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PANEL II: Public Appropriation of Private Rights: Pursuing Internet Copyright Violators

Moderator: Sonia Katyal*

Panelists: Michael Carlinsky[†]
Justin Hughes[‡]
Rebecca Tushnet[§]

MS. LE:^{||} Good morning. My name is Kim Le. I am the Managing Editor of the *Fordham Intellectual Property, Media & Entertainment Law Journal*. On behalf of the *Journal*, I welcome our guests and thank our distinguished speakers of Panel II, which is titled *Public Appropriation of Private Rights: Pursuing Internet Copyright Violators*.

It is my pleasure to introduce the panel's moderator, Professor Sonia Katyal, Professor of Law at Fordham and graduate of the University of Chicago Law School.

PROFESSOR KATYAL: Thanks, Kim. Thank you all for coming. One of our panelists is on the way, so she will join us when she gets here, Rebecca Tushnet.

In July 2002, Congress introduced a bill that would increase domestic and international enforcement of copyright laws,¹

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¹ Peer to Peer Piracy Prevention Act, H.R. 5211, 107th Cong. (2002).

targeting peer-to-peer file trading² in an attempt to keep up with evolving technology. Similarly, the recording industry recently has filed a series of lawsuits in response to an increase in unauthorized downloading of copyrighted material.³

This panel will discuss whether Congress and the recording industry should continue their focus on pursuing individual downloaders, or if they would be better served to adapt and improve their technology. The resolution of this issue may well determine the fate of the music and film industries and, increasingly, the future of privacy and personal liberty.

To start us off with this discussion, we're very excited to have Justin Hughes with us. Justin Hughes is a Professor at Cardozo School of Law. He received his Bachelor of Arts from Oberlin College and his J.D. from Harvard University. He formerly was attorney-advisor at the U.S. Patent and Trademark Office, where he was at the center of a wide variety of national and international policy debates. Professor Hughes brings to Cardozo and us a unique background in government, private practice, and academia. His areas of expertise include the Internet, World Intellectual Property Organization ("WIPO") copyright treaties,⁴ database protection, and audio-visual performers' rights. Justin?

² Peer to peer ("P2P") file trading allows individual users to share music and other types of files with other individuals throughout the Internet. Jennifer Gokenbach, Comment, *A&M Records, Inc. v. Napster, Inc.: A Case Comment*, 79 DENV. U. L. REV. 259, 260 (2001). The major problem with the technology is that it "can facilitate copyright infringement in a matter of seconds between millions of different and anonymous users." *Id.* at 259.

³ The Recording Industry Association of America ("RIAA"), which is the trade group that represents the U.S. recording industry, filed its first round of lawsuits against individuals who illegally share copyrighted music on the Internet on September 8, 2003. See RIAA, Press Room, *Recording Industry Begins Suing P2P File Sharers Who Illegally Offer Copyrighted Music Online*, at <http://www.riaa.com/news/newsletter/090803.asp> (Sept. 8, 2003) [hereinafter RIAA, Press Room]. More RIAA lawsuits have followed, and over 1,000 individual users have been targeted in the first two months of 2004. See Chris Nelson, *CD Sales Rise, but Industry Is Too Wary to Party*, N.Y. TIMES, Feb. 23, 2004, at C1 (stating that there were two rounds of litigation this year against more than 1,000 computer users).

⁴ The World Intellectual Property Organization ("WIPO") is an intergovernmental agency of the United Nations that administers twenty-three different international treaties dealing with specific aspects of intellectual property protection, including copyright. See WIPO, *About WIPO*, at <http://www.wipo.int/about-wipo/en/overview.html> (last visited

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PROFESSOR HUGHES: Okay. I actually want your help. If Rebecca is a little late, we are going to draft Sonia into the discussion in a stronger role than moderator, because Sonia and I often have divergent views, not necessarily conflicting.

I want to address three topics that I think we all should be talking about. These are three issues that I think are very important. At least on one I will say some provocative things, but maybe on the other two as well.

The first topic is enforcement against individuals. The second is the enforcement issues related to the intermediaries, whether you envision them as Internet service providers (“ISPs”) or you envision them as the peer-to-peer systems. And the question there is whether we need to revisit the structure of liability we have established for intermediaries. And then the third issue, which I think is very important and which is the focus of some of the legislative proposals, is how much social resources do we put into enforcement, because whereas (1) and (2) are issues of what do we allow the recording association to do on their own behalf, the third issue is what do we have to do on behalf of the copyright industries, or what should we do; or are we wasting our social resources by putting too much enforcement into copyright?

Now, as to the enforcement against individuals, I guess I shouldn’t say it, but what I really want to say is I told you so. A long time ago, for years, people were saying that no one was going to enforce against individuals—they were too hard to find.⁵ I don’t know how many of you have heard the Internet theory of “mice

Mar. 9, 2004). A list of copyright treaties is available online at WIPO, Copyright and Related Rights, *Treaties*, at <http://www.wipo.int/copyright/en/treaties.htm> (last visited Mar. 9, 2004).

⁵ See Hisanari Harry Tanaka, *Post-Napster: Peer-to-Peer File Sharing Systems: Current and Future Issues on Secondary Liability Under Copyright Laws in the United States and Japan*, 22 *LOY. L.A. ENT. L. REV.* 37, 74 (2001) (“[T]here are countless obstacles to the legal enforcement of copyrights in the P2P system . . . even if record companies only seek injunctions, it would still be technically difficult to locate the infringing individuals under the current P2P system . . .”); Lisa M. Zepeda, *A&M Records, Inc. v. Napster, Inc.*, 17 *BERKELEY TECH. L.J.* 71, 73 (2002) (“The Internet and related technologies have made it difficult to hold direct infringers liable for copyright infringement. Since Internet systems often obscure individual user identities, copyright owners may not be able to identify infringing users, or distinguish infringers from other users.”).

and elephants,”⁶ that the best thing you do with the Internet is enforce the law against the elephants, because they are big and slow-moving, and hope that they stamp out the mice because you have no chance of getting the mice yourself.⁷ So, that was one theory of why there would never be enforcement against individuals who were downloading copyrighted works in violation of or without authorization of the copyright holder.⁸

Another reason was simply political backlash: the society simply won't accept this, that once they start enforcing against individuals, there would be a huge, enormous political backlash.⁹

For years, I was saying don't count these chickens before they are hatched. There were cases, well-publicized cases, at least for those of us in the government, of enforcement against individuals in Belgium,¹⁰ in Taiwan,¹¹ and we were beginning to see outside

⁶ The “elephants” are the large players on the Internet, including large corporations, that are highly visible and are the easiest against which to enforce the law. See Peter Swire, *Of Elephants, Mice, and Privacy: International Choice of Law and the Internet*, 32 INT'L LAW. 991, 1019–20 (1998). The “mice” are the smaller players, which are described as “small, nimble” and fast multiplying, and are very hard to regulate successfully. *Id.*; see also J.S. Marron et al., *Mice and Elephants Visualization of Internet Traffic*, at <http://www.cs.unc.edu/Research/dirt/proj/marron/MiceElephants> (last modified June 26, 2002) (providing a detailed explanation of the mice and elephants theory in terms of Internet traffic flow).

⁷ See Swire, *supra* note 6, at 1021 (suggesting that since the Internet “elephants” have more to lose if they break copyright rules, they will comply with copyright laws at very high levels, whereas the Internet “mice” are so difficult to track down and obtain any judgment from that they are not even worth the chase).

⁸ The individuals that the speaker refers to are the Internet “mice.” See *supra* notes 5–7 and accompanying text.

⁹ John Berlau, *A New Tune May Bolster the GOP*, INSIGHT ON THE NEWS, Sept. 15, 2003, at 18 (providing an overview of the political issues and backlash that arose from the announcement of the RIAA's lawsuits, including the opportunity for Republicans in government to show the American people that they can take on big businesses and stand up for consumers by challenging the RIAA's actions), available at <http://www.insightmag.com/news/450405.html> (posted Aug. 18, 2003).

¹⁰ Police in Belgium have been enforcing copyright laws against individual users of P2P file sharing software for several years. See, e.g., Andrew Heasley & Theresa Ambrose, *Music Stormtroopers Close In*, AGE (Melbourne), Feb. 28, 2001, at 8 (describing Belgian police raids on several homes of individuals who downloaded popular music from the Internet based on a complaint made by a Belgian music industry executive from the International Federation of the Phonographic Industry); Graeme Warden, *Police Raid Napster Users*, ZDNet UK, at <http://news.zdnet.co.uk/>

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the United States those kinds of efforts. So, I wasn't surprised at all when the recording industry went after individuals.¹²

Now, here is what I want to say about the enforcement against individuals in the first wave. A lot of you have been reading, and a lot of you may be thinking that it is a public relations disaster. I want to convince you that it is utterly a public relations triumph. It is an enormous, powerful success what the recording industry has done, and they are doing it exactly the right way.

What did they do? Well, they first went after 261—let's just round it and say 250—people.¹³ They actually have not taken anyone into court yet.¹⁴ They have settled these cases.¹⁵ They have gotten a huge amount of publicity.¹⁶ How many millions of people have stopped using KaZaA?¹⁷ Enforcement against 250 people has produced a forty percent drop in KaZaA usage.¹⁸ Boy,

internet/0,39020369,2084479,00.htm (Feb. 16, 2001) (stating that the homes of Belgian individuals who used Napster were raided by police starting in December 2000).

¹¹ Taiwan officials raided college dormitories as early as 2001 to confiscate computers that allegedly contained illegal music downloads. See, e.g., Lawrence Chung, *Taiwan Reels From MP3 Music Arrests*, STRAITS TIMES (Singapore), Apr. 24, 2001, at A2 (describing a police raid at a Taiwan university that resulted in the confiscation of computers from fourteen students who faced up to a seven-year jail sentence if they were found guilty of illegally copying and trading MP3 files).

¹² See RIAA, Press Room, *supra* note 3 and accompanying text.

¹³ *Id.*

¹⁴ None of the hundreds of lawsuits the RIAA has filed has reached the courts as of the date of this symposium, and many have been settled between the RIAA and the defendants. See RIAA, Press Room, *64 Individuals Agree to Settlements in Copyright Infringement Cases*, at <http://www.riaa.com/news/newsletter/092903.asp> (Sept. 29, 2003).

¹⁵ While the RIAA has filed many lawsuits against computer users since September 2003, it also started to settle cases, many within a few weeks of the first filings. See *id.* (stating that sixty-four settlements had been reached with individuals, twelve of whom were people who had not been sued yet, but were identified by the RIAA as infringers).

¹⁶ The RIAA lawsuits have been reported in most major print and Internet news sources. See, e.g., Frank Ahrens, *RIAA's Lawsuits Meet Surprised Targets*, WASH. POST, Sept. 10, 2003, at E01; Jefferson Graham et al., *Hammering Away at Piracy*, USA TODAY, Sept. 11, 2003, at 1D; Bill Holland, *RIAA: Amnesty Nets Calls*, BILLBOARD, Sept. 20, 2003, at 1.

¹⁷ KaZaA is a popular peer-to-peer file sharing software application available for free download on the Internet that is used by millions of people. See KaZaA, *What is KaZaA Media Desktop?*, at <http://www.kazaa.com/us/index.htm> (last visited Mar. 9, 2004).

¹⁸ See Sean Byrne, *Music Fans Cut Back on Free File-Swapping, 40% Drop in KaZaA Usage*, CDFreaks.com, at <http://www.cdfreaks.com/news/8094> (Oct. 1, 2003) (stating

if we could get statistics like that on speeding laws, what a safer world we would live in!

So, the point I want to make to you is that while a lot of the press and a lot of you may have been thinking that suing a twelve-year-old girl or suing a grandma is a public relations disaster,¹⁹ I want to convince you that as long as the Recording Industry Association of America (“RIAA”) can survive it politically, it is an enormous triumph. It is a triumph because it says to everyone, “You might be targeted,” and that message is really getting out there. When you see a forty percent drop in KaZaA usage in a four- to eight-week period,²⁰ that is money extremely well spent.

What is the RIAA doing? If you are thinking about it as a lawyer, and you are thinking about it as a litigation strategy, they are doing it exactly the right way. They are going after an initial group of people, they are settling with those people, and they are going to take that money, and they are going to use that money to pay their lawyers for the next tranche of cases.²¹ As long as it is politically tolerable, they will end up with a self-sustaining enforcement operation. They will settle for \$5,000, they will settle for \$3,000, they will settle for \$7,000 with someone else, and that will feed the kitty for the next round of enforcement.

I don’t want to go into the details, but someone who is a fine artist, a well-known artist, who was entrapped in the first 250, contacted me. I said, “Wow, you are a terrible defendant, you are really unsympathetic,” because this guy is a photographer. I said, “When you go into court and say ‘I know nothing about

that between March and August of 2003, which was the time when the RIAA began issuing subpoenas, KaZaA usage dropped forty percent).

¹⁹ See Sam Diaz, *Labels’ Actions Overshadowed Their Message, Observers Say: Trade Group Viewed as Bully for Going After Consumers*, SAN JOSE MERCURY NEWS, Sept. 15, 2003 (stating that the RIAA’s lawsuits made it look like a “schoolyard bully”), available at <http://www.mercurynews.com/mld/mercurynews/business/6775671.htm> (posted Sept. 15, 2003); David Pogue, *State of the Art; Taking Their Lumps of Coal*, N.Y. TIMES, Dec. 25, 2003, at G1 (stating that the RIAA “had a lot to learn in the public relations department” with respect to its lawsuits against twelve-year old honor students and eighty-six-year old grandmothers).

²⁰ See Byrne, *supra* note 18 (the actual forty percent drop in KaZaA usage was measured over a five to six month period).

²¹ See *supra* notes 14–15 and accompanying text.

copyright,' no one will believe you. And when you go in and you say, 'Oh, I wouldn't mind all my images being traded all over the Internet without permission,' no one will believe you on that either. They are going to throw the book at you." So, those kinds of individuals, when they make those settlements, are doing absolutely the right thing.

Now, I said if it is politically tolerable. I think that, since the recording industry has survived this first wave of what you might characterize as bad publicity and also has survived Senator Norm Coleman's hearings,²² from now on it is going to be relatively easy for them. It is not going to be front-page news for the third or fourth go-around, right? And the important thing to remember politically is that once the recording industry survives that initial wave of front-page stories of the twelve-year-old girl on the Upper West Side,²³ the second round is less interesting for journalists, the third round is less interesting, the fourth round is less interesting, and then it becomes political survivable.

Now, saying that, I don't quite understand why the recording industry has adopted a different strategy now. They have backed down, in the sense that they now say they are going to a person and saying, "We are going to sue you" before they actually file the papers.²⁴ That may be a distinction without a difference, because

²² In August 2003, Senator Norm Coleman called for formal Congressional hearings into the RIAA's campaign against P2P file sharers. See generally *Privacy and Piracy: The Paradox of Illegal File Sharing on Peer-to-Peer Networks and the Impact of Technology on the Entertainment Industry: Hearing Before the Sen. Permanent Subcomm. on Investigations of the Comm. on Governmental Affairs*, 108th Cong. (2003).

²³ The story of Brianna LaHara, a twelve-year old student named as a defendant in the RIAA's initial set of lawsuits, was reported in newspapers across the United States, as well as internationally. See Helen Kennedy, *C-Notes for Brianna: Outpouring of Donations in Download Suit*, DAILY NEWS, Sept. 11, 2003, at 10 (reporting that donations were made from around the country to assist in paying a \$2,000 settlement the RIAA had reached with LaHara in a copyright infringement lawsuit); Doug Stanley, *Suing of 12-Year-Old Makes RIAA a Bully*, TAMPA TRIB., Sept. 15, 2003, at 3 (opining that suing LaHara was wrong and describing the RIAA's campaign as a "misguided and heavy-handed crusade"); Gary Younge, *Music Giants Sue 12-Year-Old for Net Theft*, GUARDIAN (London), Sept. 10, 2003, at 2 (reporting on the RIAA's suit against LaHara).

²⁴ Many of the settlements the RIAA has reached with alleged copyright infringers were reached prior to the filing of any formal papers. See RIAA, Press Room, *64 Individuals Agree to Settlements in Copyright Infringement Cases*, at <http://www.riaa.com/news/newsletter/092903.asp> (Sept. 29, 2003) (stating that twelve of

in fact what they do is they file the papers for the case, and they have, I think, between thirty and ninety days to actually serve the suit. And if they let the person know that they have this kind of Damoclean sword²⁵ hanging over his or her head, it prompts a settlement discussion anyway. So, it may be a distinction without a difference, but it does appear that in that sense the recording industry has backed down a little bit.

Having said that about this enforcement against individuals—I didn't hear any people shocked at that; I was hoping to shock some of you—I think that there are some good things that will come out of this. Let me talk about some of the good things.

One good thing is that this is a wonderful thing outside the copyright context. I think this is a wonderful thing for parental responsibility. The reason I say that is because I think we have to accept that, to date, we have lived in a world where parents believe that if they put the child in front of the computer it's like putting the child in front of the television—it's a babysitter.²⁶ What parents have not really had sink into their consciousness is the fact that while the child seems to be benignly in front of the cathode ray tube or plasma screen, that child could actually be defaming the school principal, conducting the equivalent on Web sites, making death threats against fellow students, or engaging in copyright infringement.²⁷

RIAA's reported settlements were with individuals who had not yet been sued, but were merely identified as infringers by the RIAA).

²⁵ The term "Damoclean sword" comes from the legend of Damocles, an attendant in the court of the Greek tyrant Dionysius. See Ken Gormley, *Monica Lewinsky, Impeachment, and the Death of Independent Counsel Law: What Congress Can Salvage From the Wreckage—A Minimalist View*, 60 MD. L. REV. 97, 122 n.151 (2001) (citing THE BOOK OF VIRTUES 213–15 (William J. Bennett ed., 1993)). Damocles wished for the wealth and power of Dionysius. See *id.* Dionysius invited Damocles to a banquet but forced him to sit under a sword hanging by a single hair to represent that with great wealth and power comes imminent danger. See *id.*

²⁶ "[I]n today's world, movies and television often become our babysitters." John Amos, "Edutainment"; *Media Violence and the Young*, U.N. CHRON., Sept. 22, 1999, at 18.

²⁷ In addition to the copyright infringement cases against minors like Brianna LaHara, there have been numerous other incidents involving minors' illegal activities on the Internet. See *supra* note 23; see, e.g., Joe Baird & Thomas Burr, SALT LAKE TRIB., Aug. 2, 2000, at B2 (reporting pending civil and criminal charges against a high school student who allegedly posted a defamatory Internet Web page that included put-downs of

Now, I put it in that context because we have had interesting cases in our country about all those issues related to children using the Internet.²⁸ It may be that it is this kind of widespread thinking—parents, you are responsible for your children doing this—outside the framework of intellectual property can have a salutary effect on how we use the Internet and how we integrate the Internet into our families. That is one good thing.

Two other good things. You know, the truth is that in this area of non-transformative copying, we just don't know what fair use is.²⁹ One of the things that I really would like to see happen is to get a better sense of what fair use is. It may be that over time this kind of peer-to-peer system usage will prompt a genuine and more thorough discussion about what constitutes fair use in our country.

One thing that is very different in our country than in the European Union is that the European Union has a clear framework for private copying and a clear understanding of what constitutes private copying by individuals for non-commercial purposes and a remunerative system to at least get some money back to the artists for that form of copying.³⁰ At least this may prompt a discussion

classmates, school faculty, and the principal); Cynthia Garza, *School Board Is Asked to Review Threats Policy*, FLA. TIMES-UNION, Oct. 8, 2003, at B4 (reporting that a local Florida school board was asked to review its policy on Internet threats after a student made such threats against another student); Franco Ordonez, *Franklin Police Offering Help on Fighting Cybercrime*, BOSTON GLOBE, Oct. 3, 2002, at 11 (describing an incident of Internet vandalism where a student broadcast a pornographic message to all his classmates via e-mail).

²⁸ See *supra* note 27.

²⁹ The fair use defense has been unsuccessfully argued in the P2P file-sharing software case of *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). See Stephanie Greene, *Reconciling Napster with the Sony Decision and Recent Amendments to Copyright Law*, 39 AM. BUS. L.J. 57, 65–67 (2001) (comparing the U.S. Supreme Court's finding of fair use in *Sony Corp. of America v. Universal Studios, Inc.*, 464 U.S. 417 (1984), with the Ninth Circuit's decision in *Napster* where, despite many similarities to *Sony*, the fair use defense could not convincingly be applied); see also Kevin Michael Lemley, Comment, *Protecting Consumers From Themselves: Alleviating the Market Inequalities Created by Online Copyright Infringement in the Entertainment Industry*, 13 ALB. L.J. SCI. & TECH. 613, 638 (2003) (opining that “criminalize[ing] software that carries the potential of mass distribution of copyright works” is justified because “consumers have abused their fair use privileges” in their use of this software).

³⁰ See Council Directive 2001/29/EC, 2001 O.J. (L 167) 10, 10–19, available at http://europa.eu.int/information_society/topics/multi/digital_rights/documents/index_en.htm (last updated Feb. 13, 2004).

in our country about what are the proper limits of non-transformative fair use. So, that's another thing.

Now, the third good thing is also related to fair use. One of the great concerns of intellectual property scholars is that trends have suggested that fair use actually might be shrinking. As digitization and monitoring have allowed copyright owners to monitor usages, you would have an argument under section 107 of the Copyright Act³¹ that these were exploitable markets for the copyright holder. Therefore, that would push against fair use and would shrink the zone of fair use.³²

You see that kind of case, those of you who have had copyright classes, in the *American Geophysical Union v. Texaco, Inc.* opinion,³³ where this idea of a copyright clearinghouse in effect helps shrink the zone of fair use, or arguably shrinks the zone of fair use.³⁴

Peer-to-peer systems may be doing the opposite, in that they may be establishing a custom that enlarges the zone of fair use. When I say that, you should think about what the recording industry has accepted for the iTunes digital rights management ("DRM") system.³⁵ They have accepted a proprietary Dolby technology that permits, as I understand it, up to ten copies to be made, and they have knowingly accepted that.³⁶ And, as a

³¹ 17 U.S.C. § 107 (2000).

³² Section 107(4) of the Copyright Act states that effect of the use of a copyrighted work on the potential market for or value of the work is a factor to consider when determining whether a particular use of a work is a fair use. 17 U.S.C. § 107(4).

³³ *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1994).

³⁴ In *American Geophysical Union*, the court noted that if the defendant's photocopying of the copyrighted works was not found to be a fair use, the defendant would have to acquire a photocopying license from the Copyright Clearance Center ("CCC"), and the plaintiff's revenues from the copyrighted works would significantly increase. *See id.* at 929. The CCC is an organization that licenses photocopying. *Id.* at 929 n.16.

³⁵ The Apple iTunes online music store offers thousands of songs for download through the Internet. The iTunes store uses digital rights management ("DRM") technology at the system level so there are no identifiable markers placed on individual songs that a user downloads and copies off of the iTunes store. *See Alex Salkever, A Talk With iTunes' Coordinator*, BusinessWeek Online, at http://www.businessweek.com/technology/content/may2003/tc2003057_3524_tc056.htm (May 7, 2003).

³⁶ *Id.*

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Universal Music³⁷ executive said to me, “Ten copies is as good as infinity.” What you might be seeing in Internet delivery of music is a development of a custom within the industry that, at least for non-commercial personal uses, there is going to be some recognition that non-transformative copying is okay.

These are some of the interesting issues I see about the enforcement against individuals.

As for the enforcement against ISPs and peer-to-peer systems—and I’d be very interested to hear what everyone on the panel thinks, including the moderator—when you look at *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*,³⁸ *In re Aimster Copyright Litigation*,³⁹ and the *A&M Records, Inc. v. Napster, Inc.* decision of the Ninth Circuit,⁴⁰ you will come away from this thinking that the law in this area is unstable. It is unstable on a lot of issues, but it is particularly unstable, for example, on the knowledge standard.⁴¹ What is the knowledge standard? What is the form of knowledge that must be in the mind of the person purveying the peer-to-peer system?

³⁷ Universal Music Group is one of the top music companies in the United States and the world. See Universal Music Group, *Overview*, at <http://universalmusic.com/overview.aspx> (last visited Mar. 10, 2004). It owns over a dozen record labels and represents many of the top music artists of the world. See *id.*

³⁸ 259 F. Supp. 2d 1029, 1045–46 (2003) (finding that because the vendors of the P2P file-sharing software had no control over the networks being used by individuals to share files, they could not be held liable for the copyright infringement of individuals who were using their software).

³⁹ 334 F.3d 643, 648, 652–54 (7th Cir. 2003), *cert. denied sub nom.* Deep v. Recording Indus. Ass’n of Am., Inc., 124 S. Ct. 1069 (2004) (finding that even though the file-sharing software could have non-infringing uses, this was not enough to shield the defendant provider of the software from contributory infringement, if the non-infringing uses were not substantial).

⁴⁰ 239 F.3d 1004 (9th Cir. 2001) (finding no valid fair use defense).

⁴¹ The *Grokster*, *Aimster*, and *Napster* courts do not agree on how the P2P software distributors’ liability, if any, should be measured. The *Grokster* court found that since the distributor had no control over the P2P system and was not aware of the infringement, it could not be held liable. *Grokster*, 259 F. Supp. 2d at 1045–46. The *Aimster* court held that P2P software distributor had the ability to maintain greater control and monitor the use of its system and choosing not to do so would not shield it from liability. *Aimster*, 334 F.3d at 652–54. Finally, the *Napster* court found that actual knowledge of the infringement was necessary to find a system operator liable for contributory infringement. *Napster*, 239 F.3d at 1021–22.

It seems to me that—excuse me for saying this—as geeks and others try to craft peer-to-peer systems to get around the latest case, they are, without understanding it, moving themselves farther and farther from the staple article of commerce doctrine,⁴² at least as we envisioned it.

This is an amazing thing that was actually advertised in the *New York Times*, on one of the buttons down at the bottom. This is a new system called Friends and Music.⁴³ I don't know if any of you have seen this. The Friends and Music home page literally has the word RIAA with a slash through it.⁴⁴ Their intent is somewhat clear.⁴⁵ The page says,

As you know, the Recording Industry Association has been suing KaZaA and Morpheus and others with a vengeance, whether you are a twelve-year-old girl or a seventy-one-year-old grandmother. Fortunately, Friends and Music is a new type of music-sharing site, known in the industry as a private dark net, that allows you to swap music and playlists with your friends with no trace whatsoever.⁵⁰

Come on, folks, this is far from a staple article of commerce. And if anyone thinks that this is intended to be fit under the *Sony Corp. of America v. Universal Studios, Inc.*⁴⁶ doctrine of a product or a service with substantial non-infringing uses,⁴⁷ I'm baffled. I think that we do have to revisit the issue of *Sony* in terms of the knowledge standard, and we also need to revisit *Sony* in terms of the intent standard.⁴⁸ Those are extremely complex, difficult

⁴² U.S. CONST., art. I., § 8, cl. 8.

⁴³ Friends and Music is a relatively new type of music-sharing site where fee-paying members who know each other can share MP3 files privately and securely. *See* Friends and Music, *More About FM*, at <http://friendsandmusic.com/faq.html> (last visited Mar. 10, 2004).

⁴⁴ *See* Friends and Music, at <http://friendsandmusic.com/index.html> (last visited Mar. 10, 2004).

⁴⁵ *See id.* (stating that its mission is: "Private, Untraceable Playlist and Music sharing with people you know and trust").

⁵⁰ *Id.*

⁵¹ U.S. CONST., art. I., § 8, cl. 8.

⁴⁶ 464 U.S. 417 (1984).

⁴⁷ *See id.*

⁴⁸ *See id.*

issues. They are wonderful interstices of law and philosophy, so maybe that's why I think we have to revisit it. But I think that that's the second point there.

Now, the third point is—I said I would offer you a third point—having said that the recording industry has behaved brilliantly and successfully in reducing KaZaA usage with such minimal legal activity,⁴⁹ and that we should anticipate that this enforcement against individuals will continue—

Well, let me go back a few steps. When I was in the government wet behind the ears, I remember one of my bosses, the General Counsel of the Department of Commerce,⁵⁰ explained to me why congressmen were introducing so much Internet legislation. He said, “Look, when you're a lawyer you build an Internet practice. When you're a company you build an Internet business. And when you are a legislator you just introduce legislation, whether it is needed or not, about the Internet.”

There is a lot of legislation that is being introduced these days to pump up the volume on copyright enforcement or intellectual property enforcement in general.⁵¹ I don't think this is the classic problem of Washington, of a solution in search of a problem—there is a problem out there—but what we have to ask ourselves is how much social resources do we want to put into copyright enforcement. It is one thing to empower the recording industry to go after individuals by telling them that these are their rights and that they are welcome to enforce them. It is another thing to take the resources of the Department of Justice and hurl those at copyright infringement when we have a lot of other social needs, ranging from purely domestic issues to international issues, where we have limited enforcement capacity and limited capacity in the courts. And we have to ask ourselves genuinely whether it is useful, whether it is appropriate, and whether we want to put those kinds of social enforcement resources more into the picture. So, I'm sanguine about that.

⁴⁹ See *supra* notes 17–18.

⁵⁰ The current General Counsel of the U.S. Department of Commerce is Theodore Kassinger. See U.S. Dep't of Commerce, *Office of General Counsel*, at <http://www.ogc.-doc.gov> (last visited Mar. 10, 2004).

⁵¹ See, e.g., Peer to Peer Piracy Prevention Act, H.R. 5211, 107th Cong. (2002).

Although the recording industry is on the right track and has done the right thing, I think we have to look seriously at the issue of the liability of intermediaries,⁵² and we have to figure out some things that are unstable, following the *Sony* decision and this triumvirate of peer-to-peer decisions.⁵³

I also am very concerned that we don't let our congressmen start passing a bunch of legislation that puts new strains on the U.S. Department of Justice, which doesn't really give the Department of Justice more resources to enforce copyright laws when there are an awful lot of other laws that need to be enforced.

PROFESSOR KATYAL: That was great. Thank you, Justin.

Our next speaker is Michael Carlinsky, who joins us from Quinn Emanuel Urquhart Oliver & Hedges. Mr. Carlinsky graduated *cum laude* from Susquehanna University in 1986. He received his J.D. from Hofstra in 1989. His practice areas include intellectual property, the Internet, media, securities, entertainment, class actions, complex litigation, and trial practice—most everything. He has also been widely published. He published a piece called “Posting ‘No Trespassing’ Signs on the Internet” in the *New York Law Journal*,⁵⁴ as well as “Stop the Music: Napster Is Not Covered by the DMCA,” also published in the *New York Law Journal*.⁵⁵

MR. CARLINSKY: Thanks. I was hoping to go after all the professors because I'm always interested in hearing what professors have to say. I have been practicing in this area for a number of years now. For four years, I have been lead litigation counsel for an Internet music company by the name of MP3.com.⁵⁶

⁵² See *supra* note 41.

⁵³ *Id.*

⁵⁴ Michael Carlinsky & Jeffrey Conciatori, *Posting “No Trespassing” Signs on the Internet*, N.Y.L.J., Jan. 16, 2001, at 1.

⁵⁵ Michael Carlinsky & Jeffrey Conciatori, *Stop the Music: Napster Is Not Covered by the DMCA*, N.Y.L.J., May 16, 2000, at 1.

⁵⁶ MP3.com was originally an online music service launched in early 2000. See *UMG Recordings, Inc. v. MP3.com*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000). Several major record companies sued MP3.com and were successful in obtaining a partial summary judgment on their claim that MP3.com had committed copyright infringement by making copies of their music in MP3 format and providing the copies to individuals through MP3.com's online service. See *id.* MP3.com is currently undergoing some rebuilding and does not

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I'm sure some of you have heard of it. I want to talk about that case in a moment.

The first thing I want to know is, just by a show of hands, how many people know Karin Pagnanelli?⁵⁷ Good, I'm glad no one raised their hand. She is one of the lawyers who represents the music companies in all of these cases that are filed against individuals,⁵⁸ and if anybody had raised their hands, I suspect you would have received a complaint. This, here, is one of the complaints that the music companies have filed against individuals.

I was interested in what Professor Hughes had to say about whether it has been successful or not and his views.⁵⁹ I agree that from a public relations standpoint that it has been a huge triumph.

I was on the train this morning with a woman who is an executive at a music company. I mentioned that I would be speaking today and that I wanted to solicit her views. She said, "For the first time in a number of years"—and this was her quote—"the pendulum is swinging back" and that they had turned the corner at her particular company.

I said, "First of all, I want a clarification." She clarified for me that in her view the problem with music piracy on the Internet is starting to subside. Then I asked her what she thought it was attributable to. She said, "It has been, of course, the very aggressive position that the RIAA and the record companies have taken." But she said, "Most recently it's these lawsuits that have been filed against individuals."⁶⁰

offer any music related services. *See* MP3.com, at <http://www.mp3.com> (last visited Mar. 10, 2004).

⁵⁷ Karin Pagnanelli is an associate in the Los Angeles office of Mitchell Silberberg & Knupp LLP and has represented the RIAA in numerous cases. *See* Mitchell Silberberg & Knupp LLP, *Karin Pagnanelli*, at <http://www.msk.com/attorneys.asp?id=1438> (last visited Mar. 10, 2004).

⁵⁸ *See* Andrew Harris, *Music Group Faces a Suit of Its Own*, NAT. L.J., Sept. 15, 2003, at 8 (citing Mitchell Silberberg & Knupp LLP as one of the firms handling the RIAA's lawsuits).

⁵⁹ *See supra* notes 12–20 and accompanying text.

⁶⁰ The link between a drop in online music piracy and the RIAA's lawsuits has been made. *See* Byrne, *supra* note 18 (noting that there was a forty percent drop in KaZaa

So, I think that it has had its effect. It is making parents more responsible. People are waking up. People are no longer able to say, "I didn't know" or, "I didn't know what my child was doing." And even though there have been a very few number in total lawsuits filed, I would agree that it has had its desired effect.

I think, though, that it is the kind of thing where in six or nine or twelve months it will become old news. And so I don't think that the record companies and the RIAA can just rest on their laurels, that there is going to continue being aggressive enforcement against individuals, and enforcement against the intermediaries.

What the record companies also have to do is offer a viable alternative. I remember giving a presentation in this exact seat at one of the symposiums—I think it was two years ago⁶¹—when we were really in the first or second inning of this game. My view then was that the record companies need to adapt and come up with alternatives.⁶² At the time, Napster⁶³ was still alive and kicking, although it was desperately kicking. Here, this was a technology that at its peak sixty million or more users were using,⁶⁴ and there were a lot of people—including myself—who thought that what the record companies should have done was

usage within the first few months that the RIAA began filing its lawsuits against individuals).

⁶¹ Michael Carlinsky was also a panelist at the *Fordham Intellectual Property, Media & Entertainment Law Journal's* symposium in 2000. See Symposium, *Fair Use, Public Domain or Piracy*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 361 (2001).

⁶² See *id.* at 396–97 (criticizing record labels for failing to follow through on their statements indicating support for accessibility to authorized music downloads on the Internet and actually licensing their content for online use).

⁶³ Napster, in its original form, was an extremely popular file-sharing service available for download on the Internet that allowed individuals to share copyrighted music through a centralized server. See Stephanie Greene, *Reconciling Napster with the Sony Decision and Recent Amendments to Copyright Law*, 39 AM. BUS. L.J. 57, 57–58 (2001). Napster was running from October 1999 through March 2001, until it had to shut down its service due to a preliminary injunction granted by the Ninth Circuit Court of Appeals. See *id.* Napster is now available as Napster 2.0, an online music store, where its members can buy licensed music for a fee. See Napster, *Napster's Back: Napster 2.0 Now Live for Music Fans Nationwide*, at http://www.napster.com/press_releases/pr_031029.html (Oct. 29, 2003).

⁶⁴ See Greene, *supra* note 63, at 58 (stating that Napster attracted an estimated fifty to seventy million users during its two-year period of operation).

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embrace Napster and turn it into a lawful service that everyone could have benefited from.⁶⁵

But instead—I guess maybe with the benefit of hindsight it's easy—they didn't. And so they went through a process. I'm going to segue into MP3.com⁶⁶ and talk about the other lawsuits that have been filed. But the record companies chose a path, and the path they chose was: "We will go out and try to destroy and decimate every threat to our business, and we will do it under the mantra of 'we need to provide for the starving artists' and 'artists won't produce creative works if we don't enforce the copyright laws.'"⁶⁷ I won't tell you my views, but I think that the reality is that the record companies were trying to protect their profits. I do think there is an issue with artists,⁶⁸ but I don't think it is as serious an issue as the record companies made it out to be.

Now we find ourselves in the year 2003, and the record companies have taken an approach that I would not have expected them to take, which is to go after individuals.⁶⁹ But it has worked. I think that they have passed the test of whether or not people will tolerate it, and I think it will continue.

But now the record companies are finally recognizing that there has to be both an enforcement and an alternative, and now we are seeing a lot of alternatives that are popping up on the Internet.⁷⁰

⁶⁵ See Matt Richtel, *A Curdled Musical Romance Gets Couples Counseling*, N.Y. TIMES, Apr. 16, 2001, at C1 (expressing the opinion that the recording industry must "learn to appreciate the [file-sharing] technology . . . [and] embrace it" and also providing the opinions of Napster users that they want to be able to buy music à la carte on the Internet and not have to go to record stores to pay for full length albums).

⁶⁶ See *UMG Recordings, Inc. v. MP3.com*, 92 F. Supp. 2d 349 (2000); see also *supra* note 56 and accompanying text.

⁶⁷ On its Web site, the RIAA claims that "Napster is unfair to the artists and musicians who have invested their time, effort and money to create music." See RIAA, Press Room, *Frequently Asked Questions Napster and Digital Music*, at http://www.riaa.com/news/-filings/napster_fa_q.asp (last visited Mar. 10, 2004). The RIAA also provides a list of comments from well-known artists on how they feel about Napster and its file sharing service. *Id.* Many comments include concerns for the money being taken away from artists who do not otherwise get any compensation for their music. *Id.*

⁶⁸ See *id.*

⁶⁹ See *supra* note 3 (discussing the RIAA's lawsuits against individuals for copyright infringement).

⁷⁰ Many alternatives to illegal file sharing on the Internet have developed over the past several years. These alternatives offer licensed songs and entire albums for instant

iTunes⁷¹ has been very successful. Microsoft is trying to develop its own Internet music operation.⁷² There are five or six.⁷³ The record companies are finally willing to license these Internet companies so that they will have a full catalogue of music and have the ability to offer it to you for either ninety-nine cents per download or a monthly subscription fee.⁷⁴

One final point here before I talk specifically about MP3. There was in yesterday's *New York Times* an article entitled "Music-Sharing Service at MIT Is Shut Down."⁷⁵ Some students at the Massachusetts Institute of Technology ("MIT") thought that they came up with a foolproof answer to some of these vexing problems, where they created as part of the university's cable system an analog music service so that people only within the university would be able to listen to music, as opposed to download it, because it would be in analog form, as opposed to digital. So, it would be an Internet-like radio.⁷⁶ Those same individuals thought that they had secured all of the rights. They

downloads at relatively low prices. Some examples include: BuyMusic.com, at <http://www.buymusic.com> (last visited Mar. 10, 2004); EMusic, at <http://www.emusic.com> (last visited Mar. 10, 2004); iTunes, at <http://www.apple.com/iTunes> (last visited Mar. 10, 2004); Musicmatch Downloads, at <http://www.musicmatch.com> (last visited Mar. 10, 2004); Napster 2.0, at <http://www.napster.com> (last visited Mar. 10, 2004); and Rhapsody Digital Music Service, at <http://www.listen.com> (last visited Mar. 10, 2004).

⁷¹ Apple's iTunes music store has hundreds of thousands of songs available for download. See iTunes, *Overview*, at <http://www.apple.com/itunes/overview.html> (last visited Mar. 10, 2004).

⁷² See WindowsMedia.com, *Music*, <http://windowsmedia.com/Mediaguide/Music> (last visited Mar. 10, 2004).

⁷³ See *supra* note 70 (providing a list of six Internet music stores).

⁷⁴ For example, at the iTunes music store subscribers can buy single songs for ninety-nine cents each and burn them onto CDs, play them on multiple computers, and listen to them on an unlimited number of MP3 player devices. See iTunes Music Store, at <http://www.apple.com/itunes/store> (last visited Mar. 11, 2004). Napster 2.0 offers a similar pricing plan at ninety-nine cents per song download or \$9.95 per album. See Napster, at <http://www.napster.com> (last visited Mar. 11, 2004).

⁷⁵ John Schwartz, *Music-Sharing Service at M.I.T. Is Shut Down*, N.Y. TIMES, Nov. 3, 2003, at C13.

⁷⁶ *Id.* (explaining that by using Massachusetts Institute of Technology's ("M.I.T.") cable TV network to build the system, the creators thought they could avoid restrictive laws and regulations surrounding the practice of copying and sharing digital copies of music).

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went to a company called Loudeye that has licenses from all of the copyright holders.⁷⁷

For some of you who may not know, for every piece of music there are at least two sets of copyright holders.⁷⁸ There is the sound recording, which is typically owned by the record labels.⁷⁹ Then there is an underlying composition copyright by the song writer.⁸⁰ And so when you try to get permission to use this music you have to get licenses from all of the copyright holders.⁸¹

Loudeye promoted itself as the only company that had secured all of these licenses⁸² and was in a position to give those MIT students exactly what they need to launch their service. In fact, after Loudeye had licensed whatever it had licensed, it issued a press release that said, “We’re the only company that could license all of these songs”—I think the number was 48,000—“and MIT basically has the right to do what it wants to do.”⁸³

Well, the record companies didn’t see it quite that way. Universal Music Group and then some others weighed in and said, “MIT, forget about it. You’ve obviously violated our rights. You haven’t taken into account our rights.”⁸⁴

MIT students replied, “Well, Loudeye tells us we have all of the rights.”

⁷⁷ *Id.* (noting that the system creators paid Loudeye to fill a hard drive with licensed songs).

⁷⁸ Eric Jacover, Note, *I Want My MP3! Creating a Legal and Practical Scheme to Combat Copyright Infringement on Peer-to-Peer Internet Applications*, 90 GEO. L.J. 2207, 2219 (2002) (“[A] sound recording contains two separate copyrights: a copyright in the sound recording, and a copyright in the underlying music composition.”).

⁷⁹ *See id.*

⁸⁰ *See id.*

⁸¹ *See id.* (“[I]f an Internet company wants to copy sound recordings onto its server and make them available for download, the company has to get permission from the owners of both the music composition and sound recording copyrights.”).

⁸² *See* Schwartz, *supra* note 75 (citing a Loudeye company news release that quoted one of the M.I.T. creators of the service as stating that as far as he knew Loudeye “was the only company in the country with all the rights and permissions in place to provide this service”).

⁸³ *Id.* (stating that the Loudeye news release referred to approximately 48,000 licensed digital music tracks).

⁸⁴ *Id.* (stating that within hours of the launch of the M.I.T. service, several music companies claimed that they had not granted legal permission for the use of their songs).

Then Loudeye said, “Well, wait a minute. We never really told you that in that press release we issued that we had the rights and gave you the rights. We’re withdrawing the press release, and we’re not really sure what rights you still need or what rights we had the ability to give you.”⁸⁵

I just point that out because it illustrates a pretty complex area when you get into music—who has the rights, what rights do you need to put something on the Internet, and what rights you do not have.

Let me tell you about the *MP3.com* case⁸⁶ for a couple of minutes. In January 2000, MP3.com, which was this relatively new Internet music company, had what they thought was a revolutionary idea.⁸⁷ The company had been created on the concept of providing a site where relatively unknown artists could put their music and people could come and discover these artists.⁸⁸

But there wasn’t a whole lot that you could commercially exploit out of that, so the company said, “What we need to do is we need to give people the ability to listen to the music they really want to listen to, popular music.”⁸⁹ The founder of MP3.com came

⁸⁵ *Id.* (stating that Loudeye claimed that M.I.T. had misunderstood its contract, that Loudeye never provided licenses for M.I.T. to issue the music content, and that the press release suggesting that Loudeye had all the necessary rights secured was taken off of Loudeye’s Web site).

⁸⁶ *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

⁸⁷ MP3.com had its initial public offering on July 21, 1999. See Free Music Now, *History of MP3.com*, at http://www.free-music-now.com/history_of_mp3-dot-com.shtml (last visited Feb. 25, 2004). MP3.com’s “My.MP3.com” service, which permitted users to store music in a virtual locker, was launched on or around January 12, 2000. See *UMG Recordings*, 92 F. Supp. 2d at 350.

⁸⁸ See Karen Lee, Note and Comment, *The Realities of the MP3 Madness: Are Record Companies Simply Crying Wolf?*, 27 RUTGERS COMPUTER & TECH. L.J. 131, 146–47 (2001) (stating that at that time MP3.com allowed unknown artists to present their work to the public through its Web site, offered free artist Web pages, and helped to sell the artists’ music and split the profit with them); Mike Drummond, *Insiders Selling MP3.com – For a Song*, SAN DIEGO TRIB., Feb. 23, 2000, at C-1 (“MP3.com made a name for itself by attracting thousands of unsigned musicians to post songs on its Web site, offering some tunes for free download while selling CDs.”).

⁸⁹ *UMG Recordings*, 92 F. Supp. 2d at 350 (stating that MP3.com advertised its My.MP3.com service as allowing “subscribers to store, customize and listen to the recordings contained on their CDs from any place where they have an internet connection” and that “[t]o make good on this offer, [MP3.com] purchased tens of thousands of popular CDs”).

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up with this idea, and they created a technology. There were two components to it. One was called Beam-it,⁹⁰ and one was called Instant Listening.⁹¹

The concept behind Beam-it was if you already own a CD or at least physically possess it—because there is no way of ever knowing for sure whether you own it or are borrowing it—and you represent you own it, MP3.com would let you listen through an Internet connection to the music on that CD.⁹² You would create a “virtual locker.”⁹³ Then you could leave your CD at home, and when you’re at your office and you have your computer and you want to listen to the same music in your CD collection, you could access your virtual locker; or if you are traveling, you could do the same.⁹⁴ Pretty ingenious idea. The company developed a technology that actually would let you do this.⁹⁵

To open your account, you would create this virtual locker.⁹⁶ On day one it would be empty.⁹⁷ Then you would say, “I want to add the Grateful Dead,” and it would tell you “put the CD into your CD drive,” and then this technology from San Diego, patented technology, would come down and it would read and determine that in fact the CD was the Grateful Dead. It then would turn the music from that CD on in your locker for future listening.⁹⁸ That was called Beam-it.⁹⁹

⁹⁰ Beam-it allowed a user to access his music from anywhere in the world via an Internet connection after proving that he or she already owned a copy of a particular song by putting the CD into his or her computer for a few seconds. *See UMG Recordings*, 92 F. Supp. 2d at 350.

⁹¹ The Instant Listening Service allowed a user to access his or her music from anywhere in the world via an Internet connection after purchasing it from one of MP3.com’s online retailers. *See id.*

⁹² *Id.*

⁹³ Amy Harmon, *Deal Settles Suit Against MP3.com*, N.Y. TIMES, Nov. 15, 2000, at C1 (describing the music stored for a user through MP3.com as being in a “virtual locker”).

⁹⁴ *Id.* (stating that consumers were allowed to access their virtual lockers from anywhere).

⁹⁵ *See UMG Recordings*, 92 F. Supp. 2d at 350 (describing the process of storing songs in a virtual locker in greater detail).

⁹⁶ *Id.*

⁹⁷ *Id.* (indicating that the only way for a consumer to access any songs through his virtual locker was to either prove he or she already owns the song or purchased it online through MP3.com’s retailers).

⁹⁸ *Id.*

Similarly, they had this concept called Instant Listening, where if you went to one of the affiliated retailers that the company had relationships with and you bought the Grateful Dead CD, paid for it with your credit card—so there was no question that Mike Carlinsky bought that CD—that retailer would send a message to MP3.com and, rather than waiting the three or four or five days for your CD to arrive in the mail—if you are like me, you want to listen to that music immediately—MP3 would turn the music on in your locker.¹⁰⁰ Pretty nifty, pretty innovative.

How did MP3.com accomplish this? Well, the company went out and spent about \$1.3 million and bought 80,000 CDs. They paid \$12 each,¹⁰¹ didn't even get a good deal on the CDs. I could do better. But they went out and bought 80,000 CDs.¹⁰² After it was able to peel off all that cellophane and get to the CD, which takes forever, they loaded the digital music from those CDs onto their servers in San Diego, so that music was there for people who opened up accounts, either Instant Listening or Beam-it.¹⁰³

What you got was not a digital download.¹⁰⁴ You got a stream, very different from a digital download.¹⁰⁵ So, in essence, you were having the ability to listen to your music like you would on the radio if you could demonstrate you possessed—although the requirement was ownership—or had bought—really that was a foolproof method—through Instant Listening.¹⁰⁶ That's what the company did.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See Jefferson Graham, *Upload CD, Keep It in Your Locker, Listen Anywhere*, USA TODAY, Sept. 12, 2000, at 3D (stating that MP3.com purchased over \$1 million worth of CDs); Amy Harmon & John Sullivan, *Music Industry Wins Ruling in U.S. Court*, N.Y. TIMES, Apr. 29, 2000, at C5 (stating that MP3.com purchased nearly 80,000 CDs for its system).

¹⁰² See Harmon & Sullivan, *supra* note 101.

¹⁰³ See *UMG Recordings*, 92 F. Supp. 2d at 350.

¹⁰⁴ See Wired News, *MP3.com Stores Your CDs*, at <http://www.wired.com/news/technology/0,1282,33624,00.html> (Jan. 12, 2000) (quoting Michael Robertson, then CEO of MP3.com, that “[t]here is no downloading anywhere on [their] system”).

¹⁰⁵ See *id.* (finding that because users are able to stream the music only, and not download it to hard drives, illegal MP3 files cannot be created).

¹⁰⁶ See *UMG Recordings*, 92 F. Supp. 2d at 350.

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Within two weeks of launching this service, the five major record companies brought a lawsuit here in New York for copyright infringement.¹⁰⁷ Their claim was that “your copying, MP3, of those songs from the CDs you bought onto those servers for a commercial purpose, to let people”—

By the way, MP3.com wasn’t charging people to listen to the music.¹⁰⁸ The way they would generate revenues was through advertising, which, of course, was the big thing at the time.¹⁰⁹ The theory was that while you were logging on to open up your locker to get to your music they would show you an ad for Viagra or some kind of an enlargement product.¹¹⁰ They were getting revenues generated from that.¹¹¹ That was the model.

The record companies sued.¹¹² They moved quickly for summary judgment.¹¹³ A judge here in the Southern District by the name of Jed Rakoff¹¹⁴ concluded that this was copyright infringement, plain and simple.¹¹⁵ The opinion starts by saying that the intellectual property laws and the Internet raise all sorts of complex issues, but not in this case,¹¹⁶ and that the copyright infringement was plain, clear, and simple.¹¹⁷ And so, Jed Rakoff ruled that it was a copyright violation.¹¹⁸

¹⁰⁷ See *id.* at 349; see also Sara Robinson, *3 Copyright Lawsuits Test Limits of New Digital Media*, N.Y. TIMES, Jan. 24, 2000, at C8 (stating that the MP3.com lawsuit was filed on January 21, 2000, which was just days after the My.MP3.com service was launched).

¹⁰⁸ See *UMG Recordings*, 92 F. Supp. 2d at 351 (stating that MP3.com did not currently charge its members a fee).

¹⁰⁹ See *id.* (stating the MP3.com sought to attract a large subscription base to draw advertising); Drummond, *supra* note 88 (“[MP3.com] . . . makes the vast majority of its money through selling advertising.”).

¹¹⁰ See Drummond, *supra* note 88.

¹¹¹ See *id.*

¹¹² *UMG Recordings*, 92 F. Supp. 2d 349.

¹¹³ *Id.*

¹¹⁴ Judge Jed Rakoff is a United States District Judge in the Southern District of New York.

¹¹⁵ *UMG Recordings*, 92 F. Supp. 2d at 350 (concluding that “[d]efendant’s [MP3.com’s] infringement of plaintiff’s copyrights is clear.”).

¹¹⁶ *Id.* (observing that “[t]he complex marvels of cyberspatial communication may create difficult legal issues; but not in this case”).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

From that case every other record company—not the majors, but smaller companies—as well as literally thousands of the composition copyright holders whose works were put in the MP3.com servers brought suit.¹¹⁹

This service, by the way, was up for four months.¹²⁰ The court decided within four months that it was copyright infringement.¹²¹ MP3.com shut the service down, and then it went out and tried to acquire licenses for all of these different musical works so that they could restart the service. Ultimately, they were successful securing many, many licenses.¹²²

But that act of infringement, as the court concluded, ultimately cost the company well in excess of \$100 million, even though no one in MP3.com's case could show any economic harm because there wasn't downloading going on, like there is with these peer-to-peer services.¹²³

Professor Hughes said something earlier, which I was surprised again to hear from a professor. He basically said that we just don't know what fair use is.¹²⁴ I thought that was interesting to hear, because in the *MP3.com* case the primary defense was this was a

¹¹⁹ See, e.g., *Country Road Music, Inc. v. MP3.com, Inc.*, 279 F. Supp. 2d 325 (S.D.N.Y. 2003); *Teevee Toons, Inc. v. MP3.com, Inc.*, 134 F. Supp. 2d 546, (S.D.N.Y. 2001); see also Matt Richtel, *MP3.com Is Confronting Another Copyright Suit*, N.Y. TIMES, Dec. 20, 2000, at C4 (stating that MP3.com “has been hit with a new copyright infringement suit, this time filed by Emusic.com and six of its independent partner labels”); Jim Hu, *MP3.com Faces New Suit After Settling With Record Labels*, CNET News.com, at <http://news.com.com/2100-1023-248712.html> (last modified Nov. 16, 2000) (reporting on a class action suit for copyright infringement filed by Unity Entertainment and others just two days after MP3.com ended its legal battle with the major record labels).

¹²⁰ See *supra* note 87. This service was suspended in spring 2000 amid the legal battle. See Richtel, *supra* note 119.

¹²¹ See *UGM Recordings, Inc.*, 92 F.Supp.2d at 350 (“On April 28, 2000, the Court . . . [held] defendant liable for copyright infringement.”).

¹²² See Jim Hu, *MP3.com Pays \$5.3 Million to End Copyright Suit*, CNET News.com, at <http://news.com.com/2100-1023-248583.html> (last modified Nov. 15, 2000) (“MP3.com has agreed to pay \$53.4 million to end its copyright infringement suit with Seagram's Universal Music Group. . . . Under the consent judgment, MP3.com gets a license to deliver the entire Universal Music Group catalog over its My.MP3.com service.”).

¹²³ See *UGM Recordings*, 92 F. Supp. 2d 349.

¹²⁴ See *supra* note 29 and accompanying text.

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fair use.¹²⁵ Even if it wasn't transformative, what you were really doing was allowing people to listen to their music, music that they had already purchased, and there was no harm. The court obviously didn't see it that way.¹²⁶

We continue to litigate these cases to this day, although now the statute of limitations likely has expired so we're at the tail end.¹²⁷ I have spoken with professors, and I also have spoken with some federal judges in the Southern District off the record. What always amazed me about the *MP3.com* case is that there is a pretty even split.¹²⁸ There are lots of judges out there who think what MP3.com did was a fair use. There are others, the judge in our case in particular, who thought it was not a fair use.¹²⁹

The other thing that is incredible to me is that, even though the judge was entitled to his view and others are entitled to their views, we don't know what fair use is.¹³⁰ In the *MP3.com* case, the judge thought the copyright violation was so clear; it was so clear-cut, that not only did he find the company had committed copyright infringement, but that it was a willful copyright infringement and, therefore, opened up this company to massive liability.¹³¹ With the way the copyright laws work, you don't have to show any actual damage to take advantage of the statutory provisions that allow a copyright holder to seek up to \$150,000 per work.¹³²

Come back to MP3.com—80,000 CDs, average of twelve tracks on a CD, times at least two copyrights.¹³³ The exposure

¹²⁵ See *UGM Recordings*, 92 F. Supp. 2d 349.

¹²⁶ *Id.*

¹²⁷ There is a three-year statute of limitations for bringing civil copyright infringement claims under federal copyright laws. See 17 U.S.C. § 507(b) (2000).

¹²⁸ See, e.g., Peter K. Yu., *The Copyright Divide*, 25 CARDOZO L. REV. 331, 383–402 (2003) (discussing the various MP3 file-sharing cases that have been decided in recent years).

¹²⁹ *UMG Recordings*, 92 F. Supp. 2d at 352 (“[O]n any view, defendant’s ‘fair use’ defense is indefensible and must be denied as a matter of law.”).

¹³⁰ See *supra* note 29 and accompanying text.

¹³¹ See *supra* note 115 (concluding that MP3.com’s copyright infringement is clear).

¹³² See 17 U.S.C. § 504(c)(2) (2000).

¹³³ See Harmon & Sullivan, *supra* note 101 (noting that MP3.com purchased 80,000 CDs).

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here was \$150,000 for each of those.¹³⁴ So, it was a pretty significant case.

In the last minute or two, a topic that we were asked to address is whether there is a need for further legislation. No way. I think the pendulum, as my friend on the train told me this morning, is swinging back. I think that there are still a number of unsettled issues, including what is fair use. Where are these cases ultimately going to come out?

I use the *MP3.com* example, aside from the fact that I just like to talk about the case, because I don't think MP3.com posed the same type of threat that Grokster,¹³⁵ Morpheus,¹³⁶ KaZaA, and Napster did at the time, where users were downloading.¹³⁷ Yet the RIAA came out swinging as aggressively as they possibly could, and they prevailed, and they became more emboldened. And at the same time they were fighting Napster battles, and they ultimately prevailed in *Napster*.¹³⁸ Now, they are really doing a good job of letting the public know that they are not going to tolerate this kind of conduct.

I think that if there is more legislation at this point it is overkill. We are going to see that pendulum swing back to the point where the record companies are going to start to do better and people will be more responsible. And eventually the public will accept these models. If you give them viable alternatives, people will start to pay to get music. If they want music, if they want to be able to download music, people are going to pay for that music.

Thank you.

PROFESSOR KATYAL: Our next speaker is Rebecca Tushnet, who joins us from New York University Law School where she is an assistant professor. Rebecca came to NYU Law School from Debevoise & Plimpton in Washington, D.C., where she specialized in intellectual property. She has clerked for Chief

¹³⁴ See 17 U.S.C. § 504(c)(2) (2000).

¹³⁵ See Grokster 2.6, at <http://www.grokster.com> (last visited Mar. 11, 2004).

¹³⁶ See Morpheus 4, at <http://www.morpheus.com> (last visited Apr. 28, 2004).

¹³⁷ All of these services were operating and shut down at various times. For example, Napster shut down in 2001 after a preliminary injunction was granted by Ninth Circuit. See *supra* notes 63–64.

¹³⁸ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

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Judge Edward Becker of the Third Circuit Court of Appeals in Philadelphia and Justice David Souter of the U.S. Supreme Court. She graduated from Harvard University in 1995 and from Yale Law School in 1998. At Yale she served as an articles editor for the *Yale Law Journal* and an editor for the *Yale Journal of Law and Feminism*. Her publications focus mostly on copyright and free speech and include “Copyright as a Model for Free Speech Law,” which is published in the *Boston College Law Review*,¹³⁹ and “Legal Fictions: Copyright, Fan Fiction, and a New Common Law,” which was published in the *Loyola L.A. Entertainment Law Journal* in 1997¹⁴⁰ and awarded the Nathan Burkan Prize for best paper in the field of copyright.¹⁴¹

Rebecca, thank you for coming.

PROFESSOR TUSHNET: Thank you for having me. I’m sorry I was late. I still haven’t mastered the whole subway system.

It seems to me that the story of music on the Internet over the past five or six years is the story of two fantasies colliding. The first fantasy is that information wants to be free, that with the Internet we can throw away all the bottles and just have the wine and the free flow of data, which apparently was generated from somewhere and then circulated forever. So, there was that fantasy, that we would not need copyright anymore because everything would be available to everyone. The other fantasy is the record companies’ fantasy of perfect control, that there would be some way to control every use, every copy, of music that was digital.

Those fantasies, I think, have collided with one another. It seems to me that the record companies’ version is more likely to come out on top in the area that it covers—that is in the area of

¹³⁹ Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common With Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1 (2000).

¹⁴⁰ Rebecca Tushnet, *Using Law and Identity to Script Cultural Production: Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651 (1997).

¹⁴¹ The Nathan Burkan Memorial Prize is given to a second or third year law student who has written a paper on any aspect of copyright law. See ASCAP, *Nathan Burke Memorial Competition*, at <http://www.ascap.com/burkan/burkanrules.html> (last visited Mar. 11, 2004).

music—and the fantasy of free flow of information makes sense, but only for certain kinds of things, for a lot of news, a lot of fiction, things that people want to produce on their own, a lot of free software, OpenSource software.¹⁴² It is the story of the cabining of both of these ambitions, I think, that we have been seeing for the past couple of years.

It was interesting to me to hear my co-panelists talk about the public relations (“PR”) coup of the RIAA suing people.¹⁴³ I agree. But then Justin held up this Friends and Music advertisement with its anti-RIAA sign.¹⁴⁴ How do we reconcile those two things? Apparently it’s not that much of a coup.

I think the answer is that bad PR is good PR in this case. People on Slashdot¹⁴⁵ were never going to like the RIAA. There is a certain group of people who were never going to be happy unless they could get everything they wanted for free forever.

But the average person isn’t like that. Instead, the average person has sort of Rawlsian reflexive morality.¹⁴⁶ You look at the world around, you look at what other people are doing, you look at what seems fair, and you adjust your expectations of what is fair in light of what you see around you and what the alternatives are.¹⁴⁷

So, enforcement and education and legitimate alternatives are all mutually reinforcing, and the reason that we are seeing a decline in the use of the services is not just because of the

¹⁴² Open source software is software that is developed through free distribution of the source code to programmers who donate their programming skills with the goal of creating high quality software faster and cheaper than private software developers. *See generally* Open Source Initiative, at <http://www.opensource.org> (last visited Mar. 11, 2004). For a history of the culture of open source software, see generally ERIC S. RAYMOND, *CATHEDRAL & THE BAZAAR* 82 (1999) (describing open source as “software that is freely distributable and can be readily evolved to fit changing needs”).

¹⁴³ *See supra* note 19 and accompanying text.

¹⁴⁴ *See supra* notes 44–45 and accompanying text.

¹⁴⁵ Slashdot is a Web site dedicated to providing “news for nerds.” *See* Slashdot, *About This Site*, at <http://slashdot.org/about.shtml> (last visited Mar. 11, 2004).

¹⁴⁶ Legal theorist John Rawls conceived of the theory that society may be well ordered when it is “effectively regulated by a public conception of justice.” *See* Michael Swygert & Katherine Yanes, *A Unified Theory Of Justice: The Integration of Fairness into Efficiency*, 73 WASH. L. REV. 249, 298 (1998) (citations omitted).

¹⁴⁷ *See id.* (stating that Rawls’ theory starts with the idea that “society is a cooperative venture of human beings structured for their mutual advantage”).

availability of iTunes and not just because of the enforcement against individuals, but it's a combination. It makes it easier to think of the legitimate services as the right way to go, to convince yourself that it's the right thing to do.

And at the same time, the existence of iTunes makes KaZaA increasingly immoral. It used to be that you could say, "What I get out of this is the music I want for free." The development of iTunes and similar things means the "for free" part is really what you are after. While we can all respect, I think, the desire to have all the music that you want, the "for free" part is a little shakier.

Justin's point is well taken, that by adapting to the custom of personal uses, the new forms that allow some limited copying, like iTunes, which is my favorite. The industry accepts a certain norm about sharing or about personal use and then reinforces it.¹⁴⁸ What we might see happening is what we have seen in other areas. For example, there are classroom guidelines on copying that set forth things that teachers can do, the limited amounts that they can copy, and whether they can do it spontaneously, and the size of the excerpts they can use.¹⁴⁹ There are similar restrictions on use of materials in face-to-face teaching.¹⁵⁰ As a practical matter, those guidelines have become the upper limits. They tell people "this far and no further."

One thing we will see is fair use, or at least the technologically mandated version of fair use you get with iTunes, becoming more like the other technical exceptions to copyright law that are found elsewhere in the statute.¹⁵¹ In some ways our fair use law may be

¹⁴⁸ See *supra* notes 35–37 and accompanying text.

¹⁴⁹ The Association of American Publishers has adopted guidelines, taken from the legislative history of the Copyright Act, which address the number of copies a teacher can make, spontaneity, and the size of excerpts. See Association of American Publishers, Conferences & Publications: Publications, *Guidelines for Classroom Publishing*, at <http://www.publishers.org/conference/pubinfo.cfm?PublicationID=3> (last visited Mar. 11, 2004).

¹⁵⁰ Most schools and universities have adopted a policy on face to face teaching of copyrighted works. See, e.g., Fair Use and Copyright for Teachers, *A Teacher's Guide to Fair Use and Copyright*, at <http://home.earthlink.net/~cnew/research.htm> (last updated Jan. 21, 2000).

¹⁵¹ Other exceptions found in the Copyright Act apply in very limited circumstances. See, e.g., 17 U.S.C. § 106A(c) (2000) (exceptions to the rights of certain authors to attribution and integrity); 17 U.S.C. § 119(a)(5)(E) (2000) (exception to the limitations

becoming more like the international system.¹⁵² The amorphous concept of fair use is in a smaller corner than it was because we have codified how we are dealing with other things, like personal copying.¹⁵³

I should say as an aside, with the iTunes model, for ninety-nine cents you can put a song on up to three computers and any number of iPods, and you can burn ten copies of any particular playlist onto a CD.¹⁵⁴ I don't think ten is infinity. I think the rhetoric there is still a little extreme because, as a practical matter, I think for most of the people in this room who have used these services, that's all they'd ever want to do.

Yes, you might make a mixed CD for some friends, probably not eleven of your closest friends, but if you wanted eleven you could reorder the songs in the playlist after ten.¹⁵⁵ This seems like a reasonable demand to most people. Now, the technology of the system is allowing you to do it with authorized music.¹⁵⁶ I think that is a major advancement.

As for the pirate services,¹⁵⁷ I'm not sure that going after them is ever going to be a viable idea. In theory, there is jurisdiction over KaZaA in the Northern District of California,¹⁵⁸ but what exactly are we supposed to do with them? The programs are up

on exclusive rights with respect to secondary transmissions of superstations and network stations for private home viewing); 17 U.S.C. § 512(g)(2) (2000) (exceptions concerning limitations on liability relating to material online).

¹⁵² See *supra* note 30 and accompanying text.

¹⁵³ The U.S. fair use doctrine traditionally has had a broader scope than its international counterparts. See Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 115–19 (2000).

¹⁵⁴ See Arik Hesseldahl, *Apple Tunes Up*, FORBES, Apr. 29, 2003 (stating that iTunes limits a user to ten copies of a single playlist before having to change it).

¹⁵⁵ *Id.*

¹⁵⁶ See Benny Evangelista, *Online Music Finally Starts to Rock 'n' Roll*, S.F. CHRON., Dec. 29, 2003, at E1; see also Jeffrey M. Liebenson, *iTunes Invasion; Apple Offers a Legal Option for Downloading, Copying Songs*, N.Y.L.J., Aug. 19, 2003, at 5.

¹⁵⁷ See generally Liebenson, *supra* note 156 (discussing how pirate services allow users to violate copyright laws by making unauthorized downloads of copyrighted music to their computers).

¹⁵⁸ See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1031 (C.D. Cal. 2003) (stating that the court had federal question jurisdiction, pursuant to 28 U.S.C. § 1331 (2000)).

there. If you put KaZaA out of business, the installed base stays pretty large.¹⁵⁹

Individual enforcement is better not just because it has such a powerful educational effect, but also because I am not going to move to the Seychelles, I do not have a reason; it is more important for me to stay in New York and be subject to potential criminal punishment than it is for KaZaA to stay in any particular place.

Justin's comments about the knowledge standard made me think.¹⁶⁰ I think the problem with the services is not so much knowledge—they know what they are doing; it's the combination of knowledge and control.

The key question with Grokster was: control at what time?¹⁶¹ It is a program that, at least in theory, can be released out on its own and KaZaA never has any more contact with it.¹⁶² In that case, it does seem a lot like the VCR. That is, they made the VCR with a record button, and then they let it out on the market. And there it is, and they have no idea what people are going to do with it.¹⁶³ They know some are going to infringe, but some might not.¹⁶⁴

Maybe the difference between the VCR and KaZaA is the percentage of people.¹⁶⁵ The Supreme Court said that it didn't

¹⁵⁹ See *Grokster*, 259 F. Supp. 2d at 1041 (“If either Defendant closed their doors and deactivated all computers within their control, users of their products could continue sharing files with little or no interruption.”).

¹⁶⁰ See *supra* notes 41, 48 and accompanying text.

¹⁶¹ See *Grokster*, 259 F. Supp. 2d at 1040 (“While Grokster may briefly have had some control over a root supernode, . . . Grokster no longer operates such a supernode. Thus, the technical process of locating and connecting . . . occurs essentially independently of . . . Grokster.” (citation omitted)).

¹⁶² See *id.* (“When users search for and initiate transfers of files using the Grokster client, they do so without any information being transmitted to or through any computers owned or controlled by Grokster.”).

¹⁶³ See *id.* at 1035.

¹⁶⁴ *Id.*

¹⁶⁵ The percentage of users of KaZaA or similar P2P software compared to the users of the VCR that use the products for copyright infringement differ greatly. Compare *id.* at 1034–35 (stating that many of the users of the Grokster software use it to download copyrighted media files) with *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 424 n.4 (1984) (finding that surveys indicated that a majority of the VCR users used the product for time-shifting purposes, which is a non-infringing activity).

matter, but really it does. Ninety-nine percent of what goes on on KaZaA is unlawful. In fact, it looked as if about seventy percent of what went on in home copying was fair use, according to the Supreme Court, or was done with the permission of the copyright owners.¹⁶⁶ So, that is part of it.

I also have to say I'm not sure *Sony*¹⁶⁷ would come out the same way today. It was a 5-4 decision.¹⁶⁸ It was originally decided the other way, we now know from the Marshall papers.¹⁶⁹ It is hard to remember because this immediately became a core part of the myth of American copyright, that of course home video taping is fair use, and all else follows from there.¹⁷⁰

But, especially with these viable markets for things like delayed recording,¹⁷¹ DVD boxed sets,¹⁷² plenty of videotapes of television shows,¹⁷³ all of the things that you could not get back in

¹⁶⁶ See *Sony*, 464 U.S. at 424 n.4.

¹⁶⁷ See *id.* at 417.

¹⁶⁸ See *id.* at 418 (Justices Stevens, Burger, Brennan, White, and O'Connor joined in the opinion, while Justices Blackmun, Marshall, Powell, and Rehnquist dissented).

¹⁶⁹ See Jeanne English Sullivan, *Copyright for Visual Art in the Digital Age: A Modern Adventure in Wonderland*, 14 CARDOZO ARTS & ENT. L.J. 563, 592 (1996) (stating that Justice Marshall's personal papers included a suggestion from Justice Stevens that home taping was a non-infringing use of the VCR, even though this opinion was not expressed in the *Sony* decision).

¹⁷⁰ The Court in *Sony* did not expressly find home taping to be a non-infringing use, but suggests that Congress may need to look at the technology and address the issue. See *Sony*, 464 U.S. at 456.

¹⁷¹ Delayed recording occurs when broadcast video content is recorded on a computer hard disk, and is played back after a period of delay, often in an effort to skip commercial advertisements. See TiVo, *Welcome to TiVo*, at <http://www.tivo.com/0.0.asp> (last visited Mar. 18, 2004). Delayed recording has been made popular by the TiVo Recorder which allows you to digitally record your favorite show and watch it later. See *id.*

¹⁷² DVD boxed sets for popular television shows and movie collections have become very popular. See Joanne Ostrow, *TV Reruns on DVD Billion-Dollar Baby*, DENVER POST, Feb. 22, 2004, at F-01 (stating that television-themed DVD sales topped \$1 billion in 2003).

¹⁷³ Similar to the DVD boxed sets, the older shows are also available on VHS and often offer the same features. See Laura Holson, *Nothing Is Forever (Except TV Shows)*, N.Y. TIMES, Aug. 17, 2003, at 19. Video cassette sets are rapidly being replaced by DVD boxed sets as VCRs become more obsolete. *Id.* (stating that the most popular television shows always have been available for purchase on VHS tapes but that DVDs are making the sale of television shows even more popular and lucrative).

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1978,¹⁷⁴ *Sony* is less persuasive, frankly, as a fair use. There is less of a reason to do it, just like there is less of a reason to use KaZaA now that there is iTunes. There is less of a reason to use Bit Torrent¹⁷⁵ when you know that the next season of *Smallville*¹⁷⁶ is coming out in two months—not that it is, sadly.

So, what do we do? One of the reasons that I like going after individuals is not just for the educational effect, but because I am worried about the effects on new technologies that we can't foresee, that the Supreme Court never did foresee,¹⁷⁷ that the *Napster* court didn't foresee,¹⁷⁸ and that the *Grokster* court hasn't foreseen.¹⁷⁹

I am a little worried that if we expand the idea of contributory liability¹⁸⁰ just to get KaZaA—it is a completely understandable impulse to do that, but I worry what happens next because what is very clear from all this history is that we don't know what happens next. The whole problem with the Digital Millennium Copyright Act (“DMCA”) subpoenas¹⁸¹—and this is the legal argument that

¹⁷⁴ See Mary Bellis, Inventors, *DVD*, About.com, at <http://inventors.about.com/library/inventors/bldvd.htm> (last visited Mar. 18, 2004) (stating that the DVD was announced as an industry standard in 1995 and that DVD players only became available in the United States in 1997).

¹⁷⁵ Bit Torrent is a file-sharing program where files are downloaded from one person by several people in small chunks. See Bit Torrent Headquarters, *BTHQ's Newbie Guide*, at <http://www.halm.us/bthq/newbie.html> (last updated Feb. 24, 2004). It enables more people to be able to download a file soon after its release, whereas typical file-sharing systems might get clogged if too many people were trying to download the same file. See *id.*

¹⁷⁶ *Smallville* is a popular television show on the WB Television Network about the teenage years of Clark Kent before he became Superman. See WB Television Network, *Smallville*, at <http://www.thewb.com/Shows/Show/0,7353,||126,00.html> (last visited Mar. 18, 2004).

¹⁷⁷ The Court did not anticipate the VCR technology that arose in *Sony*, 464 U.S. 417 (1984).

¹⁷⁸ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

¹⁷⁹ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029 (C.D. Cal. 2003).

¹⁸⁰ Contributory liability for copyright infringement occurs if a party with knowledge induces, causes, or materially contributes to the infringing acts of another. See *id.* at 1035.

¹⁸¹ See 17 U.S.C. § 512(h)(5) (2000).

Verizon and the other ISPs are fighting¹⁸²—is that if you read the DMCA, one good reading of it is that it only applies to stuff that is on the ISPs' servers¹⁸³ because back in the ancient history of 1998 that's where the MP3s were.¹⁸⁴ They weren't on the users' own hard drives, and now they are.¹⁸⁵ That is another piece of evidence that we really don't want to freeze anything.

Maybe contributory liability as a standard can survive this by narrowing later if there are better technologies that seem to formally fit within the standards for making Grokster liable, but I don't know. I am a little worried about that.

The one thing that always has struck me is the stuff about the Darknet and all these people who are saying, "Oh, we'll just go underground."¹⁸⁶ This seems a perfectly acceptable consequence—not great, not good.

But there is a guy on Sixth Street. I walk past him most days. He has a bunch of pirate CDs spread out on a blanket and sells them. There is a color photocopy of the cover. It's not good for all the commerce in the country to look like that, as it was in some developing countries. On the other hand, you can take some leakage. When I talked about the fantasy of perfect control at the beginning, that's really what I meant—that the recording industry failed to see. They knew in the physical world that they could take a few of those guys on the street, as long as most people were paying and as long as there was some enforcement against those guys. Similarly, you can take a few Darknets.¹⁸⁷ They will survive as long as most of the people pay most of the time.

¹⁸² In 1998, Congress passed the Digital Millennium Copyright Act ("DMCA"), Pub. L. No.105-304, 112 Stat. 2860 (1998). Verizon and other Internet service providers ("ISPs") have attempted to challenge the DMCA subpoena provisions by citing a high potential for abuse. See Grant Gross, *Verizon Divulges Customer Names*, PCWorld, at <http://www.pcworld.com/news/article/0,aid,111048,00.asp> (June 5, 2003).

¹⁸³ See DMCA, 112 Stat. 2860.

¹⁸⁴ See *Grokster*, 259 F. Supp. 2d at 1032–33.

¹⁸⁵ See *id.*

¹⁸⁶ One way for people to go underground is through Darknets. See Gary Rivlin, *2003: The 3rd Annual Year in Ideas; Darknets*, N.Y. TIMES, Dec. 14, 2003, at 60. Darknets allow users to send messages and documents through the Internet with the ease and security of a private in-house network. See *id.*

¹⁸⁷ See *id.*

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PROFESSOR KATYAL: Thank you so much. Since we have about forty-five minutes left for questions, and just for the purposes of playing the Devil's Advocate, let me just take a few minutes outside of my role as moderator and just highlight some of the worst-case scenarios that could be pictured with this door that has been opened for suing individuals who are engaging in copyright infringement.

I think all of us agree that there are real, substantial, detrimental implications for the music industry with respect to the ease of downloading and uploading music.¹⁸⁸ Certainly, that is a very uncontroversial observation.

The problem is that typically the level of copyright enforcement has always recognized that there is this level, which Rebecca alluded to, of infringement that is not necessarily acceptable or supported, but certainly understood.¹⁸⁹ The pirate who might be selling things on the street, things like that, are scenarios that traditionally copyright owners have recognized, understood, and accepted.¹⁹⁰

In one example of this, the *Sony* case, there were individual defendants who actually were engaging in taping shows and allowing their names to be used for the purposes of clarifying the different fair use rights involved, with the understanding that they would never be sued for infringement.¹⁹¹ Now, that of course was many years ago, several years ago.¹⁹² Now we are in a very

¹⁸⁸ David Segal, *Requiem for the Record Store; Downloaders and Discounters Are Driving Out Music Retailers*, WASH. POST, Feb. 7, 2004, at A01 (describing some of the financial harms to CD sales from the rise in popularity of downloading music online).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ See *Sony Corp. of Am. v. Universal City Studios Inc.*, 464 U.S. 417, 422 n.2 (1984) (stating that an individual user, William Griffiths, was named as a defendant in the district court but that no relief had been sought against him); *Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429, 436–37 (C.D. Cal. 1979), *rev'd*, 464 U.S. 417 (1984) (stating that Griffiths had consented to being a defendant in the lawsuit and that the plaintiffs had waived any claim for damages or cost against him).

¹⁹² See generally Michael Albert & Liza Vertinsky, *From Sony to Napster—and Back?: Copyright Law Implications of Decentralized File-Sharing Technology*, BOSTON B.J., Jan.–Feb. 2004 (noting the changes in copyright since the *Sony* decision twenty years ago), available at http://www.bostonbar.org/pub/bbj/bbj0102_04/analysis_sonynapster.htm (last visited Mar. 18, 2004).

different scenario, where the door has indeed been opened to sue individual defendants.

I think Justin's points are very well taken. Certainly, the RIAA has been incredibly strategic and quite sensible about their choice of the defendants that they want to go after in some scenarios. Generally, there has always been a distinction the RIAA has made between uploading and downloading. So, for example, individuals who are uploading substantial files are considered to be more likely to be sued by the RIAA than individuals who are downloading files.¹⁹³ And so in those kinds of scenarios the RIAA has been really careful and really strategic about whom they want to go after, notwithstanding the situations of twelve-year-old-girl plaintiffs and people who didn't really know what they were doing at the time.¹⁹⁴

But the door now has been opened for anyone who purports to be a copyright owner on the Internet to be able to use the same tactics to go after individuals. That, in my view, is the worst-case scenario that we could imagine.

Let me tell you a little bit about some of the different policy and civil rights issues that I see that might arise out of this whole scenario, not necessarily ones that we see today, but ones that we might see at a later point. The first has to do with the question of privacy. Many individuals expect their Internet service providers to keep their names and identities secluded, that only under very certain scenarios that involve acts of copyright infringement or defamation, things like that, will their names be revealed to a

¹⁹³ See Pamela Gaynor, *Lawsuits Not Scaring Net Music Swappers*, PITTSBURGH POST-GAZETTE, Sept. 10, 2003, at A-1 (quoting technology writer David Radin as saying that "'if you read between the lines' of recent pronouncements, the industry is not targeting the people who download music so much as those who offer their collections of songs to others"); Elec. Frontier Found., *How Not to Get Sued by the RIAA for File-Sharing (And Other Ideas to Avoid Being Treated Like a Criminal)*, at <http://www.eff.com/IP/P2P/howto-notgetsued.php> (last visited Mar. 18, 2004) (recommending that parties "disable the 'sharing' or 'uploading' features on [their] P2P application that allow other users on the network to get copies of files from [their] computer or scan any of your music directories").

¹⁹⁴ See *supra* note 23.

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copyright owner or an individual who is making those kinds of claims against them.¹⁹⁵

Now, what the DMCA subpoenas purport to do is essentially allow anyone who claims to be a copyright owner, who has a good faith belief that infringement is occurring, to go to a district court clerk and, without any oversight, have the identity of that person who is posting information on the Internet be revealed to them.¹⁹⁶

Now, under one scenario, if we are thinking of individuals who are downloading or uploading huge amounts of music and engaging in infringement, we can say that is not a very difficult case scenario. But think about some of the other complicated scenarios that we could see with respect to fair use of literary compositions on the Internet. If I have a belief that an individual is engaging in copyright infringement, this DMCA subpoena provision allows me to discover the identity of that person.¹⁹⁷ There are virtually no safeguards to protect against the anonymity of whoever might be posting that information.¹⁹⁸

I should say that anonymous speech is an area of speech that is accorded full protection under the First Amendment.¹⁹⁹ So, there are privacy and free speech issues that we could imagine leading to worst-case scenarios.

Another issue is related and involves this question of due process. The RIAA is the one that is making these determinations about who is infringing and who is not.²⁰⁰ That enables a private copyright owner to make determinations about what kinds of

¹⁹⁵ The U.S. Court of Appeals for the D.C. Circuit decided *Recording Industry Association of America v. Verizon Internet Services, Inc.*, 351 F.3d 1229 (D.C. Cir. 2003), after this symposium was held. The D.C. Circuit held that the subpoenas used “to compel ISPs to disclose the names of subscribers whom the RIAA has reason to believe are infringing its members’ copyrights” should not be enforced. *Id.* at 1232.

¹⁹⁶ See *Recording Indus. Ass’n of Am.*, 351 F.3d at 1232–33 (describing the statutory provisions under § 512(h) of the DMCA to seek subpoenas).

¹⁹⁷ See *id.*; 17 U.S.C. § 512(h) (2000).

¹⁹⁸ 17 U.S.C. § 512(h).

¹⁹⁹ See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995) (stating that “an author’s decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment”).

²⁰⁰ According to the DMCA subpoena provisions, the RIAA or any copyright owner can decide whom it wishes to identify as a copyright infringer. See *Recording Indus. Ass’n of Am.*, 351 F.3d at 1232–33.

activities constitute fair use and what kinds of activities do not.²⁰¹ And again, while we might feel like it is comfortable for the RIAA to be making those kinds of determinations, we might be less comfortable given other kinds of strategic issues that other copyright owners might use to determine who might be infringing and who is not.²⁰² There are virtually no due process protections that exist at this particular stage.²⁰³

Another issue, which some of us on the panel have already alluded to, is the issue of peer-to-peer (“P2P”) technology in general.²⁰⁴ P2P technology can enable a tremendous amount of copyright infringement, but there are lots of really important values to peer-to-peer technology that involve the sharing of information generally, information that might be in the public domain, information that individuals cannot necessarily access easily.²⁰⁵

And so, to some extent, to shut down a lot of the P2P software programs that exist merely because of the fact that copyright infringement is occurring is an overbroad result. It runs the risk of deterring the kind of innovation that traditionally copyright is designed to promote.²⁰⁶ Now again, that is an important argument to raise within the context of the *Grokster* case that is on appeal.

Finally, let me also just say a little bit about fair use and liberty. I view fair use as a very important and substantive type of liberty that is allowed by the realm of copyright. There are certain

²⁰¹ There are only a minimum of steps a copyright owner must take in order to obtain a subpoena and personal information about an individual. *See id.* The copyright owner does not have to provide any evidence that infringement has occurred before having access to information; it only has to represent that the subpoena is requested for the purpose of identifying an alleged infringer. *See id.*

²⁰² *See* Robert S. Boynton, *The Tyranny of Copyright?*, N.Y. TIMES, Jan. 25, 2004, at 40 (making note of several contemporary “copyright horror stories” where copyright holders strongly have asserted intellectual property rights).

²⁰³ *See id.* (noting that Swarthmore University’s compliance with a DMCA subpoena silenced student speech without the benefits of due process).

²⁰⁴ *See supra* note 2 and accompanying text.

²⁰⁵ *See, e.g.*, Monty Phan, *Strength in Numbers*, NEWSDAY (N.Y.), May 9, 2001, at C10 (discussing a cancer research project using peer-to-peer technology).

²⁰⁶ The copyright clause is designed “[t]o promote the Progress of Science and useful Arts.” U.S. CONST., art. I, § 8, cl. 8. It is “intended to motivate the creative activity of authors and inventors by the provision of a special reward.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

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scenarios where individuals who are engaging in fair use might be subjected to threats of copyright infringement. We do not necessarily see it in the music scenarios because many of the infringers who have been sued are not the most sympathetic. But the door now has been opened, and so, individuals who might be engaging in fair use could be chilled because of the fear of being threatened with a copyright infringement suit. That kind of chilling effect is something that we all should be very concerned with.

There are lots of scenarios, for example, with respect to digital rights management, in which individuals are virtually precluded from engaging in activities that might be construed as fair use, such as reverse-engineering.²⁰⁷

Some of the strong copyright owners might feel that those rights are marginal and not necessarily worth protecting, but I would posit that those rights are protected within the case law that has developed around copyright and that those are important elements that do result in a balance between private control and public access to information. To preclude access to that type of information to the use of P2P technology, for example, is a result that we simply should be mindful of when we trump it and apply the RIAA's choice.

I want to echo that there is a lot of value in public education about copyright, but the confusion that surrounds copyright could result in precluding fair uses that we really do want to protect.

Having said that, maybe we should take questions.

PROFESSOR HUGHES: I have a few small reactions.

PROFESSOR KATYAL: Great, okay.

PROFESSOR HUGHES: Sometimes a panel can sit up here and babble on. We panelists know some of these cases and may even dream about them, so we're not sure of the level or depth of knowledge of the audience's viewpoint sometimes.

²⁰⁷ Courts have held that the reverse engineering of unprotected elements of computer programs constitute a fair use. *See, e.g.,* Sony Computer Entm't, Inc. v. Connectix Corp., 203 F.3d 596 (9th Cir. 2000); Atari Games Corp. v. Nintendo of Am., Inc., 975 F.2d 832 (Fed. Cir. 1992).

We were talking about the staple article of commerce doctrine²⁰⁸ and substantial non-infringing uses in *Sony*.²⁰⁹ I just want to be clear. To reiterate, what we have been saying here is that the problem with substantial non-infringing uses is that we don't know whether "substantial" means an absolute amount, a percentage amount, or some combination thereof. That is why, even if you adhere to the substantial non-infringing uses doctrine, you might conclude that these peer-to-peer systems do not benefit from that kind of defense. So, just to fill out a little bit of the ambiguity of what we were left with out of the *Sony* decision.

I certainly agree with Rebecca and Sonia that there is a traditional acceptance of a great amount of leakage in the copyright system. But I just want everyone to be clear on what the word traditional means. There wasn't any leakage before 1950.²¹⁰ "Traditional" is the second half of the twentieth century.²¹¹ Up until the wide dissemination to individuals of reproductive technology, there wasn't really leakage in the copyright system.²¹² There was some piracy, in the sense that you had to establish your own manufacturing facility.

It is really a different sort of leakage that starts to occur with the advent of personally-controlled reproducing technology.²¹³ The first thing, of course, is reprographic, xerographic technology and the ability to start Xeroxing things—sorry, trademark

²⁰⁸ U.S. CONST., art. I., § 8, cl. 8.

²⁰⁹ See *Sony Corp. of Am. v. Universal City Studios Inc.*, 464 U.S. 417, 456 (1984) (stating that "[t]he Betamax is . . . capable of substantial noninfringing uses").

²¹⁰ In 1951, the first videocassette recorder was invented by Charles Ginsburg. See Mary Bellis, Inventors, *The History of Video and Related Inventions*, About.com, at <http://inventors.about.com/library/inventors/blvideo.htm> (last visited Mar. 18, 2004).

²¹¹ See Michael Plumleigh, Comment, *Digital Audio Tape: New Fuel Stokes the Smoldering Home Taping Fire*, 37 UCLA L. REV. 733 (1990).

For many years, a fire has smoldered over the issue of private home audio recording. In the second half of this century technological progress brought an increased amount of copyrighted material to the homes of the general public through an ever-expanding variety of media. Yet technological progress also provided the public with the means to reproduce copyrighted works, as copying became easier and less expensive.

Id.

²¹² See *id.* ("Ever since the advent of portable tape recorders, consumers have been using them to tape copyrighted recordings for their own use.")

²¹³ *Id.*

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infringement, Xeroxing things.²¹⁴ So, when we say “traditional leakage,” or that “traditionally this system accepted a lot of leakage,” it is traditional in our lifetimes, but it is not necessarily the course of the copyright system over its entire history.

Actually, I just wanted to take Rebecca up on something small. I think you were misunderstanding the Universal executive, because I think you thought it was a little rhetorical for him to say “ten copies is infinity.” But you actually confirmed what he meant, because you just said that for most people that’s all they ever would want to do. That is what he meant. Since it is what most people will ever want to do, ten copies; it is the equivalent to infinity. It’s equivalent to granting total rights to reproduce to most people, because most people will not want to do more than burn ten copies. So, I think you actually confirmed his point of view, that when you grant that much fair use you are granting about as much as most citizens will ever want, equivalent to, for their purposes, infinity.

The last thing on KaZaA, just to be careful on this question of control. Everyone needs to understand that in the district court decision it was Grokster, which is a licensee of KaZaA, that was off the hook, not KaZaA.²¹⁵ That is important for the issue of control, because if we shut down KaZaA right now, it is correct that the system would continue, unlike Napster.²¹⁶ But the system would degrade, and the reason the system would degrade is because it appears that KaZaA continually refreshes the information of supernodes.²¹⁷ It almost would require a board for me to lay out the technology. But KaZaA has some control

²¹⁴ Chester Carlson invented the photocopier in 1937, and it became commercially available through the Xerox Corporation in 1950. See Mary Bellis, *Inventors, Xerox Photocopiers, Xerography and Chester Carlson*, About.com, at <http://inventors.about.com/library/inventors/blxerox.htm> (last visited Mar. 18, 2004).

²¹⁵ See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1032 n.2 (C.D. Cal. 2003) (stating that since KaZaA had ceased to defend this action, the court had entered default judgment against it and that the decision only related to Grokster and another defendant).

²¹⁶ See *supra* notes 161–62 and accompanying text; KaZaA, *The Guide, Supernodes*, at <http://www.kazaa.com/us/help/faq/supernodes.htm> (last visited Mar. 18, 2004) [hereinafter KaZaA, *Supernodes*].

²¹⁷ See KaZaA, *Supernodes*, *supra* note 216.

capacity and exploits some control capacity in terms of the supernodes.²¹⁸

We know KaZaA exploits some control capacity because they cut off Morpheus; they cut off one of their licensees.²¹⁹ The fact that they cut off one of their licensees means that they do have control capacity over the system.²²⁰ So, if we shut them down, the system would degrade.²²¹ And if they could be made to comply with an order, they could apparently shut down the system. That is a difference between KaZaA, the actual holder of the technology, and the holder of the keys to the supernode list, versus Grokster, who was just a licensee.²²²

On that, I'm happy to hear so many good things about iTunes. Do you prefer iTunes or TiVo,²²³ between your two favorite new technologies?

PROFESSOR TUSHNET: Oh, no. That choice might send me into total meltdown.

Actually, I did want to say that I thought Sonia's point was worth reiterating, that we talk about the music industry because that's what we have in front of us, but we shouldn't let what happens in one industry control our response to the entire system. I mean, we already treat music differently than other copyrighted works, and maybe we should embrace that more fully than we already do.

Frankly, the record companies are a lot more attractive as copyright owners to me because most of what they go after is pure copying. A lot of what owners of literary copyrights, and to a

²¹⁸ *Id.*

²¹⁹ Roger Parloff, *From Betamax to Kazaa: The Real War Over Piracy*, FORTUNE, Oct. 27, 2003, at 148 (reporting that in 2002, KaZaA cut off Morpheus from its network after a payment dispute and stating that what made this so startling was that "the network Kazaa and Morpheus were using wasn't supposed to be capable of being switched off . . . it was thought to be decentralized and 'self-organizing'—a network that would continue to exist even if Kazaa and Morpheus were to vanish").

²²⁰ *Id.*

²²¹ See *supra* notes 216–18 and accompanying text.

²²² See *Grokster*, 259 F. Supp. 2d at 1032 (stating that Grokster was distributing a branded version of the KaZaA software).

²²³ See *TiVo*, *Welcome to TiVo*, *supra* note 171.

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certain extent audio-visual copyrights, go after is not,²²⁴ and they have much better claims to fair use, in my opinion.

In contrast, this industry looks pretty good, but Sonia reminds us that we might want to make sure that the rules that we endorse apply to everybody, or differentiate in the right ways.

PROFESSOR KATYAL: Michael, did you want to add something?

MR. CARLINSKY: No, I wasn't going to add anything further. I think maybe we should take some questions from the audience.

PROFESSOR KATYAL: Okay, great. Any questions?

QUESTIONER: My name is Ed Kramer. Aside from a brief excursion into the academic world, I spent over fifty years as a lawyer, and nineteen of those years as president and chief executive officer of a major music licensing organization, so I respectfully disagree with Professor Hughes and some of the others about what the problem is and what the solution is.

I remember very clearly—I think my mother used to put some of that alcohol in my milk. But I remember Prohibition. It didn't work.

What we have here is a new technology, and we're not dealing with a new technology by suing people. Many years ago, as some of you will have read about, there were two very big-selling recording artists, and there was a new technology out there²²⁵ that was going to interfere, if not kill, their record sales. They brought lawsuits.²²⁶ Fortunately, they lost.²²⁷ Fred Waring and Paul

²²⁴ See, e.g., *Shaw v. Lindheim*, 919 F.2d 1353 (9th Cir. 1990) (deciding that there was no infringement in a literary copyright infringement case where the copyright owner alleged that defendant's scripts were substantially similar to his own scripts).

²²⁵ The new technology at the time, the 1930s and 1940s, was broadcast radio stations, which some feared would harm record sales. See John R. Kettle, III, *Dancing to the Beat of a Different Drummer: Global Harmonization—And the Need for Congress to Get in Step with a Full Public Performance Right for Sound Recordings*, 12 *FORDHAM INTELL. PROP. MEDIA ENT. L.J.* 1041, 1060–64 (2002) (discussing the early case law on copyright protection of sound recordings in new technology including piano rolls and broadcasting).

²²⁶ See *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86 (2d Cir. 1940); *Waring v. WDAS Broad. Station, Inc.*, 194 A. 631 (Pa. 1937).

Whiteman²²⁸ wanted to prevent radio stations from playing their music because they wouldn't be able to sell records.²²⁹ Now, if radio stations couldn't play records, the industry would be in bad, bad shape.

In my view, the objective here is to say that this is not going to go away. It is not going to go away by suing people. The answer should be to try to come up with a reasonable, sensible licensing system to handle this.

I don't want to go into this in detail. I put this in writing once. My suggestion is that you take six knowledgeable people—no academics, no bureaucrats—and lock them up in a room, feed them bread and water for a week, and tell them to come up with a practical way of licensing this music because there are examples out there, which are not exactly online, but are reasonably close. Tell them to give us some path on which this can be accomplished.

In *Napster*, it was very successful—the lawyers made a lot of money. It accomplished zero. So, my answer is lock them up in a room to come up with a reasonable answer. An answer can be found.

PROFESSOR KATYAL: That's a great question. Maybe others on the panel want to talk about the issue of compulsory licensing. Why wasn't that a solution?

PROFESSOR HUGHES: Well, one reason compulsory licensing is not a solution is because of the posture of where we are, and that is—

QUESTIONER: I'm not saying compulsory licensing. I take that word out of my vocabulary.

PROFESSOR KATYAL: Okay. Well, I'm interested in hearing Justin's thoughts on that.

²²⁷ See *RCA Mfg. Co.*, 114 F.2d at 88 (stating that the “common-law property” in these performances ended with the sale of the records”). But see *Waring*, 194 A. at 448 (finding no reason why the restriction attached to the manufacture and sale of the records should not be enforced).

²²⁸ See *RCA Mfg. Co.*, 114 F.2d 86; *Waring*, 194 A. 631.

²²⁹ See *id.*

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PROFESSOR HANSEN: Well, locking them up in a room sounds a little compulsory.

PROFESSOR HUGHES: Bread and water sounds pretty compulsory to me, too.

PROFESSOR HANSEN: There are due process problems there, too.

PROFESSOR HUGHES: This is one of the curious things—the rhetorical and political positions of intellectual property professors. One of the rhetorical and political positions of intellectual property professors is that—and I will characterize this as a low protectionist political perspective—new technologies always prompt compulsory licensing, right? Sounds great and technologically deterministic—we might as well surrender.

The problem is that the scenarios in the twentieth century where that occurred, at least two of the important ones that are typically used as examples, were instances in which the courts said that there was no copyright. And the legislative compromise was to bump up the protection by creating the right and then compulsorily licensing it.²³⁰ That's what happened in the piano rolls case, and that's what happened in cable broadcasting.²³¹

And so, the reason why that kind of formula—new technology prompts compulsory licensing—might not apply in this case is because the courts didn't start out by saying that no right exists. Instead, the courts have started out by saying that there are rights, big rights, lots of rights and that they're going to throw the book at them.²³² Therefore, it's not going to Congress with the same posture. Just as a matter of the flow of history, that's why it's a quite different circumstance than other situations where new technologies have prompted compulsory licensing.

PROFESSOR KATYAL: Mike?

MR. CARLINSKY: Other questions? We can continue to debate that. I am just wondering if there are other questions that

²³⁰ See Kettle, *supra* note 225 (discussing both the piano rolls and broadcasting cases).

²³¹ See *id.* at 1063 (“In response to the increased pressure from the music industry and the growing support of the courts, Congress amended the Act of 1909 prospectively to include sound recordings within the scope of federal copyright protection.”).

²³² See, e.g., *Waring*, 194 A. 631.

people have. I have a view on that, but I'd like to hear some other questions.

PROFESSOR KATYAL: Let's hear you.

MR. CARLINSKY: My view is that I agree with what Ed said. I think that it should have happened long ago. I think that it could have been solved. I have been one who has been advocating that it be solved. It doesn't have to be compulsory. It could be just a licensing scheme, but they still haven't been able to get that figured out.

Coming back to using MP3 as an example, MP3 had licenses from the performing rights organizations ("PROs").²³³ The part about streaming had been licensed.²³⁴ What they couldn't do was put that copy onto the server.²³⁵ That was the active infringement, even though they had the right, as I said, to then stream the music.²³⁶

One argument was this. Well, wait a minute. We have a license from the PROs to stream the music. How else can you stream the music in a digital world unless you first make a digital copy onto the server that will facilitate the stream?

The problem was that there was no record company that was prepared to license MP3.com,²³⁷ and there was no compulsory license scheme set up that would have allowed MP3.com to make the copy onto its servers. And then there was debate as to who would control that license. Was that a license that you had to get from the record company or from the Harry Fox Agency?²³⁸ And so, there was even a question as to who had the right. Or perhaps both of them did.

²³³ By purchasing actual CDs, MP3.com had licenses from the performing rights organizations to stream the music. *See* UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 350 (S.D.N.Y. 2000).

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ Instead, most of major record companies brought suit to enjoin MP3.com from offering its service. *Id.*

²³⁸ The Harry Fox Agency "licenses the largest percentage of the mechanical and digital uses of music in the United States on CDs, digital services, records, tapes and imported phonorecords." *See* Harry Fox Agency, Inc., *About Us*, at <http://www.harryfox.com/-about.html> (last visited Mar. 18, 2004).

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I think there are solutions. But I think the problem is that everybody has a hand in this. The PROs say, “Of course we’ll license you, but we want the lion’s share.” And then the record companies say, “No, the sound recording rights are more valuable than the publishing rights.” And so, they all have divergent interests, but all have the common interest of capitalizing on the buck and wanting to take the lion’s share.

So, it could have been resolved.

Other questions?

QUESTIONER: I am a law student here at Fordham. My question is about the lawsuits that are obviously generating a lot of public attention and media attention.²³⁹ As somebody who has never downloaded music and has never studied copyright law, it just seems that there is a ready legal defense, certainly for a twelve-year-old child who downloaded music. For example, it seems that there is an inherent problem in prosecuting somebody who doesn’t even have the legal right to contract.²⁴⁰ Maybe you could talk about the contracting part.

MR. CARLINSKY: Can I respond to something you said? In these cases with the innocent twelve-year-old, copyright infringement is essentially strict liability.²⁴¹ Unlike contributory infringement, where there is a knowledge element to it, the individual who is doing the downloading is committing direct copyright infringement, allegedly, and so innocence is not a defense to the copyright infringement.²⁴²

PROFESSOR HUGHES: It’s not innocence.

MR. CARLINSKY: I’m using innocence and ignorance perhaps in the same way. There is no defense there. It may be a mitigating circumstance. In the world in which we all live, we might say, “Well wait a minute, that’s not fair. Why should this

²³⁹ See *supra* note 16 and accompanying text.

²⁴⁰ RESTATEMENT (SECOND) OF CONTRACTS § 12 (1981) (stating that an infant does not have legal capacity to enter into a contract).

²⁴¹ See Ronnie Heather Brandes et al., *Intellectual Property Crimes*, 37 AM. CRIM. L. REV. 657, 686 (2000) (stating that “copyright infringement is governed by strict liability”).

²⁴² *Id.*

twelve-year-old girl, who didn't realize what she was doing was unlawful, be sued and penalized for it?"

But with the way the law is set up, the ignorance or innocence of "I didn't know" is just not a defense.²⁴³ If you copied, you copied. And you have committed, allegedly, the act of copyright infringement.²⁴⁴ So, it is a problem.

PROFESSOR TUSHNET: But at least in this case—I'm not exactly a high protectionist—she had thousands of songs on her hard drive.²⁴⁵ I'm sorry that she is twelve, but she was doing a lot of damage. I see no reason why her age should in any way inhibit the record companies from telling her to stop that. The settlement she got was incredible, and somebody else paid the fine for her.²⁴⁶ But \$2,000 for 2,000 songs,²⁴⁷ when we're starting off with a statutory fine of—

PROFESSOR HUGHES: \$150,000.²⁴⁸

PROFESSOR TUSHNET: For willful?

PROFESSOR HUGHES: No, not for willful.

MR. CARLINSKY: No. It starts out at \$750 at the low end. It's up to \$30,000 for a song at the high end before there is willfulness.²⁴⁹ Then, if it's willful, that \$30,000 goes up to \$150,000.²⁵⁰

PROFESSOR TUSHNET: Thus, she paid 1/750th of her potential liability, and she didn't even pay it.

PROFESSOR HUGHES: But none of us are family law experts. What do you think her parents' responsibility should be? What do you think her parents' responsibility should be if she is out playing baseball and breaks a window intentionally? What do you think?

²⁴³ See 17 U.S.C. § 501(a) (2000).

²⁴⁴ See *id.*

²⁴⁵ See *supra* note 23 and accompanying text.

²⁴⁶ *Id.*

²⁴⁷ See *id.*

²⁴⁸ See 17 U.S.C. § 504(c)(2) (2000) (stating that a court may increase statutory damages for each infringement to \$150,000 where there is a willful violation).

²⁴⁹ See 17 U.S.C. § 504(c)(1).

²⁵⁰ See 17 U.S.C. § 504(c)(2).

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QUESTIONER: I think the parents are generally less educated about the Internet. My Mom doesn't even use e-mail. Parents know so little about Internet technology.

That was actually the second part of the question that I had forgotten to ask, but you have already answered it by saying that there is strict liability.²⁵¹ What if you just go onto these sites regardless of your age? Your friends tell you about these sites where you can get this music for free, and you don't realize it's illegal unless there is an explicit warning sign. It is really surprising that there is strict liability for something like this. How is somebody supposed to know? Unless you are a computer geek, as you used the term before, a lot of people don't know the difference between uploading and downloading.

PROFESSOR HUGHES: Again, let me ask you. You didn't answer my question. What do you think the responsibility of parents should be for what their children do? First of all, a lot of parents say that they didn't know what their kids were doing. Do you think that is a defense? Generally, do you think that's a defense?

QUESTIONER: I suppose it depends on what the act is. And I guess it depends on how bad the act is, in my personal opinion.

PROFESSOR HUGHES: I don't think this is limited to copyright, as I said before. I think we need to figure out a whole range of parental responsibility for what kids are doing on the Internet. If they are threatening their principal with death, which there have been cases,²⁵² I think that the parents have a certain amount of responsibility. I don't know what it is, but I think that we need to sit down and think about it. We don't just tell them that they're off the hook because they didn't know.

MR. CARLINSKY: Plus, in today's day and age, you would have to be living in a cave not to realize, given how much publicity there has been in the last several years about the Internet and the problems and the issues it poses, as well as the whole debate over music. So, that excuse, if that excuse had any viability, was

²⁵¹ See *supra* note 241 and accompanying text.

²⁵² See *supra* note 27 and accompanying text.

available four, five, or six years ago.²⁵³ In today's day and age, I just don't think it is viable, unless you literally do not read or write and don't have any communication with others. So, I don't think it's a viable defense.

And then, as Rebecca points out, this girl had thousands of songs.²⁵⁴ It's not as if she copied one and tripped over herself, and then the record company came after her. She had thousands. And so, it's not a credible excuse.

QUESTIONER: I guess I just meant pre-*Napster*.²⁵⁵ Before *Napster* made the media, I personally had no awareness of the illegality of downloading music.

MR. CARLINSKY: Right. But the record companies only started suing individuals in the last three or four months. Thus, I think that the people who are being sued now can credibly say that they didn't know or had no appreciation of this.

PROFESSOR TUSHNET: I'd like to believe that, but unfortunately there was an article in the *New York Times* where they actually interviewed kids.²⁵⁶ I thought it was quite interesting. Adolescents are not paying attention to anything much outside of themselves, so I found it credible that they didn't know. And even when you told them, they didn't believe you. This is a problem, and it won't be solved just by lawsuits, although clearly it will become more persuasive as more people hear about twelve-year-olds getting sued.

In some ways, maybe even things like iTunes can help us out with that by setting these technological limits, so that you will understand what you can do with a DVD because you use it all the time; you will understand what you can do with a sound recording because you use it all the time. The technology itself may help with the education. I hope, anyway.

²⁵³ See Marty Jerome, *Using MP3 Is Stealing*, BOSTON GLOBE, Dec. 31, 2000, at B13 (questioning whether it was illegal to download music during the pre-*Napster* period).

²⁵⁴ See *supra* note 245 and accompanying text.

²⁵⁵ The *Napster* decision came out in 2001. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

²⁵⁶ See Rob Walker, *The Way We Live Now: 9-21-03; Turn On. Tune In. Download.*, N.Y. TIMES, Sept. 21, 2003, at 15 (stating that more than sixty-seven percent of the children who download music illegal think they should be able to do so).

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PROFESSOR KATYAL: Let me just add one last thing to that. The recording industry did engage in spending millions on public relations campaigns for a really long time before it took this final step. So, I think that they did try to educate the public to a tremendous extent.²⁵⁷

More questions?

QUESTIONER: My name is Matt. I'll leave the last name out because I am downloading music without paying for it all the time. I don't know if this is so much of a question—

PROFESSOR KATYAL: Weren't you a student in my Intellectual Property class?

QUESTIONER: I would like to just suggest that there are fair uses out there for music. I, for one, like making music on the computer with software like Rizon and Qbase, and I routinely download music that I wouldn't listen to in a million years just to sample one-sixteenth of a second of a drum hit. I'm not going to pay \$30 for some Kenny Rogers CD for a tiny, little sound. And so I will have music on my computer that from time to time I will remember to erase afterwards. But if you looked at my computer, there would be plenty of music on there, and I just don't know that just getting rid of the technology and the ability to download sounds from songs—I mean, it seems to me like there are plenty of fair uses for music out there. I was just wondering what your thoughts are.

PROFESSOR HUGHES: I think that you have hit upon a tremendously important issue, and I think all of us would agree that—and I regret that the fair use debate has been kidnapped by non-transformative uses—the fair use debate has been all about something that is *not* the core of fair use. The core of fair use is transformative uses.²⁵⁸ That is what is important for art, that is what is important for the society, that is what is important for our

²⁵⁷ See RIAA, *What the RIAA Is Doing About Piracy*, at <http://www.riaa.com/-issues/piracy/riaa.asp> (last visited Feb. 28, 2004) (stating that the RIAA “prefers to educate all citizens so they know what is legal and illegal”).

²⁵⁸ See Kelly Donohue, *Copyrights and Trademarks: Recent Article: Court Gives Thumbs-Up for Use of Thumbnail Pictures Online*, 2002 DUKE L. & TECH. REV. 6 (2002) (stating that defining the boundaries of fair use has been murky in some contexts).

political discourse, the most important part. It is regrettable that purely reproductive copying really has kidnapped the fair use debate. I think that it is sad.

Now, having said that, again to go back to this point, the people who are being sued are the people who are offering it as an upload.²⁵⁹ That is both because they get them not on the right of reproduction, but on the right of distribution.²⁶⁰ Based on our precedent, when you offer something for upload, you are engaging in the act of distribution.²⁶¹

So, your downloading and sampling is not what they are going after, yet. I'm not saying that they wouldn't go after it. I'm just saying that it is different. You don't need to be engaging in sampling or offering your entire inventory of MP3s on the upload on KaZaA. If you are doing that, it is not necessary for you to be engaged as an artist in sampling. So, it is a little different.

PROFESSOR TUSHNET: Well, that's not much help. That distinction isn't much help if there is nobody offering Kenny Rogers for download, which is the effect of—or at least the intended effect of—suing the people with the big collections.

PROFESSOR HUGHES: Right.

PROFESSOR TUSHNET: That's the point. You go after them and stop a hundred downloads, one of which is yours. There is just no doubt that the balance, including the transformative uses, is going to be made more expensive by the new system.

The question is: what are our choices? If you could design an artists' share system that would share music only for those purposes, I would applaud you. But I have my doubts about whether it can be done. And so we are faced with a bunch of second-best choices.

I don't know if I completely believe this, but on the other hand, in a couple of years, maybe already now, that tune will be ninety-nine cents. You might not spend \$30 to do it—and maybe it's not

²⁵⁹ See *supra* note 193 and accompanying text.

²⁶⁰ Napster was shut down, in part, because it held all of the shared files in a central server and became a distributor of the music. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1012 (9th Cir. 2001).

²⁶¹ See *id.*

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fair to make you spend ninety-nine cents to create new art, but it's easier. It will be less of a deterrent when you can get bits and pieces like that.

PROFESSOR HUGHES: And in terms of the sound recording right, if you hear it and reproduce it electronically, which you can increasingly do, it is not a violation of the copyright and sound recording right.²⁶² So, as long as you're not copying a musical composition, as long as what you are getting is just so small that it just would be taken as copying the sound recording.²⁶³ If you reproduce it electronically after hearing it, you're fine, too.²⁶⁴

QUESTIONER: Assuming that you paid for the software to reproduce it.

PROFESSOR HUGHES: Well, if you didn't pay for the software to reproduce it, that's different.

PROFESSOR KATYAL: Any other questions?

PROFESSOR HANSEN: Is this the last one? If so, I'll defer to others.

PROFESSOR KATYAL: No, we have time for a couple more.

PROFESSOR HANSEN: One thing I have to say is this is one of the most reasonable panels on this area I've ever seen. I almost find nothing to disagree with, which upsets me quite a bit.

MR. CARLINSKY: We're worried.

PROFESSOR HANSEN: But one thing I do object to—and Sonia said it, and I think Justin actually acknowledged it—is that in the analog world, copyright owners understood and accepted certain types of infringement. I don't think that is true. I think transaction costs prevented them. And they accepted that transaction costs meant that they couldn't go after these people.

But there is no reason why, when you have new technology that is more efficient, copyright owners shouldn't be able to take advantage of that efficiency any more than users should be able to take advantage of that efficiency. The idea that technology can

²⁶² See 17 U.S.C. § 114 (2000).

²⁶³ See *id.*

²⁶⁴ See *id.*

only benefit users and not benefit owners by reducing transaction costs, I think there is no logic to that, other than just a bias in favor of users. So, if in fact you can go after these people today because the transaction costs are less, then I think that is a legitimate tactic to take.

Then the question is raised that Sonia is raising, about the due process and privacy issues. I'd like to see some specifics as to what you say was recognized previously in the law. I'm not sure that they were recognized in copyright in the analog world, and I'm wondering what the due process issues are. We're all sensitive to that, but it would help if we had more explicit examples of what we are trying to save and what is lost by trying to save that, so it's a cost/benefit analysis. So, if you'd like to give some examples, that would be good.

PROFESSOR KATYAL: Sure. Let me actually have Rebecca answer your first question, then I'll take your second.

PROFESSOR TUSHNET: What I meant by the terms accepted leakage was that a record company reasonably can say, "I can return a profit to my shareholders even if there are some pirate CDs out there. No, of course I don't like it, of course when I find them I will go after them, but I understand that the lack of perfect control does not destroy my business model."

As to the question of the transaction costs of enforcement, you ask what is the reason that the copyright owner can't get perfect control. The answer is Napster. The answer is the Darknet. The answer is all the little things that are wriggling around underground.

And again, I'm not saying that I approve of them or that they should be a big part of the system. I am saying that an appropriate business model accepts that there are going to be these holes.

PROFESSOR HANSEN: I actually wasn't addressing your comment. I accepted your comment. I thought that Justin and Sonia were saying something else.

PROFESSOR HUGHES: I had said that the leakage was only traditional from 1950 on, and so, there was no leakage.²⁶⁵

²⁶⁵ See *supra* notes 210–12 and accompanying text.

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PROFESSOR HANSEN: That was traditional. That's something else.

PROFESSOR HUGHES: I'm just trying to say that it's only traditional in the very short-term history. But I'll agree with Rebecca, that if the answer is, "Gee, if there had been less leakage, the hulk would be bigger and greener," I'm not sure we needed it. The artistic quality of what we are getting out of the copyrighted industries does not seem to have been hurt by the leakage up to the point of Napster.

PROFESSOR KATYAL: Let me respond to your second question about looking for examples. I would answer this in two or three different ways. The first is that the RIAA's own techniques of detecting and determining infringement, even after the Coleman hearings, which purported to expose their methods, are still somewhat secretive.²⁶⁶ No one really understands how the RIAA targets individuals. The ways in which the RIAA makes its own determinations were, until very recently, shrouded in secrecy.²⁶⁷ I mean, there was no real definition of what individuals who were "infringing substantially" actually meant under the RIAA's determination.²⁶⁸ So, at the first level, the amount of uncertainty creates a lot of different risks in terms of chilling effects of using or accessing information on the Internet.

Second, with respect to specific examples, let me give you a few. There is a school in Pennsylvania that had a professor named Peter Usher, who uploaded an *a cappella* version of a song that he sang with some colleagues.²⁶⁹ A few months after this song was posted on the Internet, the RIAA sent them an incredibly threatening letter saying that this song that they were uploading was a downloaded song that was created by the artist Usher.²⁷⁰

²⁶⁶ See *supra* note 22 and accompanying text. According to the RIAA, it has a team of Internet specialists who help to track and stop Internet sites that make illegal recordings available. See RIAA, *What the RIAA Is Doing About Piracy*, *supra* note 257.

²⁶⁷ See *id.*

²⁶⁸ The problem is that the DMCA does not provide much guidance on how a copyright owner can determine what constitutes substantial infringement. See *Recording Indus. Ass'n of Am. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003); *supra* notes 200–03 and accompanying text.

²⁶⁹ See Gil Kaufman, *RIAA Admits Piracy Goof*, *ROLLING STONE*, May 14, 2003.

²⁷⁰ See *id.*

The RIAA further threatened them with terminating their entire Internet subscription.²⁷¹

That is the worst-case scenario. This is a situation where someone is uploading original music, and his name and the another author's name are confused.²⁷² And then what happens under these kinds of scenarios is that the DMCA subpoenas' provisions purport to empower these kinds of individual determinations. That is one example.

Another example is where some kid posts a book report that is entitled "Harrypotterbookreport.rtf" online and then receives a very threatening letter for his original book report.²⁷³ Maybe now we don't see that many examples because the RIAA is engaging in very strategic examples of searching. But I want to make it clear that these DMCA subpoenas empower anyone who purports to be a copyright infringer to engage in these searching tactics.²⁷⁴

PROFESSOR HANSEN: You can do that in the analog world. I mean, they went after the Girl Scouts.²⁷⁵ So, you always have horror stories. But is that all you're pointing to? Mistakes and horror stories? Is that a justification for allowing—

PROFESSOR KATYAL: I'm not justifying infringement on the Internet widespread or even touching the P2P level of liability. What I am advocating for is a more measured approach to enforcement that recognizes the substantial speech, privacy, and due process implications.

PROFESSOR HANSEN: What would be the alternative?

²⁷¹ *See id.*

²⁷² *See id.*

²⁷³ *See* Reply in Support of Verizon Internet Services Inc.'s Motion for a Stay Pending Appeal at 9, Recording Indus. Ass'n of Am. v. Verizon Internet Servs., Inc., 351 F.3d 1229 (D.C. Cir. 2003) (No. 1:02MS00323).

²⁷⁴ *See* 17 U.S.C. § 512(h) (2000).

²⁷⁵ The Girl Scouts Organization was sent thousands of letters from ASCAP demanding royalties for songs sung around the campfire. *See* Jonathan Zittrain, *Thinking Big: Calling Off the Copyright War in Battle of Property vs. Free Speech, No One Wins*, BOSTON GLOBE, Nov. 24, 2002, at D12. ASCAP now charges the Girl Scouts a symbolic fee of \$1 per year. *See id.*

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PROFESSOR HUGHES: Hold on. Let me fill out some things here. The second example you gave—the Harry Potter one—wasn't that a notice and takedown?²⁷⁶ That's not a subpoena.

PROFESSOR KATYAL: Yes. I'm sorry.

PROFESSOR HUGHES: And the first one, was it a notice and takedown or a subpoena?

PROFESSOR KATYAL: It was a letter.²⁷⁷

PROFESSOR HUGHES: The reason I asked Sonia if it's a notice and takedown is because there is a fascinating little problem I will tell you about. Sonia said it should be more measured, and she is probably right. Something is happening about the notice and takedown provision that no one has figured out, and it is as follows. The notice and takedown provision requires a signature or an electronic signature on the notification to the ISP.²⁷⁸ The major copyright industries are generating the notices with spiders by the thousands and thousands.²⁷⁹

I can tell you that I am not alone in thinking this because the U.S. Copyright Office General Counsel²⁸⁰ and I both agreed that no one knows if all these notifications are just wrong. They're just null because they do not have a signature of a person or an electronic signature of a person. And if they had an electronic signature of a person who verified everything in the notification, it would be much more measured. And you wouldn't have gotten the notice and takedown for the Usher thing.

So, it may be an over-zealous application of technology, and they should be using spidering technology to identify the stuff, but what they have been doing is just using the spidering technology, linking it to a machine that literally generates the notifications and

²⁷⁶ See Reply in Support of Verizon Internet Services Inc.'s Motion for a Stay Pending Appeal at 9–10, *supra* note 273.

²⁷⁷ See Kaufman, *supra* note 269.

²⁷⁸ See 17 U.S.C. §§ 512(b)–(d) (2000).

²⁷⁹ See RIAA, *What the RIAA Is Doing About Piracy*, *supra* note 257 (stating that there is a twenty-four-hour automated Web crawler constantly detecting illegal recordings on Internet sites).

²⁸⁰ The U.S. Copyright Office is the federal agency where copyrights are registered and recorded. See U.S. Copyright Office, Information Circular, *A Brief History and Overview*, at <http://www.copyright.gov/circs/circ1a.html> (last visited Mar. 18, 2004).

spews them out by the thousands. I think the Motion Picture Association of America had 50,000 notifications last year.²⁸¹

They need to be getting stuff off the Internet, but they may not be doing it in the measured way that the law actually requires. So, I just wanted to tell you that the DMCA may actually require more of a measured response than is actually being done.

QUESTIONER: My name is Bernie Korman. I was curious about the MIT situation, as to what rights were delivered and what rights were missing that caused the students to have to discontinue the operation.²⁸²

MR. CARLINSKY: From the article I can't tell. It looked like all of the rights had been delivered. It seems now what the record companies are saying is that they didn't have the right to make the server copy or the equivalent of the server copy.

PROFESSOR TUSHNET: The performance right, I think.

MR. CARLINSKY: No, because they wouldn't have the right.

MR. HUGHES: There is no sound right.

PROFESSOR TUSHNET: It's the reproduction right.

MR. HUGHES: There is no performance right.

MR. CARLINSKY: There is no performance right there. They don't have the performance right.

MS. TUSHNET: But there's one reproduction to get the server copy. But I think what they don't have is the reproduction right.

PROFESSOR KATYAL: A perfect example of the complications of copyright.

MR. CARLINSKY: They get a performance right for the musical composition.

²⁸¹ The Motion Picture Association of America ("MPAA") is the trade organization representing the American film industry. See MPAA, *About MPA, MPAA*, at <http://mpaa.org/about> (last visited Mar. 18, 2004). It launched over 60,000 investigations in the year 2000 related to suspected pirating activities. See MPAA, *Anti-Piracy*, at <http://mpaa.org/anti-piracy/index.htm> (last visited Mar. 18, 2004).

²⁸² See *supra* notes 75–85 and accompanying text (discussing the controversy over a service started at M.I.T., which was challenged by the major recording labels).

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PROFESSOR TUSHNET: They have that license because everybody has that license.

PROFESSOR HUGHES: Right.

QUESTIONER: What other right do they need?

MR. CARLINSKY: They don't need any other right, except of course the next time around the American Society of Composers, Authors & Publishers ("ASCAP") isn't going to give them the license on the same terms.

PROFESSOR TUSHNET: That's for sure. They need three rights.

PROFESSOR HUGHES: That's a different issue.

PROFESSOR KATYAL: That is a complicated question. We only have time for one more question.

QUESTIONER: I agree it's a complex question. I graduated from this school, and I've practiced law for over thirty years with a company that is a large developer of computer software.

Maybe I'm a dinosaur here, but I think we have to go back to first principles. I don't think there is anybody in this room who would disagree that when I create something I have a right to be compensated for it, and no one else has a right to copy it without my permission or without my being compensated for it.

What this discussion is all about was well pointed out over here. We have to come up with a system to figure out how people are going to be compensated once they put their creative work out there. The digital world has changed this because, as opposed to analog, the very act of putting a digital work up there means that it is being copied. An author has to copy it to put it up there.

I think that the answer here is a reasonable licensing system. There are places where they say, "Once I decide to license it, I can be forced to license it to others." Europe walks on the border of that. I think that is the time when compulsory licensing comes along. But I really do believe that what we've got to try to figure out is how to compensate the author, and anyone else that the author decides to put in his chain of distribution, for the role they play in the distribution.

I don't think we should tolerate theft for a minute, because the making of a copy without permission is a theft. A couple of times this morning I was worried that there may be some people in this room who don't believe that. I think we all do believe that.

So, what we've got to work on here is a reasonable way to make the system work with the compensation to the creators, the people who ought to be compensated.

PROFESSOR KATYAL: Does anyone want to respond?

PROFESSOR TUSHNET: I'll say that I don't believe that, not under all circumstances certainly. I don't believe that copying is theft. It doesn't involve physical dispossession. It may be wrongful, but it is not robbery. And, under some circumstances, yes, I think you should be able to copy without permission. Not under all, not under the circumstances we have been talking about, but I see no reason to make a blanket statement like that.

PROFESSOR HUGHES: Senator Orrin Hatch also wouldn't agree with you.²⁸³ The Chairman of the Senate Judiciary Committee clearly would not agree with you.²⁸⁴ He would think that there are occasions when making a copy is not what you would call a theft, and not even wrongful.²⁸⁵

But again, let's just remember that—it was very interesting to listen to you. You were talking in what a legal scholar would call a natural rights discourse,²⁸⁶ that you think that this is natural, that this is the order of justice, and that is not the copyright doctrine of the Supreme Court.²⁸⁷ The copyright doctrine of the Supreme Court is clearly an economic theory. This is a theory to motivate

²⁸³ U.S. Senator Orrin Hatch (R-Utah), the Chairman of the Senate Committee on the Judiciary, has been a strong supporter of finding effective solutions to combat Internet piracy of copyrighted works. See U.S. Senator Orrin Hatch, *Hatch Comments on Copyright Enforcement*, at http://hatch.senate.gov/index.cfm?FuseAction=Press-Releases.Detail&PressRelease_id=205147 (June 18, 2003).

²⁸⁴ See *id.*

²⁸⁵ *Id.*

²⁸⁶ See LOUIS HENKIN, *THE AGE OF RIGHTS* 1 (1st ed. 1990).

²⁸⁷ The Supreme Court has followed a utilitarian-economic interpretation of the copyright doctrine and has rejected the natural rights theory. See generally Marci Hamilton, *Copyright at the Supreme Court: A Jurisprudence of Deference*, 47 J. COPYRIGHT SOC'Y U.S.A. 317 (2000).

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people to produce.²⁸⁸ If motivating people to produce means that one out of five copies can be given away and that people still will produce as much, then it is not so clear. Very clearly, the Supreme Court has adopted this economic model, not the natural justice model.²⁸⁹ A natural rights model would be more familiar in French jurisprudence, on *droit d'auteur*.²⁹⁰

I think that when you get to the mainstream of copyright theory you're the outlier.

PROFESSOR KATYAL: We have run out of time. Thank you all so much for coming and thanks to our panelists for a great presentation.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ See generally Michael B. Reddy, *The Droit De Suite: Why American Fine Artists Should Have the Right to a Resale Royalty*, 15 LOY. L.A. ENT. L.J. 509 (1995) (discussing a concept of artists' resale royalty that exists in French law).