive/One-of-a-Kind-Q-Fest-Opens-Today.html>>.

<sup>176</sup> See Danielle Riendeau, *Review of "And Then Came Lola"*, AfterEllen.com (Aug. 24, 2009) <<http://www.afterellen.com/review-of-and-then-came-lola/08/2009/>>.

Unfortunately, Ellen and Megan had not foreseen the emergence of advertising-driven cyberlocker services geared toward content piracy when they embarked on their film project. Within a day of the German DVD release, *And Then Came Lola* showed up on unauthorized websites throughout the world. Ellen's life quickly shifted from filmmaker to anti-piracy forensics geek. She was soon spending two to three hours per day ferreting out unauthorized links – multiplying into the thousands – and trying to use the Digital Millennium Copyright Act's takedown system to staunch the unauthorized flow. But no sooner did she request that a copy be taken down than more copies appeared on the same service. She even found copies dubbed in foreign languages, such as the economic motivation for posters.

Recognizing that this whack-a-mole approach was doomed to failure, Ellen turned to the underlying economic drivers. A new cyberlocker business model was driving a lot of the unauthorized traffic. Kim Dot Com's Megaupload service was a principal source of the problem. Its founder claimed to have a billion users and accounted for 4% of global Internet traffic at the height of its success. MegaUpload relied on legitimate businesses placing advertisements through ad networks within the cyberlockers. Those who could attract Internet users to their cyberlockers could earn revenue through the ad networks. So did MegaUpload. And how better to attract eye balls to a cyberlocker than by hosting popular films and television shows and posting those links in chat rooms throughout on the Internet.

By the time that I caught up with Ellen, her life had been transformed into the role of anti-piracy crusader. She went from making films and contributing directly to culture to speaking out about who profits from online piracy – developing videos about the economic drivers of piracy, blogging, maintaining a website devoted to the challenges facing filmmakers,<sup>177</sup> and appearing on radio talk shows to discuss the connection between piracy and profits.

The effects of film piracy are particularly grave because unlike sound recordings, which don't typically require large financial outlays, many of the most valuable films require substantial capital investment. When I asked Ellen if she planned to pursue further independent film projects, she laughed. The experience of producing *And Then Came Lola*, only to struggle to repay the loans and watch as others profited from her hard work, chilled her expression.

### **C. The Copyright/Internet Paradox**

For most of the history of copyright protection, authors and performing artists have struggled to find a sustainable way of supporting their art. The problem was not the lack of effective protection; it was the challenge of producing, manufacturing, marketing, and distributing the copyrighted product – a book, a film, a sound recording. They inevitably had to rely upon intermediaries, who typically took a large portion of the revenue. How could an author distribute a book without a publisher who could promote the project and manufacture and

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<sup>177</sup> See Who Profits From Piracy <<http://popuppirates.com/>>; Vox Indie: Copyright & Creative Culture – Commentary, Memes and More <<http://voxindie.org/>>.

distribute it to a large network of book stores? How could a musician produce, manufacture, market, and distribute a record without a major record label to ensure that thousands of copies would be in the right stores as the song hit the radio airwaves? How could a filmmaker finance, produce, and distribute a film without a major studio?

That is why we have come to see the copyright system as revolving around content industries – essentially the intermediaries that have connected creators and consumers. For most of the twentieth century, the content industries focused as much or more on the intermediaries – the publishers, studios, broadcasters, and record labels – as the authors, artists, and actors. Creators had to break through this phalanx in order to reach the audience.

Advances in digital technology have substantially reduced the role of the intermediaries separating creators and fans. Eli Miller and Ellen Seidler – like many other talented and resourceful artists and authors – are role models for what the copyright system aims to encourage: direct commerce between creators and fans. Yet digital technology has created new challenges that rival the old.<sup>178</sup> Although Eli and Ellen can reach large audiences directly, the promiscuity of Internet technology erects new challenges to their economic sustainability. Both, unfortunately, have moved on to other livelihoods notwithstanding their desires to pursue creative projects and the apparent desire of their fans for them to create music and film.

I have come to see the content governance ecosystem as a paradox. The very technologies that empower creators and enable them to reach vast audiences without the intermediaries of old make it ever more difficult to achieve an adequate reward for their investments in producing art. What we are seeing is a shift in creative ecosystem toward alternative financing mechanisms, with advertising-based models as the primary drivers. Such models, however, distort the art and manipulate the audience.<sup>179</sup> I believe that what creators want is a fair compensation system based on the popularity of their art; and what consumers want is easy access to creative original art at a competitive price.

I don't intend to suggest that there has been no progress in these directions. We are seeing the emergence of innovative symbiotic distribution platforms – such as iTunes, Spotify, Hulu, and Netflix – that enhance the digital content marketplace.<sup>180</sup> Nonetheless, these markets are plagued by complex pathologies that undermine public respect for the copyright system.

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<sup>178</sup> Cf. The Songwriters Association of Canada's Proposal to Monetize the Non-commercial Sharing of Music (updated Mar. 2011) (“Music file-sharing is a vibrant, open, global distribution system for music of all kinds, and presents a tremendous opportunity to both creators and rights-holders. Additionally, once a fair and reasonable monetization system is in place, all stakeholders including consumers and Internet service providers will benefit substantially.”) <<http://www.songwriters.ca/proposaladetailed.aspx>>.

<sup>179</sup> See Menell, *supra* n.128. <Brand Totalitarianism>

<sup>180</sup> See Paul Sloan, *Spotify: Growing Like Mad, Yet So Far to Go*, C|Net (Mar. 12, 2013) <[http://news.cnet.com/8301-14013\\_3-57573394/spotify-growing-like-mad-yet-so-far-to-go/](http://news.cnet.com/8301-14013_3-57573394/spotify-growing-like-mad-yet-so-far-to-go/)>.

## 1. Digital Music Platform Pathology

The emergence of the Napster platform demonstrated the technological possibility of a true celestial jukebox in mid 1999. Although Napster had not licensed the content flowing through its system, it nonetheless proved to the music-loving public that they could seamlessly gain access to any musical track through an Internet connection. Once such a tantalizing possibility had been revealed, the public was not going to be content with anything less. This did not necessarily mean that such an extraordinary technology had to be free. But it had to be available, user-friendly, and reasonably priced.

Unfortunately, the byzantine structure of music copyright and the music industry as well as antitrust law posed tremendous challenges in achieving what consumer came to expect. The emergence of the radio industry provides the closest analogy. It took several decades to develop and implement a workable licensing structure.<sup>181</sup> This system has operated since the 1950s under a complex antitrust consent decree. In the Analog Age, consumers had no alternative to regulated radio channels and hence they had no choice to wait for the slow evolutionary processes of business licensing and legal oversight to run their course.

The Internet Age afforded music industry titans no such luxury. If copyright owners were not willing or able to provide a celestial jukebox, then technology entrepreneurs and consumers would create their own. As noted previously,<sup>182</sup> UMG and other music companies were in the planning phases of digital music services in the late 1990s. They hoped to use digital rights management technology to build a controlled digital jukebox. But once consumers got a taste of Napster, many would have none of the clunky, fragmented, tethered music services being offered by the major record labels. Pressplay and MusicNet limped out of the starting gate and quickly failed as ventures.

Napster's rapid emergence forced the major record labels and music publishers to pivot their strategy,<sup>183</sup> which produced the historic Apple iTunes licensing deals with much of the industry. This business model, however, achieved only limited market scope. It did wonders for Apple's iPod sales, but only modestly offset the recording industry's revenue decline. Even after Napster's shutdown, consumers continued to flock to other peer-to-peer services from Grokster to Grooveshark. The music industries gradually expanded licensing of music to a broader range of vendors, but competing with free was a challenge. Each of the services had limitations and drawbacks.

Spotify, introduced in parts of Europe beginning in 2008 and launched in the United States in mid 2011, comes closest to offering consumers a vast authorized catalog

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<sup>181</sup> See RUSSELL SANJEK, *PENNIES FROM HEAVEN: THE AMERICAN POPULAR MUSIC BUSINESS IN THE TWENTIETH CENTURY* (1996).

<sup>182</sup> See *supra* <II(B)(1)>

<sup>183</sup> See Amy Harmon, *Grudgingly, Music Labels Sell Their Songs Online*, N.Y. Times C1 (Jul. 1, 2002).

(approximately 20 million songs) on a wide range of devices through a user-friendly interface – featuring consumer playlists, integration with preference-based playlists, radio stations, and social media integration.<sup>184</sup> All of these features are available through Spotify’s Premium Service for \$9.99 per month. A more limited service is available for \$4.99 per month. And Spotify is available for “free” through an ad-supported system. As of March 2013, Spotify reported 6 million paying subscribers world-wide.<sup>185</sup> Its entire user base (ad-supported and paid subscribers) reached 24 million active users in March 2013.<sup>186</sup>

Nonetheless, Spotify does not fulfill all of the critical desires of creators and consumers, which undermines its success as an alternative to unauthorized distribution. Although Spotify offers an innovative interface, the per-stream payment to artists has proven disappointing.<sup>187</sup> David Byrne estimates that a four person band with a 15% royalty on Spotify streams would need to stream nearly a quarter of billion performances per year in order to sustain a minimum wage of \$15,080.<sup>188</sup> Rather than agreeing to a transparent royalty model, the labels obtained a \$500 million advance from Spotify for the right to license their catalogs in the U.S.<sup>189</sup> and took an equity position – with a “a possible sale of shares by the label would end up in the proverbial ‘blackbox’ (non-attributable revenue that remains with the label).”<sup>190</sup> Meanwhile, “indie labels...

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<sup>184</sup> See Spotify, Wikipedia <<http://en.wikipedia.org/wiki/Spotify>>

<sup>185</sup> See Paul Sloan, Spotify: Growing Like Mad, Yet So Far to Go, C|Net (Mar. 12, 2013) <[http://news.cnet.com/8301-14013\\_3-57573394/spotify-growing-like-mad-yet-so-far-to-go/](http://news.cnet.com/8301-14013_3-57573394/spotify-growing-like-mad-yet-so-far-to-go/)>.

<sup>186</sup> See id.

<sup>187</sup> See Ben Sisario, As Music Streaming Grows, Royalties Slow to a Trickle, N.Y. Times (Jan. 28, 2013; as corrected Jan. 31 2013) (reporting that “Spotify generally pays 0.5 to 0.7 cent a stream for the paid tier, which results in \$5,000 to \$7,000 per million plays”) <<http://www.nytimes.com/2013/01/29/business/media/streaming-shakes-up-music-industrys-model-for-royalties.html>>. Spotify and its defenders respond that it provides a substantial payout to music copyrights owners. See Sloan, supra n.160 (reporting that Spotify pays out 70 percent of its revenue to music copyrights owners); see also Mike Masnick, Myth Dispensing: The Whole “Spotify Barely Pays Artists” Story Is Bunk, techdirt (Jun. 26, 2012).

<sup>188</sup> See David Byrne, “The Internet Will Suck All Creative Content out of the World,” The Guardian (Oct. 11, 2013) (noting that “[f]or perspective, Daft Punk’s song of the summer, ‘Get Lucky’, reached 104,760,000 Spotify streams by the end of August: the two Daft Punk guys stand to make somewhere around \$13,000 each. Not bad, but remember this is just one song from a lengthy recording that took a lot of time and money to develop.”) <[http://www.theguardian.com/music/2013/oct/11/david-byrne-internet-content-world?CMP=tw\\_t\\_gu](http://www.theguardian.com/music/2013/oct/11/david-byrne-internet-content-world?CMP=tw_t_gu)>.

<sup>189</sup> See id.

<sup>190</sup> See Helienne Lindvall, Behind The Music: The Real Reason the Major Labels Love Spotify, London: The Guardian (Aug. 17, 2009) <<http://www.theguardian.com/music/musicblog/2009/aug/17/major-labels-spotify>>; Steve Guttenberg, Is Spotify Unfair to Musicians? C|Net (Oct. 17, 2011) <[http://news.cnet.com/8301-13645\\_3-57540964-47/is-spotify-unfair-to-musicians/](http://news.cnet.com/8301-13645_3-57540964-47/is-spotify-unfair-to-musicians/)>; Robert Andrews, It’s Time for Transparency on Music Streaming Rates, paidContent (Nov. 16, 2011)

as opposed to the majors . . . receive no advance, receive no minimum per stream and only get a 50% share of ad revenue on a pro-rata basis.”<sup>191</sup>

Because the legacy catalog is essential to Spotify’s viability, the major labels were able to demand an equity stake and royalty regime that not only ensures that their own artists are marginalized but also that independent artists (i.e., those not controlled by the majors) don’t see a reasonable share of digital music revenues.<sup>192</sup> These tactics mirror the machinations in the F.B.T. litigation.<sup>193</sup> Although major record labels have clout because of their catalog, the artists responsible for that catalog will be hard-pressed to derive a fair share.<sup>194</sup>

These patterns are playing out on new subscription platforms as well. Merlin, an organization that represents global digital rights for independent artists, expressed concern that indies are being unfairly treated in negotiations with subscription services because major labels demand large advances on royalties based on their physical goods market share.<sup>195</sup> Merlin contends that this approach unfairly treats independent labels, whose artists don’t compete as effectively at physical good retailers. Basing payments on this baseline, as opposed to digital market share, artificially inflates major labels’ market share. Furthermore, recording artists are preparing to bring lawsuits in Sweden against Universal Music Group and Warner Music over the distribution of Spotify royalties.<sup>196</sup>

These patterns create a pathology that undermines the content governance ecosystem. Some of the most popular recording artists – including Adele, Black Keys, Coldplay, deadmau5,

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<<http://paidcontent.org/2011/11/16/419-its-time-for-transparency-on-music-streaming-rates/>>; Spotify Should Give Indies a Fair Deal on Royalties, The Guardian (Feb. 1, 2011)

<<http://www.theguardian.com/media/pda/2011/feb/01/spotify-royalties-independents>>; cf. Masnick, supra n.165 (noting that “Spotify pays labels, not artists. And labels aren’t always great about paying artists”).

<sup>191</sup> See Lindvall, supra n.168.

<sup>192</sup> See Masnick, supra n. 165 (noting that there are “legitimate concerns about how Spotify splits up its proceeds between major labels and indies, since the majors have an equity stake”).

<sup>193</sup> See Section II(B)(1), supra.

<sup>194</sup> See Dave Morris, Spotify’s Miracle Growth Undermined by Artists’ Revolt, Globe and Mail (Aug 5, 2013) (commenting that “if and when [Spotify] does IPO – rumours have swirled for several years, and valuations have approached \$3-billion (U.S.) – it will have to reconcile with musicians, and right now, they seem further apart than ever”).

<sup>195</sup> See Janko Roettgers, Merlin CEO: Major Labels Are Setting New Music Services Up to Fail, paidContent (Oct. 12, 2013) <[http://gigaom.com/2013/10/12/merlin-ceo-major-labels-are-setting-new-music-services-up-to-fail/?utm\\_source=General+Users&utm\\_campaign=78be9f7b95-c%3Amed+d%3A10-15&utm\\_medium=email&utm\\_term=0\\_1dd83065c6-78be9f7b95-99121857](http://gigaom.com/2013/10/12/merlin-ceo-major-labels-are-setting-new-music-services-up-to-fail/?utm_source=General+Users&utm_campaign=78be9f7b95-c%3Amed+d%3A10-15&utm_medium=email&utm_term=0_1dd83065c6-78be9f7b95-99121857)>

<sup>196</sup> See Artists to Sue Labels over Streaming Earnings in Sweden, Music:)ally: Information and Strategy for the Music Business (Oct. 28, 2013) <<http://musically.com/2013/10/28/artists-to-sue-labels-over-streaming-earnings-in-sweden/>>.

Rihanna, Taylor Swift, and Thom Yorke – have kept their new releases off Spotify and other digital services in the hopes of attracting greater revenue from CD and digital download sales.<sup>197</sup> Other classic artists who control their masters – including AC/DC, Aimee Mann, the Beatles, Garth Brooks, and Led Zeppelin – have refused to allow their music to stream on authorized services.<sup>198</sup> The unavailability of such popular releases on the celestial jukebox, in turn, frustrates, confuses, and disillusiones the very consumers who have joined an authorized service and fuels unauthorized downloads and streams of these artists’ music. Furthermore, other artists have denigrated Spotify, with Thom Yorke of Radiohead proclaiming that Spotify is “the last desperate fart of a dying corpse”<sup>199</sup> and David Byrne declaring that “[t]he internet will suck all

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<sup>197</sup> See Andrew Orlovski, Radiohead’s Thom Yorke pulls his own music off Spotify, *The Register* (Jul. 15, 2013) <[http://www.theregister.co.uk/2013/07/15/thom\\_yorke\\_spotify\\_no/](http://www.theregister.co.uk/2013/07/15/thom_yorke_spotify_no/)>; Kia Makarechi, Black Keys: Sean Parker Is an A\*\*hole, Spotify Isn’t Fair to Artists, *Huffington Post* (Mar. 28, 2012) <[http://www.huffingtonpost.com/2012/03/28/black-keys-sean-parker-spotify-asshole\\_n\\_1384882.html](http://www.huffingtonpost.com/2012/03/28/black-keys-sean-parker-spotify-asshole_n_1384882.html)>; Robert Andrews, Interview: Spotify Exec on Royalties and Keeping Labels Happy, *paidContent* (Dec. 10, 2012) <<http://paidcontent.org/2012/12/10/interview-spotify-exec-on-royalties-and-keeping-labels-happy/>>.

<sup>198</sup> See Charles Arthur, Thom Yorke Blasts Spotify on Twitter as He Pulls His Music, *The Guardian* (Jul. 15, 2013) <<http://www.theguardian.com/technology/2013/jul/15/thom-yorke-spotify-twitter>>; David Gritten, Aimee Mann Interview: “I Don’t Make Money from Spotify,” *The Telegraph* (Jan. 24, 2013) <<http://www.telegraph.co.uk/culture/music/rockandpop/features/9822192/Aimee-Mann-interview-I-dont-make-money-from-Spotify.html>>.

<sup>199</sup> See Alex Young, Thom Yorke: Spotify Is “the Last Desperate Fart of a Dying Corpse,” *Consequence of Sound* (Oct. 3, 2013) <<http://consequenceofsound.net/2013/10/thom-yorke-spotify-is-the-last-desperate-fart-of-a-dying-corpse/>>; see also Arthur, *supra* n.176 (quoting Yorke’s tweet: “Make no mistake, new artists you discover on Spotify will not get paid. Meanwhile shareholders will shortly be rolling in it. Simples”). Yorke responded to the suggestion that his “rebellion is only hurting your fans,” that he was “standing up for our fellow musicians.” See *id.* Nigel Godrich, Radiohead’s producer, notes that:

Making new recorded music needs funding. Some records can be made in a laptop, but some need musician[s] and skilled technicians. Pink Floyd’s catalogue has already generated billions of dollars for someone (not necessarily the band) so now putting it on a streaming site makes total sense. But if people had been listening to Spotify instead of buying records in 1973 I doubt very much if Dark Side [of the Moon, Pink Floyd’s record-breaking album released that year which sold [] millions of copies] would have been made. It would just be too expensive.

See *id.*

creative content out of the world.”<sup>200</sup> Notwithstanding promising growth rates,<sup>201</sup> subscriptions to authorized services remain anemic and unauthorized services continue to attract a large following.

## 2. Digital Film Platform Pathology

As in the music industry, file-sharing accelerated the development of authorized Internet services by and in conjunction with film and television content owners. iTunes expanded beyond music into downloads of video content. Netflix, which began as a mail-order DVD rental business, shifted to a streaming service. Several studios combined to introduce Hulu. HBO and some cable providers have afforded their customers with broader access to their programming over the Internet.

These services have attracted a growing portion of would-be file-sharers through convenient, reasonably priced subscription plans and original programming. Nonetheless, the copyright owners and broadcasters undermine consumer confidence in the authorized content channels through fragmentation, limited availability of programming, and other restrictions that limit consumers’ ability to access what they want, when they want it, at a fair price.<sup>202</sup> The obvious explanation is that such windowing enables the content owner to maximize profit through price discrimination. In the pre-Internet Age, consumers had little choice if they wanted to see the programming other than to wait. The Internet, however, provides another option – file-sharing.

This development puts copyright owners and broadcasters to a choice. And some enterprises have followed the control model. As a result, shows like HBO’s *Game of Thrones* – which appeals to a demographic that is particularly able to use file-sharing technology – has

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<sup>200</sup> See Byrne, supra n.166. Other artists see Spotify as a more promising future. See Helienne Lindvall, Dave Stewart: Thom Yorke Was Wrong – Songwriters Should Worship Spotify, The Guardian Media Blog (Sep. 27, 2013) (reporting that Dave Stewart, songwriter, producer, and performer with the Eurythmics, has gone from being critical of Spotify to embracing it) <<http://www.theguardian.com/media/media-blog/2013/sep/27/dave-stewart-thom-yorke-spotify>>.

<sup>201</sup> See Sloan, supra n.163 reporting 44% growth of paid music service subscriptions to 20 million in 2012).

<sup>202</sup> See Leigh Beadon, Dear HBO, Netflix Et Al: Fragmenting Online TV Lets Piracy Keep Its Biggest Advantage, techdirt (Jan. 16, 2013) <<http://www.techdirt.com/articles/20130114/18442221671/dear-hbo-disney-netflix-et-al-fragmenting-online-tv-lets-piracy-keep-its-biggest-advantage.shtml>>; Mike Masnick, Warner Bros., MGM, Universal Collectively Pull Nearly 2,000 Films from Netflix to Further Fragment the Online Movie Marketplace, techdirt (May 2, 2013) ,<<http://www.techdirt.com/articles/20130430/22361622903/warner-bros-mgm-universal-collectively-pull-nearly-2000-films-netflix-to-further-fragment-online-movie-market.shtml>>.

become the most pirated show.<sup>203</sup> Jeff Bewkes, head of Time Warner, the studio that produces the show, celebrates this distinction by suggesting that it is “better than an Emmy.”<sup>204</sup> Such cynicism by an industry leader, however, overlooks the challenges faced by independent filmmakers that don’t have the where-with-all of a major studio. It also reinforces the legitimacy of unauthorized access and erodes the copyright foundation supporting the full range of professional creators.<sup>205</sup> A better long-term solution should welcome consumers to more convenient authorized channels,<sup>206</sup> something HBO and Showtime have been unwilling to do.

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Advances in digital technology have altered the content governance ecosystem irreversibly. Unlike the ecosystem in which “My Generation” came of age, consumers now play an active role in the functioning of the copyright system. If they do not like the way content industries distribute music or film, a large and growing swath of netizens can obtain those products through unauthorized channels. Neither efforts to shutdown services capable of non-infringing use nor carpet-bombing of consumers are feasible or desirable. The copyright system cannot rely on a simple deterrence model to achieve compliance. The past decade has demonstrated that Congress cannot put the Internet genie back in the bottle merely through ramping up statutory damages. Content owners need to tap into what fans truly value about their industries – creativity and independence – and the copyright system must afford consumers greater access and freedom of expression. A central goal of copyright reform should be to make the system understandable and acceptable to new age creators and consumers.

### **Act III – How Do We Improve Copyright’s Public Approval Rating (and Efficacy)?**

From its inception more than 300 years ago, copyright law has granted reproduction and publication rights to encourage authors and publishers to pursue and disseminate creative expression. In its modern incarnation, it promotes free expression by relying upon market

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<sup>203</sup> See Ernesto, Top 10 Most Pirated TV-Shows of the Season, TorrentFreak (Jun. 22, 2013) (reporting Game of Thrones as the most downloaded TV show on BitTorrent during spring 2013, estimating 5.2 million downloads of Game of Thrones compared with 5.5 million TV viewers) <<http://torrentfreak.com/top-10-most-pirated-tv-shows-of-the-season-130622/>>.

<sup>204</sup> See Todd Spangler, Time Warner’s Bewkes: Piracy of HBO “Game of Thrones” Is “Better Than an Emmy,” Variety (Aug. 7, 2013) <<http://variety.com/2013/digital/news/time-warners-bewkes-piracy-of-hbo-game-of-thrones-is-better-than-an-emma-1200575271/>>.

<sup>205</sup> See “I Tried to Watch Game of Thrones and This Is What Happened,” The Oatmeal <[http://theoatmeal.com/comics/game\\_of\\_thrones](http://theoatmeal.com/comics/game_of_thrones)>.

<sup>206</sup> See Andrew Wallenstein, Time to Free HBO Go From Its TV Shackles: Enough Stonewalling, HBO – Let Consumers Pay for Broadband-only Subscriptions Before It’s Too Late, Variety (Mar. 29, 2013) <<http://variety.com/2013/digital/news/time-to-free-hbo-go-from-its-tv-shackles-1200329375/>>. <<http://variety.com/2013/digital/news/time-to-free-hbo-go-from-its-tv-shackles-1200329375/>>.

competition,<sup>207</sup> as opposed to patronage or government funding, to support the creative arts. Copyright protection resists the suppression of ideas by powerful elites. It promotes free and independent expression and provides a forum for overcoming prejudice and bigotry. It has long supported investigative journalism – the Fourth Estate that provides a vital check on corruption and abuse of power, and promotes democratic values.

If copyright is to continue to serve these vital functions in the Internet Age, it will be because all of the institutions governing its operation – digital technology, markets, political institutions, and especially social norms – work together to support well-functioning markets for creative enterprise as well as breathing room for free expression and nurturing successive generations of creators.

As Act II emphasized, “freeconomics” has emerged as a dominant social norm in the Internet Age. If consumers opt out of legitimate markets, the creative engine will not grind to a halt. But the creative ecosystem will change in undesirable ways – from the loss of independent, professional creators to distortion of the creative process. Advertising will increasingly dominate the creative process, relegating art and consumers to the roles of advertising vehicles and targets. As some have suggested, “if you are not paying, then you are the product.”<sup>208</sup> Journalistic independence will give way to overt and covert consumer persuasion.

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<sup>207</sup> Professor James Grimmelmann characterizes copyright’s ethical default principle in market terminology:

The basic ethical expectation of copyright is that authors and audiences respect each other and meet in the marketplace. Authors behave well when they create and offer works that enrich the audience’s intellectual and cultural lives. Audiences behave well when they offer authors the financial support needed to engage in creative work. The exchange is commercial, voluntary on both sides, reciprocal, and respectful.

James Grimmelmann, *The Ethical Visions of Copyright Law*, 77 *Fordham L. Rev.* 2005, 2014 (2009).

<sup>208</sup> See Menell, *supra* n.128 <Brand Totalitarianism>; Scott Goodson, *If You’re Not Paying for It, You Become the Product*, *Forbes* Mar. 5, 2012 <<http://www.forbes.com/sites/marketshare/2012/03/05/if-youre-not-paying-for-it-you-become-the-product/>>; Olivia Solon, *You Are Facebook’s Product, Not Customer*, *Wired.co.uk* Sept. 21, 2011 <<http://www.wired.co.uk/news/archive/2011-09/21/doug-rushkoff-hello-etsy>>; Nathan Newman, *You’re Not Google’s Customer – You’re the Product: Antitrust in a Web 2.0 World*, *Huffington Post*, Mar. 29, 2011 <[http://www.huffingtonpost.com/nathan-newman/youre-not-google-custome\\_b\\_841599.html](http://www.huffingtonpost.com/nathan-newman/youre-not-google-custome_b_841599.html)>; THOMAS O’GUINN, CHRIS ALLEN, & RICHARD J. SEMENIK, *ADVERTISING AND INTEGRATED BRAND PROMOTION* 81-82 (4th ed. 2006); Randal C. Picker, *The Digital Video Recorder: Unbundling Advertising and Content*, 71 *U. Chi. L. Rev.* 205 (2004); Matthew Savare, *Where Madison Avenue Meets Hollywood and Vine: The Business, Legal, and*

Copyright's deterrence-based enforcement regime has proven both unworkable and counterproductive in the Internet Age. For those reasons, even the best organized and most powerful copyright owners have largely abandoned the use of enforcement against end users. Many of those who continue to wield the statutory damage cudgel are widely viewed as opportunists looking for undeserved windfalls. As a result, the statutory damages regime is bringing down the very system it was intended to support. Opportunistic enforcement has distorted the interpretation of copyright law.<sup>209</sup> Rather than enhancing copyright protection, the enforcement tools developed for the analog era are increasingly sully copyright law's public approval without deterring unauthorized distribution.

Furthermore, popular forms of art – such as music mash-ups – significantly operate outside of copyright markets.<sup>210</sup> New generations of creators and consumers see the copyright system as a relic or worse, the problem. In the current content governance ecosystem, a recording artist is likely to covet a Pepsi endorsement deal more than a recording contract.<sup>211</sup>

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Creative Ramifications of Product Placements, 11 UCLA Ent. L. Rev. 331, 333-34 (2004); SCOTT DONATON, MADISON & VINE (2004).

<sup>209</sup> See Peter S. Menell, Judicial Regulation of Digital Copyright Windfalls: Making Interpretive and Policy Sense of *Viacom v. YouTube* and *UMG Recordings v. Shelter Capital Partners* (May 1, 2012) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2049445](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2049445)>; Shyamkrishna Balganesh, Foreseeability and Copyright Incentives, 122 Harv. L. Rev. 1569 (2009).

<sup>210</sup> KEMBREW MCLEOD & PETER DICOLA, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING 196-201(2011).

<sup>211</sup> See Ben Sisario, In Beyoncé Deal, Pepsi Focuses on Collaboration, N.Y. Times B4 (Dec. 9, 2012) (reporting that “[o]ver the last decade many consumer brands have been taking more active roles with artists, particularly in pop music”; PepsiCo “has embarked on a hybrid project with Beyoncé that will include standard advertising like commercials as well as a multimillion-dollar fund to support the singer’s chosen creative projects” estimated at \$50 million). Sisario writes that although bands “always risk fan disapproval when shaking hands with big corporations[,] with record company budgets diminished, Madison Avenue money is often seen as essential.” He quotes a top marketing executive at PepsiCo: “We recognize that there have been massive disruptions in music industry: lower investment in artist development, fewer points of distribution, financial constraints. We look at those disruptions as opportunities for Pepsi.” See *id.*; see also Kia Makarechi, Jay-Z, Samsung Reportedly Eying \$20 Million Deal, Huffington Post (Jun. 4, 2013) (stating that “[m]onths after Beyonce inked a \$50 million, multi-faceted deal with Pepsi, Jay-Z and Samsung are said to be locking in a \$20 million package that would see the rapper collaborating on multiple projects with the tech giant”) <[http://www.huffingtonpost.com/2013/06/04/jay-z-samsung-deal-20-million\\_n\\_3383317.html](http://www.huffingtonpost.com/2013/06/04/jay-z-samsung-deal-20-million_n_3383317.html)>

It should be noted that Pepsi's deal is not confined to “superstar” artists. Pepsi “will also play a role in selecting local talent as opening acts at various points around the world” to better reach “saavy young consumers.” See Sisario, *supra*. Pepsi's market executive expressed confidence “that its music projects, like ‘Tonight Is the Night’ by the little-known rapper and

The continued vitality of the copyright system depends not on aggressive and uncritical enforcement against Internet users or the wielding of statutory damages to derive windfalls from file-sharers or technology companies but on promoting fairly priced, flexible, on-demand, user-friendly services and encouraging platform and device entrepreneurs to develop symbiotic technological advances, such as iTunes, YouTube (with ContentID), Facebook, Spotify, Dropbox, Netflix, Twitter, Hulu, and Pinterest. It is unrealistic to expect overworked federal courts to manage millions of copyright lawsuits or for the government – legislators, regulators, or courts – to restrain innovative communication technologies.

These lessons emphasize the importance of remaking copyright law to appeal to the post-Napster generations as well as to digital entrepreneurs that seek balanced ecosystems for technological innovation and the creative arts. This refocusing ought not to be seen as capitulation but rather the natural evolution of copyright protection. Consumers ultimately care about the quality and convenience of creative works. And technology entrepreneurs seek to offer superior services, which increasingly involve having content strategies that align with content creators. Apple, Sony, Netflix, Google, Amazon, Time-Warner, and Comcast increasingly span the content-technology divide, creating the opportunity for greater symbiosis. Copyright law must continually be re-equilibrated to strive for balance within the digital ecosystem.

This final Act offers a multi-institutional agenda aimed at restoring copyright law's public acceptance. Such a realignment holds the promise of gaining the post-Napster generations' participation in content markets that are competitive, fair (to creators and consumers), and user-friendly. Section A sketches out a broad set of legislative proposals to modernize copyright law. Section B examines market reforms, emphasizing a grand experiment addressing the dual vice plaguing the music marketplace.

Such reforms need to be complementary. Copyright enforcement alone cannot restore copyright's public acceptance or efficacy. Rather, it must complement market shifts that encourage consumers to join user-friendly services. Each consumer that participates in a music and video service is one fewer enforcement problem, thereby effectuating copyright's creativity-promoting mechanism, reducing enforcement costs, and obviating divisive legislative initiatives.

## **A. Legislative Agenda**

The public interacts with the copyright system in two principal ways – through their enjoyment of copyrighted works and their use of copyrighted works as inputs in creative, research, and personal activities. The first mode implicates enforcement. The second implicates the scope of copyright protection.

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singer Outasight — which sold 1.1 million copies after a push in 2010, when the song was featured in a commercial and Outasight appeared on the Pepsi-sponsored show 'The X Factor' — bring a return on investment. 'We believe all that transfers into brand equity for Pepsi, and, ultimately, sales.'" See *id.*

## 1. Dual Enforcement Regime

Content industries have tended to see copyright enforcement along one dimension: stronger sanctions translate into stronger enforcement. This follows a standard theoretical economic model of law enforcement.<sup>212</sup> The past 15 years provided a stress test of this theory. The theory did not hold up well.

As Act I chronicled, this deterrent regime was rarely put to much of a test during the Analog Age because the media on which copyrighted works were instantiated – paper, canvas, vinyl, and celluloid – were inherently difficult and costly to reproduce and the content industries could control access – through theatrical turnstiles and broadcasting. The primary area of copyright enforcement concerned public performance of musical compositions by commercial establishments – bars, restaurants, clubs, hotels, and radio stations. The statutory damages cudgel worked relatively well in persuading these small and medium-sized businesses to take blanket licenses from ASCAP and BMI.

By the turn of the century, the Internet empowered anyone to access and distribute just about any copyrighted work at the touch of a computer device. The recording industry hoped that the statutory damages cudgel could discourage online service providers and end users from acting upon that temptation. But as charismatic technologies like Napster and YouTube emerged, the pent-up consumer demand for unrestricted access to copyrighted works proved torrential – literally and figuratively.

Even putting aside the challenge of competing with free, the delay in getting user-friendly, authorized services of the breadth available through unauthorized channels up and running led many consumers to file-sharing. Suing consumers proved unworkable and unpopular. Courts were disinclined to open the floodgates to disproportionate sanctions – whether against file-sharers or the developers of new services that arguably fell within the *Sony* or DMCA OSP safe harbors. Efforts to push courts toward undeserved windfalls led to broad interpretation of the safe harbors. The past 15 years has demonstrated that the deterrence enforcement model on which the 1976 Copyright Act is based does not function as intended in the Internet Age.

The solution lies not in further ramping up sanctions but in a more variegated enforcement regime that distinguishes between different classes of actors in the content marketplace and uses nudges and carrots as well as the occasional stick. Copyright enforcement should encourage consumers to participate in a growing competitive marketplace for content, cumulative creators to pursue original and transformative projects, and innovators to develop balanced, symbiotic technologies. It should not be seen as an enforcement lottery – threatening crushing liability against file-sharers, experimental artists, and technology entrepreneurs.

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<sup>212</sup> See William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. Legal Stud. 1 (1975); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169 (1968).

It is useful to distinguish between two classes of enforcement targets: (1) non-commercial, small-scale infringers such as individual file-sharers and cumulative creators; and (2) commercial and larger scale individuals and enterprises such as platform developers who facilitate widespread copyright infringement.

### **i. Non-Commercial/Small-Scale Infringers**

We have gone through several phases in the 15 years since Napster's emergence.<sup>213</sup> In the initial period, consumers faced a choice – obtain copyrighted works through authorized markets (with few authorized and limited online options available) or partake in the unlimited, free unauthorized online file-sharing networks. As iTunes and other services emerged, an authorized digital marketplace developed, although file-sharing remained strong. Beginning in 2003, the recording industry engaged in an aggressive public campaign against file-sharers resulting in significant costs and public backlash. In late 2008, the industry pulled the plug on this effort and gradually expanded the range of authorized channels and eased the restrictions on consumer freedom. This was spurred in part by technological advances (better devices and software) and improvements in broadband access. At this point, the major content industries have abandoned aggressive direct enforcement against file-sharers and have emphasized ways of channeling consumers into a growing range of authorized channels.

Nonetheless, a fringe contingent of content owners and entrepreneurial lawyers continue to use pursue disproportionate remedies against file-sharers in the hopes of getting rich. These opportunistic “troll” schemes undermine the copyright system's legitimacy in the eyes of the courts and the public without supporting the creation of new expressive works.

The high fine/low enforcement cost deterrence model is poorly attuned to the challenges of the Internet Age. While this model may have functioned effectively in motivating restaurants, bars, and nightclubs to take ASCAP and BMI blanket licenses, it fails in channeling Internet Age consumers into content markets. The use of disproportionate cudgels breeds resentment, which is particularly dangerous in a technological era in which unauthorized access is a viable alternative and the use of such cudgels is costly and prone to numerous judicial impediments. Copyright law can better encourage a norm of participation in a robust marketplace through nudges as opposed to cudgels. Copyright law should address garden variety file-sharing not through costly and complex federal court proceedings but instead through streamlined, higher detection probability, low-fine means – more in the nature of parking tickets, with inducements and nudges to steer consumers into better (e.g., subscription) parking plans.

The hope for such an approach is not to support an army of digital meter maids but rather to shift consumers into a growing array of competitively priced parking plans. We have an interesting window into how consumers might feel about this approach. In 2011, DigitalRights Corp. (DRC) instituted an online enforcement campaign on behalf of copyright owners offering

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<sup>213</sup> See supra <Section I(D)>

file-sharers the opportunity to settle a copyright infringement allegation for \$10 per infraction.<sup>214</sup> Their approach diverged from prior initiatives<sup>215</sup> in that the DRC notices emphasize the availability of a settlement amount that is “reasonable for both you and the copyright holder”<sup>216</sup> rather than crushing liability. DRC is able to communicate this message at relatively low cost. Rather than filing an action against the ISP hosting the copyrighted work without authorization, it merely sends a DMCA takedown notice which the ISP is obliged to pass on to its customer. The notice contains a link to DRC’s website, which generates the settlement offer. There is no direct compulsion, but rather an opportunity for the file-sharer to settle this matter inexpensively and quickly.

A critical question is whether this approach is likely to breed further resentment against copyright owners. A day after news of this approach broke, the blog TorrentFreak – not considered one of the more copyright-friendly online communities – ran an entry entitled “\$10 Music Piracy Fine: A Fair Deal Or Just Another Cheap Trick?” about the DRC.<sup>217</sup> The story began by presenting DRC’s approach in a forthright manner, but went on to chastise DRC for using “the same old anti-piracy scare tactics”: noting the Copyright Act’s potentially large statutory damage limit; implying that failure to settle may affect the file-sharer’s Internet service; and emphasizing that DRC’s clients include many deceased song writers and recording artists.

Not surprisingly given the TorrentFreak audience and the tone of the latter part of the piece, many commenters took potshots at copyright enforcers and the copyright system. But there was some more reflective and balanced threaded discussion indicating that this direction for copyright enforcement was more acceptable than prior enforcement approaches. Eddy wrote:

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<sup>214</sup> See Jeff John Roberts, \$10 Settlement Offers: The Entertainment Industry’s New Copyright Tactic, paidContent (Sep. 23, 2011) (noting that some copyright owners authorized DRC to apply an “amnesty scale” or quantity discount with lower settlement levels for multiple infringements) <<http://paidcontent.org/2011/09/23/419-10-settlement-offers-the-entertainment-industrys-new-copyright-tactic/>>. DRC has since raised the settlement price to \$20 per infringement. See Sample Settlement Agreements, DigitalRights website <[http://digitalrightscorp.com/joomla/index.php?option=com\\_content&view=article&id=71&Itemid=278](http://digitalrightscorp.com/joomla/index.php?option=com_content&view=article&id=71&Itemid=278)>.

<sup>215</sup> See Ernesto, Automated Legal Threats Turn Piracy Into Profit, TorrentFreak (Jun. 28, 2009) <<http://torrentfreak.com/automated-legal-threats-turn-piracy-into-profit-090628/>>; Ernesto, GetAmnesty.com: MPAA Extortion at its Finest, TorrentFreak (Aug. 27, 2007) <<http://torrentfreak.com/getamnestycom-mpaa-extortion-at-its-finest/>>

<sup>216</sup> See enigmax, “\$10 Music Piracy Fine: A Fair Deal Or Just Another Cheap Trick?”, TorrentFreak (Sep. 24, 2011) <<http://torrentfreak.com/10-music-piracy-fine-a-fair-deal-or-just-another-cheap-trick-110924/>>

<sup>217</sup> See enigmax, “\$10 Music Piracy Fine: A Fair Deal Or Just Another Cheap Trick?”, TorrentFreak (Sep. 24, 2011) <<http://torrentfreak.com/10-music-piracy-fine-a-fair-deal-or-just-another-cheap-trick-110924/>>

Before reading this I thought it seemed a good idea, the reality is a bit different but the initial idea would seem to make economic sense to all concerned.

Let me say that first I am not just a file sharer but also own a small torrent site, so you know where I am coming from and not a copyright troll.

If we take this idea as genuine [which this psrticular one isnt] it could be the answer to the sharing problem.

Lets stop bullshitting each other, we all know we shouldnt be getting things for free, but we do, cause we can. We also all know, despite what we all keep sayiing, that the vast majority of IP's collected ARE genuine. So lets take that on board and pretent for a minute that they are all genuine...for the sake of this argument.

I download a movie and get caught, I have downloaded thousands but they got me this time...they send me a letter informing me that I have broken the law [debatable] and to clear this up quickly I should pay for the file i got [film, music whatever], not stupid greedy money, just the RRP<sup>218</sup> price of the product I downloaded. £10.00 for a dvd. Use the email as a legal agreement, [they agree not to persue if I pay, they drop the case and no furthur action is taken].

I get a film for the RRP, they get the money for the film [like they wanted in the first place] and I use a proxy in future.

I like to think that filesharers are fair minded people, if these guys meet us half way when they catch us, instead of trying to rape us financially, maybe everything could work out for both sides.

I know I am just speculating cause at the end of the day these guys arent really interested in stopping piracy, its all about the dollars....gimme gimme gimme.

Henrik Eriksson opined:

Personally I think this is a fair deal. A scam, sure, but still a fair deal. They caught you in the act. You pay, skip 1 or 2 beer in the weekend, and thats it. You have paid for what you downloaded, they got their money, a reasonable amount, and everyones happy. My major beef with the industry is that they fight the technology, and force you to the brink of ruin so you have to beg for money on the street when they catch you. With this they can still get the money, and we can download without fearing being the bum down the street.

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<sup>218</sup> RRP is an acronym for "Recommended Retail Price."

Sure, the actual evidence collection might improve quite a bit, but this is a totally acceptable common grounds until they do I believe.

Randy\_Lahey writes:

I'd pay a \$10 fine if caught on the torrents, and I'd be willing to wager that most people would too..Imagine how much money they would make if the penalty was more realistic? It's not like the content creators are going to see any of it anyway, whether its \$10 or \$10,000.

These comments reveal a greater openness among a skeptical constituency toward copyright enforcement as well as concerns about fairness to artists.

As the major copyright industries have come to realize, the high fine/low administrative cost model does not achieve copyright compliance. Furthermore, it undermines the system's legitimacy. It makes sense to shift copyright protection to a low fine/streamlined enforcement system. The larger goal would be to channel consumers into content markets. More moderate remedies in conjunction with streamlined enforcement is more likely than expensive judicial enforcement to achieve copyright law's goals.

#### **a. Re-calibrating Statutory Damages**

For these reasons, I would like to see statutory damage remedies substantially curtailed for non-commercial, small-scale infringers such as file-sharers and cumulative creators. Caps on statutory damages ought to be in a range to enable enforcement against recalcitrant offenders, but *far* below the \$150,000 per work upper bound for willful infringement currently in the statute. In addition, the range ought to reflect the quantity of works being infringed, bearing in mind that the goal of the law is to channel infringers into authorized market channels and not to generate windfalls.<sup>219</sup> Congress can ensure more consistent and predictable remedies by establishing file-sharing remedy guidelines (or delegating authority to establish such guidelines to an appropriate body). This would also have the advantage of removing the uncertainty created by the Supreme Court's *Feltner* decision.<sup>220</sup>

In conjunction with these changes, Congress should substantially reduce the impediments to and costs of enforcing copyright protection in garden-variety file-sharing cases. The following changes would make it easier for copyright owners to detect and resolve file-sharing infringement claims: (1) expansion of the §512(h) subpoena power to reach peer-to-peer and related technologies; (2) clarification of the scope of protection; (3) encouraging responsibility

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<sup>219</sup> Cf. Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 Harv. L. Rev. 1569, 1633 (2009) (arguing that copyright law ought not reward copyright owners with windfalls from unforeseeable uses of their works).

<sup>220</sup> See *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998); *supra* text accompanying note \_\_\_\_.

for web access points; and (4) institution of a streamlined small claims processing institution for handling file-sharing matters.

### **b. Expanded Subpoena Power for Detecting File-Sharers**

When Congress passed the DMCA in 1998, it included a provision (§ 512(h)) enabling copyright owners to determine the identity of a person storing copyrighted works on an Internet server directly from the online service provider without the need to file a court action.<sup>221</sup> This streamlined procedure was intended to afford copyright owners a rapid, low cost tool to police the Internet. At that time, the Internet functioned predominantly as a server-client system in which computer clients accessed website-hosted content.<sup>222</sup>

The next year, Napster's peer-to-peer architecture enabled any client computer to function as a searchable and accessible website. As a result, the accessible domain of the Internet expanded beyond conventional servers to the memory devices of all computers connected to the Internet through peer-to-peer software. Napster's particular technology enabled searches for music files encoded in the .mp3 format. The next wave of peer-to-peer networks included many more file formats.

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<sup>221</sup> See 17 U.S.C. §512(h).

<sup>222</sup> See *Recording Industry Ass'n of America, Inc. v. Verizon Internet Services, Inc.*, 351 F.3d 1229, 1238 (D.C. Cir. 2003) (observing that “the legislative history of the DMCA betrays no awareness whatsoever that internet users might be able directly to exchange files containing copyrighted works. That is not surprising; P2P software was ‘not even a glimmer in anyone’s eye when the DMCA was enacted.’” (quoting *In re Verizon Internet Services, Inc.*, 240 F.Supp.2d 24, 38 (D.D.C. 2003))).

When copyright owners sought to invoke § 512(h) in pursuit of file-sharers using peer-to-peer technology, the D.C. Circuit found that the text of the statute did not allow this provision to be stretched beyond identifying those storing copyrighted materials on the online service providers' servers.<sup>223</sup> The court was equally clear, however, that "Congress had no reason to foresee the application of § 512(h) to P2P file sharing, nor did they draft the DMCA broadly enough to reach the new technology when it came along. Had Congress been aware of P2P technology, or anticipated its development, § 512(h) might have been drafted to reach such addressable corners of the Internet."<sup>224</sup> The court concluded by noting that it was

not unsympathetic either to the RIAA's concern regarding the widespread infringement of its members' copyrights, or to the need for legal tools to protect those rights. It is not the province of the courts, however, to rewrite the DMCA in order to make it fit a new and unforeseen internet architecture, no matter how damaging that development has been to the music industry or threatens being to the motion picture and software industries. The plight of copyright holders must be addressed in the first instance by the Congress . . .<sup>225</sup>

In moving copyright's file-sharing enforcement regime toward a low fine/low cost enforcement model, Congress should remove needless costs in identifying unauthorized file-sharing. As with § 512(h), this expanded subpoena power should include safeguards to prevent abuse.<sup>226</sup>

### **c. Confirming the Making Available Right**

If the copyright protection is to work effectively with much more modest remedies, then copyright owners and the judiciary system should not devote undue resources to adjudicating garden-variety disputes. As litigation against file-sharers unfolded a decade ago, defendants latched upon a questionable means of raising copyright owners costs – by contending that copyright owners had to prove not only that defendants had made copyrighted works available to others through file-sharing networks but also that other netizens had actually downloaded the files. This argument in no way justified the act of placing the latest release by a recording artist in a share folder that was accessible to millions. Yet it offered the strategic advantage of raising

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<sup>223</sup> See *id.* at 1234 - 37 (finding that the "text of § 512(h) and the overall structure of § 512 clearly establish . . . that § 512(h) does not authorize the issuance of a subpoena to an ISP acting as a mere conduit for the transmission of information sent by others").

<sup>224</sup> See *id.* at 1238.

<sup>225</sup> See *id.*

<sup>226</sup> See 17 U.S.C. § 512(f) (imposing liability upon "any person who knowingly materially misrepresents. . . that material or activity is infringing"); § 512(h)(2)(C) (requiring a "sworn declaration to the effect that the purpose for which the subpoena is sought is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting rights under this title").

discovery costs. Ironically, tracing the distribution of files on the Internet would have posed a substantial threat to privacy interests.

As I have explored elsewhere at length,<sup>227</sup> this contention rests on a misunderstanding of Congress’s intention in replacing copyright law’s historic “publication” right with the “distribution” right in the 1976 Act. The legislative history of the 1976 Act revealed that Congress intended to broaden the historic rights to “publish” in crafting the right to distribute. The reason is subtle but completely understandable in historical context: Under the 1909 Act regime, “publication” served two principal purposes – as a foundational exclusive right and the trigger for federal protection (and loss of common law protection).<sup>228</sup> In order to avoid the potentially harsh effects of publication without proper copyright notice (loss of common law protection and forfeiture of federal statutory protection), courts evolved a confusing and roundly criticized set of doctrines distinguishing of investive and divestive publication. Congress chose the term “distribute” merely to avoid that confusion and expressed unequivocally its intention to retain and broaden the prior rights to publish and vend. Furthermore, Congress intended the distribution right to parallel the statutory definition of “publication.”<sup>229</sup>

The text and legislative history surrounding the Sound Recording Amendments Act of 1971 show that Congress intended to incorporate a making available right in U.S. copyright law for the purpose of deterring record piracy – a purpose which was broadened in the 1976 Act to reach all forms of unauthorized distribution.<sup>230</sup> The legislative history of the 1976 Act also reveals that Congress drafted the exclusive rights broadly so as to avoid their erosion as a result of unforeseen technological changes.<sup>231</sup>

Thus, faithful interpretation of the distribution right would enable a copyright owner to prove infringement merely by showing that a copyrighted work has been placed in a publicly accessible share folder without authorization. Nonetheless, the wording of the statute is open to the interpretation that the distribution right requires proof of actual receipt of an unauthorized copy.<sup>232</sup> Although such proof could be established circumstantially,<sup>233</sup> the need to put on such a case needlessly inflates the costs of copyright enforcement.

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<sup>227</sup> See Peter S. Menell, In Search of Copyright’s Lost Ark: Interpreting the Right to Distribute in the Internet Age, 59 J. Copyright Soc’y U.S.A. 1 (2011).

<sup>228</sup> See id. at 37- 38.

<sup>229</sup> See id. at 41-42, 44-46.

<sup>230</sup> See id. at 50-51.

<sup>231</sup> See id. at 43-44.

<sup>232</sup> Section 106 reads:

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

\* \* \*

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; \* \* \*

I struggle to understand why copyright law would put owners to such a costly and invasive requirement in garden-variety file-sharing cases. I am not aware of any valid reason for a person to place the entirety of a recently released sound recording, motion picture, or book in a share folder available to a large audience without authorization. As best I can understand, the best argument for requiring proof of actual receipt of shared works is as a response to the threat of excessive punishment for file-sharing under present law. I share that concern, but not the indirect means of addressing it, which is why I advocate substantially reducing the statutory damages range as applied to non-commercial, small-scale infringement activity. With this adjustment, Congress establish in the clearest possible terms making copyrighted works available through file-sharing networks violates the Copyright Act, subject, of course, to limiting doctrines, defenses, exemptions, and other limitations. So doing would streamline the procedures for adjudicating file-sharing cases. Copyright owners would be eligible for summary judgment of liability by establishing ownership of the copyrighted work and that the work was made available through a share folder associated with the defendant. Damages could also be resolved without trial (assuming no other defense) if the copyright owner stipulated to the low end of the statutory damage range.

#### **d. Encouraging Responsibility for Web Access Points**

One line of defense in file-sharing litigation is that an individual other than the person who controls a wireless network is responsible for the unauthorized activity. This could happen, for example, if a network is unsecured or if someone hacked it. These factual questions can be complicated, greatly adding to the costs of enforcement.

Part of the problem lies in the lack of accountability norms relating to Internet ports. There could be value in developing standards for ensuring that those who operate hubs take responsibility to ensure that they are not misused. This could come in the form of service requirements, security protocols, and liability for misuse of the network. For example, the Copyright Act could subject wireless network operators (including households with wireless

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17 U.S.C. §106. The plain meaning of “distribute” arguably entails receipt by a third person, but there is good reason to interpret the term in a more copyright-oriented manner. Webster’s dictionary refers to “spread[ing] out or scatter[ing]” as in “distributing magazines to subscribers” and “market[ing] (a commodity).” . See Webster’s Third New International Dictionary of the English Language, Unabridged 660 (Philip Babcock Gove ed., 1961, 1993). The means clause of § 106(3) – “by sale or other transfer of ownership, or by rental, lease, or lending” – is also subject to a range of interpretations. See Menell, *supra* n.203, at 55. There seems ample justification to test these ideas against the 1976 Act’s legislative history, which strongly supports a “making available” interpretation.

<sup>233</sup> See David O. Carson, Making the Making Available Right Available, 33 Colum. J.L. & Arts 135, 155 (2010); Robert Kasunic, Making Circumstantial Proof of Distribution Available, 18 Fordham Intell. Prop. Media & Ent. L.J. 1145 (2008).

Internet access) to bear capped strict liability (e.g., up to \$500) for unauthorized file-sharing that occurs through their hub.

#### **e. A Small Claims Processing Institution for File-Sharing Infringements**

As currently configured, copyright enforcement entails federal court civil litigation – a costly, time-consuming process.<sup>234</sup> Simply filing a civil complaint costs \$400. While the federal civil enforcement system might have made sense to protect the interests involved in copyright cases that, in theory, could result in damages in the tens of thousands of dollars per copyrighted work infringed, this gold-plated adjudication institution is not well-suited to a “parking ticket” regime for file-sharing enforcement. With the damage range reduced substantially, an alternative regime – involving online claims processing – could more appropriately achieve efficient and fair enforcement.<sup>235</sup>

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It is important to bear in mind that the streamlined enforcement regime outlined above is intended as a complement to, rather than a substitute for, well-functioning content markets. It would serve as a better calibrated judicial backstop for addressing file-sharing infringements. In contrast to the present system, this new regime would not threaten crushing liability or produce windfalls. Rather it would be calibrated to impose just enough cost upon file-sharers to encourage participation in what is hoped will be a growing competitive marketplace for content. It will be important for content companies to use carrots rather than sticks to entice consumers into that marketplace. The re-calibrated copyright enforcement system would replace menacing, unwieldy cudgels with mildly irritating twigs. Such a “parking ticket” approach to copyright non-commercial, small-scale infringements would better promote public understanding and acceptance of copyright protection as a balanced regime.

#### **ii. Commercial/Large-Scale Infringers**

Although the 1976 Act enforcement regime did focus on commercial infringement issues, technological advances have rendered much of its approach obsolete. The predominant issue is no longer public performances of musical compositions in restaurants and bars but rather all manner of Internet businesses that profit directly and indirectly from unauthorized distribution of copyrighted works. Various legislative updates – including the NET Act and the DMCA – have augmented the 1976 Act enforcement regime, but have not achieved the effectiveness and balance sought.

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<sup>234</sup> See U.S. Copyright Office, Copyright Small Claims: A Report of the Register of Copyrights 1-2 (Sept. 2013) <<http://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>>.

<sup>235</sup> The Copyright Office has recently proposed the establishment of a general, consensual, streamlined small claims process. See U.S. Copyright Office, *supra* n.210. I am envisioning a more focused process aimed specifically at file-sharing violations.

As illustrated by the rapid emergence of file-sharing, user-generated websites, and cyberlockers, digital enforcement challenges develop quickly and affect the broad spectrum of copyrighted works. Three problems have plagued the enforcement regime: (1) the challenges of addressing broad scale, on-line, cross-border infringement; (2) the difficulty of interpreting and applying the DMCA's safe harbor provisions; and (3) the astronomical threat of liability posed by copyright law's statutory damage provisions. These problems result in massive under and over enforcement. At one extreme, a vast array of copyright owners can find themselves facing rampant piracy through cross-border websites such as MegaUpload. At the other, exciting online services – such as YouTube – can face billion dollar liability claims without evidence of harm to copyright owners.

These problems reflect the challenges of regulating activity on a borderless frontier and imprecision of an enforcement regime developed for a simpler bygone technological era. The cross-border enforcement problem goes beyond private enforcement tools. The interplay of ambiguous statutory provisions and untethered statutory damages creates the potential for opportunistic windfalls which produce Dickensian litigation.

Unfortunately, there are no simple solutions to these problems. The Internet's extraordinary capacity to enable people throughout the world to communicate freely and broadly as well as its rapid technological advance caution against the use of blunt tools to regulate online activities. Yet failure to act quickly to staunch unauthorized distribution of valuable, creative works undermines the markets for valuable, costly projects. Unless society is to abandon copyright as a driver of expressive creativity, there must be effective and balanced tools for protecting copyrighted works in the promiscuous, dynamic, and significantly anonymous Internet ecosystem.

I offer three approaches for improving copyright enforcement against large-scale, commercial enterprises: (1) re-calibrating statutory damages to avoid windfall opportunism; (2) developing a balanced public enforcement regime for dealing with broad-scale infringing activities; and (3) introducing whistleblower bounties to elicit evidence of illegal activity.

#### **a. Re-Calibrating Statutory Damages**

Even if the high fine/low administrative cost deterrence has not operated as economic theorists predicted to rein in consumer file-sharing, it might nonetheless work in dealing with larger-scale, commercial infringers. The experience of the past decade, however, suggests otherwise. Copyright law does not draw a clear dividing line between legal and illegal activities, especially in the context of innovative distribution platforms. The DMCA insulates a broad range of online services from copyright liability.<sup>236</sup> The contours of these exemptions, however, are notably opaque, resulting in the potential for astronomical damage requests if a service falls outside of DMCA's safe harbor. Content owners have seized on this exposure as a way to

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<sup>236</sup> See 17 U.S.C. § 512.

discourage innovative technologies and to reap windfalls. Such efforts to impose crushing liability on innovative distribution platforms have fed public perceptions that copyright law is extortionate and wasteful.<sup>237</sup> As in file-sharing cases against individuals, disproportionate damage requests in cases against large, commercial enterprises have back-fired and undermined the public’s and judiciary’s perception of the copyright system. Re-calibrating the statutory damages regime for the Internet Age is critical to restoring support for copyright protection.

The disproportionate awards sought in several high profile cases appear to have led courts to interpret the DMCA’s safe harbors expansively – arguably beyond what Congress intended.<sup>238</sup> The introduction to the Second Circuit’s YouTube opinion offers a telling clue:<sup>239</sup>

The plaintiffs alleged direct and secondary copyright infringement based on the public performance, display, and reproduction of approximately 79,000 audiovisual ‘clips’ that appeared on the YouTube website between 2005 and 2008. They demanded, *inter alia*, statutory damages pursuant to 17 U.S.C. § 504(c) . . .<sup>240</sup>

Section 504(c) provides for the award of “not less than \$750 or more than \$30,000” per infringed work and up to \$150,000 per work for willful infringement in the court’s discretion<sup>241</sup> – creating a liability range from \$59 million to nearly \$12 billion. Under the Supreme Court’s decision in *Feltner v. Columbia Pictures Television, Inc.*,<sup>242</sup> the determination of statutory damages is a question for a jury. The Ninth Circuit’s decisions in *UMG Recordings v. Shelter Capital Partners*,<sup>243</sup> also lean toward an expansive view of the DMCA safe harbors.<sup>244</sup>

And even though the court in record companies’ enforcement action against LimeWire granted summary judgment on liability,<sup>245</sup> Judge Wood characterized the plaintiffs’ damages theory that could “reach into the trillions” – “more money than the entire music recording

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<sup>237</sup> See Liz Shannon Miller, Google’s Viacom Suit Legal Fees: \$100 Million, Gigaom (Jul. 15, 2010) (reporting that Google’s legal fees reached \$100 million more as of three years ago) <<http://gigaom.com/2010/07/15/googles-viacom-suit-legal-fees-100-million/>> ; Viacom’s Expensive Suit, Forbes (Mar. 8, 2007) (reporting that Viacom’s \$1 billion lawsuit against Google could generate \$350 million or more in legal fees) <[http://www.forbes.com/2007/03/27/youtube-viacom-google-tech-cx\\_ll\\_0328google.html](http://www.forbes.com/2007/03/27/youtube-viacom-google-tech-cx_ll_0328google.html)>.

<sup>238</sup> See Menell, *supra* n. \_\_. <Windfalls paper>

<sup>239</sup> See 17 U.S.C. §512(c).

<sup>240</sup> *Viacom Intern., Inc. v. YouTube, Inc.*, 676 F.3d 19, 26 (2<sup>nd</sup> Cir. 2012).

<sup>241</sup> See 17 U.S.C. § 504(c).

<sup>242</sup> 523 U.S. 340 (1998).

<sup>243</sup> See *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006 (9<sup>th</sup> Cir. 2013); *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022 (9<sup>th</sup> Cir. 2011).

<sup>244</sup> See Menell, *supra* n. \_\_;

<sup>245</sup> See *Arista Records LLC v. Lime Group LLC* 784 F.Supp.2d 398 (S.D.N.Y. 2011).

industry has made since Edison's invention of the phonograph in 1877" – as "absurd."<sup>246</sup> The resulting media coverage fanned the flames of rapacious copyright owner greed.<sup>247</sup>

If those who develop technology that can be used to infringe copyrights are exposed to potentially crushing liability – as befell Napster, MP3.com, ReplayTV, Grokster, and LimeWire – it seems reasonable to surmise that digital technology innovators would invest their resources and energies elsewhere.<sup>248</sup> Yet there has been no shortage of tantalizing new digital technologies – from the iPod to image search engines, YouTube, Facebook, Google's Book Search, BitTorrent, iPhone, iPad, Kindle, and Twitter – that could be (and have been) portrayed as facilitating copyright infringement. The relatively modest capital requirements associated with innovation in digital distribution technologies, research and social norms, risk and liability-insulating institutions, and the importance of technological advance in fields unaffected by copyright liability dampen the chilling effects of disproportionate copyright liability.<sup>249</sup>

Nonetheless, these countervailing forces in no way justify disproportionate damages. Absent serious under-detection or under-enforcement of copyright infringement,<sup>250</sup> copyright damages should be calibrated to actual harm. The technologies exerting the largest effects on copyright owners can often be identified with relative ease. Copyright owners can and do use the same techniques to find unauthorized copies of their works as consumers. Where those alleged infringers can be haled into U.S. courts, it is difficult to see the need for disproportionate damage remedies; and certainly not of the unprecedented scale being sought in the Internet Age. Statutory damages might still be useful as a means for reducing the costs of proving actual damages. Nonetheless, the levels should be calibrated to approximate actual damages. At a minimum, the statutory damage levels should be scaled to the number of works affected. A copyright statutory

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<sup>246</sup> See *Arista Records LLC v. Lime Group LLC*, 784 F.Supp.2d 313, 317 (S.D.N.Y. 2011).

<sup>247</sup> See Jaikumar Vijayan, *RIAA Request for Trillions in Limewire Copyright Case Is "Absurd," Judge Says*, *Computerworld* (Mar. 25, 2011) <[http://www.computerworld.com/s/article/9215074/RIAA\\_request\\_for\\_trillions\\_in\\_LimeWire\\_copyright\\_case\\_is\\_absurd\\_judge\\_says](http://www.computerworld.com/s/article/9215074/RIAA_request_for_trillions_in_LimeWire_copyright_case_is_absurd_judge_says)>.

<sup>248</sup> See Michael A. Carrier, *Copyright and Innovation: The Untold Story*, 2012 *Wis. L. Rev.* 891(2012); Robert Hof, "Ten Years of Chilled Innovation," *BUS. WK.* (Jun. 29, 2005), <[http://www.businessweek.com/print/technology/content/jun2005/tc20050629\\_2929\\_tc057.htm](http://www.businessweek.com/print/technology/content/jun2005/tc20050629_2929_tc057.htm)>; Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 *Stan. L. Rev.* 1345 (2004).

<sup>249</sup> See Peter S. Menell, *Indirect Copyright Liability and Technological Change*, 32 *Columbia Journal of Law and the Arts* 375 (2009).

<sup>250</sup> See A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 *Harv. L. Rev.* 869, 887-96 (1998) (justifying higher damage awards where it is difficult to trace the source of harm-producing activity); *supra* Section I <discussion of statutory damages>.

damages “sentencing commission”<sup>251</sup> could develop and adapt target ranges for copyright damages. Copyright owners always have the option of proving actual damages.

The YouTube case is instructive. Three young programmers who had experienced success as early employees of PayPal developed the idea for a video-sharing technology in 2005. They were able to attract venture capital, launched a website later that year, and quickly became a household name. As emails that emerged in subsequent copyright infringement litigation indicated, the founders were a bit loose in their adherence to copyright law. They hoped to attract a lot of eye balls as well as potential acquirers. They wildly succeeded, posting thousands of user-uploaded videos a day, receiving over 100 million views per day, and obtaining an acquisition by Google for \$1.65 billion within a year of launch.

YouTube also attracted copyright infringement lawsuits – filed by Viacom, the English Premier League, and numerous others. The Viacom suit alleged that YouTube hosted more than 150,000 unauthorized clips of its material that had been viewed “an astounding 1.5 billion times.”<sup>252</sup> It sought \$1 billion in statutory damages.

What was far less clear was the damage caused to Viacom and others. As noted earlier,<sup>253</sup> I was first introduced to the brilliance of Jon Stewart through user uploads on YouTube and soon became a loyal Viacom customer. I regularly view the *Daily Show* (as well as its spinoff, *The Colbert Report*), through our cable provider and Viacom’s website.

Shortly after the YouTube acquisition, Google developed ContentID, a sophisticated technology for screening unauthorized user-uploaded videos. Viacom has agreed that this technology eliminates infringement problems prospectively but it nonetheless continues to seek a veritable statutory damages lottery jackpot through ongoing litigation. Yet the only winners here appear to be the lawyers – who have earned hundreds of millions of dollars in litigation fees.

As best I can tell, this Dickensian litigation continues to be driven by the windfall possibility created by statutory damages. Even though the Second Circuit has effectively cabined Viacom’s potential recovery, Viacom has little choice but to continue the battle or risk facing a massive attorney fee award should it lose the case outright. A better calibrated damages regime would likely have brought this case to a far quicker and less expensive resolution.

Content owners might defend wielding the statutory damages cudgel in cases such as this one on the grounds that only the threat of crushing liability was going to persuade Google to

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<sup>251</sup> Cf. Comprehensive Crime Control Act of 1984, Pub.L. 98–473, 98 Stat. 1976 (establishing the U.S. Sentencing Commission, an independent judicial branch agency responsible for establishing and updating sentencing guidelines for the federal courts).

<sup>252</sup> See Declan McCullagh, *Youtube’s Fate Rests on Decade-old Copyright Law*, C|Net News (Mar. 13. 2007) <[http://news.cnet.com/YouTubes-fate-rests-on-decade-old-copyright-law/2100-1028\\_3-6166862.html](http://news.cnet.com/YouTubes-fate-rests-on-decade-old-copyright-law/2100-1028_3-6166862.html)>.

<sup>253</sup> See *supra* <Section I(D)>.

develop and implement ContentID technology. Yet it appears that Google had significant independent motivation to implement this technology; it has proven to be a great means of monetizing advertising in conjunction with and to the benefit of copyright owners (including Viacom). But even if the litigation played a role in Google's wise decision to develop a symbiotic technological platform,<sup>254</sup> it is not at all clear that a rational copyright damages system would not have achieved comparable technological innovation. And it might have done so in a manner that did not distort the DMCA's safe harbor regime, to the broader detriment of content owners.

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<sup>254</sup> See Peter S. Menell, Design for Symbiosis: Promoting More Harmonious Paths for Technological Innovators and Expressive Creators in the Internet Age, 55 Communications of the ACM, No. 5, 30-32 (May 2012).

I am more inclined to the view that this episode illustrates the litigation principle that “pigs get fat, hogs get slaughtered.”<sup>255</sup> The theoretical availability of astronomical statutory damages has undermined the balance sought in the DMCA’s safe harbor regime. A more rational damages regime could have produced more rational litigation, with parties identifying the gains from compromise. Instead, the potential for vast, undeserved transfers of Internet-generated wealth produced a scorched-earth court battle and deepened distrust between the content and technology sectors. And more to the central theme of this lecture, opportunistic use of statutory damages has undermined public respect for the copyright system.

Thus, a better calibrated statutory damages regime would better serve both content and technology industries, as well as the public-at-large. But such a system can only go so far. Where alleged infringers cannot effectively be haled into U.S. courts, even the optimal damages regime cannot produce effective copyright enforcement. That brings us to the role for public enforcement.

### **b. Instituting Balanced Public Enforcement**

The challenges of enforcing copyright protection in a global, borderless Internet Age reached front page news in early 2012 as Congress neared a vote on the Stop Online Piracy Act (SOPA).<sup>256</sup> Working largely behind the scenes and without input from the technology sector or the public, content industries orchestrated potentially draconian legislation aimed at curbing copyright infringement through foreign websites. The proposed legislation authorized the Attorney General to commence *in personam* and *in rem* proceedings to block “foreign infringing” websites, including requiring that search engines “take technically feasible and reasonable measures, as expeditiously as possible . . . designed to prevent the foreign infringing site from resolving to that domain name’s Internet Protocol address.”<sup>257</sup> The legislation also authorized copyright owners to use a notice process to require that American online service providers block access to foreign infringing websites.<sup>258</sup> SOPA would also have criminalized streaming of

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<sup>255</sup> See Idiom: Pigs get fat, hogs get slaughtered, UsingEnglish.com (explaining that this idiom is used “to express being satisfied with enough, that being greedy or too ambitious will be your ruin”)

<<http://www.usingenglish.com/reference/idioms/pigs+get+fat,+hogs+get+slaughtered.html>>.

<sup>256</sup> See Stop Online Piracy Act (“SOPA”), H.R. 3261, 112th Cong. (2011); see also Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 (“Protect IP Act” or “PIPA”), S. 968, 112 Cong. (2011).

<sup>257</sup> See SOPA, *supra* n. \_\_, § 102. SOPA also authorized the Attorney General to bar payment processors from completing payment transactions to foreign infringing websites and Internet advertising services from advertising on such sites. See *id.*

<sup>258</sup> See SOPA, *supra* n. \_\_, § 103. SOPA also authorized copyright owners to bar payment processors from completing payment transactions to foreign infringing websites and Internet advertising services from advertising on such sites. See *id.*; StopOnline Piracy – Stopping SOPA: A Backlash from the Internet Community Against Attempts to Rein in Content Theives, *The Economist* (Jan. 21, 2012) <<http://www.economist.com/node/21543173>>.

copyrighted works.<sup>259</sup> In the days leading up to the congressional vote,<sup>260</sup> a broad range of technology companies, civil libertarians, and legal scholars attacked the bill for suppressing speech, violating due process, undermining security and stability of the Internet, weakening online service provider safe harbors, and unduly expanding copyright protection.<sup>261</sup> An unprecedented groundswell of online opposition brought the legislation to ignominious defeat.<sup>262</sup>

Even before SOPA gained salience, the U.S. Department of Justice had embarked on a multi-faceted, international enforcement campaign targeting “websites and their operators that distribute counterfeit and pirated items over the Internet, including counterfeit pharmaceuticals and pirated movies, television shows, music, software, electronics and other merchandise, as well as products that threaten public health and safety.”<sup>263</sup> “Operation in Our Sites” has resulted in the seizure of over 1,700 website domains.<sup>264</sup> This unprecedented use of public resources to enforce copyright protection signals a significant shift in the allocation of authority between private and public enforcement.<sup>265</sup>

These developments reflect the inherent difficulties of protecting copyrighted works in a dynamic Internet Age as well as the growing tension between copyright protection and other core values – such as freedom of expression and due process. It is almost laughable to think that the major enforcement concern troubling the 1976 Act drafters was public performances of musical compositions in restaurants, bars, and night clubs.

The challenge of addressing foreign infringing websites, as well as other Internet Age developments, calls for a broad reassessment of copyright enforcement institutions and approaches. This section first traces copyright law’s shift from a purely private enforcement

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<sup>259</sup> See SOPA, supra n. \_\_, § 201.

<sup>260</sup> See Grant Gross, Lawmakers Seem Intent on Approving SOPA, PIPA, PCWorld (Jan. 5, 2012) <[http://www.pcworld.com/article/247339/lawmakers\\_seem\\_intent\\_on\\_approving\\_sopa\\_pipa.html](http://www.pcworld.com/article/247339/lawmakers_seem_intent_on_approving_sopa_pipa.html)>.

<sup>261</sup> See Jenna Wortham, A Political Coming of Age for the Tech Industry, N.Y. Times A1 (Jan. 17, 2012) <<http://www.nytimes.com/2012/01/18/technology/web-wide-protest-over-two-antipiracy-bills.html?pagewanted=all>>

<sup>262</sup> See Jonathan Weisman, After an Online Firestorm, Congress Shelves Antipiracy Bills N.Y. Times B6 (Jan. 20, 2012) <<http://www.nytimes.com/2012/01/21/technology/senate-postpones-piracy-vote.html?ref=copyrights>>

<sup>263</sup> See Nat’l Intell. Prop. Rts. Coordination Center, Operation In Our Sites, <<http://www.iprcenter.gov/reports/fact-sheets/operation-in-our-sites/view>>

<sup>264</sup> See News Release, U.S. Immigration and Customs Enforcement, Houston ICE Seizes 89 Websites Selling Counterfeit Goods (Dec. 20, 2012) (reporting that 1,719 domain names have been seized under Operation In Our Sites since the program began in June 2010) <<https://www.ice.gov/news/releases/1212/121220houston.htm>> .

<sup>265</sup> See generally A. Mitchell Polinsky & Steven Shavell, The Economic Theory of Public Enforcement of Law, 38 J. Econ. Lit. 45 (2000) (surveying the law and economics literature on public versus private law enforcement).

regime to a mixed private and public system. It then suggests ways in which the range and integration of public and private enforcement tools can be improved to better balance copyright protection, First Amendment, and due process concerns.

Throughout most of its history, copyright's enforcement regime has centered on private enforcement. In many contexts, the principal impacts of copyright infringement affected one or a few copyright owners and the law used tort-based remedies as the enforcement driver. Where there were economies of scale and scope in enforcement, as in the case of musical compositions, authors and publishers joined forces to police violations and enforce copyright protection.<sup>266</sup>

That is not to say that copyright law has lacked criminal enforcement provisions. Congress established criminal liability for willful, commercial exploitation of dramatic and musical compositions in 1897 to address the difficulty of enforcement of copyright protection against traveling performers.<sup>267</sup> Congress expanded criminal liability to all willful copyright infringements for profit in the 1909 Act,<sup>268</sup> but criminal copyright prosecutions were only rarely pursued.<sup>269</sup> Congress included criminal penalties in the Sound Recording Act of 1971,<sup>270</sup> and largely carried the 1909 Act's criminal enforcement provisions to the 1976 Act with increased sanctions.<sup>271</sup>

The advent of the video cassette recorder opened up new avenues for copyright infringement. The motion picture and the recording industries persuaded Congress to pass the Piracy and Counterfeiting Amendments Act of 1982,<sup>272</sup> which increased criminal sanctions. As advances in digital technology in the 1990s greatly expanded the scale, modalities, and complexity of copyright infringement, Congress expanded criminal copyright liability to deal with the threats.<sup>273</sup> At the urging of the computer software industry, Congress passed the

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<sup>266</sup> See Robert P. Merges, Contracting into Liability Rules, (discussing the emergence of ASCAP as collective enforcement institution).

<sup>267</sup> See Act of Jan. 6, 1897, ch. 4, 29 Stat. 481 (classifying such acts misdemeanors punishable by imprisonment of up to one year); I. Trotter Hardy, Criminal Copyright Infringement, 11 Wm. & Mary Bill Rts. J. 305, 315 (2002).

<sup>268</sup> See Copyright Act of 1909, ch. 320, 35 Stat. 1075 (authorizing fines up to \$25,000 and imprisonment up to one year).

<sup>269</sup> See William S. Strauss, Study No. 24: Remedies Other than Damages for Copyright Infringement 128 (Mar. 1959).

<sup>270</sup> Pub. L. No. 92-140, 85 Stat. 391.

<sup>271</sup> See 17 U.S.C. § 506; United States v. Moran, 757 F. Supp. 1046, 1050 (D. Neb. 1991); Criminalization of Copyright Infringement in the Digital Era, 112 Harv. L. Rev. 1705, 1708-09 (1999).

<sup>272</sup> Pub. L. No. 97-180, 96 Stat. 91 (1982); see Mary Jane Saunders, Criminal Copyright Infringement and the Copyright Felony Act, 71 Denv. U. L. Rev. 671, 687 (1994).

<sup>273</sup> See Hardy, *supra* n. \_\_\_, at 317-23.

Copyright Felony Act of 1992,<sup>274</sup> significantly expanding criminal sanctions for willful infringement of all copyrighted works.<sup>275</sup>

Yet in one of the first criminal Internet copyright infringement cases, *United States v. LaMacchia*,<sup>276</sup> the government sought to use the wire fraud statute<sup>277</sup> rather than the Copyright Act to pursue the operator of a computer bulletin board service distributing copies of copyrighted software. The reason for this strategy was that the defendant lacked a profit motive.<sup>278</sup> The court characterized David LaMacchia, a 21 year old MIT student, as a computer hacker<sup>279</sup> – implying that he was merely following a hacker credo of sharing code.<sup>280</sup> Prior to the Internet, such Robin Hood-type activity could not reach a global audience. Judge Stearns sensed that such behavior posed a serious threat to the copyright system.<sup>281</sup>

Nonetheless, the court granted the defendant’s motion to dismiss the case,<sup>282</sup> relying on the Supreme Court’s decision in *Dowling v. United States* holding that the wire fraud statute could not be interpreted to encroach on copyright’s domain without clear indication that Congress so intended.<sup>283</sup> While praising the government’s purpose in prosecuting LaMacchia,<sup>284</sup> Judge

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<sup>274</sup> Pub. L. No. 102-561, 106 Stat. 4233.

<sup>275</sup> Congress added counterfeiting of copyrighted works a racketeering offense under the Racketeer Influenced and Corrupt Organizations (RICO) Act in 1996. See Anticounterfeiting Consumer Protection Act of 1996, Pub. L. No. 104-153, 110 Stat. 1386.

<sup>276</sup> 871 F.Supp. 535 (D. Mass. 1994).

<sup>277</sup> See 18 U.S.C. § 1343.

<sup>278</sup> The Copyright Act’s criminal provisions required proof of “commercial advantage or private financial gain.” 17 U.S.C. § 506(a).

<sup>279</sup> See *id.* at 536-37 (noting that the defendant was a young MIT student/computer hacker).

<sup>280</sup> The “hacker ethic” is “a belief that ‘access to computers ... should be unlimited and total’ and ‘all information should be free.’” Robert L. Dunne, *Deterring Unauthorized Access to Computers: Controlling Behavior in Cyberspace Through a Contract Law Paradigm*, 35 *Jurimetrics J.* 1, 10 (1994) (quoting Dorothy Denning, *Concerning Hackers Who Break into Computer Systems*, Paper Presented at the 13th National Computer Security Conference, Washington, D.C. (Oct. 1-4, 1990)); see also *The Hacker Manifesto* (“This is our world now . . . the world of the electron and the switch . . . We make use of a service already existing without paying for what could be dirt-cheap if it wasn’t run by profiteering gluttons, and you call us criminals. We explore... and you call us criminals. . . . Yes, I am a criminal. My crime is that of curiosity. . . . My crime is that of outsmarting you, something that you will never forgive me for. I am a hacker, and this is my manifesto. You may stop this individual, but you can’t stop us all . . .”) <<http://www.mithral.com/~beberg/manifesto.html>>; *Hacker Manifesto*, Wikipedia <[http://en.wikipedia.org/wiki/Hacker\\_Manifesto](http://en.wikipedia.org/wiki/Hacker_Manifesto)>.

<sup>281</sup> See *United States v. LaMacchia*, 871 F.Supp. at 545.

<sup>282</sup> See *id.* at 537-39.

<sup>283</sup> 473 U.S. 207 (1985). Justice Blackmun observed that Congress has chosen to tread cautiously in crafting copyright enforcement, relying “chiefly ... on an array of civil remedies to

Stearns nonetheless noted that the government’s interpretation of the wire fraud statute would “criminalize the conduct of not only persons like LaMacchia, but also the myriad of home computer users who succumb to the temptation to copy even a single software program for private use.”<sup>285</sup> He invited Congress to address this issue, observing that “[c]riminal as well as civil penalties should probably attach to willful, multiple infringements of copyrighted software even absent a commercial motive on the part of the infringer. One can envision ways that the copyright law could be modified to permit such prosecution. But, “[i]t is the legislature, not the Court which is to define a crime, and ordain its punishment.”<sup>286</sup>

Notwithstanding concerns about bringing the activities of college pranksters within the felony realm,<sup>287</sup> Congress closed the “*LaMacchia* loophole” in the No Electronic Theft Act of 1997.<sup>288</sup> This so-called “NET Act” extended criminal infringement to willful “reproduction or distribution [of copyrighted works], including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000,”<sup>289</sup> which removes any *mens rea* (motive) component. It also stiffened the criminal penalties applicable to copyright infringement committed through electronic means.<sup>290</sup> Congress viewed prosecutorial discretion in whether to pursue the matter and judicial restraint in sentencing as critical to achieving appropriate enforcement.<sup>291</sup>

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provide copyright holders protection against infringement” while mandating “studiously graded penalties” only in those instances where Congress has concluded that the deterrent effect of criminal sanctions was required. See *id.* at 221; *United States v. LaMacchia*, 871 F.Supp. at 545 (quoting 3 *Nimmer on Copyright*, § 15.05 at 15–20 (1993)).

<sup>284</sup> 871 F.Supp. at 844 (noting that “the government’s objective is a laudable one”); 845 (commenting that “[i]f the indictment is to be believed, one might at best describe his actions as heedlessly irresponsible, and at worst as nihilistic, self-indulgent, and lacking in any fundamental sense of values”).

<sup>285</sup> See *id.* at 845.

<sup>286</sup> See *id.* (quoting *Dowling v. United States*, 473 U.S. 207, 214 (1985) (quoting *United States v. Wiltberger*, 5 Wheat. 76, 95, 5 L.Ed. 37 (1820))).

<sup>287</sup> See 143 Cong. Rec. S12689-90 (daily ed. Nov. 13, 1997) (statement of Sen. Hatch).

<sup>288</sup> Pub. L. No. 105-147, 111 Stat. 2678-80 (codified as amended at 17 U.S.C. § 506, 18 U.S.C. § 2319, and 28 U.S.C. § 994).

<sup>289</sup> See 17 U.S.C. § 506(a)(2).

<sup>290</sup> See 18 U.S.C. § 2319.

<sup>291</sup> See 143 Cong. Rec. S12689 (daily ed. Nov. 13, 1997) (statement of Sen. Hatch) (“I am also relying upon the good sense of prosecutors and judges. Again, the purpose of the bill is to prosecute commercial-scale pirates who do not have commercial advantage or private financial gain from their illegal activities. But if an over-zealous prosecutor should bring and win a case against a college prankster, I am confident that the judge would exercise the discretion that he or she may have under the Sentencing Guidelines to be lenient. If the practical effect of the bill turns out to be draconian, we may have to revisit the issue.”).

The NET Act substantially raised the profile of criminal prosecution in copyright law's enforcement toolbox just as the Internet Age was taking hold.<sup>292</sup> A year later, the DMCA added further criminal enforcement tools as part of the anti-circumvention provisions.<sup>293</sup> In 1999, the Clinton Administration established the National Intellectual Property Law Enforcement Coordination Center<sup>294</sup> within the Department of Homeland Security's Immigration and Customs Enforcement (ICE) service to coordinate investigations and prosecutions and communicate information about these activities within the government and with the public.<sup>295</sup> In 2000, Attorney General Janet Reno announced broad new criminal enforcement initiatives aimed at digital copyright infringement as well as other forms on Internet-based criminal activity.<sup>296</sup> The following year, Attorney General John Ashcroft established ten "Computer Hacking and Intellectual Property" (CHIP) units aimed at computer hacking and pirating intellectual property.<sup>297</sup>

These initiatives led to the break-up of several notorious software distribution rings. In 1999, federal agents brought down "Pirates With Attitude" (PWA), considered to be the "oldest and most sophisticated band of software pirates in Internet history."<sup>298</sup> It operated 13 FTP (file transfer protocol)<sup>299</sup> servers hosting over 30,000 software programs.<sup>300</sup> A December 2001 raid by

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<sup>292</sup> See Criminalization of Copyright Infringement in the Digital Era , 112 Harv. L. Rev. 1705 (1999).

<sup>293</sup> See 17 U.S.C § 1204 (providing that "[a]ny person violates section 1201 [circumvention of technological measures] or 1202 [false copyright management information] willfully and for purposes of commercial advantage or private financial gain – (1) shall be fined not more than \$500,000 or imprisoned for not more than 5 years, or both, for the first offense; and (2) shall be fined not more than \$1,000,000 or imprisoned for not more than 10 years, or both, for any subsequent offense").

<sup>294</sup> The National Intellectual Property Law Enforcement Coordination Center would be renamed the National Intellectual Property Rights Coordination Center (NIPRCC).

<sup>295</sup> See Treasury/Postal Appropriations Bill, Pub. L. No. 106-58, Section 653 (1999) (establishing NIPLECC); The National Intellectual Property Law Enforcement Coordination Council Annual Report 2000 <<http://www.uspto.gov/web/offices/dcom/olia/niplecc/>>.

<sup>296</sup> See Attorney General Janet Reno, 'Protecting Intellectual Property in the Digital Age,' Symposium of the Americas (September 2000), online: <<http://www.usdoj.gov/archive/ag/speeches/2000/91200agintellectualprop.htm>>.

<sup>297</sup> See Lisa M. Bowman, U.S. to Cybercriminals: You're Going Down, c|net (July 20, 2001) <[http://news.cnet.com/U.S.-to-cybercriminals-Youre-going-down/2100-1001\\_3-270322.html](http://news.cnet.com/U.S.-to-cybercriminals-Youre-going-down/2100-1001_3-270322.html)>.

<sup>298</sup> See Darryl van Duch, Eyes on 'Pirates' Trial in Chicago, Nat'l L.J. (New York City), Mar. 26, 2001, at B1.

<sup>299</sup> See File Transfer Protocol, Wikipedia <[http://en.wikipedia.org/wiki/File\\_Transfer\\_Protocol](http://en.wikipedia.org/wiki/File_Transfer_Protocol)>.

<sup>300</sup> See Press Release, U.S. Department of Justice, Leader Of Software Piracy Sentenced To 18 Months In Prison (May 15, 2002) <[http://www.cybercrime.gov/rothbergSent\\_pirates.htm](http://www.cybercrime.gov/rothbergSent_pirates.htm)>.

federal agents in 27 cities broke the “DrinkorDie” software piracy ring.<sup>301</sup> Many more prosecutions involving computer software and motion pictures followed.<sup>302</sup>

Based on the first few years of NET Act prosecutions, Professor Eric Goldman concluded that the actions “appear generally consistent with Congress’ objectives for the Act” and, contrary to some predictions,<sup>303</sup> have not resulted in overreaching prosecutions against de minimis offenders.<sup>304</sup> He noted, however, that the NET Act did not appear to have curbed software piracy,<sup>305</sup> although the piracy baseline would have increased substantially in the years following passage of the NET Act as a result of vastly expanded broadband penetration, software products, and Internet usage. The pertinent question is whether the NET Act reduced piracy relative to no public enforcement, which seems likely.

The major reason why infringement of software (including video games) has not been substantially higher has been the use of digital rights management, frequent updating, and the large size of such programs. Even Internet motion picture piracy remained relatively modest in the early to mid 2000 period due to DVD encryption, the large file size of films, the reduced quality of shared versions, and the difficulty of porting films to large screens for viewing.

These technological restraints faded with growing broadband coverage and the advent and spread of BitTorrent.<sup>306</sup> Introduced in mid 2001, BitTorrent enabled much more rapid transfer of large files. As illustrated by the difficulties Kathryn Bigelow (*The Hurt Locker*) and Ellen Seidler (*And Then Came Lola*) experienced in marketing their independent films,<sup>307</sup> the advent of cyberlocker sites such as MegaUpload and RapidShare in the mid 2005 to 2009 time period brought pirated feature films within the reach of most Internet users.

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<sup>301</sup> See Robert Lemos, U.S. Plans New Raids on File Swappers (Dec. 12, 2001) <<http://news.com.com/2100-1023-276885.html>>; Associated Press, Feds Zero in on Piracy Ring (Dec. 11, 2001) <<http://www.wired.com/news/politics/0,1283,49026,00.html>>; Reuters, DrinkorDie Leader Pleads Guilty (Feb. 27, 2002), <<http://www.wired.com/news/politics/0,1283,50715,00.html>>.

<sup>302</sup> See Eric Goldman, A Road to No Warez: The No Electronic Theft Act and Criminal Copyright Infringement, 82 Or. L. Rev. 369, 381-92 (2003) (chronicling a wave of prosecutions between 2001 and 2003).

<sup>303</sup> See Andrew Grosso, The Promise and Problems of the No Electronic Theft Act, Comm. of the ACM, 23, 26 (Feb. 2000) <<http://delivery.acm.org/10.1145/330000/328243/p23-grosso.pdf?key1=328243&key2=878343660-1&coll=GUIDE&dl=GUIDE&CFID=13119240&CFTOKEN=57162232>>.

<sup>304</sup> See Goldman, supra n. \_\_\_, at 393-96.

<sup>305</sup> See id. at 396-99.

<sup>306</sup> See BitTorrent, Wikipedia <[http://en.wikipedia.org/wiki/BitTorrent\\_%28software%29](http://en.wikipedia.org/wiki/BitTorrent_%28software%29)>.

<sup>307</sup> See supra <Section II(B)(2)>.

These and related concerns would prompt Congress to pass the Prioritizing Resources and Organization for Intellectual Property (PRO-IP) Act of 2008.<sup>308</sup> This legislation ramps up civil and criminal penalties, with much higher limits for repeat offenders. It also established an Intellectual Property Enforcement Coordinator (IPEC) office within the Executive Office of the President to coordinate anti-piracy efforts across relevant Federal agencies (Department of Justice, Office of Management and Budget, Department of Homeland Security, Federal Bureau of Investigation (FBI), Immigration and Custom Enforcement (ICE), Customs and Border Protection, the Patent and Trademark Office, the Office of the U.S. Trade Representative, and the U.S. Copyright Office), foreign governments, private companies, and public interest groups to implement the best strategies to foster and protect invention and creativity. The IPEC has been responsible for developing and implementing a Joint Strategic Plan to combat counterfeiting and piracy.

As part of these efforts, the IPEC coordinated “Operation in Our Sites,” leading the ICE and the Department of Homeland Security to seize hundreds of websites alleged to traffic in unauthorized copyright content and counterfeit goods. The seizure of domains containing allegedly infringing copyrighted materials proceeds according to the following steps:<sup>309</sup> (1) ICE agents download or stream suspicious content; (2) ICE agents then check with rights holders to verify that the content is protected; (3) ICE and NIPRCC present this evidence to the Department of Justice, which determines whether there is adequate basis to obtain a seizure order for the website in question; (4) investigators determine whether the domain name is registered in the United States; (5) ICE and NIPRCC present affidavits to a federal magistrate judge; (6) the federal magistrate judge determines whether there is probable cause to support infringement; (7) the magistrate judge grants a seizure order that is served on the domain name registry (as opposed to the website operator); (8) the domain name registry must restrain and lock the domain name pending completion of the forfeiture proceeding and transfer the domain name’s title, rights, and interests to the U.S. government; and (9) the registry must redirect the domain to a web page operated by the U.S. government displaying a plaque stating that the website has been seized.<sup>310</sup> Among the factors that the Department of Justice considers in determining whether to seize a website are the popularity of the site, whether it is commercial in nature, whether it is profitable, and whether seizure would have a substantial impact on piracy.<sup>311</sup>

These seizures have raised concerns about freedom of expression, due process, and chilling effects on technological innovation.<sup>312</sup> The owner of a website that has been seized under

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<sup>308</sup> See Pub. L. 110-403, 122 Stat. 4256 (2008).

<sup>309</sup> See Karen Kopel, Operation Seizing Our Sites: How the Federal Government Is Taking Domain Names Without Prior Notice, 28 Berkeley Tech. L.J. 859, 875-76 (2013).

<sup>310</sup> The plaque states that the seizure is pursuant to 18 U.S.C. §§ 981 and 2323.

<sup>311</sup> See Brian T. Yeh, Online Infringement and Counterfeiting: Legislation in the 112th Congress, 1099 PLI/Pat 693, 704 (2012).

<sup>312</sup> See Letter from Sen. Ron Wyden to John Morton, Director, U.S. Immigration and Customs Enforcement, and Eric Holder, Attorney General (Feb. 2, 2011) (expressing concern that the seizure procedure “could stifle constitutionally protected speech, job-creating innovation, and

this process cannot challenge the decision until after the website has been transferred to the government. Only then is the website owner afforded an opportunity to challenge the validity of the affidavit supporting the seizure. The government bears the burden of proof in such proceeding.<sup>313</sup> The website owner may also demand return of the property by writing directly to ICE.<sup>314</sup> If ICE does not return the website within 15 days, the owner can petition the U.S. District Court in which the seizure warrant was issued or executed.

Several ICE domain seizures illustrate the due process, free expression, and overbreadth problems. In November 2010, the government seized 82 domains alleged to be engaged in the sale and distribution of counterfeit goods and pirated works.<sup>315</sup> The seizures included several rap and hip hop blogs showcasing new artists tagged by an RIAA representative as pirate sites.<sup>316</sup> Dajaz1.com allegedly posted based on posting of pre-release songs owned by RIAA member labels. Yet these songs had apparently been “leaked” by record label promotional representatives for marketing and publicity.<sup>317</sup> Thus, the website seized had authorization to post the works.

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give license to foreign regimes to censor the Internet”)  
<<http://wyden.senate.gov/download/?id=103d177c-6f30-469b-aba8-8bbfdd4fd197>>; Letter from Rep. Zoe Lofgren to John Morton, Director, U.S. Immigration and Customs Enforcement (Apr. 7, 2011) <[http://lofgren.house.gov/images/stories/pdf/letter\\_to\\_morton\\_4-7.pdf](http://lofgren.house.gov/images/stories/pdf/letter_to_morton_4-7.pdf)>; Letter from Rep. Zoe Lofgren, Rep. Jared Polis & Rep. Jason Chaffetz to Eric Holder, Attorney General, and Secretary Napolitano (Aug. 30, 2012)  
<[http://lofgren.house.gov/images/Letter\\_to\\_AG&uscore;Holder\\_083012.pdf](http://lofgren.house.gov/images/Letter_to_AG&uscore;Holder_083012.pdf)>; Promoting Investment and Protecting Commerce Online: Legitimate Sites v. Parasites. Part 1: Hearing Before the H. Comm. on the Judiciary, Subcomm. on Intellectual Property, Competition, and the Internet, 112th Cong. 37 (2011) (statement of David Sohn, Senior Policy Counsel, Center for Democracy & Technology, raising concerns about mitigating factors and overbreadth not being adequately considered) <[http://judiciary.house.gov/hearings/hear\\_03142011.html](http://judiciary.house.gov/hearings/hear_03142011.html)>; David Makarewicz, 5 Reasons Why the US Domain Name Seizures Are Unconstitutional, TorrentFreak (Mar. 12, 2011) <<http://torrentfreak.com/5-reasons-why-the-us-domain-seizures-are-unconstitutional-110312/>>.

<sup>313</sup> See 18 U.S.C. §983(c)(1).

<sup>314</sup> See Promoting Investment and Protecting Commerce Online: Legitimate Sites v. Parasites, Part II: Hearings Before the H. Subcomm. on Intellectual Property, Competition, and the Internet, 112th Cong. 117 (2011) (statement of John Morton, Director, ICE).

<sup>315</sup> See Immigration and Customs Enforcement News Release: ICE Seizes 82 Website Domains Involved in Selling Counterfeit Goods as Part of Cyber Monday Crackdown (Nov. 29, 2010) <<http://www.ice.gov/news/releases/1011/101129washington.htm>>.

<sup>316</sup> See Mike Masnick, More & Bigger Mistakes Discovered In Homeland Security’s Domain Seizures, Techdirt (Dec. 22, 2010)  
<<http://www.techdirt.com/articles/20101222/02112912376/more-bigger-mistakes-discovered-homeland-securitys-domain-seizures.shtml>>.

<sup>317</sup> See Ben Sisario, Piracy Fight Shuts Down Music Blogs, N.Y. Times (Dec. 13, 2010)  
<[http://www.nytimes.com/2010/12/14/business/media/14music.html?\\_r=1&](http://www.nytimes.com/2010/12/14/business/media/14music.html?_r=1&)>.

Even after this mistake was revealed within a few weeks by the *New York Times*,<sup>318</sup> the government delayed more than a year before unceremoniously returning the domain.<sup>319</sup> As later unsealed documents would reveal, the delay resulted from ICE waiting for the RIAA to provide evidence establishing that the postings of the songs were illegal.<sup>320</sup> Such evidence never materialized.<sup>321</sup> The owner and users of the blog lost more than a year of activity without justification.<sup>322</sup> And while the government asserts that it “followed all proper procedure,”<sup>323</sup> it is difficult to see how this episode accords with justice.

In February 2011, ICE’s joint operation with the Department of Justice’s Child Exploitation and Obscenity Section executed “seizure warrants against 10 domain names of websites engaged in the advertisement and distribution of child pornography.”<sup>324</sup> While pursuing a laudable goal, ICE agents mistakenly seized all domains registered under mooo.com, a registry that allows individuals and small businesses to register “username.moos.com” subdomains. As a result, all 84,000 moos.com subdomains were redirected to a website warning:

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<sup>318</sup> See *id.*

<sup>319</sup> See David Kravets, *Feds Seized Hip-Hop Site for a Year, Waiting for Proof of Infringement*, *Wired* (May 3, 2012) <<http://www.wired.com/threatlevel/2012/05/weak-evidence-seizure/>>; Mike Masnick, *Breaking News: Feds Falsely Censor Popular Blog For Over A Year, Deny All Due Process, Hide All Details*, *Techdirt* (Dec. 8, 2011) <<http://www.techdirt.com/articles/20111208/08225217010/breaking-news-feds-falsely-censor-popular-blog-over-year-deny-all-due-process-hide-all-details.shtml>>.

<sup>320</sup> See Mike Masnick, *RIAA Tries To Downplay Its Role In The Feds’ Unjustifiable Censorship of Dajaz1*, *Techdirt* (May 8, 2012) (hereinafter cited as “Unjustifiable Censorship”) <<http://www.techdirt.com/articles/20120507/16073718821/riaa-tries-to-downplay-its-role-feds-unjustifiable-censorship-dajaz1.shtml>>; Mike Masnick, *Judge Lets Feds Censor Blog For Over A Year So The RIAA Could Take Its Sweet Time*, *Techdirt* (May 3, 2012) <<http://www.techdirt.com/articles/20120502/16575418746/judge-lets-feds-censor-blog-over-year-so-riaa-could-take-its-sweet-time.shtml>>.

<sup>321</sup> See Ben Sisario, *Hip-Hop Copyright Case Had Little Explanation*, *N.Y. Times* (May 6, 2012) <[http://www.nytimes.com/2012/05/07/business/media/hip-hop-site-dajaz1s-copyright-case-ends-in-confusion.html?\\_r=3&](http://www.nytimes.com/2012/05/07/business/media/hip-hop-site-dajaz1s-copyright-case-ends-in-confusion.html?_r=3&)>.

<sup>322</sup> See Mike Masnick, *Breaking News: Feds Falsely Censor Popular Blog For Over A Year, Deny All Due Process, Hide All Details*, *Techdirt* (Dec. 8, 2011) <<http://www.techdirt.com/articles/20111208/08225217010/breaking-news-feds-falsely-censor-popular-blog-over-year-deny-all-due-process-hide-all-details.shtml>>.

<sup>323</sup> See Sisario, *supra* n. <*Hip-Hop Copyright Case Had Little Explanation*, *N.Y. Times* (May 6, 2012)>. Counsel for Dajaz1.com questions that assertion. See *Unjustifiable Censorship*, *supra* n. \_\_\_.

<sup>324</sup> See Joint DHS-DOJ “Operation Protect Our Children” Seizes Website Domains Involved in Advertising and Distributing Child Pornography (Feb. 15, 2011) <<http://www.dhs.gov/news/2011/02/15/joint-dhs-doj-operation-protect-our-children-seizes-website-domains-involved>>; Operation Protect Our Children, *Wikipedia* <[http://en.wikipedia.org/wiki/Operation\\_Protect\\_Our\\_Children](http://en.wikipedia.org/wiki/Operation_Protect_Our_Children)>.

This domain name has been seized by ICE – Homeland Security Investigations pursuant to a seizure warrant issued by a United States District Court under the authority of Title 18 U.S.C. 2254.

Advertisement, distribution, transportation, receipt, and possession of child pornography constitute federal crimes that carry penalties for first time offenders of up to 30 years in federal prison, a \$250,000 fine, forfeiture and restitution.<sup>325</sup>

ICE later released a statement notice explaining that “[d]uring the course of a joint DHS and DOJ law enforcement operation targeting 10 websites providing explicit child pornographic content, a higher level domain name and linked sites were inadvertently seized for a period of time.”<sup>326</sup> Although the websites were restored, the owners lost three days of activity and could well have been injured by the suggestion that their website was associated with child pornography.<sup>327</sup>

These incidents, even if exceptional, illustrate problems with the framework of public enforcement in the Internet Age. Although some view the entire government domain name seizure effort as fundamentally misguided,<sup>328</sup> I believe that government enforcement can and should play a substantial role in copyright protection in the Internet Age. The government is uniquely situated to act quickly and effectively. It can also address the collective action problem posed by websites that can infringe indiscriminately across wide swaths of expressive creativity. And unlike private enforcement, public enforcement brings in the element of prosecutorial discretion.

Independent filmmakers like Ellen Seidler or even substantial motion picture studios have little chance against vast infringing enterprises like MegaUpload or the Pirate Bay. And any gains they achieve in curbing piracy will largely fall to others. Enforcement in the Internet Age presents a classic free rider problem. Content owners that wait by the sideline will reap comparable gains to those that incur enforcement costs. Thus, the government can act as an efficient collective enforcement institution. But in order to harness these comparative advantages over private enforcement, the government must earn the respect of the public. It must deal fairly with all affected parties and exercise prosecutorial discretion in a neutral manner.

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<sup>325</sup> See Steven Mostyn, 84,000 Websites Wrongly Culled for Child Pornography, *The Tech Herald* (Feb. 28, 2011) <<http://www.thetechherald.com/articles/84-000-websites-wrongly-culled-for-child-pornography/12837/>>.

<sup>326</sup> See Thomas Claburn, ICE Confirms Inadvertent Web Site Seizures, *Information Week* (Feb. 18, 2011) <<http://www.informationweek.com/security/vulnerabilities/ice-confirms-inadvertent-web-site-seizur/229218959>>.

<sup>327</sup> See *id.*; Corynne McSherry, ICE Seizures Raising New Speech Concerns, *EFF* (Feb. 16, 2011) <<https://www.eff.org/deeplinks/2011/02/ice-seizures-raising-new-speech-concerns>>.

<sup>328</sup> See Corynne McSherry, ICE Seizures Raising New Speech Concerns, *EFF* (Feb. 16, 2011) <<https://www.eff.org/deeplinks/2011/02/ice-seizures-raising-new-speech-concerns>>.

The entire copyright public enforcement enterprise needs to re-thought from the standpoints of building public acceptance and sustained effective progress. I recommend a three-pronged approach for establishing legitimacy, balance, and effectiveness: (1) the development of a hybrid public enforcement model to augment criminal enforcement that integrates stronger due process and civil law elements; (2) expanded efforts to work across the content and technology sectors to identify consensual cross-industry solutions to enforcement challenges; and (3) more transparent and balanced approaches to international copyright protection.

### **1. A Balanced Public Enforcement Process**

The existing enforcement institutions have developed largely through a criminal law framework that is not well tailored to the complex and evolving online copyright enforcement challenges or the importance of public acceptance of the copyright system in the Internet Age. While the criminal model be appropriate for dealing with warez rings,<sup>329</sup> it is too heavy-handed for many policing Internet activities.

I propose that rather than viewing public enforcement of copyright through the traditional criminal law lens, we view government enforcement more generally as a complement to private enforcement – as a means for dealing with those problems that cannot be handled effectively through private infringement actions. Those problems include pursuing infringing websites targeting U.S. interests that are beyond U.S. jurisdiction, confronting infringing websites that affect a wide swath of copyright owners (thereby creating a collective action problem), and combating infringing activities that require rapid response. The enforcement procedures should be matched to the particularities of these problems.

It is beyond the scope of this lecture to explore all of the design details of an optimal regime, but I will trace the main contours. Outside of those contexts in which urgent action might be required – for example, where a film that has not yet been released or is in first-run theatrical release is being pirated or where the operators of a pirate website are likely to be out of reach of private enforcers or judgment-proof – the government should provide target websites with an opportunity to respond to a seizure request. Moreover, those requesting seizure should bear the costs of false positives. The government should institute a bonding mechanism that to fund compensation for those website owners who are inappropriately targeted.<sup>330</sup> Such procedures would discourage excessive enforcement and afford those wrongly accused with more than a bureaucratic “never mind.” It would also introduce safeguards against excessive enforcement.

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<sup>329</sup> Professor Goldman questions the effectiveness of criminal enforcement of warez rings. See Goldman, *supra* n. \_\_\_, at \_\_\_-\_\_\_. While his observations make sense, it is not clear that there is a good enforcement alternative. Furthermore, there likely has been a deterrent effect, even if such rings continue to evolve.

<sup>330</sup> A provision analogous to 17 U.S.C. § 512(f) providing for liability for those who misuse the DMCA notice and takedown procedure would make sense. As noted below, however, see *infra* <>, the § 512(f) process could be improved.

More generally, the costs of these operations ought to be shared among the illegal operators (to the extent that their assets can be reached) and the beneficiaries of the enforcement activities – the content industries. Thus, recoveries of assets in enforcement proceedings as well as a modest revenue-based fee on those industries that stand to benefit from a collective enforcement effort could provide sustainable funding for government copyright enforcement efforts. Although the public-at-large should benefit from a better functioning copyright system, the public might not view this initiative as a high priority. Raising the costs of public copyright enforcement would provide a market check on the need for such efforts. If affected industries are not willing contribute to such efforts, then perhaps the need is not so acute.

At the same time, the government should strive for transparency and insulation from undue influence in carrying out these activities.<sup>331</sup> There can be serious appearances of impropriety when the government engages in secretive enforcement activities with industry organizations whose members stand to gain from public enforcement.<sup>332</sup> The enforcement process requires evidence from the affected parties. But safeguards should be put in place to ensure that the investigative process is objective and responsibly administered. Full contemporaneous transparency would obviously not work for sting operations and some other urgent enforcement activities, but the complaint process, pertinent evidence, and interaction with complainants ought to be available where feasible to operate as a check on the exercise of government power.

In the end, government copyright enforcement should build trust in the copyright system and government institutions. Tone, transparency, and willingness to admit and provide compensation for mistakes should be the highest order. Flawed enforcement efforts reinforce larger concerns about government trampling of free expression and due process rights. Dajazl.com’s lawyer characterized the treatment of his client – who was subjected to secret proceedings – as a form of “digital Guantanamo.”<sup>333</sup> When the government makes mistakes, it should own up to them and make recompense. Copyright enforcement is not a sensitive national security issue. The worst that can happen is that a film reaches illicit channels before its theatrical release, which while costly to the producers of the film, is not life threatening. Outside the realm of serious criminal activity, public copyright enforcement should be a civil process that balances harms to copyright owners and harms to website operators.

## **2. Working Collaboratively Across the Content and Technology Sectors**

The government can also play an effective role in facilitating cross-industry efforts to address copyright enforcement challenges.<sup>334</sup> Such agreements provide alternatives to costly

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<sup>331</sup> See Kopel, *supra* n. \_\_\_, at \_\_\_-\_\_\_.

<sup>332</sup> See, e.g., *Unjustifiable Censorship*, *supra* n. \_\_\_; McSherry, *supra* n. \_\_\_.

<sup>333</sup> See *Unjustifiable Censorship*, *supra* n. \_\_\_.

<sup>334</sup> See Peter S. Menell, *Design for Symbiosis: Promoting More Harmonious Paths for Technological Innovators and Expressive Creators in the Internet Age*, 55 *Communications of the ACM*, No. 5, 30-32 (May 2012).

litigation<sup>335</sup> and legislative provisions that become obsolete.<sup>336</sup> As legitimate Internet content distribution models have emerged, many more technology companies stand to gain from consumers accessing content from legitimate sources. Authorized vendors – such as iTunes, Amazon, YouTube, Netflix, and Spotify – experience greater traffic and commerce to the extent that illegal alternatives are harder to access. ISPs can better manage their traffic when consumers access content from legitimate sources. As ISPs integrate distribution and content businesses, they will see even greater direct benefits from reduced piracy.<sup>337</sup>

The cross-industry effort to establish the Principles for User Generated Content Services encouraged the development and implementation of effective filtering technologies for user-upload websites.<sup>338</sup> Although Google did not formally join this initiative, the ContentID system that it deployed for YouTube follows the UGC Principles. In March 2011, Youku.com, China’s

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<sup>335</sup> Epic litigations over user-generated content websites and Google book search, see *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011), illustrate how adversarial processes can drag out, drain coffers, and hamper introduction of innovative technologies.

<sup>336</sup> The DMCA failed to anticipate the development of Web 2.0 services, resulting in expensive and inconclusive litigation.

<sup>337</sup> Following the 2011 merger of Comcast, a cable and Internet company, and NBC Universal, a content company, Comcast’s CEO acknowledged a shift in outlook on online copyright enforcement. See Kenneth Corbin, *Comcast Set to Enter Copyright Wars*, *Datamation.com* (Jan. 27, 2010) <<http://www.datamation.com/cnews/article.php/3861096/Comcast-Set-to-Enter-Copyright-Wars.htm> (quoting Brian Roberts: “We are now going to be on both sides of [the whole question of piracy].”)>. Similarly, Sony Corporation, which prevailed in the hard-fought battle over the video cassette recorder, *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), took a more conciliatory approach to piracy concerns after it acquired motion picture and record labels in the late 1980s. See *Sony Completes \$3.4 Billion Acquisition of Columbia, L.A. Times* (Nov. 8, 1989) (noting the acquisition of Columbia Pictures Entertainment Inc., the film and television studio) <[http://articles.latimes.com/1989-11-08/business/fi-1040\\_1\\_columbia-pictures](http://articles.latimes.com/1989-11-08/business/fi-1040_1_columbia-pictures)>; Columbia Records, Wikipedia (noting that Sony acquired Columbia Records in 1988) <[http://en.wikipedia.org/wiki/Columbia\\_Records](http://en.wikipedia.org/wiki/Columbia_Records)>. Rather than litigate over digital audio tape technology, Sony collaborated with content owners in crafting the Audio Home Recording Act of 1992. See Pub. L. No. 102-563, 106 Stat. 4237 (codified as amended at 17 U.S.C. §§ 1001-1010).

Scholars have criticized legislative deal-making as political capture. See Lewis Kurlantzick & Jacqueline E. Pennino, *The Audio Home Recording Act of 1992 and the Formation of Copyright Policy*, 45 *J. Copyright Soc’y U.S.A.* 497 (1998); see generally Jessica Litman, *Copyright Legislation and Technological Change*, 68 *Or. L. Rev.* 275 (1989). Compromises growing from cross-industry mergers, however, are more likely to promote social welfare than backroom deals with one industry group. The larger concern is activating and involving diffuse and less well-organized interests. See Mancur Olson, *The Logic of Collective Action* (1971). The Internet has awakened and helped to organize more of those interests.

<sup>338</sup> See *The Principles for User Generated Content Services: A Middle-Ground Approach to Cyber-Governance*, 121 *Harv. L. Rev.* 1387 (2008).

leading Internet television company, joined the initiative.<sup>339</sup> This is a particularly encouraging development in light of the special challenges of addressing piracy in China.<sup>340</sup>

The Intellectual Property Enforcement Coordinator has encouraged development of memoranda of understanding and comparable initiatives aimed at preventing enforcement problems and costly litigation.<sup>341</sup> In June 2011, major credit card companies and payment processors reached an agreement on voluntary best practices to reduce sales of counterfeit and pirated goods.<sup>342</sup> The best practices are designed to cut off financial services to websites distributing infringing goods. The agreement provides mechanisms to investigate complaints and remove payment services from sites that continue to operate unlawfully. It also provides appeal mechanisms during and after the investigation phase and both before and after any action is taken.<sup>343</sup>

In July 2011, leading ISPs (AT&T, Comcast, Cablevision, Verizon, and Time Warner Cable) and major and independent music labels and movie studios reached an agreement to reduce online piracy through what has been called “graduated response.”<sup>344</sup> Under the agreement, ISPs will notify subscribers, through a series of alerts, when their Internet service accounts appear to be misused for infringement on peer-to-peer networks. The agreement contains safeguards to

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<sup>339</sup> See Press Release: Youku Joins Broad Coalition in Support of UGC Principles (Mar. 7, 2011) <<http://ir.youku.com/phoenix.zhtml?c=241246&p=irol-newsArticle&id=1536305>>.

<sup>340</sup> See Vincent Brodbeck, *Using the Carrot, Not the Stick: Streaming Media and Curbing Digital Piracy in China*, 19 B.U. J. Sci. & Tech. L. 127 (2013).

<sup>341</sup> See U.S. Intellectual Property Enforcement Coordinator, 2011 Joint Strategic Plan on Intellectual Property Enforcement 6, 46-47 (Mar. 2012) <[http://www.whitehouse.gov/sites/default/files/omb/IPEC/ipec\\_annual\\_report\\_mar2012.pdf](http://www.whitehouse.gov/sites/default/files/omb/IPEC/ipec_annual_report_mar2012.pdf)>; U.S. Intellectual Property Enforcement Coordinator, 2013 Joint Strategic Plan on Intellectual Property Enforcement 36 (June 2013) (hereinafter cited as “IPEC 2013 Joint Strategic Plan”) <<http://www.whitehouse.gov/sites/default/files/omb/IPEC/2013-us-ipec-joint-strategic-plan.pdf>>.

<sup>342</sup> See U.S. Intellectual Property Enforcement Coordinator, 2011 Joint Strategic Plan on Intellectual Property Enforcement 46 (Mar. 2012) <[http://www.whitehouse.gov/sites/default/files/omb/IPEC/ipec\\_annual\\_report\\_mar2012.pdf](http://www.whitehouse.gov/sites/default/files/omb/IPEC/ipec_annual_report_mar2012.pdf)>

<sup>343</sup> Andrew Bridges, attorney for Dajaz1.com, notes that his law firm has “observed a number of instances in which companies received threats of termination based on accusations by rights holders and had to argue for their continued participation in the payment networks.” See Andrew P. Bridges, “SOPA Didn’t Die. It Just Became Soft SOPA.” Fenwick & West 2013 Summer Bulletin 3

<[http://www.fenwick.com/FenwickDocuments/IP\\_Bulletin\\_Summer\\_2013.pdf](http://www.fenwick.com/FenwickDocuments/IP_Bulletin_Summer_2013.pdf)>. Mr. Bridges does not indicate, however, the extent to which this initiative has reduced piracy. It remains to be seen whether this approach will provide a better balance in the marketplace.

<sup>344</sup> See Memorandum of Understanding (July 26, 2011) <<http://www.copyrightinformation.org/sites/default/files/Memorandum%20of%20Understanding.pdf>>; See Annemarie Bridy, *Graduated Response American Style: “Six Strikes” Measured Against Five Norms*, 23 Fordham Intell. Prop. Media & Ent. L.J. 1 (2012).

ensure the accuracy of detection methods and afford users opportunities to challenge accusations of improper activity. Professor Annemarie Bridy sees the initiative in mixed terms:

On the positive side, it does not involve content blocking or filtering, and it is unlikely to result in even a temporary suspension of Internet access for any accused repeat infringer. In addition, it does not require ISPs to monitor subscriber traffic or to turn over identifying information about individual subscribers to copyright owners. Finally, it provides an opportunity to appeal a finding of repeat infringement to an independent reviewer before any sanction is imposed, without foreclosing the possibility of judicial process.

On the negative side, there are insufficient safeguards in [copyright alert system] to insure the accuracy of allegations of infringement, the fairness of the independent review process, and the independence and expertise of the various “independent experts” the MOU requires [the Center for Copyright Information] to consult. Moreover, there is no way for the public to know whether the program is meeting the goals established for it in the MOU.<sup>345</sup>

It remains to be seen whether this approach will achieve its goals, but there can be little doubt that it offers a more balanced approach to illegal file-sharing than the mass litigation that unfolded from 2003 through 2008. As I discuss below,<sup>346</sup> I would encourage the industries to take a more conciliatory approach than graduated response – what I call graduated embrace.

In July 2013, the IPEC announced promulgation of “Best Practices for Ad Networks to Address Piracy and Counterfeiting”<sup>347</sup> by the Interactive Advertising Bureau and leading ad networks.<sup>348</sup> As noted by Susan Molinari, Google’s Vice President for Public Policy and Government Relations,

[u]nder these best practices, Ad Networks will maintain and post policies prohibiting websites that are principally dedicated to selling counterfeit goods or engaging in copyright piracy from participating in the Ad Network’s advertising programs. By working across the industry, these best practices should help reduce

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<sup>345</sup> See Bridy, *supra* n. \_\_\_, at 67.

<sup>346</sup> See *infra* < >.

<sup>347</sup> See “Best Practices for Ad Networks to Address Piracy and Counterfeiting” <<http://2013ippractices.com/bestpracticesguidelinesforadnetworkstoaddresspiracyandcounterfeiting.html>>

<sup>348</sup> Victoria Espinel, “Coming Together to Combat Online Piracy and Counterfeiting,” Office of Management and Budget (July 15, 2013) (announcing that 24/7 Media, Adtegrity, AOL, Condé Nast, Google, Microsoft, SpotXchange, and Yahoo!, with the support of the Internet Advertising Bureau, collaborated in establishing self-regulating best practices for their ad networks) <<http://www.whitehouse.gov/blog/2013/07/15/coming-together-combat-online-piracy-and-counterfeiting>>.

the financial incentives for pirate sites by cutting off their revenue supply while maintaining a healthy Internet and promoting innovation.<sup>349</sup>

This initiative promises a less draconian, more flexible approach to piracy enforcement.

### **3. Balanced International Efforts to Promote Copyright Protection**

A third prong of public enforcement concerns international initiatives, ranging from foreign enforcement cooperation and indiction efforts to copyright and trade treaties. IPEC and NIPRCC coordinate with INTERPOL and foreign enforcement agencies to investigate and enforce copyright laws.<sup>350</sup> IPEC, the Patent and Trademark Office (PTO), and the U.S. Trade Representative (USTR) play central roles in promoting enforcement of U.S. intellectual property rights abroad through trade policy tools.<sup>351</sup> The USTR conducts an annual compliance review of intellectual property protection and market access practices in foreign countries.<sup>352</sup>

The negotiation of international trade agreements relating to intellectual property enforcement has been vigorously criticized for lack of transparency and public participation as well as substantive flaws.<sup>353</sup> These problems undermine public support for international enforcement initiatives.

More importantly, the U.S. has tended to treat international IP and trade treaties much the way the recording industry treated consumers following the emergence of peer-to-peer technology – as enforcement problems.<sup>354</sup> Much of the rhetoric surrounding the issue emphasizes expressive

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<sup>349</sup> See Susan Molinari, Ad Networks Agree on Industry Best Practices to Combat Piracy and Counterfeiting, Google Public Policy Blog (Jul. 15, 2013)

<<http://googlepublicpolicy.blogspot.com/2013/07/ad-networks-agree-on-industry-best.html>>.

<sup>350</sup> See National Intellectual Property Rights Coordination Center, About Us Partners <<http://www.iprcenter.gov/about-us>>; IPEC 2013 Joint Strategic Plan, supra n. \_\_, at 25-26, 30-31.

<sup>351</sup> See IPEC 2013 Joint Strategic Plan, supra n. \_\_, at 27-30.

<sup>352</sup> The USTR's annual report is conducted pursuant to Section 182 of the Trade Act of 1974, as amended by the Omnibus Trade and Competitiveness Act of 1988 and the Uruguay Round Agreements Act. See Office of the United States Trade Representative, 2013 Special 301 Report (May 2013)

<<http://www.ustr.gov/sites/default/files/05012013%202013%20Special%20301%20Report.pdf>>.

<sup>353</sup> See Michael Blakeney, Covert International Intellectual Property Legislation: The Ignoble Origins of the Anti-counterfeiting Trade Agreement (ACTA), 21 Mich. St. Int'l. L. Rev. 87 (2013); Michael Geist, ACTA's State of Play: Looking Beyond Transparency, 26 Am. U. Int'l L. Rev. 543 (2011); Eddan Katz & Gwen Hinze, The Impact of the Anti-Counterfeiting Trade Agreement on the Knowledge Economy: The Accountability of the Office of the U.S. Trade Representative for the Creation of IP Enforcement Norms Through Executive Trade Agreements, 35 Yale J. Int'l L. Online 24 (2009).

<sup>354</sup> This is not surprising in view of the political economy of copyright policy. The major content industries perceive these issues through a narrow and myopic lens. They have taken the

creativity as an export/balance of trade issue for our nation; not as a critical economic and social policy for all nations. If the U.S. wants the developing world to respect intellectual property protection, those nations need to have a stake other than as paying consumers.

As nations develop domestic creative industries, they are more receptive to embracing laws protecting content of other nations<sup>355</sup> – a lesson the United States appears to have forgotten. Charles Dickens was initially welcomed on his tour of the United States in the 1840s as a hero of the common man.<sup>356</sup> The press and the public turned on him, however, as he sought to use this platform to promote copyright protection for foreign (as well as domestic) authors.<sup>357</sup>

It was only after the U.S. developed a robust market for home-grown expressive creativity that international protection became a priority.<sup>358</sup> U.S. treaty and trade negotiators should celebrate and nurture Bollywood, Nollywood, and other creative communities as a primary focus for achieving global copyright protection. The U.S. should not be seen as an IP bully on the international stage but rather as a genuine partner willing to lend a hand up to nations willing to support their creative industries.<sup>359</sup> Such a policy has the added bonus of promoting free expression and democratic ideals.

### **c. Whistleblower Bounties**

As the challenge of online file-sharing has developed, technology companies have advocated pursuing bad actors rather than those who develop innovative technologies.<sup>360</sup>

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expedient course of emphasizing domestic employment concerns and balance of trade as opposed to promoting expressive creativity.

<sup>355</sup> See Aubert J. Clark, *The Movement for International Copyright in Nineteenth-Century America* (1960) (observing that the United States did afford intellectual property legislation for non-U.S. citizens until its economy developed).

<sup>356</sup> See Sherri L. Burr, *The Piracy Gap: Protecting Intellectual Property in an Era of Artistic Creativity and Technological Change*, 33 *Willamette L. Rev.* 245, 248 (1997).

<sup>357</sup> See Gerhard Joseph, *Charles Dickens, International Copyright, and the Discretionary Silence of Martin Chuzzlewit*, 10 *Cardozo Arts & Ent. L.J.* 523 (1992); See Edward G. Hudon, *Literary Piracy, Charles Dickens and the American Copyright Law*, 50 *A.B.A. J.* 1157 (1964); Lawrence H. Houtchens, *Charles Dickens and International Copyright*, 13 *Am. Literature* 18 (1941); James J. Barnes, *Authors, Publishers and Politicians: The Quest for an Anglo-American Copyright Agreement 1815-1854* (1974).

<sup>358</sup> See Clark, *supra* n. \_\_\_, (observing that the United States did afford intellectual property legislation for non-U.S. citizens until its economy developed).

<sup>359</sup> See Sean Pager, *Accentuating the Positive: Building Capacity for Creative Industries into the Development Agenda for Global Intellectual Property Law*, 28 *Am. Univ. Int'l L. Rev.* 223 (2012).

<sup>360</sup> See Mark Lemley & Anthony Reese, *Reducing Digital Copyright Enforcement Without Restricting Innovation*, 56 *Stan. L. Rev.* 1345 (2004).

Unfortunately, it is often difficult to separate the good actors from the bad.<sup>361</sup> In the context of technologies like user-generated content web portals or book search, it is often exceedingly difficult to know where the line is drawn. The *Sony* staple article of commerce doctrine, DMCA OSP safe harbors, and fair use doctrine can be difficult to navigate.

In some cases, however, the line between legal and illegal activity is relatively easy to ascertain but the intent and actions of the actors can be illusive. Take, for example, the case of Grooveshark, a popular online music streaming service that offers a broad music catalog, including major label releases. Although Grooveshark does not have licenses from the copyright owners, it asserts that it is insulated from liability because it merely hosts these files at the behest of users and expeditiously removes copyrighted works for which it lacks authorization when it receives legitimate takedown requests.<sup>362</sup> Putting aside whether the DMCA safe harbor extends this far,<sup>363</sup> the service would clearly run afoul of copyright law if Grooveshark employees knowingly uploaded copyrighted music to the service.

So imagine if a Grooveshark employee were to acknowledge that

[w]e are assigned a predetermined amount of weekly uploads to the system and get a small extra bonus if we manage to go above that (not easy). The assignments are assumed as direct orders from the top to the bottom, we don't just volunteer to 'enhance' the Grooveshark database.<sup>364</sup>

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<sup>361</sup> See Jane C. Ginsburg, Separating the *Sony* Sheep from the *Grokster* Goats: Reckoning the Future Business Plans of Copyright-Dependent Technology Entrepreneurs, 50 *Ariz. L. Rev.* 577 (2008).

<sup>362</sup> See Mike Masnick, Grooveshark Insists It's Legal; Points Out That Using DMCA Safe Harbors Is Not Illegal, *techdirt* (Apr. 20, 2011) <<http://www.techdirt.com/articles/20110419/11434013962/grooveshark-insists-its-legal-points-out-that-using-dmca-safe-harbors-is-not-illegal.shtml>>.

<sup>363</sup> Grooveshark contends that the prevalence of major label hits being promoted by its "Popular" button does not send up any "red flag" signaling apparent infringing activity. According to one of Grooveshark's vice presidents, the "popular list" is merely "an automated list of songs, based on day-to-day activity on our site." "This isn't a list that we are going out of our way to put together. We have really no direct control of the songs that pop up in the 'popular' section." Perhaps Grooveshark employees, including those maintaining the website, never monitor that page or traffic on the site. Perhaps they don't know that many of the most popular artists are on major record labels that are suing them for copyright infringement. That would be astonishing for a company that advertises itself as "the world's largest international community of music lovers" that is actively seeking licensing deals from record labels. Or perhaps they are willfully blind to what's going on. See Peter S. Menell, Jumping the Grooveshark (Dec. 21, 2011) <[http://www.mediainstitute.org/new\\_site/IPI/2011/122111.php](http://www.mediainstitute.org/new_site/IPI/2011/122111.php)>.

<sup>364</sup> See Ben Sisario, Digital Notes: Grooveshark Copyright Suit and Its Unusual Evidence, *N.Y. Times* (Jan. 18, 2012) <<http://mediadecoder.blogs.nytimes.com/2012/01/18/digital-notes-grooveshark-copyright-suit-and-its-unusual-evidence/>>.

This statement, if true, would establish that Grooveshark was not eligible for the DMCA safe harbor and was directly liable for copyright infringement. The statement was posted to *Digital Music News*, a music and tech industry news blog, by a person purporting to be an anonymous Grooveshark employee.<sup>365</sup> Grooveshark served *Digital Media News* with a subpoena seeking information about the identities of the poster as well as correspondence with the major record labels. *Digital Media News* refused to comply on First Amendment grounds. The litigation between record labels and Grooveshark has languished for several years.

Another enforcement problem concerns darknets<sup>366</sup> and private torrent sites,<sup>367</sup> which use anonymizing technology and invitation-based screening to avoid detection. Such activity operates below general search engine radar and hence is significantly more difficult to detect. The effects of such activity on content markets are likely to be smaller because files are not accessible to the public-at-large. Furthermore, the individuals that participate in these channels are technology savvy and especially resistant to having their digital freedom limited. Nonetheless, their activity violates copyright protection and potentially seeds the spread of unauthorized copies into more public channels.

Traditional copyright enforcement lacks the tools to surface these violations effectively. One solution would be to reward those with information about illegal activity who come forward with pertinent evidence. The False Claims Act (FCA)<sup>368</sup> offers a potentially useful model.<sup>369</sup> This statute uses the prospect of gaining a share of eventual recovery from enterprises that defraud the government as a mechanism to elicit evidence of fraud. While the particularities of the FCA could not be carried over to copyright enforcement entirely, the use of bounties or rewards for information used in enforcement has been extrapolated to private software copyright enforcement. The Business Software Alliance (BSA) and the Software and Information Industry

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<sup>365</sup> See Sisario, *supra* n. \_\_\_.

<sup>366</sup> See Peter Biddle, Paul England, Marcus Peinado, and Bryan Willman, *The Darknet and the Future of Content Distribution*, ACM Workshop on Digital Rights Management. (Nov 2002) <<http://msl1.mit.edu/ESD10/docs/darknet5.pdf>>.

<sup>367</sup> See Bodó Balázs, *Set the Fox to Watch the Geese: Voluntary IP Regimes in Piratical File-Sharing Communities*, in M. Fredriksson & J. Arvanitakis (Eds.), *Piracy: Leakages from Modernity* (2013) <<http://ssrn.com/abstract=2261679>>; Andy, *Why Private Torrent Sites Have Strict Copyright Enforcement Rules*, *TorrentFreak* (May 11, 2013) (explaining that “private torrent sites” – of which there are possibly thousands – utilize invite-only walls so as to prevent detection) <<http://torrentfreak.com/why-private-torrent-sites-have-strict-copyright-enforcement-rules-130511/>>.

<sup>368</sup> See False Claims Act, ch. 67, 12 Stat. 696 (1863) (current version at 31 U.S.C. §§ 3729-3733); see generally Claire M. Sylvia, *The False Claims Act: Fraud Against the Government* (2d ed. 2010).

<sup>369</sup> See Patricia Meador and Elizabeth S. Warren, *The False Claims Act: A Civil War Relic Evolves into a Modern Weapon*, 65 *Tenn. L. Rev.* 455 (1998)

Alliance (SIIA) offer bounties to those who report software piracy.<sup>370</sup> This has facilitated direct enforcement and likely deterred infringing activity.<sup>371</sup>

## 2. Promoting Cumulative Creativity

Beyond these structural and substantive adjustments to copyright's enforcement regime, Congress can better promote creativity by updating copyright law to facilitate building upon the stock of copyrighted works. In some contexts, this can be accomplished by adjusting copyright law's default rules to make it easier for follow-on creators to license underlying works. In others, this can be accomplished by curtailing the scope of rights in underlying works in ways that will not discourage primary incentives. Many of copyright's rules developed for an analog age stand in the way of rapid creative advance made possible by digital technology. New technologies remove many of the historic impediments to dissemination of research and development of new works that build upon the old. Loosening several of copyright law's protection doctrines while making minimal demands on copyright owners to maintain up-to-date digital records of their ownership interests could greatly increase the value of existing works while unleashing a vast wave of new creativity. This section highlights a non-exhaustive range of promising reform possibilities.

### i. Academic Research

Copyright law's expansive subject matter and broad rights sweep academic scholarship into the same bucket as J.K. Rowling novels and much else, notwithstanding the stark motivational differences between these categories of writing. Novelists rely on the market to support their craft. They rely on royalties (sometimes advanced by publishers). If their books don't sell, they don't get paid. Academics, by contrast, get paid a salary to do academic research and write articles. They do not earn royalties from sales of the journals containing their works.

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<sup>370</sup> See Mark Malven, Technology: Software Piracy Watchdogs Offer Up to \$1 million Bounty to Corporate Whistleblowers, *Inside Counsel* (Nov. 19, 2010) <<http://www.insidecounsel.com/2010/11/19/technology-software-piracy-watchdogs-offer-up-to-1>>; Ken Fisher, BSA Announces \$1 Million Reward for Piracy Snitches, *arstechnica* (Jul. 2, 2007) <<http://arstechnica.com/tech-policy/2007/07/bsa-announces-1-million-award-for-piracy-snitches/>>. The BSA and SIIA provide online forms for reporting software piracy. See BSA <<https://reporting.bsa.org/r/report/add.aspx?src=us&ln=en-us>>; See SIIA <<https://www.sii.net/piracy/report/report.asp?>>.

<sup>371</sup> See Whistleblowers Can Be Rewarded For Turning In Boss For Computer Crimes, *CBS Bay Area* (Sep. 5, 2013) (reporting that the BSA settled eight piracy cases in the U.S. last year involving more than \$2.5 million in pirated software and that a percentage of the fines go to informants as a reward) <<http://sanfrancisco.cbslocal.com/2013/09/25/whistleblowers-can-be-rewarded-for-turning-in-boss-for-computer-crimes/>>; Robert J. Scott, BSA | The Software Alliance "Whistleblower" Radio Ads Focus on Omaha, Portland, Salt Lake City, and Tampa, *PRWeb* (Mar. 12, 2013) (offering audit services in response to the advertisements soliciting whistleblowers) <<http://www.prweb.com/releases/2013/3/prweb10521211.htm>>.

Yet for much of the history of copyright protection, these differences did not present much of a problem. The costs of publishing, marketing, and distribution scholarly journals required funding that copyright protection helped to generate. The revenues from selling academic journals helped to support the professional societies that peer-reviewed these works. Copyright protection supported this infrastructure. In this way, copyright indirectly fostered academic scholarship, but it did so through monopoly pricing and limitations of access.

Now that advances in digital technology have largely eliminated the costs of publishing, marketing, and distributing scholarly journals, the case for copyright protection of academic scholarship is much attenuated if not eliminated.<sup>372</sup> In fact, copyright protection can delay the spread of academic research which can have undesirable effects on research, access to medicine, and a large range of social purposes.<sup>373</sup>

The low cost of distributing academic scholarship and scientific research has fueled a vast open access movement.<sup>374</sup> The Internet provided a quantum leap in open access publishing, which continues to grow rapidly. The Public Library of Science (PLoS) hosts a family of science journals.<sup>375</sup> The Social Science Research Network has become a central repository for a wide range of social science, humanities, business, and legal scholarship.<sup>376</sup> The Directory of Open Access Journals lists nearly 10,000 journals across 122 nations making available over 1.5 million articles.<sup>377</sup> Many open source publications utilize Creative Commons licenses that authorize uses that might otherwise be restricted by copyright law.<sup>378</sup>

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<sup>372</sup> See Jorge L. Contreras, *Confronting the Crisis in Scientific Publishing: Latency, Licensing, and Access*, 53 Santa Clara L. Rev. 491 (2013); Steven Shavell, *Should Copyright of Academic Works be Abolished?*, 2 J. Legal Analysis 301 (2010); Jessica Litman, *The Economics of Open Access Law Publishing*, 10 Lewis & Clark L. Rev. 779 (2006); Theodore C. Bergstrom, *Free Labor for Costly Journals?*, 15 J. Econ. Persp. 183 (2001).

<sup>373</sup> See Sean Flynn, Aidan Hollis, & Mike Palmedo, *An Economic Justification for Open Access to Essential Medicine Patents in Developing Countries*, 37 J.L. Med. & Ethics 184 (2009).

<sup>374</sup> See Mikael Laakso, Patrik Welling, Helena Bukvova, Linus Nyman, Bo-Christer Björk, and Turid Hedlund, *The Development of Open Access Journal Publishing from 1993 to 2009*, 6 PLoS ONE 1 (2011)

<<http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0020961>>. Peter Suber maintains a timeline of the open access movement, tracing policies back several decades. See *Timeline of the Open Access Movement* <<http://oad.simmons.edu/oadwiki/Timeline>>

<sup>375</sup> See Public Library of Science, <<http://www.plos.org/>>.

<sup>376</sup> See Social Science Research Network <<http://www.ssrn.com/>>. Its slogan – “Tomorrow’s Research Today” – captures a key benefit of online and open dissemination: speed.

<sup>377</sup> See Directory of Open Access Journals (data based on October 2013) <<http://www.doaj.org/>>.

<sup>378</sup> See Creative Commons, <<http://creativecommons.org/>>. For example, PLoS applies the Creative Commons Attribution (CC BY) license, under which authors retain ownership of the copyright for their content, but allow anyone to download, reuse, reprint, modify, distribute

The National Academies Press, publisher for the National Academy of Sciences, Institute of Medicine, and other arms of the National Academies, has provided free online full-text editions of their books alongside priced, printed editions since 1994. The National Academies Press sees free online access as a means to promote print sales.<sup>379</sup>

Although open access continues to expand and blunt the overreach of copyright law's default protection scheme for academic research, the continued availability, scope, and duration of copyright protection deserves careful reconsideration. Copyright protection for academic research increasingly serves purposes contrary to copyright's purpose of promoting progress in technological innovation and expressive creativity. Commercial publishers have raised journal prices and slowed the spread of knowledge.

This is not to say the solution is easy. For example, it might be difficult to distinguish between journal articles, for which copyright law no longer serves valuable purposes, and academic books, which do rely on copyright protection (and compensate authors). But in view of the dramatic changes that digital technology has brought to publishing, the time is ripe to re-examine copyright law's treatment of academic research – a field in which rapid and unrestricted dissemination is particularly vital to promoting progress and economic motivations diverge from the underlying assumptions of the copyright system.

## **ii. Digital Archiving and Search**

Within a short time, Internet technology created a vast repository of knowledge that could be searched quickly and effortlessly from anywhere. Yet much of the most valuable knowledge remains outside the Internet – in books, journals, and other documents.

Google's bold announcement in December 2004 that it intended to scan, digitize, and make universally searchable the collections of leading libraries<sup>380</sup> promised to bring the timeless aspirations of enlightened societies within reach. The project offered the beginning of a new era for scholars, authors, and other users of recorded knowledge. For public domain works, users would be able to retrieve and download the full documents. For works still under copyright protection, Google would provide a few sentences surrounding the search term as well as information about where the work could be procured legally (publisher sites, bookstores, and libraries). Just a few years ago, the cost and time required to digitize and render searchable ten percent of the vast stock of written human knowledge was thought to be prohibitive. Yet Google

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and/or copy the content as long as the original authors and source are cited. No further permission is required from the authors or the publishers to make these uses.

<sup>379</sup> See Open Access, Wikipedia <[http://en.wikipedia.org/wiki/Open\\_access](http://en.wikipedia.org/wiki/Open_access)>.

<sup>380</sup> See Press Release, Google, Google Checks Out Library Books (Dec. 14, 2004) <[http://www.google.com/press/pressrel/print\\_library.html](http://www.google.com/press/pressrel/print_library.html)>.

committed to making extensive collections of some of the world's leading libraries available within less than a decade and without any public expenditure.<sup>381</sup>

Shortly after Google's announcement, leading publishers and authors complained that Google's project infringed their copyrights and requested that Google delay scanning any copyright protected works until an agreement could be negotiated.<sup>382</sup> The Authors Guild, followed shortly by five commercial publishers, brought suit alleging that Google's Book Search Project infringed their copyrights "by unlawfully reproducing and publicly distributing and displaying copies of such works."<sup>383</sup> The President of the American Association of Publishers asserted that while "Google Print Library could help many authors get more exposure and maybe even sell more books, authors and publishers should not be asked to waive their long-held rights so that Google can profit from this venture."<sup>384</sup>

Ironically, authors and publishers stand to gain tremendously from having their works indexed and searchable through Google's Book Project. Many publishers have authorized Google to include their works. Nick Taylor, a successful author and former president of the Authors Guild, offered the following vignette:

Last fall, not long after the Authors Guild sued Google for copyright infringement in its library scanning program, an author approached me at a cocktail party. His name is Warren Adler, and he wrote *The War of the Roses*, among many other excellent novels. 'What you're doing is all wrong,' he said. By scanning our books, making them searchable online and providing links to bookstores, Google was letting people find them and perhaps buy them. Objecting to that kind of exposure was like objecting to sunlight on flowers. He was so committed to this point of view that he had had all of his books digitized and made available online.<sup>385</sup>

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<sup>381</sup> Google projects that it can scan thirty-two million volumes in ten years time. Jeffrey Toobin, *Google's Moon Shot*, *New Yorker*, Feb. 5, 2007, at 30. While Google has not disclosed an estimated cost of scanning thirty-two million volumes, some estimate it will cost \$750 million. Jonathan Band, *The Google Library Project: Both Sides of the Story*, 1 *Plagiary* 6, 13 (2006), available at <http://quod.lib.umich.edu/p/plag/images/5240451.0001.002.pdf>. Other estimates put the cost at as little as \$10 per volume. Elisabeth Hanratty, *Google Library: Beyond Fair Use?*, 2005 *Duke L. & Tech. Rev.* 0010, ¶1 (2005), available at <http://www.law.duke.edu/journals/dltr/articles/2005dltr0010.html>.

<sup>382</sup> See Chris Gaither, *Google Puts Book Copying on Hold*, *L.A. Times*, Aug. 13, 2005, at C1 (noting that publishers felt an opt out option would not protect their copyrights).

<sup>383</sup> Complaint at ¶38, *McGraw-Hill Cos. v. Google, Inc.*, No. 05-CV-8881, 2005 WL 2778878 (S.D.N.Y. Oct. 19, 2005).

<sup>384</sup> Press Release, *Assoc. of Am. Publishers, Publishers Sue Google Over Plans To Digitize Books* (Oct. 19, 2005), available at <http://www.publishers.org/press/releases.cfm?PressReleaseArticleID=292>.

<sup>385</sup> See Nick Taylor, *Manges Lecture: The Prospects for Copyright in a Bookless World*, 30 *Colum. J.L. & Arts* 185, 187-88 (2007).

Taylor also invoked Google’s General Counsel’s point that information wants to be discovered. Nonetheless, he defended the lawsuit not as a way to stop Google’s project, but rather as a way for authors to get paid.<sup>386</sup>

After eight years of costly litigation, it remains unclear whether the authors will get paid. What is clear is that the public’s access to this valuable functionality has been delayed and authors and publishers have likely lost out on additional book sales. Rather than endure further legal wrangling over whether Google’s Book Search Project qualifies as fair use, Congress should confront the potential opportunities and risks of digital technology preemptively and directly to strike the appropriate balance between protection of works of authorship on the one hand and accessibility and preservation on the other.<sup>387</sup> By focusing on the economic, social, and cultural benefits of building a comprehensive publicly searchable database of literary and artistic works, Congress can effectuate the overarching purposes of “promoting progress” and preserving human knowledge without sacrificing the beneficial economic incentives afforded by copyright law. A carefully crafted safe harbor, with appropriate safeguards to prevent piracy of in-copyright works, would fuel markets for copyrighted works while making accessible the vast stock of knowledge to current scholars and authors and preserving the largest possible record for future generations.

### **iii. Orphan Works**

The functioning of the copyright system relies on the market not only to support primary creators, but also as a means of promoting cumulative creativity. Every generation of artists draws inspiration and borrows from those who came before. This is especially true in the digital age as a result of the extraordinary tools available for integrating and remixing prior creativity into new works. The fair use doctrine provides some leeway for such borrowing, but it is notoriously vague. What constitutes transformation is often in the eye of the beholder. And cumulative creators cannot easily gauge the perceptions of yet-to-be-determined judges or jurors. Furthermore, cumulative creators might want to go beyond that uncertain line, in which case they need permission from the copyright owner.

In order for such transactions to occur, the follow-on creator must be able to identify and communicate with the copyright owner. But due to the long duration of copyright and the absence of requirements to register and maintain copyright ownership records, locating the appropriate counter-party(ies) can be a costly, and in some cases, impossible task. This tracing difficulty has come to be known as the orphan work problem – works that might still be copyright-protected but for which the cumulative creator cannot, after a good faith effort, locate the rightful copyright owner to seek permission. It is particularly vexing for historians and documentary filmmakers who seek to use vintage photographs in telling the most vivid and accurate account. The problem also arises for rap and hip hop artists seeking to incorporate prior

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<sup>386</sup> See *id.* at 188.

<sup>387</sup> See Peter S. Menell, Knowledge Accessibility and Preservation Policy for the Digital Age, 44 *Hous. L. Rev.* 1013 (2007).

sound recordings. These cumulative creators face a stark choice: omit the work or run the risk of an owner emerging and facing defense costs, possible injunctive relief blocking their entire integrated work, and potentially large statutory damages.

The Copyright Office has been exploring this issue for a long time,<sup>388</sup> but without tangible results. The impasse continues to plague the creative ecosystem and sends a disheartening message to new generations of creators.

The copyright system is often analogized to property systems. Those systems, however, not only create rights but also impose responsibilities on property owners.<sup>389</sup> Absentee owners risk loss of their rights. Copyright law needs to do the same. Scholars have proposed many constructive correctives, such as re-instituting formalities,<sup>390</sup> expanding immunities,<sup>391</sup> and developing a copyright analog to adverse possession.<sup>392</sup>

Advances in digital identification technologies over the past decade have created promising means for addressing the orphan work problem. These technologies have the ability to identify audio, textual, graphic, and visual works at low cost and with high precision. Audible Magic Corporation was among the first to develop sophisticated acoustic fingerprinting technologies. It now provides audio and content identification tools to companies seeking to track digital media and identify and block infringing content. Shazam offers an application that allows a mobile phone to identify almost any sound recording. YouTube's ContentID (AudioID and VideoID) system enables content owners to block, monetize, and track usage of their works within the YouTube's expanding online ecosystem.

These technologies provide the framework for a universal copyright notification system. If all copyrighted works were digitized and registered, potential users of copyrighted works could employ relatively inexpensive and now commonplace optical scanning and audio devices to identify the copyright status of any registered work.

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<sup>388</sup> See Maria A. Pallante, *Orphan Works & Mass Digitization: Obstacles & Opportunities*, 27 *Berkeley Tech. L.J.* 1251 (2012); U.S. Copyright Office, *Report on Orphan Works* (Jan. 2006) <<http://www.copyright.gov/orphan/orphan-report.pdf>>.

<sup>389</sup> See Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 *Duke L.J.* 1, 52-144 (2004); Jacqueline Lipton, *Information Property: Rights and Responsibilities*, 56 *Fla. L. Rev.* 135, 148 (2004).

<sup>390</sup> See Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 *Stan. L. Rev.* 485 (2004).

<sup>391</sup> See Lydia Pallas Loren, *Abandoning the Orphans: an Open Access Approach to Hostage Works*, 27 *Berkeley Tech. L.J.* 1431 (2012).

<sup>392</sup> See Katherine Moran Meeks, *Adverse Possession of Orphan Works*, 33 *Loy. L.A. Ent. L. Rev.* 1 (2012-13).

A mandatory copyright registration and digital deposit system would provide the foundation for a robust digital clearance system for copyright owners and users.<sup>393</sup> Suppose, for example, that a documentary filmmaker was seeking to use photographic works of unknown provenance. Under a decentralized safe harbor regime (and assuming no actual knowledge of the photograph's copyright status and ownership), the filmmaker would scan the work using specified technology. If the scan did not produce a match, then she would be able to use the work without fear of injunctive relief.<sup>394</sup> Furthermore, the scan would reduce costs in locating true owners if a universal registration system were in place. As with other orphan work proposals, various forms of liability rules could be developed (ranging from zero to fair market value) to address any legitimate copyright holder who comes forward.

#### **iv. Operationalizing Fair Use**

Copyright law's fair use is great in theory, but often unavailing in practice. The fair use doctrine recognizes "a privilege in others than the owner of the copyright"<sup>395</sup> constituting an implied consent by the author "to a reasonable use of his copyright works . . . as a necessary incident of the constitutional policy of promoting the progress of science and the useful arts."<sup>396</sup> The doctrine seeks to accommodate criticism, comment, news reporting, teaching, scholarship, and research, among other purposes. In practice, however, the doctrine's vague and subjective contours,<sup>397</sup> the lack of pre-clearance institutions,<sup>398</sup> financing and insurance concerns,<sup>399</sup> copyright's draconian remedial structure,<sup>400</sup> and the costs of litigation make it difficult for many

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<sup>393</sup> See Peter S. Menell & Michael J. Meurer, Notice Failure and Notice Externalities, 5 J. Leg. Anal. 1, 50-51 (2013).

<sup>394</sup> This system could create some problems for low resolution copies of works, but such concerns are likely to be manageable. Documentary filmmakers (and other users) have an incentive to obtain high quality versions of whatever they use. Although this system would not resolve fair use and bargaining breakdowns, it does resolve the problem of using untraceable works.

<sup>395</sup> 17 U.S.C. § 107.

<sup>396</sup> See *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 549 (1985).

<sup>397</sup> See 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 12.1, at 12:3 (3d ed. 2005) ("No copyright doctrine is less determinate than fair use."); David Nimmer, *The Fairest of Them All*, 66 *Law & Contemp. Probs.* 263, 263 (Winter/Spring 2003).

<sup>398</sup> See Menell & Meurer, *supra* n. \_\_\_, at 12, 24-25, 38.

<sup>399</sup> See MICHAEL C. DONALDSON, CLEARANCE AND COPYRIGHT: EVERYTHING YOU NEED TO KNOW FOR FILM AND TELEVISION 29 (3d ed. 2008) (warning that "[e]ven documentaries, which are usually in the public interest, should not cavalierly incorporate uncleared footage from the films of others. Clear your film clips with a license or solid fair-use opinion from an attorney approved by the E&O [Errors and Omissions] insurance companies in advance because lawsuits are expensive. It can be even more expensive to remove a section of your film at some point in the future if a court rules against you.").

<sup>400</sup> See Molly Van Houweling, *Distributive Values in Copyright*, 83 *Texas L. Rev.* 1535 (2005) (discussing disproportionate impact of copyright remedies on independent artists)

creators to rely on fair use.<sup>401</sup> Thus, a familiar refrain in professional creative communities is “if in doubt, leave it out.”

Fair use serves somewhat effectively in cases in which the uses are very modest and in a few distinct areas where the law is relatively clear.<sup>402</sup> But, by and large, the doctrine functions largely as a shield in litigation when defendants overlooked a potential clearance issue.<sup>403</sup>

Fair use is increasingly important for cumulative creativity in the Internet Age. Digital technology has empowered anyone to remix art and the Internet has opened vast content distribution channels. Creators no longer need to go through traditional professional gatekeepers – publishers, studios, broadcasters, and record labels. They can reach massive audience through all manner of user-generated content websites. Most of such activity will fly under the radar. Nonetheless, the potential copyright liability exposure can be substantial. Moreover, some budding creators will want to determine the line between permissible and impermissible conduct. Thus, the time is ripe to develop constructive tools for creators to go beyond mere guesswork in evaluating copyright risks involved in incorporating copyrighted works in their cumulative projects.

No solution can quickly, costlessly, and accurately resolve fair use determinations, but there are many promising reforms that can better balance the competing interests than the present system: (1) a “Fair Use Board” to afford creators the opportunity to pre-clear uses or at least obtain some immunity for uses that were favorably vetted by an expert body;<sup>404</sup> (2) reduced remedies or immunity for use of orphan works;<sup>405</sup> (3) bright-line “fair use harbors” to provide

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<sup>401</sup> See DONALDSON, *supra* n. \_\_\_, at 29, 363-67; PATRICIA AUFDERHEIDE & PETER JASZI, *UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS* (2004) (exploring the copyright-clearance challenges faced by documentary filmmakers); Nancy Ramsey, *The Hidden Cost of Documentaries*, N.Y. Times, (Oct. 16, 2005) (discussing the film *Tarnation*), <http://www.nytimes.com/2005/10/16/movies/16grams.html>.

<sup>402</sup> See Pamela Samuelson, *Unbundling Fair Uses*, 77 *Fordham L. Rev.* 2537 (2009).

<sup>403</sup> See, e.g., David Kravetts, *Hangover Tattoo Infringement Lawsuit Settles*, *Wired* (Jun. 22, 2011) <<http://www.wired.com/threatlevel/2011/06/tattoo-flap-settled/>>.

<sup>404</sup> See Michael W. Carroll, *Fixing Fair Use*, 85 *N.C. L. Rev.* 1087, 1123-27 (2007); David Nimmer, *A Modest Proposal to Streamline Fair Use Determinations*, 24 *Cardozo Arts & Ent. L.J.* 11, 12 (2006) (proposing a panel of “Fair Use Arbiters” appointed by the Register of Copyright); David A. Simon, *Teaching Without Infringement: A New Model for Educational Fair Use*, 20 *Fordham Intell. Prop. Media & Ent. L.J.* 453, 527-50 (2010) (proposing a more limited institution focused on evaluating fair education uses of copyrighted works); Jason Mazzone, *Administering Fair Use*, 51 *Wm. & Mary L. Rev.* 395, 415-21 (2009) (proposing two models of administrative regulation of fair use).

<sup>405</sup> See Joshua O. Mausner, *Copyright Orphan Works: A Multi-Pronged Solution to Solve a Harmful Market Inefficiency*, 12 *J. Tech. L. & Pol’y* 395, 398 (2007); *Orphan Works Act of 2006*, H.R. 5439, 109th Cong. (2006) (limiting remedies against users who “performed and

assurance in particular settings;<sup>406</sup> (4) using fee-shifting as a means of penalizing copyright owners who unreasonably withhold consent or pursue dubious infringement actions;<sup>407</sup> and (5) adjusting damage awards to reflect the uncertainty surrounding fair use law.<sup>408</sup> None of these proposals achieves all of the goals, but each of them could make the fair use doctrine more operational. Many of the reforms would be complementary.

#### **v. Experimental and Self-Expressive Use**

Digital technology has vastly expanded everyone's ability to engage with copyrighted works in their daily lives. Anyone can express themselves and their appreciation or disgust with the creative works of others through various modes of social media. This has brought forth a tremendous amount and range of fan fiction, web pages, videos, and other works that incorporate copyrighted material.<sup>409</sup> Such cumulative creativity runs smack into copyright law's right to prepare derivative works<sup>410</sup> as well as other so-called exclusive rights. The fact that social media can reach enormous audiences opens up such fan creativity to potentially significant liability.

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documented a reasonably diligent search in good faith to locate the owner of the infringed copyright"); cf. Register of Copyrights, Report on Orphan Works 95-112 (2006), available at <http://www.copyright.gov/orphan/orphan-report.pdf>.

<sup>406</sup> See Gideon Parchomovsky & Kevin Goldman, Fair Use Harbors, 93 Va. L. Rev. 1483 (2007).

<sup>407</sup> See Peter S. Menell & Ben Depoorter, Using Fee Shifting to Promote Fair Use and Fair Licensing, 102 Cal. L. Rev. \_\_ (forthcoming 2014).

<sup>408</sup> See Menell & Meurer, *supra* n. \_\_, at 45-46.

<sup>409</sup> See Steven A. Hetcher, Using Social Norms to Regulate Fan Fiction and Remix Culture, 157 U. Pa. L. Rev. 1869 (2009); Anupam Chander and Madhavi Sunder, Everyone's a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction as Fair Use, 95 Cal. L. Rev. 597 (2007); Rebecca Tushnet, Legal Fictions: Copyright, Fan Fiction, and a New Common Law, 17 Loy. L.A. Ent. L. Rev. 651 (1997). See, e.g., FanFiction.net <<http://www.fanfiction.net>>; Star Trek FanZines, Star Trek: The Original Series, <<http://www.sttos.net/sttos/eng/zines.php>>.

<sup>410</sup> See 17 U.S.C. § 106(2). The Copyright Act defines "derivative work" broadly to include:

a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work".

See 17 U.S.C. § 101.

The good news is that most copyright owners have not pursued the vast majority of fan creativity.<sup>411</sup> And for good reason. It is rarely a good idea to sue your customers.<sup>412</sup> In most contexts, fan fiction provides the owners of the original works with free online marketing and fan engagement. This sustains interest in the franchise<sup>413</sup> and increases demand for new works from the authorized source. Even putting aside the potential for adverse publicity, the cost of policing fan activity would be astronomical.

Many copyright owners draw the enforcement line at commercialization.<sup>414</sup> Lucasfilm pursues those who seek to commercialize *Star Wars* merchandise and other creative works.<sup>415</sup> Castle Rock Entertainment took action against the author and publisher of book containing trivia

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<sup>411</sup> See Edward Lee, Warming up to User-Generated Content, 2008 U. Ill. L. Rev. 1459 (2008).

<sup>412</sup> See, e.g., Kieren McCarty, Warner Brothers Scraps Harry Potter Legal Actions: Regrets Any Misunderstandings, *The Register* (Mar. 19, 2001) (reporting that “Warner Brothers appears to have extended the olive branch to the operators of all Harry Potter fan sites, following its decision to withdraw from legal action against [a 15-year-old fan]”) <[http://www.theregister.co.uk/2001/03/19/warner\\_bros\\_scraps\\_harry\\_potter/](http://www.theregister.co.uk/2001/03/19/warner_bros_scraps_harry_potter/)>.

<sup>413</sup> In 2007, Lucasfilm released tools to support fan-created remixes. Jeffrey Ulin, one of Lucasfilm’s attorneys, explained that the mash-ups are “part of keeping the love of ‘Star Wars’ and the franchise alive. We’re really trying to position ourselves for the next 30 years.” See Sarah McBride, Make-It-Yourself “Star Wars”: Lucasfilm Will Post Clips From Film Saga on the Web, Inviting Fans to Edit at Will, *Wall. St. J.* (Mar. 24, 2007) <<http://online.wsj.com/news/articles/SB117997273760812981>>.

<sup>414</sup> See *id.* (noting that Lucasfilm pursues those who seek to commercialize *Star Wars* merchandise and other creative works); see, e.g., Press Release, Lucasfilm Ltd., Lucasfilm Ltd. Wins Major Copyright Infringement Lawsuit Against Star Wars Stormtrooper Pirate (Oct. 11, 2006) <<http://www.lucasfilm.com/press/news/news20061011.html>>; *Lucasfilm Ltd v Media Market Group Ltd* 182 F Supp 2d 897 (N.D. Cal. 2002) (seeking to block a pornographic parody of *Star Wars*).

<sup>415</sup> See, e.g., Press Release, Lucasfilm Ltd., Lucasfilm Ltd. Wins Major Copyright Infringement Lawsuit Against Star Wars Stormtrooper Pirate (Oct. 11, 2006) <<http://www.lucasfilm.com/press/news/news20061011.html>>; *Lucasfilm Ltd v Media Market Group Ltd* 182 F Supp 2d 897 (N.D. Cal. 2002) (seeking to block a pornographic parody of *Star Wars*). (Full disclosure: I served as an expert witness on U.S. copyright law in the U.K. enforcement action. Lucasfilm prevailed in its effort to enforce the U.S. judgment against a prop maker from the first *Star Wars* film who started selling storm trooper costumes. Nonetheless, the U.K. Supreme Court denied Lucasfilm relief under the U.K. law on the ground that the costumes constituted industrial designs, protection for which expires after 25 years. See *Lucasfilm Ltd and others v. Ainsworth and another*, [2011] UKSC 39).

questions about the Seinfeld show.<sup>416</sup> Warner Bros sued Steven Vander Ark and the publisher of “The Lexicon,” an encyclopedia of Harry Potter trivia.<sup>417</sup>

Copyright law’s default rules should be reformed to insulate fans from liability for expressive, non-commercial activities. While express and tacit support for such engagement by major media companies has eased concerns about copyright infringement, a formal statutory safe harbor for non-commercial fan fiction and related activities (e.g., fan sites, Pinterest) would encourage more such activity as well as send an affirming message to new and existing generations of fans. The fair use doctrine does not provide clear enough authorization for this activity.

More generally, the copyright law ought to authorize, or at least cabin or eliminate statutory damages with respect to, non-commercial educational and experimental uses of copyrighted works. Often the best way to learn a musical instrument or develop artistic or creative writing skill is to imitate the works of others. Yet these acts, if publicly performed or recorded and uploaded to a social media website, create risk of copyright liability. The past decade indicates that copyright owners need not worry about these uses. Fan fiction has enriched their coffers. More importantly, there is no better way to promote progress than to nurture artistic, musical, and literary skills among the next generation of creators.

#### **vi. Photography of Public Art**

Copyright’s broad protection of pictorial, graphic, and sculptural works<sup>418</sup> create tension that makes little sense in a world in which much of the population is equipped with a phone camera that enables them to shoot photographs and video and immediately post them to all manner of social networking websites.<sup>419</sup> Anyone ought to be able to photograph their friends and family near public art and post the image on Facebook without risk of liability. Although fair use would likely govern these situations, copyright law ought to provide a clear carve-out.

Motion picture studios have long agonized over shooting “on location” out of concern for inadvertently capturing publicly viewable copyrighted works and having to fend off a lawsuit. The producers of “Batman Forever” learned this lesson the hard way when the artist who designed a streetwall and courtyard space sued for depiction of this “sculptural work” in the background of a few scenes in the film.<sup>420</sup> Although sculptors and billboard artists rarely pursue

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<sup>416</sup> See *Castle Rock Entm’t, Inc. v. Carol Publ’g Group*, 150 F.3d 132 (2d Cir. 1998).

<sup>417</sup> See *Warner Bros. Entertainment Inc. v. RDR Books*, 575 F.Supp.2d 513 (S.D.N.Y. 2008).

<sup>418</sup> See 17 U.S.C. §§ 101 (definition of “pictorial, graphic and sculptural works”); 102(a)(5).

<sup>419</sup> See Bryce Clayton Newell, *Freedom of Panorama: A Comparative Look at International Restrictions on Public Photography*, 44 *Creighton L. Rev.* 405 (2011).

<sup>420</sup> See *Leicester v. Warner Bros.*, 232 F.3d 1212 (9th Cir. 2000) (presenting a cautionary tale in which .

such claims – likely due to copyright’s *de minimis* and fair use doctrines<sup>421</sup> – the lack of a clear statutory exclusion for such activities imposes significant costs on the public and motion picture studios without any discernible benefit in terms of the incentives to create public art.

An analogous exemption was expressly built into copyright law when the U.S. extended protection to architectural works in 1990.<sup>422</sup> Section 120(a) provides:

Pictorial Representations Permitted.— The copyright in an architectural work that has been constructed does not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place.<sup>423</sup>

The legislative history explains that “[t]hese uses do not interfere with the normal exploitation of architectural works. Given the important public purpose served by these uses and the lack of harm to the copyright owner’s market, the Committee chose to provide an exemption, rather than rely on the doctrine of fair use, which requires ad hoc determinations.”<sup>424</sup> The House Report notes the benefits to tourism,<sup>425</sup> scholarly research,<sup>426</sup> and general public interest<sup>427</sup> and that it would not appreciably affect incentives to create the artistic work.<sup>428</sup>

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<sup>421</sup> See *Davis v. The Gap, Inc.*, 246 F.3d 152, 173(2d Cir. 2001) (observing that “[t]he *de minimis* doctrine is rarely discussed in copyright opinions because suits are rarely brought over trivial instances of copying”); Pierre N. Leval, Nimmer Lecture: Fair Use Rescued, 44 UCLA L. Rev. 1449, 1457-58 (1997) (noting that certain questions fall in the category of “[q]uestions that never need to be answered. If [they] did need to be answered, I believe the answer would be provided by the doctrine of *de minimis non curat lex . . .*”).

<sup>422</sup> See Architectural Works Copyright Protection Act, Pub. L. No. 101-650, § 706, 104 Stat. 5133 (1990) (codified at 17 U.S.C. §§ 101 102(a) 106 120 301(b)).

<sup>423</sup> 17 U.S.C. § 120(a).

<sup>424</sup> See H.R. Rep. 101-735 (Copyright Amendments Act of 1990), 1990 U.S.C.C.A.N. 6935, 6953.

<sup>425</sup> See *id.* (noting that “[m]illions of people visit our cities every year and take back home photographs, posters, and other pictorial representations of prominent works of architecture as a memory of their trip”).

<sup>426</sup> See *id.* (noting that “numerous scholarly books on architecture are based on the ability to use photographs of architectural works”).

<sup>427</sup> See *id.*; see also Architectural Design Prot.: Hearing on H.R. 3990 and H.R. 3991 Before the Subcomm. on Courts, Intell. Prop., and the Admin. of Justice of the House Comm. on the Judiciary, 101st Cong. 70-71 (1990) (statement of Ralph Oman, Register of Copyrights and Associate Librarian of Congress for Copyright Services) (noting that pictorial representations of architectural works “serve a valuable public interest”).

<sup>428</sup> See *id.* (noting that pictorial uses “do not interfere with the normal exploitation of architectural works” and “the lack of harm to the copyright owner’s market”); cf. Balganes, *supra* note 1.

Congress should extend this exemption to photographing of any publicly viewable art, perhaps subject to the limitation that the photographer is not making commercial use of a non-transformative reproduction – such as selling faithful reproductions as posters.<sup>429</sup> Museums and other institutions would retain the ability to restrict photography on their premises, but the permissibility of photographing in public spaces – which most people assume – would be codified in copyright law.

### **vii. Remix Compulsory License**

Even before digital technology spawned revolutionary changes in the *distribution* of copyrighted works, it supplied extraordinary tools for *creating* new works of authorship. Rap, Hip Hop, and Mash-up genres of music owe much to digital technology – synthesizers, drum machines, samplers, and music workstations.<sup>430</sup> As reflected in my “My Generation’s” fascination with mix tapes, the human desire to combine and remake predates digital technology. The development of synthesizers and sampling machines unleashed entirely new creative genres.

Hip Hop music traces its roots back to 1970s era DJs using dual turntables. Electronic dance music, disco, and industrial music followed in the 1980s. By the late 1980s, Rap artists were appropriating samples as the background for their poetic flourishes. Hip hop grew out of and expanded the genre.

Remixed music does not fit comfortably within copyright law’s “exclusive rights” regime. In what has been referred to as the “golden age of sampling,”<sup>431</sup> spanning from roughly 1987 to 1992, American Hip Hop music gained a foothold in the culture without attracting much scrutiny from owners of the copyrighted works being sampled.<sup>432</sup> It was an underground genre that did not attract much notice from the major labels. But with its growing success, record labels began to take notice and the “golden age” came to a close with copyright lawsuits and demand letters.<sup>433</sup>

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supra n.\_\_\_\_ (arguing for copyright law to consider foreseeability in analyzing the scope of copyright protection).

<sup>429</sup> See Andrew Inesi, *Images of Public Places: Extending the Copyright Exemption for Pictorial Representations of Architectural Works to Other Copyrighted Works*, 13 *J. Intell. Prop. L.* 61, 86-89 (2005).

<sup>430</sup> See *Sampler (musical instrument)*, Wikipedia  
<[http://en.wikipedia.org/wiki/Sampler\\_%28musical\\_instrument%29](http://en.wikipedia.org/wiki/Sampler_%28musical_instrument%29)>; *Remix*, Wikipedia  
<<http://en.wikipedia.org/wiki/Remix>>.

<sup>431</sup> See MCLEOD & DICOLA, supra n.\_\_\_\_, at 19-26.

<sup>432</sup> Robert Levine, *Steal This Hook? D.J. Skirts Copyright Law*, *N.Y. Times E1* (Aug. 7, 2008) (noting that the Beastie Boys and Public Enemy introduced their sampled compositions “when record companies were paying less attention to these legal issues”).

<sup>433</sup> The Sixth Circuit’s dubious interpretation of the Copyright Act in *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390 (6th Cir. 2004), concluded with the admonition: “Get a license or do not sample.” See *id.* at 398.

The era of unrestrained sampling passed even as the Hip Hop genre went mainstream. The major labels acquired and developed Hip Hop sub-labels and developed customs and practices for licensing digital samples.<sup>434</sup> Many Hip Hop entrepreneurs welcomed commercial opportunities.<sup>435</sup>

The extra layer of negotiation imposed by seeking copyright permission, however, constrained the genre and many of the pioneers left or altered their sampling practices to live within copyright law's "exclusive rights" constraints. Based upon extensive interviews, Kembrew McLeod and Peter DiCola concluded that "[b]y the 1990s, high costs, difficulties negotiating licenses, and outright refusals made it effectively impossible for certain kinds of music to be made legally, especially albums containing hundreds of fragments."<sup>436</sup>

But as Napster demonstrated, America's cultural freedom is not so easily cabined. Telling artists that they cannot do something likely propelled further hacking of the copyright system. Within a few years, Greg Gillis, who performs under the name "Girl Talk," was building a following entirely outside of the copyright system. His first album, *Secret Diary*, appeared in 2002 on the Illegal Art label.<sup>437</sup> His break-through third album, *Night Ripper* (2006), would go on to critical acclaim<sup>438</sup> and earned a Wired Magazine Rave Award.<sup>439</sup>

Just when it seems like mashups are played out — or playing dead, thanks to litigious record labels — along comes Girl Talk (née Gregg Gillis). For last year's album *Night Ripper*, the laptop mixologist used more than 250 samples from 167

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<sup>434</sup> Major record labels began signing Hip Hop artists as they developed fan bases. See Def Jam Recordings, Wikipedia <[http://en.wikipedia.org/wiki/Def\\_Jam\\_Recordings](http://en.wikipedia.org/wiki/Def_Jam_Recordings)>. The most successful Hip Hop artists were given sub-labels within the major record label umbrellas. See, e.g., Aftermath Entertainment, Wikipedia (describing Dr. Dre's sub-label within Universal Music Group).

<sup>435</sup> Cf. Susan Berfield, The CEO of Hip Hop, *Bus. Wk.*, Oct. 27, 2003, at 90 <<http://www.businessweek.com/stories/2003-10-26/the-ceo-of-hip-hop>>.

<sup>436</sup> See MCLEOD & DICOLA, *supra* n. \_\_ at 28.

<sup>437</sup> See Illegal Art, Wikipedia <[http://en.wikipedia.org/wiki/Illegal\\_Art](http://en.wikipedia.org/wiki/Illegal_Art)>.

<sup>438</sup> See Sean Fennessey, Girl Talk: Night Ripper (Illegal Art; 2006), *Pitchfork* (Jul. 17, 2006) (noting that "the idea that two songs blender-ized can recombine to create something wholly new is thrilling in theory, but the execution is usually sloppy or samey, either simply aligning two similar beat structures or pairing up two completely disparate tracks for the slapstick novelty of a jokey title," and then praising *Night Ripper* for "cram[ing] six or eight or 14 or 20 songs into frenetic rows, slicing fragments off 1980s pop, Dirty South rap, booty bass, and grunge, among countless other genres. Then he pieces together the voracious music fan's dream: a hulking hyper-mix designed to make you dance, wear out predictable ideas, and defy hopeless record-reviewing") <<http://pitchfork.com/reviews/albums/9208-night-ripper/>>.

<sup>439</sup> See Angela Watercutter, The 2007 Rave Awards: Music: The Synthesizer – Gregg Gillis | Girl Talk, *Wired* (Apr. 4, 2007) <[http://www.wired.com/culture/lifestyle/multimedia/2007/04/ss\\_raves?slide=10](http://www.wired.com/culture/lifestyle/multimedia/2007/04/ss_raves?slide=10)>.

artists. Raps by Ludacris rub up against a Boston riff, the Ying Yang Twins whisper over the Verve's 'Bittersweet Symphony.' As the album became an indie sensation, Gillis resigned himself to the inevitable cease-and-desist order. But it never materialized. 'Labels are starting to realize that something like Night Ripper isn't going to hurt their artists,' Gillis says. 'If anything, it will promote them.' Gillis is also famous for his uninhibited live shows — on YouTube, you can watch him crowdsurfing and stripping down to his skivvies between sessions spent pounding the keyboard of his Toshiba Satellite M115 laptop. And while the 25-year-old from Pittsburgh still has a day job as a biomedical engineer, he's also remixing tracks for major-label artists and planning his next album. 'I'm jumping on a plane to London to do a show with Beck and flying back to get in the cubicle Monday morning. It's pretty bizarre.'<sup>440</sup>

The Pitchfork review of *Night Ripper* concludes ominously: "[d]ue to its overwhelming number of unlicensed sources, *Night Ripper* is practically begging for court drama."<sup>441</sup>

Greg Gillis would give up his day job the following year and has enjoyed an extraordinary music career entirely outside of the copyright system.<sup>442</sup> Many other remix artists have followed his example, producing an entire musical genre that flourishes outside of copyright law's permission-based practices. Recording artists and record labels complain about such defiance, but few have been willing to test the limits of fair use. Remix artists earn their primary income from live shows. Copyright owners and remix artists have achieved a detente of sorts. One of the effects, however, has been to marginalize the copyright system and further reduce its relevance for the post-Napster generations.

This equilibrium strikes me as better than the nuclear option (mass litigation) and the lock down option (every use requiring permission), but suboptimal in a variety of respects. As a fan of Girl Talk's remixes, I appreciate both his creativity and the creativity of works on which his compositions are built. Both contribute value. In an idealized intellectual property system featuring cumulative creativity, society would likely share consumers' willingness to pay among

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<sup>440</sup> See *id.* My reproduction of the entirety of the Wired review may well exceed the fair use privilege. But including it in a scholarly work that amplifies the theme of remixing copyright law to better accommodate the Internet Age hopefully has a transformative character. And does Wired magazine want to pursue such an action? It seems to cut against a lot of their editorializing, but they could then feature our case in their "Threat Level" feature. See <<http://www.wired.com/threatlevel/>>. I'll run the risk.

<sup>441</sup> See Fennessey, *supra* n. \_\_\_.

<sup>442</sup> See D.X. Ferris, Gregg Gillis Talks About the Continuing Popularity of his Mashup Project, *Girl Talk*, *Riverfront Times* (Jan. 13, 2011) <<http://www.riverfronttimes.com/2011-01-13/music/girl-talk-interview-2011-gregg-gillis-tour-dates-st-louis-pageant/>>; Zachary Lazar, The 373-Hit Wonder, *N.Y. Times Mag.* 38 (Jan. 9, 2011) (noting that when Gillis released his latest album "All Day" for free download on the Internet, extremely heavy download traffic led to server crashes and headlines on MTV stating "Girl Talk Apologizes for Breaking the Internet").

the creative inputs.<sup>443</sup> But therein lies the rub. When we have a tremendous number of parties, each possessing “exclusive rights,” the transaction costs skyrocket.<sup>444</sup> We experienced such a system following the wave of copyright sampling cases in the early to mid 1990s and it constrained the creative ecosystem. Artists like Girl Talk have thrived only by exiting the system entirely.

A compulsory license for remix music potentially offers an attractive solution for all parties. Such a regime would not resolve the inevitably case-specific fair use questions, but it could offer a sweet spot in which copyright owners, remix artists, and fans could participate in a market-based system for more fairly allocating value among creators.<sup>445</sup> Such a system could provide a sustainable and adaptable ecosystem for the promoting art and commerce.

I envision such a system as an expansion of the Copyright Act’s § 115 cover license which permits anyone to record a musical composition that has previously been distributed to the public under the authority of the copyright owner upon the payment of a compulsory license determined by a formula specified in the statute. The current rate is 9.1¢ for a standard (5 minute or less) length song, with escalations for longer songs.<sup>446</sup> The remix compulsory license would need to go well beyond the § 115 license in several respects. First, it would have to afford remix artists the opportunity to alter the work.<sup>447</sup> Secondly, it would need to license the sound recording as well as the musical composition.

Under a hypothetical Remix Compulsory License Act (RCLA), a remix artist seeking to develop a sound recording that comprises more than 5 existing sound recordings would be eligible for a compulsory license by paying 18.2¢ for a 5 minute song (or less); with escalations for longer songs)) into the RCLA Fund. The basic idea is that the remixer would be building his or her work on both musical composition and sound recording works and hence the baseline for the entire work should be double the musical composition cover license rate. By making the compulsory license rate 100% of the baseline for just the musical composition copyright, the remixer would effectively be credited with half of the total value of the remixed work (assuming that the musical composition and sound recording copyrights were treated symmetrically). Thus, by paying 18.2¢, the remixer could clear all sample licenses needed for a mashup of 5 minutes (or less).

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<sup>443</sup> See Peter S. Menell & Suzanne Scotchmont, Intellectual Property Law 1476, 1499, HANDBOOK OF LAW AND ECONOMICS (A. Mitchell Polinsky & Steven Shavell eds. 2007).

<sup>444</sup> See MICHAEL HELLER, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES (2008).

<sup>445</sup> Cf. Menell & Depoorter, *supra* n. \_\_ (that creative artists typically care most about expressive freedom and getting their projects accomplished; and that many would prefer fair licensing over uncertain and costly litigation).

<sup>446</sup> See U.S. Copyright Office, Mechanical License Royalty Rates <<http://www.copyright.gov/carp/m200a.pdf>>.

<sup>447</sup> Section 115 does not permit cover artists to change the “basic melody or fundamental character of the work.” See 17 U.S.C. § 115.

In order to obtain the compulsory license, the remix artist would be required to register the remixed work with the Copyright Office along with a detailed, per second explication of what prior musical compositions and sound recordings were used. The Copyright Office would, through notice and comment rulemaking, develop formula for dividing revenue among the musical composition and sound recording owners. (The Copyright Office would also work with the music publishing and sound recording industries to develop a comprehensive database of protected works and tools for identifying owners of tracks that are sampled.) SoundExchange - which administers statutory licenses for sound recording copyrights and allocates revenues - would be responsible for allocating the RCLA Fund to eligible musical composition and sound recording owners.

In order to make this new regime effective, the RCLA would create some categorical fair use safe harbors and limitations. For example, the RCLA might categorically exempt any sample of less than 5 seconds from liability. The purposes of these fair use safe harbors and limitations would be to channel remix artists and consumers into a market for remix music.

I had the opportunity to test this proposal last spring. I was invited to moderate a panel on “Sampling, Mixes, & Mashups.”<sup>448</sup> We were fortunate to have not just the usual suspects – law professors and practicing attorneys – but two successful DJs who perform under the stage name “Rock-It! Scientists.”<sup>449</sup> With some trepidation, I tossed out the RCLA proposal to the DJs. They said that the model “would be appealing” to them; “it would be a direction for the industry to go.”<sup>450</sup>

I don’t want to suggest that RCLA would perfectly resolve the ethical, economic, and legal issues surrounding remix music. As things stand, DJs operate in a legal limbo and have found some profitable niches in the live performance marketplace. Traditional composers and recording artists don’t see direct compensation for this use of their work and complain about the distortion of their work,<sup>451</sup> yet they might enjoy some promotional benefits from having back catalog music discovered by new generations. Record label marketing staffs are operating in the background, feeding tracks to DJs and websites to promote label-released music. Music fans are

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<sup>448</sup> See 2013 Symposium: Copyright in the Digital Age, Stanford Technology Law Review <<http://stlr.stanford.edu/symposia/2013-copyright-digital-age/>>.

<sup>449</sup> See Rock-It! Scientists <<http://therockitscientists.com/>>.

<sup>450</sup> The panel is available on YouTube <<http://www.youtube.com/watch?v=u6uzlvhEs0U>>. My presentation of the proposal can be found the segment beginning at 7:01 and running to 11:09. The colloquy about the proposal can be found at 1:21:00 to 1:26:27. I also recommend the DJs discussion of how the major record labels tacitly support their works as a means of promoting their own releases. See segment from 1:15:34 to 1:21:00.

<sup>451</sup> Cf. Elizabeth Adeney, *The Sampling and Remix Dilemma: What Is the Role of Moral Rights in the Encouragement and Regulation of Derivative Creativity?*, 17 Deakin L. Rev. 335 (2012).

gravitating away from copyright-based markets and developing norms and practices that undermine the legitimacy of copyright protection.

Many scholars have come to see all remix art as fair use.<sup>452</sup> While I recognize the transformative aspect of this work, I worry that society risks losing a balanced ecosystem for fairly supporting and promoting the full range of creative inputs.<sup>453</sup> The blanket license system that developed for licensing musical compositions to radio broadcasters and other public performance institutions contributed to flourishing of musical creativity.<sup>454</sup> My hope in proposing the RCLA is that an analogous approach could provide a framework for constructive dialogue among all of the affected communities – traditional songwriters and recording artists, remix DJs, record labels, and music fans – about how to best promote creativity and creative freedom in the Internet Age.

### **viii. Enhanced Penalties for Abuse of the Notice and Takedown System**

The other side of the enforcement coin concerns abuse of the notice and takedown system. The DMCA afforded web users a cause of action for damages, including costs and attorneys' fees, incurred by the alleged infringer as a result of knowing material misrepresentation that a material posted to a website is infringing.<sup>455</sup> Unfortunately, this right has proven to be ineffective as a practical matter. Although the federal court rejected Universal Music Group's argument that it need not consider whether a use is fair in order to vindicate this right in Stephanie Lenz's action against Universal Music Group in the dispute regarding her dancing baby,<sup>456</sup> the resulting litigation costs and modest remedies warn off those unfairly accused of infringing copyright law from pursuing a misrepresentation claim.

Just as copyright law saw statutory damages as an appropriate tool for addressing under-enforcement of copyright protection and as a means to deter infringement, the argument can be

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<sup>452</sup> See Kerri Eble, *This Is a Remix: Remixing Music Copyright to Better Protect Mashup Artists*, 2013 U. Ill. L. Rev. 661 (2013); Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* 14 (2008).

<sup>453</sup> Cf. Robert M. Vrana, *The Remix Artist's Catch-22: A Proposal for Compulsory Licensing for Transformative, Sampling-based Music*, 68 Wash. & Lee L. Rev. 811 (2011).

<sup>454</sup> See Russell Sanjek & David Sanjek, *Pennies from Heaven: The American Popular Music Business in the Twentieth Century* (1996); Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 Calif. L. Rev. 1293, 1328-35 (1996) (explaining that "ASCAP's rise paralleled the growth of radio, and later television. From its original 9 members, the membership grew to 1,000 composers in 1941, 3,000 in 1958, 17,800 composers and 4,800 publishers in 1977, and over 31,000 composers and approximately 24,000 publishers [by 1996]").

<sup>455</sup> See 17 U.S.C. § 512(f).

<sup>456</sup> See *Lenz v. Universal Music Corp.*, 572 F.Supp.2d 1150 (N.D. Cal. 2008) (rejecting copyright owner's motion to dismiss on the grounds it was not required to consider the fair use doctrine in filing a takedown notice).

made that copyright law ought to provide enhanced penalties in order to deter improper takedown notices. Perhaps Congress should extend the same enforcement tools that it uses in § 504(c) – enabling victims of improper takedown requests to obtain up to \$150,000 per improper takedown notice.

As much as my 16 year old alter ego might love such a vindictive approach, I do not seriously propose imposing on copyright owners such an untethered damage remedy. But I do think that this thought experiment illustrates the imbalance of the present copyright enforcement regime. Congress should revisit statutory damages with an eye towards channeling consumers into the marketplace and discouraging copyright owners from chilling free speech and self-expression.

Copyright owners ought to be leading the charge to extend such an olive branch. Their industries are hurt and the reputation of the copyright system tarnished when companies pursue ridiculous takedown efforts. Content industries would gain far more in good will than they would lose in verdicts from such a change in the law.

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This set of proposals would offer hope to future generations of creators that copyright protection supports their desires while minimizing transaction costs and affording copyright owners fair compensation for their contributions to cumulative creativity. It also affords the public the ability to express themselves and engage with content without risk of liability. As the next section explores, some of the most promising and complementary adjustments to content ecosystems must come from changes in the content marketplace.

## **B. Market-Based Solutions**

The past decade established that legal sanctions alone cannot achieve compliance with copyright law.<sup>457</sup> In fact, aggressive enforcement may well have backfired.<sup>458</sup> Nor does

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<sup>457</sup> See Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U.J. Int'l L. & Pol. 219, 220, 234 (1997) (observing that the difficulties concerning gaining compliance with intellectual property law are typical of the problems involved in a wide variety of areas"; and that "reliance upon threats of punishment to enforce intellectual property laws is a strategy that is likely to be ineffective"); see generally Tom R. Tyler, *Why People Obey the Law* (1990).

<sup>458</sup> See Ben Depoorter, Alain Van Hiel, & Sven Vanneste, *supra* n. \_\_, at 1283-89; Måns Svensson & Stefan Larsson, *supra* n. \_\_; Jason R. Ingram & Sameer Hinduja, *supra* n. \_\_; Yuval Feldman & Janice Nadler, *supra* n. \_\_; Ben Depoorter & Sven Vanneste, *supra* n. \_\_; Justin Hughes, *On the Logic of Suing One's Customers and the Dilemma of Infringement-Based Business Models*, 22 *Cardozo Arts & Ent. L.J.* 725, 731-35 (2005) (discussing the music industry's lawsuits against individual consumers and their effect on deterring infringement and increasing awareness of copyright law); Steven A. Hetcher, *The Music Industry's Failed Attempt*

“educating” consumers seem to be much good either.<sup>459</sup> The legislative proposals that I have sketched are not ends unto themselves but rather more appropriate enforcement tools and default rules aimed at channeling consumers into robust markets for expressive creativity. In order to achieve these ends, however, the marketplace, social norms, and technological advance must pull in complementary directions.

Competition, technological advance, and market response to technological, social norm, and cultural disruption have spurred tremendous marketplace changes over the course of the past decade. Once the recording industry came to realize that it could not dictate the terms and conditions of digital channels, record labels and music publishers began to license a growing variety of online services. Many film and television copyright owners have expanded online availability of their works. These initiatives have vastly expanded the content marketplace and there is renewed optimism in content industries.

Yet there is still a tremendous amount that can be done to welcome the post-Napster generation to the marketplace. As explored earlier, there are inherent structural impediments to achieving a robust, user-friendly, and fair (to creators) marketplace – the dual vise of the music industry and film industry windowing orientation. Consumers will be more willing to participate in a marketplace that fairly rewards creators and affords easy access to what is already available on illegal websites.<sup>460</sup> Moreover, by re-plumbing revenue flows in the content industries fairly, content industries can look to recording artists to promote these platforms. As things stand, artists don’t see much point in advocating services that don’t provide them with much compensation. In a more robust marketplace with money flowing to artists in proportion to consumer demand,

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to Influence File Sharing Norms, 7 Vand. J. Ent. L. & Prac. 10 (2004); Tom R. Tyler & John M. Darley, Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account When Formulating Substantive Law, 28 Hofstra L. Rev. 707 (2000).

<sup>459</sup> A comprehensive study of piracy across a broad range of nations concluded that:

[w]e see no evidence that [clarifying for students that file-sharing of copyrighted music is piracy] will have any impact on practices. We see no real ‘education’ of the consumer to be done. . . . Efforts to stigmatize piracy have failed. . . . Although education is generally presented as a long-term investment in counteracting these attitudes, the lack of evidence for their effectiveness is striking.

See SOC. SCI. RESEARCH COUNCIL, MEDIA PIRACY IN EMERGING ECONOMIES 33-34 (Joe Karaganis ed., 2011).

<sup>460</sup> See Tyler, *supra* n. \_\_\_, at 234 (emphasizing the need “to create a moral climate that clearly associates various forms of intellectual property law with public morality”); Danwill David Schwender, Reducing Unauthorized Digital Downloading of Music by Obtaining Voluntary Compliance with Copyright Law Through the Removal of Corporate Power in the Recording Industry, 34 T. Jefferson L. Rev. 225 (2012).

creators can then focus their energies on their art and consumers and not on advertisers. It would produce a virtuous, self-reinforcing ecosystem. Intermediaries could earn more as the pie grows, although less as a percentage. New artists would see the potential for sustainable livelihoods tied to their ability to attract fans.

Thus, the next major breakthrough in building online content markets needs to come from establishing a transparency between creators and consumers and improving the accessibility of digital content. Structural impediments to these objectives undermine the overall economic performance of the content industries. This last section confronts these enormous challenges with two provocative, and hopefully constructive, approaches.

### **1. The Grand Kumbaya Experiment**

Act II closed with the image of a dual vise in which creators are squeezed between fans who do not participate in critical content markets and rapacious record labels that minimize artists' share of the revenue pie.<sup>461</sup> Even as extraordinary new technologies for accessing music online have become available, a vicious cycle has emerged in which some of the most popular artists have pulled their music. Moreover, artists have seen little reason to promote these platforms and some have denigrated them. The messages to consumers are: "The only reason to participate in these markets is because their convenience is worth the price"; "Don't expect artists to see any real income from your participation in the marketplace"; and "Copyright protection doesn't promote art, it merely enriches greedy corporations."

While overreaching by record labels was certainly true for "My Generation," record labels actually did more to support the creative environment in that technological age. They produced and recorded albums, manufactured product, marketed music, and distributed records. They orchestrated a complex supply chain, justifying a relatively large share of revenue. As noted in Act I, "My Generation" did not have much choice about whether to participate in the marketplace. If we wanted a record, we had to go through an authorized channel – whether a record store or a record club.

The recording industry still controls the online marketplace not because they carry out many of the essential economic functions of the supply chain<sup>462</sup> but because of the immense power that the legacy catalog confers. No online service can achieve economic viability without licenses to a substantial portion of the legacy collection. Even young fans want to be able to stream the classics. And through this power, the major record labels have structured online

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<sup>461</sup> See supra < >.

<sup>462</sup> Artists today will typically produce and deliver final product to a record label. Labels specialize in marketing. They have shifted to 360 deals as a way of controlling more of the total music revenue. Many artists go without major label representation. Unfortunately, they face the copyright/Internet paradox, see supra < >, and the power that major labels exercise over online music services.

royalties in such a way that their own artists but also independent artists are unlikely to see a fair share.

I realize that the concept of “fairness” is vague and subjective. What I am trying to get at is how the economic services would be valued in a truly competitive marketplace. Record labels used to have a primary role in that marketplace. A upstart artist had no chance of reaching a broad marketplace without a partner who could fund and produce a master recording, manufacture copies, market the recording and get radio air play, and ensure that there were sufficient units available in record stores at the time that the recording hit the air waves. Digital technology has largely eliminated most of those functions, which should mean two things: (1) the cost of recorded music should fall; and (2) the share going to the artist should rise. The former has come to fruition. The real cost of music has fallen substantially over the past several decades. But the latter ramification has not materialized. If anything, things have gotten worse.

A second critical economic point is that the total size of the pie depends on consumers’ perception of fairness. Compliance with the law – which translates into participation in authorized online content markets – depends on consumers’ views regarding the morality and legitimacy of the economic system. This is particularly true for online information goods which consumers can easily acquire illicitly.

Structural features of the music marketplace have stranded artists, labels, and consumers in a sub-optimal equilibrium. Many consumers remain outside of the marketplace – gaining music through file-sharing and assuaging any guilt with the thought that the artist would not see any significant compensation from the fan’s participation in the marketplace. Artists see little economic return for their efforts and labels’ revenues are depressed. Pundits tell consumers that the answer lies in concert tickets, advertising, and merchandise; freeconomics is the opiate of the masses. Yet the most valuable form of musical enjoyment – passive, on-demand streaming through portable devices – largely goes uncompensated.

The solution – even for record labels – lies in introducing fairness to artists into the online music marketplace. What artists, record labels, and technology companies have not recognized is that by failing to achieve a more equitable and transparent system for pricing and distributing revenue, society cannot reach the ideal point: widely adopted and fairly priced services that attract the vast numbers of consumers who enjoy recorded music. Such an equilibrium would staunch the piracy problem while alleviating pressure for punitive copyright remedies. As the post-Napster generation joins balanced content services, the problems that have been plaguing the content and technology companies subside.

Re-structuring the economic terms of trade in the music industry could potentially lift all boats. If artists could get a reasonable share of income from new services, consumers could be more readily enticed to the marketplace. Consumers could feel better about their market participation. Artists would start seeing serious income to the extent that fans streamed their songs. Labels would see greater income, even as their share of the pie were to fall. Technology companies would see a lessening of pressures to ramp up copyright enforcement. If online digital

services could grow from the anemic levels of today<sup>463</sup> by an order of magnitude – from 6 million paid subscribers to 60 million – then there would be more than enough for everyone to celebrate. And the enforcement concerns would recede.

The potential for re-shaping the music marketplace could be gauged through what I will call the “Grand Kumbaya Experiment.” What I have in mind is an Internet pledge of support for re-negotiating the revenue split between labels and artists if, and this is a big “if,” a large segment of consumers committed to participating in a state-of-the-art music service that fairly compensated artists. The technology for enabling consumers to have access to the full music catalog through a range of user-friendly devices now exists, as Spotify has demonstrated. What is lacking is an equitable way of distributing the revenues.

Interested consumers would go to a website to sign the pledge. They would conditionally provide their credit card information. The pledge would take the following form:

If by Dec. 31, 2014, 60 million fans worldwide commit to a premium music subscription service (of \$10 per month) that pays artists 50% of total gross revenue to be distributed based on streaming levels, then I agree to pay \$10 per month to participate in such service for at least a year.

If the goal were achieved, the recorded music industry would see \$7.2 billion per year from this one revenue source. The non-royalty costs of such a service would not be very high due to the wonders of digital technology. Total worldwide music industry revenue reached \$16.5 billion last year, only a modest portion of which comes from subscription services.<sup>464</sup> This bump alone would produce record growth in music industry revenues. As norms and practices evolved, such services could be expected to grow. And it is unlikely that consumers will drop the service after one year. Once consumers get used to these services, they tend to stick with them. Furthermore, if artists are getting a fairer shake, social norms would like reinforce remaining on such a service

Such an approach would have the ability to draw creative artists to the cause. Rather than staying on the sidelines or criticizing online services, artists would have economic motivation to encourage their fans to join the online marketplace. Technology companies should support these efforts as a means for increasing the marketplace for their services as well as constructive means for defusing pressure to ramp up copyright enforcement. President Obama could tout this initiative as a constructive and collaborative way of addressing a divisive economic issue. And

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<sup>463</sup> See Sloan, *supra* n.\_\_\_\_ (reporting that Spotify, the largest on-demand music service, had reached a 6 million paying customers worldwide as of March 2013).

<sup>464</sup> See Eric Pfanner, *Music Industry Sales Rise, and Digital Revenue Gets the Credit*, N.Y. Times (Feb. 26, 2013) <[http://www.nytimes.com/2013/02/27/technology/music-industry-records-first-revenue-increase-since-1999.html?\\_r=0](http://www.nytimes.com/2013/02/27/technology/music-industry-records-first-revenue-increase-since-1999.html?_r=0)>; International Federation of the Phonographic Industry, *IFPI Digital Music Report 2013: Engine of a Digital World* (2013) <<http://www.ifpi.org/content/library/dmr2013.pdf>>.

Jon Stewart and Steven Colbert could celebrate a solution to the hypocrisy that has abounded surrounding these issues.

The pledge could fail for two principal reasons. First, consumers might not be willing to participate. And if that were true, then at a minimum we would learn valuable information about where consumers' hearts lie. This problem has aspects of a classic collective action problem. My hope is that through a broad-based campaign, we would inspire and reveal the better side of human nature. I would hope to enlist President Obama, the Stewart/Colbert nations, the tech sector (Google, Facebook, Apple, Yahoo, and, of course, Spotify), as well as the Electronic Frontier Foundation to support the pledge. We could also encourage recording artists – Bob Dylan, Bruce Springsteen, Lady Gaga, Eminem, Peter Dinklage, Katy Perry, Dave Grohl, Lars Ulrich, . . . – to throw a “summer of love” series of free concerts calling attention to the pledge as a way for fans to show their commitment to building and sustaining a robust artist community.<sup>465</sup>

The second problem could arise if the pledge achieves its goal of gaining the commitment of 60 million fans worldwide to a much fairer music marketplace. There is nothing requiring record labels to renegotiate their deals with their recording artists or online services. I would, of course, like to see the labels make that commitment up-front. But even if they declined, shame and, more importantly, Wall Street, would come into play. One would hope that record labels would see more benefit in maximizing shareholder value than in thumbing their noses at recording artists and consumers.<sup>466</sup> But if the labels refused the pledge, Wall Street forces – such as famed corporate raider Carl Icahn or the technology sector – might sweep in to take over record labels and do what would be most beneficial to shareholders (as well as consumers, recording artists, and the public-at-large). Furthermore, policymakers would see that major label executives are holding back progress and be less supportive of their initiatives.

The Grand Kumbaya Music Internet pledge is akin to a collective and sustained Kickstarter campaign. It would function as a form of consumer collective action. Music fans would have a vehicle to communicate en masse their dissatisfaction with the current state of the music industry and their desire to participate in a more just music ecosystem. Whereas the massive online protest of SOPA communicated opposition to regulating the Internet, the Grand Kumbaya Music Internet pledge would speak to the virtues of an ethical copyright system for the Internet Age.

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<sup>465</sup> See Nathan Ingraham, Pink Floyd Drummer Sings Spotify's Praises, Says Streaming 'Might Work' for Artists, *The Verge* (Sep. 26, 2013) (quoting Nick Mason saying “[w]e’d like to see a standard rate of at least 50/ 50 split between the record company and the artist [for streaming revenues]”) <<http://www.theverge.com/2013/9/26/4774774/pink-floyd-drummer-sings-spotifys-praises>>

<sup>466</sup> See *id.* (reporting that Nick Mason expressed that both the labels and the artists would benefit from an increased presence by musicians on the board of record labels to make sure their voices are heard).

Hopefully the time is ripe for fans, artists, tech companies, and record labels to come together in writing a new social contract for the music industry. Even noted adversaries Lars Ulrich, Metallica's drummer and one of the music industry's most outspoken critics of Napster (and file-sharing),<sup>467</sup> and Sean Parker, the Internet entrepreneur who co-founded Napster, have recently found common ground.<sup>468</sup> Having Metallica license their catalog to Spotify in conjunction with Ulrich's endorsement of the service helps to heal the rift between the content and technology industries and reinforces Spotify's reputation as a legal alternative to piracy. The Grand Kumbaya Music Internet pledge would enable Lars and Sean to scale their collaboration to the entire music ecosystem.

## 2. Graduated Embrace

As noted previously,<sup>469</sup> a group of major ISPs (SBC, AT&T, Comcast, Verizon, CSC, and Time Warner Cable) and leading content industry organizations (RIAA and MPAA) entered into a Memorandum of Understanding (MOU) in July 2011 to implement a Copyright Alert System to discourage unauthorized distribution of copyrighted works. Such a regime is often referred to as a "graduated response" in that copyright owners and ISPs escalate sanctions with repeat offenses.<sup>470</sup> The signatories to this MOU committed to implement an escalating system of alerts in

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<sup>467</sup> Recalling the time he first heard of Napster and the sharing of music files over the Internet without authorization, Lars Ulrich told Metallica's manager "Maybe we should go over there and . . ." He punched his hand three times with his fist. The band's attitude at the time was: "You f--- with us, we'll f--- with you." See Greg Sandoval, *Metallica Joins Spotify, Buries the Hatchet with Sean Parker*, C|Net (Dec. 6, 2012) <[http://news.cnet.com/8301-1023\\_3-57557576-93/metallica-joins-spotify-buries-the-hatchet-with-sean-parker/](http://news.cnet.com/8301-1023_3-57557576-93/metallica-joins-spotify-buries-the-hatchet-with-sean-parker/)> Metallica led the charge to sue Napster and took on the most visible public face of artist dissatisfaction with file-sharing. See Ryan Buxton, *Metallica Drummer Lars Ulrich Recalls Battle With Napster: "They F--ked With Us, We'll F--k With Them"* (VIDEO), Huffington Post (Sep. 24, 2013) <[http://www.huffingtonpost.com/2013/09/24/metallica-napster\\_n\\_3984374.html](http://www.huffingtonpost.com/2013/09/24/metallica-napster_n_3984374.html)>.

<sup>468</sup> See Sandoval, *supra* n.\_\_\_\_.

<sup>469</sup> See *supra* < >.

<sup>470</sup> To provide a deterrent against online illegal file-sharing, Chile, France, Taiwan, South Korea, and the United Kingdom have recently introduced the so-called graduated response system or are in the process of doing so. See International Federation of the Phonographic Industries, *IFPI Digital Music Report 2011: Music at the Touch of the Button 3*, 19 (2011); Kaitlin Mara, *UK Passes Internet Access-Limiting Bill for Alleged IP Infringers*, *Intell. Prop. Watch* (Apr. 8, 2010, 12:11 PM), <http://www.ip-watch.org/weblog/2010/04/08/uk-isps-required-to-limit-internet-access-for-ip-infringers>.

For discussions of the graduated response system, see generally Annemarie Bridy, *Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement*, 89 *Or. L. Rev.* 81 (2010); Eldar Haber, *The French Revolution 2.0: Copyright and the Three Strikes Policy*, 2 *Harv. J. Sports & Ent. L.* 297 (2011); Alain Strowel, *Internet Piracy as a Wake-up Call for Copyright Law Makers--Is the "Graduated Response" a Good Reply?*, 1 *WIPO J.* 75; Peter K. Yu, *The Graduated Response*, 62 *Fla. L. Rev.* 1373 (2010).

response to alleged infringing activities: (i) an Educational Step Copyright Alert; (ii) an Acknowledgment Step Copyright Alert; and (iii) a Mitigation Measure Copyright Alert Step. The Mitigation Step can include a reduction in upload/download transmission speeds, a step down to a lower tier service, redirection to a landing page until the matter is resolved, and restrictions on Internet access. The MOU provides for “warning bells” along the alert steps as well as an appeals procedure.

This graduated response system provides a foundation for ISPs and copyright owners to collaborate more constructively in pursuit of a free and less piracy-prone Internet ecosystem. It builds a balanced enforcement system into ISP activities. As this experiment unfolds, the parties will be able to learn more about the ecosystem and how to adapt these techniques to better channel consumers into the legitimate marketplace.

While this approach has the potential to be more constructive, and certainly less counter-productive, than the RIAA lawsuits against 35,000 end users during the past decade, I worry that the tone of the campaign could reduce the effectiveness of the enterprise. Most parents learn that telling their teenage children what to do often produces undesired results.<sup>471</sup> It is often better for parents to listen and be supportive of their children even as they gently steer them in other directions.

The ISP-content industry “graduated response” program partially reflects this lesson. The organizers of the program have gone to great lengths to introduce balance into the program’s operation, which is part of the reason it has taken a long time to launch. Nonetheless, the campaign is often referred to as the “six strikes” campaign and it does have a judgmental quality.

I would urge a more progressive concept: “graduated embrace.” Rather than criticizing Internet users for participating in file-sharing, the messaging should welcome the file-sharers’ appreciation for the content owners’ works and steer them to authorized services, perhaps with a discount coupon for joining. To the extent that a work is not available through such a service, that ought to trigger the copyright owner to rethink their online distribution model. The goal should be to maximize availability of content through user-friendly and reasonably priced services.

There will inevitably be circumstances where studios resist making works available through online channels immediately. The film industry has been built on large-budget motion pictures appearing first in theaters. Studios have shortened those windows and moved toward global (“day and date”) theatrical release so as to reduce online piracy across markets.<sup>472</sup> And as

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<sup>471</sup> Cf. Thomas Gordon, *Parent Effectiveness Training: The Proven Program for Raising Responsible Children* (2000); Adele Faber & Elaine Mazlish, *How to Talk So Kids Will Listen* (1999).

<sup>472</sup> See Justin Kroll, *Paramount Ramps Up Day-and-Date VOD Plans for Indies*, *Variety* (Jul. 30, 2013) <<http://variety.com/2013/film/news/paramount-ramps-up-day-and-date-vod-plans-for-indies-1200569981/>>; Nathan Blaisdell, “Day-and-date” Film Release. What It Is. Why It’s

home theaters become more like public theaters, theatrical release will decline in economic importance. The theater business has shifted more toward Imax, 3-D, and other qualities that are not available in homes.

Studios evaluate the costs and benefits of exclusive theatrical release and other windowing choices based on the short run profit and loss trade-off. Such a calculation, however, overlooks the negative impact that windowing has on social norms and perceptions of the morality and legitimacy of the copyright system. Studios and the industry at large should directly consider the heavy cost on everyone in the industry of works being unavailable through online channels. The industry should value the long term benefits of improved public approval that would flow from greater authorized accessibility of copyrighted works.

Table 1 shows the availability of the 10 most pirated movies for the week ending October 21, 2013. None of these films were available for streaming, only two were available for digital rental, and three were available for digital purchase. While this data does not justify pirating, it highlights the limited availability of pirated films. By holding released films back from authorized digital channels, the film industry loses more of the market to piracy and reinforces consumers’ engaging in illicit access.

<b>Table 1 Most Pirated Movies of the Week Ending Oct. 21, 2013</b>				
Film	Release Date	Availability Through Authorized Channel		
		Streaming	Digital Rental	Digital Purchase
1. Man Of Steel	June 10, 2013	no	no	no
2. Pacific Rim	July 12, 2013	no	yes	yes

the Future. 5<sup>th</sup> Cinema (Mar. 11, 2013) (discussing the role of online piracy in pushing independent studios to shift to day and date release, but noting that major studios “will probably take longer, although there are signs that they’re starting to pay attention”) <<http://5thcinema.com/blog/2013/03/day-and-date-release/>>; Daniel Miller, Sundance 2012: The Day-And-Date Success Story of “Margin Call,” The Hollywood Reporter (Jan. 18, 2012) <<http://www.hollywoodreporter.com/news/sundance-2012-margin-call-video-on-demand-zach-quinto-283033>>; Steven Mallas, Time Warner, Apple Love “day-and-date” Movie Release – and So Should Investors, DailyFinance (May 1, 2008) (reporting that Time Warner CEO Jeff Bewkes “seemed satisfied that experiments with the strategy worked out well, proving that issues of cannibalization are overblown and that the margin scenarios [video on demand typically earn studios substantially more than DVD on a per view basis] are too cool to ignore”) <<http://www.bloggingstocks.com/2008/05/01/time-warner-apple-love-day-and-date-movie-release-and-so-s/>>.

3. Despicable Me 2	July 3, 2013	no	no	no
4. White House Down	June 28, 2013	no	no	no
5. The Lone Ranger	June 22, 2013	no	yes	no
6. Kick-Ass 2	August 14, 2013	no	no	no
7. Elysium	August 8, 2013	no	no	no
8. 2 Guns	August 2, 2013	no	no	no
9. The Internship	June 7, 2013	no	no	yes
10. Monsters University	June 21, 2013	no	no	yes
Sources: piracydata.org, TorrentFreak < <a href="http://torrentfreak.com/category/dvdrip/">http://torrentfreak.com/category/dvdrip/</a> >, Can I Stream It < <a href="http://www.canistream.it/">http://www.canistream.it/</a> >.				

Even the comments of one of the industry’s leading figures seem to legitimate piracy and undermine a shift in social norms toward authorized channels. As noted earlier,<sup>473</sup> the head of Time Warner characterized having the most pirated show (*Game of Thrones*) as “better than an emmy.” Rather than segment markets through windowing, the film and television industries need to look at the broader benefits of channeling consumers into a more balanced ecosystem that responds to consumers’ understandable desires for what they want when they want it through a user-friendly interface at a reasonable price point.<sup>474</sup>

Kevin Spacey, the star of *House of Cards*, Netflix’s break-through over the Internet original series, succinctly proposed a cure for this pathology:<sup>475</sup>

[T]hrough this new form of distribution, we have demonstrated that we have learned the lesson that the music industry didn’t learn. Give people what they

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<sup>473</sup> See supra < >

<sup>474</sup> Cf. Andrew Wallenstein, Comcast Developing Alternative to ‘Six Strikes,’ Variety (Aug. 5, 2013) (reporting that Comcast is pitching the television industry on a plan to convert illegal downloads to legal transaction opportunities by pushing a pop-up message with links to purchase or rent content that is being accessed illegally) <<http://variety.com/2013/digital/news/comcast-developing-anti-piracy-alternative-to-six-strikes-exclusive-1200572790/>>.

<sup>475</sup> See Mike Masnick, Kevin Spacey: Give Users Control, What They Want, When They Want It, At A Fair Price, And Stop Worrying About Piracy, techdirt (Aug. 26, 2013) <<http://www.techdirt.com/articles/20130824/22031324306/kevin-spacey-give-users-control-what-they-want-when-they-want-it-fair-price-stop-worrying-about-piracy.shtml>>.

want, when they want it, in the form they want it in, at a reasonable price and they'll more like pay for it rather than steal it.<sup>476</sup>

Professor Marty Kaplan, Director of the Norman Lear Center at the USC Annenberg School for Communication and Journalism, observes that “[i]t’s hard to imagine that the sequenced distribution of product over a controllable period of time through an orderly series of ‘windows’ – venues and platforms and formats and pipes and territories, each with their own license deals and consumer prices – will survive unbroken.”<sup>477</sup> He sees responding to consumer demand, as opposed to scaring, educating, or shaming consumers into not pirating, to be the way forward. Robert Bauer, Director of Projects for the MPAA, recognized as much in 2009, advocating a strategy “to isolate the forms of piracy that compete with legitimate sales, treat those as a proxy for unmet consumer demand, and then find a way to meet that demand.”<sup>478</sup>

Riffing off the title of Netflix’s popular new original series, “Orange is the New Black,” New York Times reporter Brian Stelter cleverly remarked that “content is the new black”<sup>479</sup> or, better yet, “easily and legally accessible content is the new black.” Netflix has seen rapid subscription growth since the release of its high quality, bingeable, original programming. It has reached 40 million subscribers worldwide (30 million domestic), surpassing HBO’s domestic U.S. subscription level for the first time.<sup>480</sup> The stock market appears sanguine about Netflix’s disruptive business model, driving its stock price up 440 percent in the past year<sup>481</sup> to a market capitalization nearly a third the market value of Time-Warner Inc., HBO’s wide-ranging parent corporation.<sup>482</sup> The stock market is far from perfect, but Netflix does point in a promising

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<sup>476</sup> Kevin Spacey Urges TV Channels to Give Control to Viewers, The Telegraph YouTube Channel  
<[http://www.youtube.com/watch?v=P0ukYf\\_xvgc&desktop\\_uri=%2Fwatch%3Fv%3DP0ukYf\\_xvgc&nomobile=1](http://www.youtube.com/watch?v=P0ukYf_xvgc&desktop_uri=%2Fwatch%3Fv%3DP0ukYf_xvgc&nomobile=1)>.

<sup>477</sup> See Marty Kaplan, Moses, Media Piracy and the MPAA, Huffington Post (Apr. 3, 2011) <[http://www.huffingtonpost.com/marty-kaplan/moses-media-piracy-and-th\\_b\\_843317.html](http://www.huffingtonpost.com/marty-kaplan/moses-media-piracy-and-th_b_843317.html)>

<sup>478</sup> See SOC. SCI. RESEARCH COUNCIL, *supra* n. \_\_\_, at 66.

<sup>479</sup> See Brian Stelter, Netflix Hits Milestone and Raises Its Sights, N.Y. Times (Oct. 21, 2013 B1) <[http://www.nytimes.com/2013/10/22/business/media/netflix-hits-subscriber-milestone-as-shares-soar.html?\\_r=0](http://www.nytimes.com/2013/10/22/business/media/netflix-hits-subscriber-milestone-as-shares-soar.html?_r=0)>.

<sup>480</sup> See Claire Atkinson, Netflix Stock Soars, US Subscriber Count Passes HBO’s, New York Post (Oct. 21, 2013) <<http://nypost.com/2013/10/21/netflix-stock-soars-us-subscriber-count-passes-hbos/>>. Netflix still lags HBO’s 114 million subscribers worldwide subscriber base and \$1.6 billion in net income. See Stetler, *supra* n. \_\_.

<sup>481</sup> See Stetler, *supra* n. \_\_.

<sup>482</sup> Netflix’s market capitalization as of October 21, 2013 was approximately \$19 billion. Time-Warner’s market capitalization – which includes New Line Cinema, Time Inc., Turner Broadcasting System, The CW Television Network, TheWB.com, Warner Bros., Cartoon Network, CNN, DC Comics, Hanna-Barbera, and Castle Rock Entertainment in addition to HBO, was valued about \$64 billion on that date.

direction for creators and consumers. The sooner content industries can build robust online marketplaces for their products, the sooner piracy fades in importance.<sup>483</sup>

## Conclusions

Throughout most of copyright history, the public's view of the copyright system exerted little force on its functioning. Due to the difficulties of reproducing paper, vinyl, and celluloid as well as the relative ease of policing content markets, consumers had few options other than to access copyrighted works through authorized channels. The Internet has broken that mold, freeing consumers to find and share copyrighted works with ease and relatively low risk of detections. The first 13 years of living in this era has revealed that copyright law's principal tool for preventing unauthorized distribution of copyrighted works – deterrent enforcement through statutory damages – is largely counter-productive in a technological age in which consumers can easily circumvent content markets.

By not shifting to a more balanced enforcement regime, adjusting copyright law doctrines to support cumulative creative, and opening up user-friendly market channels, policymakers and content industries risk further alienating the post-Napster generations. The touchstone for reforming copyright law and market institutions should be welcoming, supporting, and embracing future creators and consumers. By recognizing the essential role of social norms in the operation of the Internet Age content governance ecosystem, policymakers and industry leaders can re-equilibrate copyright law and content markets to motivate the next generation of creators and engage the next generation of consumers.

Thus concludes “This (my) American Copyright Life,” a cautionary tale that recognizes the moral, economic, and social virtues of copyright protection as well as the dysfunctionality of the current copyright system in the Internet Age. Every person has his or her “copyright life.” I worry that too many post-Napster “copyright lives” are disheartening. The goal of this story has been to offer a sensible path for restoring faith in the copyright system.

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<sup>483</sup> It appears that Time-Warner may be getting the message. See Todd Spangler, Comcast Offers HBO Without Other Cable Channels in Bundle Aimed at Cord-Cutters and Cord-Nevers, *Variety* (Oct. 25, 2013) <<http://variety.com/2013/biz/news/comcast-becomes-first-pay-tv-distributor-to-offer-hbo-without-basic-cable-1200761863/>>.