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A Tale of Two Countries: Canada's Response to the Peer-to-Peer Crisis and What it Means for the United States

Cover Page Footnote

J.D. Candidate, 2006, Fordham University School of Law.

A TALE OF TWO COUNTRIES: CANADA'S RESPONSE TO THE PEER-TO-PEER CRISIS AND WHAT IT MEANS FOR THE UNITED STATES

*Fara Tabatabai**

We must stop thinking of intellectual property as an absolute and start thinking of it as a function—as a process, which, if it is to be successful, must meet diverse aims: the assurance of a fair reward to creators and inventors and the encouragement of research and creativity, on the one hand; and on the other hand, the widest possible dissemination of the ideas and products of which the world, and all the individuals in it, have such great need.¹

INTRODUCTION

On August 25, 2004, federal agents raided five private residences in Texas, Wisconsin, and New York.² These residences were not drug houses or brothels, but the suspected locations of peer-to-peer (“P2P”) file-sharing³ hubs that formed an online system called the Underground Network.⁴ Using these file-sharing hubs, computer users were able to exchange copyrighted songs and movies instantaneously.⁵ FBI agents had been monitoring the residences as part of a sting operation for months, culminating in a final raid to seize computers, software, and related equipment at each of the homes.⁶

The targeting of the Underground Network seems somewhat odd, given that it is not, by any stretch of the imagination, among the most

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1. The Honourable Madam Justice Beverley McLachlin, Supreme Court of Canada, *Intellectual Property: What's It All About?*, in Trade-Marks Law of Canada 397 (Gordon F. Henderson ed., 1993).

2. Terry Frieden, *Feds Launch Internet Crime Crackdown*, CNN.com, Aug. 26, 2004, at <http://www.cnn.com/2004/TECH/08/26/cybercrime.probe/>.

3. For a full definition of P2P file sharing and how it works, see *infra* notes 152-63 and accompanying text.

4. Jonathan Krim, *Suspected File-Sharing 'Hubs' Raided*, Wash. Post, Aug. 26, 2004, at E1, available at <http://www.washingtonpost.com/wp-dyn/articles/A33959-2004Aug25.html>.

5. *Id.*

6. *Id.*

popular file-sharing services on the Internet. To the contrary, the popular P2P network Kazaa boasts over sixty million users worldwide, with twenty-two million of those users residing in the United States.⁷ In contrast, the Underground Network had only 7000 users at the time of the raid.⁸ Nevertheless, the Underground Network presented the perfect service out of which to make an example. In a statement made the same day as the raids, then United States Attorney General John Ashcroft announced Operation Digital Gridlock, an ongoing federal criminal investigation of P2P networks.⁹ Ashcroft stated that the Underground Network raids served as a

clear message to online thieves who steal the hard work and innovation of others... [and] to those who think nothing of downloading those stolen goods to their computers or MP3 players. You can pay the fair value for music, movies, software and games like every other consumer, or you can pay an even higher price when you are caught committing online theft.¹⁰

Unfortunately, the message was lost on the Underground Network. On the same evening as the raids, the Network was up and running again, having transferred its operations to computers overseas.¹¹

This story illustrates two interesting points. First, it is an excellent example of the strict, no-nonsense approach that the United States has taken to P2P file sharing. Congress, for example, has responded to the massive rates of copyright infringement on P2P networks by roundly condemning file sharing as responsible for everything from child pornography¹² to terrorism.¹³ Meanwhile, the Recording Industry Association of America ("RIAA") has filed hundreds of John Doe lawsuits against individual file sharers for alleged copyright infringement.¹⁴ It has also filed contributory infringement claims against P2P networks, with varying degrees of success.¹⁵

7. Alice Kao, *RIAA v. Verizon: Applying the Subpoena Provision of the DMCA*, 19 Berkeley Tech. L.J. 405, 408 n.25 (2004).

8. Krim, *supra* note 4.

9. Prepared Statement of Attorney General John Ashcroft, *Digital Gridlock Announcement* (Aug. 25, 2004), available at <http://www.usdoj.gov/criminal/cybercrime/AshcroftRemarks082504.htm>.

10. *Id.*

11. Krim, *supra* note 4, at E1.

12. Gen. Accounting Office, *Report to the Chairman and Ranking Minority Member, Comm. on Gov't Reform, U.S. House of Representatives, File-Sharing Programs: Peer-to-Peer Networks Provide Ready Access to Child Pornography*, GAO-03-351 (Feb. 2003), available at <http://www.gao.gov/cgi-bin/getrpt?GAO-03-351>; see also *House Subcommittee Holds Hearing on P2P Smut*, Tech L.J. (May 6, 2004), at <http://www.techlawjournal.com/topstories/2004/20040506.asp>.

13. *International Copyright Piracy: A Growing Problem with Links to Organized Crime and Terrorism: Hearing Before the House Comm. on the Judiciary*, 108th Cong. 11-12 (2003), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_house_hearings&docid=f:85643.wais.pdf.

14. In June 2004, the RIAA filed 482 John Doe lawsuits against file sharers, bringing the total number of people it had sued to 3429. See John Borland, *RIAA*

The second point that the above story illustrates is that all of these efforts may ultimately accomplish nothing, except the shifting of P2P technology into countries with more liberal rules on file sharing.¹⁶ The time between the FBI raids and the time when the Underground Network could begin operating again as if nothing had happened was only a matter of hours.¹⁷ In the borderless world of the Internet, copyright enforcement either occurs on a global scale or not at all.

Thus, it was particularly shocking for copyright holders in the United States to read the headline on the morning of March 31, 2004: "File-sharing is legal in Canada!"¹⁸ The headlines referred to *BMG Canada Inc. v. John Doe*,¹⁹ a controversial Canadian ruling in which a federal court judge declared that P2P file sharing—the online exchange of copyrighted works—does not constitute infringement under the Canadian Copyright Act.²⁰ The global reaction was instantaneous. File sharers around the world rejoiced.²¹ The Canadian recording industry vowed to appeal.²² Commentators worried about Canada becoming a safe haven for P2P technologies.²³

Takes Hundreds More 'John Does' to Court, CNET News.com, June 22, 2004, at http://news.com.com/2100-1027_3-5243587.html.

15. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154 (9th Cir.) (holding P2P network Grokster not liable for contributory infringement), *cert. granted*, 125 S. Ct. 686 (2004); *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003) (holding P2P network Aimster liable for contributory infringement), *cert. denied sub nom. Deep v. Recording Indus. Ass'n of Am.*, 540 U.S. 1107 (2004); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014-19 (9th Cir. 2001) (holding P2P network Napster liable for contributory infringement).

16. For a discussion of the problems posed by P2P technologies moving offshore, see *infra* note 295.

17. Krim, *supra* note 4, at E1.

18. See, e.g., Janet McFarland, *Ruling Deals Blow to Music Industry*, *Globe and Mail* (Toronto), Apr. 1, 2004, at B4, available at www.globeinvestor.com/servlet/ArticleNews/print/GAM/20040401/RMUSICPRIVACY01; John Borland, *Judge: File Sharing Legal in Canada*, CNET News.com, Mar. 31, 2004, at <http://news.com.com/2100-1027-5182641.html>; *Online Music Swapping Legal: Court*, CBC News, Mar. 31, 2004, at http://www.cbc.ca/story/canada/national/2004/03/31/download_court040331.html; Cynthia L. Webb, *Canada Puts Arctic Chill on Music Industry*, *Wash. Post Online*, Apr. 1, 2004, at <http://www.washingtonpost.com/ac2/wp-dyn/A41679-2004Apr1?language=printer>.

19. [2004] 3 F.C.R. 241 (Trial Div.) (Can.).

20. *Id.* at 258-61.

21. See, e.g., Thread Response to Zeropaid Forums, General Computing, P2P Politics, File Sharing Is Now LEGAL in Canada!, at <http://www.zeropaid.com/bbs/archive/index.php/t-19252> (last visited Feb. 14, 2005).

22. The industry, true to its word, filed an appeal on April 13, 2004 with the Federal Court of Appeal of Canada. Fed. Court of Appeal of Can., Proceedings Queries—Additional Information on A-203-04, at http://www.fca-caf.gc.ca/IndexingQueries/infp_moreInfo_e.php?A-203-04 (last visited Feb. 14, 2005). The court set April 20, 2005 as the first date for the two-day hearing. Fed. Court of Appeal of Can., Hearing List, at http://www.fca-caf.gc.ca/business/hearings/a_full_e.shtml (last visited Feb. 14, 2005).

23. See, e.g., Jeremy N. Geltzer, *The New Pirates of the Caribbean: How Data*

At the core of each of these reactions was one basic question: How could file sharing, so obviously and egregiously an act of copyright infringement in the United States, be legal in Canada?

The answer lies in the recent shifts of focus in the copyright laws of both countries. While the American copyright regime has become increasingly rigid, and increasingly focused on expanding the rights and remedies of copyright holders,²⁴ the Canadian copyright regime has become increasingly flexible.²⁵ Rather than try to stop file sharing altogether, Canada has focused on achieving a balance between the rights of copyright holders and the rights of users, and on developing unique solutions that may ultimately legitimize P2P, while compensating artists.²⁶

The United States has taken a different approach. Currently before Congress are three bills which target both individual file sharers and file-sharing technologies.²⁷ Each of these bills, if passed, would expand the rights and remedies of copyright holders, without any corresponding expansion of users' rights, or any protections for technological innovations.²⁸

In formulating this legislation, Congress has followed the American courts in failing to consider alternative analyses to the problems that P2P has engendered. At this critical time, before this legislation passes, Congress must shift its focus from a copyright law that exclusively benefits creators, to a copyright law that benefits all members of society. At a time when the United States appears to have traded flexibility for the enforcement of outmoded rules, the Canadian example introduces an alternate way of thinking about P2P. Now, at a time when the American response to P2P is threatening to undermine the rights of users, the Canadian example sheds some light on the path back to copyright balance.

Part I of this Note examines the main features of American and Canadian copyright law, and discusses how both countries have reacted to the challenges of the digital age. Part II analyzes how P2P both fits into and modifies the emerging copyright regimes of the United States and Canada. Finally, Part III argues that America's

Havens Can Provide Safe Harbors on the Internet Beyond Governmental Reach, 10 Sw. J. L. & Trade Am. 433, 442-43 (2004); Doug Alexander & Peter Ford, *New Haven for Free Music: Canada*, Christian Sci. Monitor, Apr. 2, 2004, at 6 (stating that the ability of Canadians to file share without impunity will cause "a lot of concern" in the United States), available at <http://www.csmonitor.com/2004/0402/p06s01-woam.html>.

24. See *infra* notes 302-49, 417-41 and accompanying text.

25. See *infra* notes 442-55 and accompanying text.

26. See *infra* notes 375-474 and accompanying text.

27. These three bills are the Inducing Infringement of Copyrights Act of 2004, S. 2560, 108th Cong. (2004); the Piracy Deterrence and Education Act of 2004, H.R. 4077, 108th Cong. (2004); and the Protecting Intellectual Rights Against Theft and Expropriation Act of 2004, S. 2237, 108th Cong. (2004). For a discussion of these bills, see *infra* notes 305-49 and accompanying text.

28. See *infra* notes 400-41 and accompanying text.

approach has failed to maintain an acceptable balance between the interests of copyright holders and the public interest in access to P2P technologies. Part III also advocates the application of the Canadian approach—including an explicit focus on copyright balance and a willingness to adapt existing regimes to new problems—to the American context, in the hopes that Congress will reconsider its approach to P2P before it legislates P2P out of existence.

I. THE EVOLUTION OF COPYRIGHT IN THE UNITED STATES AND CANADA

As copyright has progressed into the modern technological age, it has adapted to a variety of new innovations that present an increased capacity for both creative and infringing activity.²⁹ The law's response to these innovations has produced shifts in the way that courts and legislatures think about copyright. Part I.A explores these shifts, first by examining the theoretical underpinnings of copyright law, and then by discussing recent changes in Canada towards the expansion of users' rights. Part I.B discusses the impact of past technological innovations on the copyright regimes in both the United States and Canada, and examines how these responses set the stage for the battles that are currently raging around P2P.

A. *Features of American and Canadian Copyright Law*

Many of the unique features of American and Canadian copyright law stem from underlying theoretical justifications for intellectual property. There are essentially three major theories that inform copyright law: the utilitarian theory,³⁰ the natural rights theory,³¹ and the moral rights theory.³² To the extent that the United States and Canada have modeled their copyright laws after one or more of these theories, their intellectual property regimes are either more or less protective of the rights of creators. The Canadian regime was traditionally more protective of copyrights, and less protective of users' rights.³³ Recently, however, this has begun to change, as fundamental shifts in Canadian law have brought the copyright regime more in line with the utilitarian notion of balance.³⁴

29. The invention of radio, cable television, and the VCR all threatened existing notions of copyright. *See infra* notes 91-112 and accompanying text. In addition, the advent of "home taping" on audio cassette recorders presented a significant challenge to copyright law, which both Canadian and American legislatures addressed by legalizing private copying. *See infra* notes 114-51 and accompanying text.

30. *See infra* notes 35-42 and accompanying text.

31. *See infra* notes 44-48 and accompanying text.

32. *See infra* notes 49-52 and accompanying text.

33. *See infra* notes 53-64 and accompanying text.

34. *See infra* notes 65-82 and accompanying text.

1. Justifications for Copyright

Of the three primary theories for the existence of copyright, the one that has found the most favor in the United States is the utilitarian theory. According to this theory, copyright is a bargain struck between private and public interests,³⁵ which grants authors a limited statutory monopoly as an incentive for them to create.³⁶ The goal of copyright, however, is not to reward authors, but rather to ensure the enrichment of the public domain.³⁷

The roots of this theory in the American consciousness stretch back to the United States Constitution, which grants Congress the power “to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”³⁸ In accordance with this theory, when revising the Copyright Act in 1909, Congress stated that copyright did not validate any natural right of the author, but rather existed solely for the public welfare.³⁹

The Supreme Court endorsed this view of copyright in its landmark decision in *Sony Corp. of America v. Universal City Studios, Inc.*⁴⁰ There, the Court noted that:

Congress . . . has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product. Because this task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society’s competing interest in the free flow of ideas, information, and commerce on the other hand, our patent and copyright statutes have been amended repeatedly.⁴¹

The *Sony* Court thus recognized the centrality of a copyright balance to the utilitarian principles underlying intellectual property law. This is a recognition that American copyright, at its origin, existed primarily to benefit the public, and only secondarily to reward the copyright holder.⁴²

The origins of Canadian copyright law are markedly different. Canada’s Constitution Act of 1867 grants Parliament the power to

35. Jessica Litman, *Revising Copyright Law for the Information Age*, in *Copyrights: The Future of Intellectual Property in the Information Age* 125, 128 (Adam Thierer & Wayne Crews eds., 2002) [hereinafter *Copyrights*].

36. L. Ray Patterson & Stanley W. Lindberg, *The Nature of Copyright: A Law of User’s Rights* 49-50 (1991).

37. *See id.* at 70.

38. U.S. Const. art. I, § 8, cl. 8.

39. H.R. Rep. No. 60-2222, at 7 (1909).

40. 464 U.S. 417 (1984).

41. *Id.* at 429.

42. Patterson & Lindberg, *supra* note 36, at 70-71.

legislate copyright, but, unlike the United States Constitution, is silent on the theories underlying its decision to do so.⁴³ The traditional Canadian justification for copyright was the natural right of the author to the products of her labor.⁴⁴ Natural rights theory is based on the Lockean notion that an author has an inherent property right in her own creative work.⁴⁵ Until very recently, this theory dominated discourse about copyright in Canada.⁴⁶ A 1934 case in the Canadian Court of Chancery, for example, noted that the Copyright Act “was passed with a single object, namely, the benefit of authors.”⁴⁷ Even more bluntly, a 1985 Sub-Committee Report on Copyright stated, “[o]wnership is ownership is ownership.’ The copyright owner owns the intellectual works in the same sense that a landowner owns land.”⁴⁸

Another theory that finds recognition in the Canadian Copyright Act is that of moral rights.⁴⁹ The notion of moral rights is founded on the Hegelian notion that an author invests her personality in her creative work.⁵⁰ As such, that work deserves protection from actions that modify it so as “to prejudice the honour or reputation of the author.”⁵¹ Recently, the Supreme Court of Canada recognized the limited nature of these rights, specifically their inability to protect against actions that, although taken without the author’s consent, do not strictly damage the author’s honor or reputation.⁵²

43. Constitution Act, 1867, 30 & 31 Vict., c. 3, § 91, cl. 23 (U.K.), *reprinted in* R.S.C., app. II, no. 5 (1985).

44. David Fewer, *Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada*, 55 U. Toronto Fac. L. Rev. 175, 191 (1997).

45. Tom W. Bell, *Indelicate Imbalancing in Copyright and Patent Law, in* Copyrights, *supra* note 35, at 1, 3.

46. *See* Fewer, *supra* note 44, at 191.

47. *Performing Right Society Ltd. v. Hammond’s Bradford Brewery Co.*, [1934] 1 Ch. 121, 127 (Can.).

48. Standing Comm. on Communications and Culture, Report of the Sub-Comm. on the Revision of Copyright, A Charter of Rights for Creators, Standing Committee on Communications and Culture 9 (1985) (Ministry of Supply and Services Canada).

49. The Canadian Copyright Act grants authors moral rights in their work. Authors may not assign these rights, but they may bequeath them to a specified person after their death. Copyright Act, R.S.C., ch. 10 (4th Supp.), §§ 4, 6 (1985) (Can.).

50. Under this theory, an author expresses her will to personhood by claiming externalities as individual property. Moral rights therefore protect the author’s identity in her work. As such, they last even after a particular work has been sold. Rebekah O’Hara, *You Say You Want a Revolution: Music & Technology—Evolution or Destruction?*, 39 Gonz. L. Rev. 247, 253 (2003).

51. R.S.C., ch. 10 (4th Supp.), § 6.

52. *See* *Théberge v. Galerie d’Art du Petit Champlain Inc.*, [2002] 2 S.C.R. 336, 355 (Can.). In *Théberge*, the court dealt a sweeping blow to moral rights, stating that “[o]nce an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it.” *Id.* at 355-56. This holding severely limited the protections of moral rights. Viewed expansively, moral rights protect against any modification of a work contrary to the author’s consent. As the court noted in *Théberge*, however, the Canadian Copyright Act

Because Canada's justifications for copyright focused almost exclusively on the rights of authors, the Canadian copyright regime was traditionally less protective of users' rights than its American counterpart. In Canada, for example, more subject matter qualified for copyright than in the United States. Blank forms, such as accounting forms and sporting schedules, are copyrightable in Canada,⁵³ but not in the United States.⁵⁴ Similarly, Canada allows the government to copyright works produced by any governmental department,⁵⁵ while the United States denies protection to government works.⁵⁶

Perhaps most striking is the difference between the Canadian defense to copyright infringement, called fair dealing, and the comparable American defense of fair use. The Canadian Copyright Act explicitly delimits the fair dealing defense to research or private study,⁵⁷ criticism or review,⁵⁸ and news reporting.⁵⁹ Additionally, the fair dealing defense is only available for the purposes of criticism or review and news reporting if the person asserting the defense can show that he acknowledged the source of the copyrighted material.⁶⁰

The American defense of fair use is much more expansive. The American Copyright Act includes a list of purposes that may satisfy the criteria for fair use, but this list is clearly not exhaustive.⁶¹ Instead, whether a particular use is fair depends on (1) the purpose and

specifically limits protection to acts that prejudice the author's honor—apparently a high standard to prove. *See id.* at 349, 353.

53. *See* U&R Tax Services Ltd. v. H&R Block Canada Inc., [1995] 62 C.P.R. (3d) 257 (F.C.T.D.) (Can.) (copyright subsists in a compilation where sufficient time and labor has been expended); *Bulman Group Ltd. v. "One Write" Accounting Sys. Ltd.*, [1982] 2 F.C. 327 (Trial Div.) (Can.) (accounting forms copyrightable); *B.C. Jockey Club v. Standen*, [1985] 8 C.P.R. (3d) 283 (B.C. Ct. App.) (Can.) (horse racing schedules copyrightable).

54. 37 C.F.R. § 202.1 (2004) (stating that blank forms and sporting schedules are not copyrightable); *see also* *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) (rejecting outlay of time and labor as sufficient for copyrightability); *Baker v. Selden*, 101 U.S. 99 (1879) (stating that blank accounting forms are not copyrightable).

55. R.S.C., ch. C-42, § 12.

56. Copyright Act, 17 U.S.C. § 105 (2000). The government may, however, hold copyrights that outside parties assign, bequeath, or otherwise transfer to it. *Id.*

57. Copyright Act, R.S.C., ch. 24, § 18 (1997) (Can.).

58. *Id.*

59. *Id.*

60. *Id.*

61. The Copyright Act mentions purposes "such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" as examples of fair use. 17 U.S.C. § 107. The use of the words "such as" indicates that the list is non-exhaustive. *Id.* The Supreme Court has also endorsed an expansive view of fair use, stating that the task of determining whether a particular use is fair "is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis. The text employs the terms 'including' and 'such as' . . . to indicate the 'illustrative and not limitative' function of the examples given." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (citations omitted).

character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) the effect of the use upon the potential market for or value of the copyrighted work.⁶² Fair use in the United States potentially applies to any situation, not merely to the presumptively worthy purposes outlined in the Canadian Copyright Act.⁶³ As a result, many uses, such as parody, that may constitute fair use in the United States may nevertheless infringe on copyright in Canada.⁶⁴

2. Recent Shifts in Canadian Copyright

Recently, however, Canadian courts have become increasingly sympathetic to utilitarian justifications for copyright. In *Théberge v. Galerie d'Art du Petit Champlain Inc.*,⁶⁵ the Supreme Court of Canada acknowledged that the Copyright Act must strike a balance “between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator.”⁶⁶ As weighed against the public interest, creators’ rights must be limited in nature.⁶⁷

The court went on to state that “[e]xcessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole.”⁶⁸ Accordingly, in a sweeping blow to moral rights theory, the court declared that once an authorized copy of a work is sold to the public, the purchaser—not the author—generally has the right to determine what happens to it.⁶⁹ *Théberge* thus represented a dramatic departure from the natural rights and moral rights principles that had long informed Canadian copyright law.

Two years later, the Supreme Court of Canada heard another copyright case, *CCH Canadian Ltd. v. Law Society of Upper Canada*,⁷⁰ in which a group of copyright holders challenged the operating society of Canada’s Great Library.⁷¹ The library provided request-based

62. 17 U.S.C. § 107.

63. See *supra* note 61.

64. David Vaver, *Canada’s Intellectual Property Framework: A Comparative Overview*, 17 *Intell. Prop. J.* 125, 151 (2004). Compare *Campbell*, 510 U.S. at 572 (holding that parody of a song, even if for a commercial purpose, may be a fair use), with *Michelin & Cie v. CAW-Canada*, [1997] 2 F.C. 306 (Trial Div.) (Can.) (holding that parody is not “criticism” within the fair dealing defense).

65. [2002] 2 S.C.R. 336 (Sup. Ct.) (Can.).

66. *Id.* at 355.

67. *Id.*

68. *Id.* at 356.

69. *Id.* at 355-56.

70. [2004] 1 S.C.R. 339 (Sup. Ct.) (Can.).

71. *Id.* at 346.

photocopy services and self-service photocopiers, both of which the plaintiffs argued were used to infringe on their copyrights.⁷² In a dramatic decision signifying its fidelity to the utilitarian notion of copyright balance, the court held that the Law Society did not infringe on CCH's copyrights when it reproduced various works in its library.⁷³

The court illustrated this new fidelity in its discussion of both the originality requirement for copyrightability,⁷⁴ and the fair dealing defense.⁷⁵ On the issue of originality, the court noted that, historically, Canadian courts had adopted a low standard of originality, granting copyright protection to any work which involved a certain degree of time and labor to produce.⁷⁶ This "industriousness" standard of originality comports with a natural rights view of copyright.⁷⁷ In *CCH Canadian*, however, the court held that such a standard would "tip the scale [of copyright] in favour of the author's or creator's rights, at the loss of society's interest in maintaining a robust public domain that could help foster future creative innovation."⁷⁸ Instead, the court adopted a standard of originality that requires for copyrightability that a work be the product of the exercise of skill and judgment.⁷⁹

The court also dramatically broadened the scope of Canada's fair dealing defense. Characterizing fair dealing as a "user's right" and counterweight to copyright, the court stated that fair dealing is "an integral part of the *Copyright Act* [rather] than simply a defence."⁸⁰ To maintain the proper balance between copyrights and users' rights, courts must therefore give fair dealing a "large and liberal" interpretation.⁸¹ For example, the court interpreted the fair dealing exception to exempt research for commercial purposes, as well as for charity and private study.⁸²

Most significantly, the court consolidated the several defenses to copyright infringement into what Professor Michael Geist has called a

72. *Id.*

73. *Id.* at 348.

74. *Id.* at 351-60.

75. *Id.* at 364-75.

76. *Id.* at 354. While pointing out the historical approach of Canadian courts, the *CCH Canadian* court also recognized that, in recent years, a few courts had moved away from the industriousness standard. *Id.* (citing *Édutile Inc. v. Auto. Prot. Ass'n*, [2000] 4 F.C. 195 (Ct. App.) (Can.); *Tele-Direct (Publ'ns) Inc. v. Am. Bus. Info. Inc.*, [1998] 2 F.C. 22 (Ct. App.) (Can.)).

77. *Id.* at 351-52.

78. *Id.* at 355.

79. *Id.* at 357.

80. *Id.* at 364.

81. *Id.* at 365.

82. *Id.* The court noted, however, that research conducted for commercial purposes may not be "as fair" as research conducted for more laudable purposes, such as charity. *Id.* at 367.

“new copyright” right: users’ rights.⁸³ This notion of users’ rights, never before explicit in Canadian jurisprudence, emerged out of *CCH Canadian* as a limiting principle on the rights of copyright holders.⁸⁴ As a result of this unrelenting focus, Geist has hailed the unanimous decision “as one of the strongest pro-user rights decisions from any high court in the world, showing what it means to do more than pay mere lip service to balance in copyright.”⁸⁵

Considering that Canada has historically been more protective of the rights of copyright holders, the supreme court’s pronouncement in *CCH Canadian* was quite remarkable. Indeed, and perhaps even more remarkably, many of the principles of *CCH Canadian* are responsible for the federal court’s holding in *BMG Canada*⁸⁶—the case that pronounced file sharing legal under the Canadian Copyright Act.

B. Copyright and Technological Innovation

The advent of file-sharing technology is not the first time that the copyright regime has had to deal with challenges from new technologies. Many of the greatest innovations of the past century began with copyright infringement,⁸⁷ or introduced an enhanced capacity for users to infringe on copyrighted materials.⁸⁸ In each case, either the legislature⁸⁹ or the judiciary⁹⁰ stepped in to resolve the conflict. The result was the adaptation of the copyright regime to

83. Michael Geist, *Low-Tech Case Has High-Tech Impact*, Toronto Star Online, Mar. 22, 2004, at http://www.thestar.com/NASApp/cs/ContentServer?pagename=thestar/Layout/Article_PrintFriendly&c=Article&cid=1079910611083.

84. *CCH Canadian*, [2004] 1 S.C.R. at 364-65.

85. Geist, *supra* note 83. Geist also argues that *CCH Canadian* represents a “growing personalization of copyright” within Canada.

Accompanying the Canadian Supreme Court’s increased focus on the rights of users is the view that copyright is no longer primarily about large-scale commercial infringement claims that do not resonate with the average person. Rather, copyright is now very personal, focusing on the work, creativity, and activities of millions of individuals—including judges—who will increasingly question standards of what is right and wrong through the lens of their own actions.

Id.

86. *BMG Canada Inc. v. John Doe*, [2004] 3 F.C.R. 241, 260 (Trial Div.) (Can.); see *infra* notes 221-23 and accompanying text.

87. Radio and cable television are examples of technologies that were born of piracy. See *infra* notes 91-100 and accompanying text.

88. The VCR allowed users to record copyrighted television programs, thereby infringing on copyright. See *infra* notes 101-12 and accompanying text.

89. In the case of radio and cable television, Congress set a low statutory licensing fee for the use of copyrighted materials. See *infra* notes 92-96, 100 and accompanying text.

90. In the case of the VCR, the U.S. Supreme Court created a rule of contributory infringement that protected the VCR from liability. See *infra* notes 103-12 and accompanying text.

ensure both adequate compensation for creators, and freedom for the development of new technologies.

1. Past Innovations and Infringement

When the radio emerged as a popular medium, it did so by essentially infringing on the public performance rights of both composers and recording artists.⁹¹ Composers demanded compensation for the use of their songs, and Congress responded by setting a low statutory licensing fee.⁹² As a result, radio continued to flourish, and composers now earn approximately \$300 million a year from American radio stations.⁹³ Recording artists, on the other hand, do not receive any compensation under existing copyright law.⁹⁴ When they argued in front of Congress that radio was not respecting their intellectual property rights, Congress rejected their claim,⁹⁵ concluding that the indirect benefit of increased public exposure was sufficient compensation.⁹⁶

The birth of cable television is another example of a technology that spanned copyright infringement, and which copyright owners vehemently opposed. At their inception, most cable companies refused to compensate broadcasters for the content that they echoed.⁹⁷ Even more egregiously, when the cable companies started demanding subscriptions from their customers, they refused to pay for the television broadcasts they sold.⁹⁸ Broadcasters and copyright owners attacked this practice as theft, and fought the cable companies for nearly thirty years.⁹⁹ Eventually, however, Congress resolved the issue by requiring cable companies to pay a statutory license fee for the content that they broadcast.¹⁰⁰

The advent of P2P is also not the first time that the reaction of copyright holders to new methods of infringement has been to attack the technology directly. Perhaps the most famous battle between copyright and technology occurred with the introduction of the VCR.¹⁰¹ The Supreme Court stepped in to resolve the conflict in *Sony*

91. Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* 58 (2004).

92. *See id.* at 74; William Fisher, *Don't Beat Them, Join Them*, N.Y. Times, June 25, 2004, at A23.

93. Fisher, *supra* note 92. This figure, from 2000, represented roughly three percent of radio stations' total revenues for that year. *Id.*

94. Lessig, *supra* note 91, at 59.

95. *Id.* at 74.

96. *Id.*

97. *Id.* at 59.

98. *Id.*

99. *Id.* at 60-61.

100. *Id.* at 61.

101. Copyright holders reacted vociferously to the VCR. Jack Valenti, then and still the President of the Motion Picture Association of America ("MPAA"), famously stated that the VCR was "to the American film producer and the American

*Corp. of America v. Universal City Studios, Inc.*¹⁰² and held that Sony was not contributorily liable for any copyright infringement that VCR users committed.¹⁰³ Drawing on patent law principles, the Court noted the importance of the public interest in access to articles of commerce like the VCR.¹⁰⁴ Accordingly, the mere sale of such a product would not constitute contributory infringement if the product was “widely used for legitimate, unobjectionable purposes.”¹⁰⁵ Indeed, the Court went on to say that the product “need merely be capable of substantial noninfringing uses.”¹⁰⁶

The Court then phrased the relevant question as whether the VCR was “capable of commercially significant noninfringing uses.”¹⁰⁷ The Court deliberately did not address the question of how much use is commercially significant, because one use of the VCR plainly satisfied the Court’s standard.¹⁰⁸ This use was “time-shifting,”¹⁰⁹ the practice of recording a television program playing at an inconvenient time for later viewing at a more convenient time.¹¹⁰ The Court agreed with the district court’s finding that consumers principally used the VCR for time-shifting purposes.¹¹¹ Because time shifting constituted fair use, it was a noninfringing use of the VCR, and Sony escaped liability.¹¹² Since then, the *Sony* case has served as an important precedent for the determination of contributory liability for technological innovations.¹¹³

public as the Boston Strangler is to the woman alone.” Adam Liptak, *Is Litigation the Best Way to Tame New Technology?*, N.Y. Times, Sept. 2, 2000, at B9 (quoting Jack Valenti), *available at* <http://partners.nytimes.com/library/tech/00/09/biztech/articles/02napster.html>.

102. 464 U.S. 417 (1984).

103. *Id.* at 443-56.

104. *Id.* at 440.

105. *Id.* at 442.

106. *Id.* The four dissenters disagreed with this standard, arguing that the correct inquiry should be whether “a *significant* portion of the product’s use is *noninfringing*.” *Id.* at 491 (Blackmun, J., dissenting). However, if virtually all of the product’s use was infringing, or if no one would buy the product for noninfringing purposes alone, then the manufacturer would be “purposely profiting” from the infringement, and should be contributorily liable. *Id.* The dissent also reasoned that the key factual question should be the amount of VCR usage that was infringing, not the amount of television programming that was copyrighted. *Id.* at 492. Because the district court declined to make findings on the percentage of legal use versus illegal use, the dissent would have remanded the case for further factual consideration. *Id.* at 492-93.

107. *Id.* at 442.

108. *Id.*

109. *Id.*

110. *Id.* at 421.

111. *Id.*

112. *Id.* at 443-56.

113. *See, e.g.,* Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965 (9th Cir. 1992) (holding the manufacturer of the “Game Genie,” a technology that allowed users to alter features of copyrighted video games, not liable for contributory infringement); Cable/Home Comm. Corp. v. Network Prod., Inc., 902 F.2d 829 (11th Cir. 1990) (holding liable for contributory infringement manufacturers of software used to pirate cable transmissions intended for paying customers); A&M Records,

2. Private Copying

Yet the innovation with perhaps the most dramatic effect on copyright law was the cassette recorder, which, in the 1980s and 1990s, ushered in an era of at-home recording of music played on the radio, and an accompanying controversy among private users and copyright holders.¹¹⁴

a. *The Canadian Private Copying Exception*

In 1997, Canadian authorities realized the futility of trying to prevent citizens from copying songs for private use.¹¹⁵ Consequently, Parliament added sections to the Canadian Copyright Act which legalized private copying.¹¹⁶ The private copying exemption specifically allowed for the copying of musical works onto audio recording media for the private use of the person making the copy.¹¹⁷ The Copyright Act defines audio recording media as any media “onto

Inc. v. Gen. Audio Video Cassettes, Inc., 948 F. Supp. 1449 (C.D. Cal. 1996) (holding seller of blank, time-loaded cassettes liable for contributory infringement).

114. See *infra* note 151 and accompanying text.

115. See Mark K.J. Rushton & Virginia H.L. Jones, *The Tortoise and the Hare: Canadian Legislative Copyright Reforms Race Against Copyright Infringement over Kazaa and Other New Generation Peer-to-Peer Networks*, 32 AIPLA Q.J. 197 (2004). Rushton and Jones note that Canadian legislators were guided by the words of British judge Lord Templeman in *CBS Songs Ltd. v. Amstrad Consumer Electronics*, [1988] 2 All E.R. 484 (H.L.) (Eng.). Rushton & Jones, *supra*, at 244. Regarding private copying, Lord Templeman stated the following:

From the point of view of society the present position is lamentable. Millions of breaches of the law must be committed by home copiers every year. Some home copiers may break the law in ignorance, despite extensive publicity and warning notices on records, tapes and films. Some home copiers may break the law because they estimate that the chances of detection are non-existent. Some home copiers may consider that the entertainment and recording industry already exhibit all the characteristics of an undesirable monopoly, lavish expenses, extravagant earnings and exorbitant profits, and that the blank tape is the only restraint on further increases in the prices of records. Whatever the reason for home copying, the beat of Sergeant Pepper and the soaring sounds of the Miserere from unlawful copies are more powerful than law-abiding instincts or twinges of conscience. A law which is treated with such contempt should be amended or repealed.

[1988] 2 All E.R. at 498. Many of these comments apply to the current P2P situation as well. In particular, many P2P users are forthright about the illegality of their activity, but claim that they are fighting against the tyrannical monopoly of “Big Music.” See, e.g., Neil Strauss, *A Chance to Break the Pop Stranglehold*, N.Y. Times, May 9, 1999, § 2 (Magazine), at 1; David Wiernicki, *Big Music Doesn’t Deserve Your Money*, 14850 Magazine, Feb. 2004, at <http://magazine.14850.com/0402/musicindustry.html>; Boycott-riaa.com, *Why We Are Here*, at <http://www.boycott-riaa.com/mission> (last visited Feb. 12, 2005); Ram Samudrala, *The Free Music Philosophy* (v1.4) (June 17, 1998), at <http://www.ram.org/ramblings/philosophy/fmp.html>.

116. Copyright Act, R.S.C., ch. 24, § 50 (1997) (Can.).

117. *Id.*

which a sound recording may be reproduced, and that is of a kind ordinarily used by individual consumers for that purpose.”¹¹⁸ To compensate artists for lost royalties due to private copying, the Act requires all manufacturers and importers of blank audio recording media sold in Canada to pay a levy.¹¹⁹

The Canadian Copyright Board is responsible for setting the levy rate.¹²⁰ Currently, the rates stand at 29¢ for audio cassettes of forty minutes or more; 21¢ for CD-Rs¹²¹ and CD-RWs;¹²² 77¢ for CD-R Audios,¹²³ CD-RW Audios,¹²⁴ and MiniDiscs;¹²⁵ \$2 for non-removable memory recorders of no more than 1GB¹²⁶ of data; \$15 for recorders between 1GB and no more than 10GB; and \$25 for recorders of over 10GB, such as the popular Apple iPod.¹²⁷ The money from this levy then goes to collecting societies¹²⁸ for the benefit of eligible authors,¹²⁹

118. *Id.*

119. *Id.*

120. *Id.*

121. CD-R stands for “compact disc-recordable,” a type of compact disc onto which a user can copy files. Once those files are copied onto a CD-R, however, the user cannot erase or replace them. Microsoft, Windows Media Knowledge Center Glossary, *at* http://www.microsoft.com/windows/windowsmedia/knowledgecenter/glossary.aspx#compact_disc_recordable_cd_r_gls (last visited Feb. 12, 2005). A compact disc is a storage medium for digital data. *Id.*

122. CD-RW stands for “compact disc-rewritable,” a type of compact disc onto which a user can copy, erase, and replace files. *Id.*

123. A CD-R Audio is a high density compact disc used to store digitally sampled audio. Sony DADC, Glossary, *at* <http://www.sonydadc.com/customerarea/glossary.go> (last visited Feb. 12, 2005). Once a user has copied music files onto a CD-R Audio, they cannot be erased or replaced. *See supra* note 121.

124. A CD-RW Audio, like a CD-R Audio, is a high density compact disc used to store digitally sampled audio. Sony DADC, *supra* note 123. Unlike a CD-R Audio, however, a user can copy, erase, and replace music files on a CD-RW Audio. *See supra* note 122.

125. A Minidisc is a compact data storage medium designed to store music. Yamaha, MD4 Glossary, *at* http://www.yamaha.co.jp/product/proaudio/homeenglish/faq/glossaries/glossarie/md4_glossary.html (last visited Feb. 12, 2005).

126. A byte is a unit of data that typically holds a single character, such as a letter, digit, or punctuation mark. Microsoft, Microsoft Glossary for Business Users, *at* <http://www.microsoft.com/atwork/glossary.msp> (last visited Feb. 9, 2005). A gigabyte (“GB”) is equivalent to approximately one billion bytes. *Id.*

127. *Private Copying 2003-2004 Decision*, [2003] 28 C.P.R. (4th) 417, *available at* <http://www.cb-cda.gc.ca/decisions/c12122003-b.pdf>.

128. Copyright Act, R.S.C., ch. 24, § 50 (1997) (Can.). An independent organization called the Canadian Private Copying Collective collects the levies and then routes them through collecting societies for distribution to eligible parties. Canadian Private Copying Collective, Royalty Distribution—Information for Copyright Holders, *at* <http://cpcc.ca/english/infoCopyHolders.htm> (last visited Feb. 12, 2005) [hereinafter CPCC Royalty Information].

129. An author of a musical work that is embodied in a sound recording is eligible, regardless of when the work was written or recorded, if copyright subsists in Canada in that musical work. *See* R.S.C., ch. 24, § 50.

makers,¹³⁰ and performers.¹³¹ Copyright holders register with these collective societies, and receive royalties based on representative samples of radio airplay and album sales.¹³² From 2000 to 2003, the Canadian Private Copying Collective (“CPCC”)¹³³ collected more than CA \$78 million.¹³⁴ In 2003 and 2004, over CA \$35 million was actually distributed to eligible parties.¹³⁵

The Canadian government intended these levies to compensate creators only for royalties lost due to private copying. To compensate creators for infringement occurring over the Internet, the Society of Composers, Authors and Music Publishers of Canada (“SOCAN”) proposed an additional tariff in 1995.¹³⁶ This tariff, known as Tariff 22, would make internet service providers (“ISPs”) responsible for paying royalties for all copies their users made while using their Internet services.¹³⁷ Although no one contested the validity or necessity of the tariff, the ISPs argued that they should not be responsible for the infringing actions of their users.¹³⁸ After nine years of litigation, the Supreme Court of Canada agreed. In *SOCAN v. Canadian Ass’n of Internet Providers*, the court held that ISPs are not content providers, but rather intermediaries.¹³⁹ As such, absent special circumstances, ISPs are not liable for infringement occurring on their networks.¹⁴⁰ Nevertheless, Canada’s blank media levy remains in place.

130. A maker of a sound recording (for example, a recording company) that embodies a musical work is eligible, regardless of when the work was recorded, if the maker, at the time the work was first fixed into a sound recording, had its headquarters in Canada or, if the maker is a natural person and not a corporation, was a Canadian citizen or permanent resident of Canada, and copyright subsists in Canada in the sound recording. A maker is also eligible if, at the time the work was first fixed into a sound recording, the maker had its headquarters in a country published under Section 50 of the Copyright Act or, if the maker is a natural person, was a citizen, subject, or permanent resident of that country. *Id.*

131. A performer of a musical work, regardless of when the performance took place, is eligible if the performance is embodied in a sound recording and the performer was, at the date the performance was first fixed into a sound recording, a Canadian citizen or permanent resident, and copyright subsists in the recording in Canada. A performer is also eligible if, at the date the performance was first fixed into a sound recording, the performer was a citizen, subject, or permanent resident of a country published under Section 50 of the Copyright Act. *See id.*

132. CPCC Royalty Information, *supra* note 128. The allocation of funds for the year 2000 was: 75% to eligible authors, 13.7% to eligible performers, and 11.3% to eligible makers. *Id.* The allocation of funds for 2001 to 2004 was: 66% to eligible authors, 18.9% to eligible performers, and 15.1% to eligible makers. *Id.*

133. The CPCC is an independent organization which the Copyright Board has designated to collect private copying levies. *See supra* note 128.

134. *See* Canadian Private Copying Collective, Financial Highlights, at <http://cpcc.ca/english/finHighlights.htm> (last visited Feb. 12, 2005).

135. *Id.*

136. Rushton & Jones, *supra* note 115, at 251.

137. *Id.* at 252.

138. *Id.*

139. [2004] 2 S.C.R. 427

140. *See id.* Unlike Canada, the United States has enacted legislation exempting

b. *The American Audio Home Recording Act*

Canada is not the only country to have implemented a blank media levy to compensate creators for private copying. At least twenty-five countries, including the United States, have comparable regimes.¹⁴¹ The comparable statute in the United States is the Audio Home Recording Act (“AHRA”).¹⁴² The AHRA requires manufacturers and importers of digital audio recording devices to pay a levy of two percent of the transfer price,¹⁴³ and manufacturers and importers of blank media to pay three percent of the transfer price.¹⁴⁴ The Canadian private copying exception, on the other hand, only requires payment from the manufacturers and importers of blank media.¹⁴⁵

The reach of the AHRA’s exemption for private copying also differs slightly from its Canadian counterpart. The AHRA is broader in that it exempts individuals from liability for copyright infringement for any noncommercial copying use of a digital audio recording device or medium.¹⁴⁶ The Canadian version, however, only exempts the

ISPs for liability for infringing material on their networks under certain circumstances. See Digital Millennium Copyright Act (“DMCA”), Pub. L. No. 105-304, § 202, 112 Stat. 2860, 2877-86 (codified at 17 U.S.C. § 512 (2000)). The DMCA has proven to be extremely controversial. For a sampling of the issues in this controversy, see Matthew Amedeo, *Shifting the Burden: The Unconstitutionality of Section 512(h) of the Digital Millennium Copyright Act and Its Impact on Internet Service Providers*, 11 *CommLaw Conspectus* 311 (2003); David Nimmer, *Back from the Future: A Proleptic Review of the Digital Millennium Copyright Act*, 16 *Berkeley Tech. L.J.* 855 (2001); Eugene R. Quinn, Jr., *An Unconstitutional Patent in Disguise: Did Congress Overstep Its Constitutional Authority in Adopting the Circumvention Prevention Provisions of the Digital Millennium Copyright Act?*, 41 *Brandeis L.J.* 33 (2002); Jeff Sharp, *Coming Soon to Pay-Per-View: How the Digital Millennium Copyright Act Enables Digital Content Owners to Circumvent Educational Fair Use*, 40 *Am. Bus. L.J.* 1 (2002).

141. Rushton & Jones, *supra* note 115, at 247 n.184.

142. 17 U.S.C. §§ 1001-1010 (2000). The portions of the Audio Home Recording Act (“AHRA”) which delineate the use of blank media levies are located at §§ 1003-1007.

143. *Id.* § 1004(a)(1). In the case of a domestic product, the “transfer price” of a digital audio recording device or medium is the manufacturer’s transfer price. *Id.* § 1001(12). In the case of an imported product, the “transfer price” is the actual entered value at United States Customs. *Id.*

144. *Id.* § 1004(b). For a definition of “transfer price,” see *supra* note 143. The Register of Copyrights receives the royalties culled from these levies, and deposits them into the Treasury of the United States for later distribution to eligible parties. 17 U.S.C. § 1005. Two-thirds of the royalties then go to the Sound Recording Fund, which allocates forty percent for featured artists, a small percentage for non-featured artists and back-up musicians, and the rest for record companies. *Id.* § 1006(b)(1). The remaining one-third of the royalties go into a Musical Works Fund, which allocates fifty percent for songwriters and fifty percent for music publishers. *Id.* § 1006(b)(2). Interested parties must file a claim with the Librarian of Congress to receive royalties. *Id.* § 1007(a)(1).

145. Copyright Act, R.S.C., ch. 24, § 50 (1997) (Can.).

146. 17 U.S.C. § 1008.

making of private copies for one purpose: the personal use of the individual making the copy.¹⁴⁷

Conversely, the AHRA is narrower than its Canadian counterpart in that it only exempts recordings made using devices or media which are “primarily marketed” or “most commonly used” for digital audio recording.¹⁴⁸ The Canadian version, on the other hand, exempts media “ordinarily used” for recording, whether or not recording is their primary use.¹⁴⁹ It is for this reason that the AHRA has seen much less use than its Canadian counterpart: technologies that the statute did not cover quickly superseded the digital audio recording devices that the AHRA explicitly referenced.¹⁵⁰

Exempting private copying from infringement liability made sense during the greater part of the 1990s, when taping a small selection of songs onto blank cassette tapes was a common and—despite the recording industry’s frequent warnings to the contrary—relatively innocuous practice.¹⁵¹ A few years later, however, a new technological innovation would challenge the existing copyright regime in a way and on a scale that no one anticipated.

3. P2P Technology Arrives

That innovation is P2P file sharing, a term which refers to the instantaneous online exchange of files between computer users.¹⁵² Typically, these files are MP3 files containing copyrighted songs.¹⁵³ The compression of songs into small, easily transferable MP3 files, together with the advent of file-sharing technologies, revolutionized

147. R.S.C., ch. 24, § 50 (1997).

148. 17 U.S.C. § 1001(3)-(4).

149. R.S.C., ch. 24, § 50 (1997).

150. See Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 Stan. L. Rev. 1345, 1407 (2004).

151. See generally Mark Jenkins, *Hit Charade*, Slate, Aug. 20, 2002, at <http://slate.msn.com/?id=2069732>. Nevertheless, home taping did ignite a huge controversy in the 1980s and 1990s. For a sampling of the issues surrounding this controversy, see N. Jansen Calamita, *Coming to Terms with the Celestial Jukebox: Keeping the Sound Recording Copyright Viable in the Digital Age*, 74 B.U. L. Rev. 505 (1994); Jonathan Fein, Note, *Home Taping of Sound Recordings: Infringement or Fair Use?*, 56 S. Cal. L. Rev. 647 (1983); and Michael Plumleigh, Comment, *Digital Audio Tape: New Fuel Stokes the Smoldering Home Taping Fire*, 37 UCLA L. Rev. 733 (1990).

152. Aric 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, 2213 (2002).

153. MP3 files are digital audio files that utilize what is known as a Layer 3 coding scheme. This coding scheme greatly condenses the audio file, without any noticeable sacrifice in sound quality. Because MP3 files are small, they are easy to transfer across the Internet. Alex Colangelo, *Copyright Infringement in the Internet Era: The Challenge of MP3s*, 39 Alberta L. Rev. 891, 894 (2002).

the distribution of digital data.¹⁵⁴ The effects were immediate. When file-sharing network Napster debuted on the Internet in May 1999,¹⁵⁵ it quickly became the fastest growing Internet site in history.¹⁵⁶ By the end of its first year, Napster had twenty-three million subscribers.¹⁵⁷ By 2001, when the recording industry finally succeeded in shutting Napster down,¹⁵⁸ over eighty million users had downloaded as many as three billion songs a month.¹⁵⁹

Part of the success of the P2P model lies in how incredibly easy it is to use. To begin file sharing, a computer user must download file-sharing software from any one of various, easily accessible sites on the Internet.¹⁶⁰ Once the user installs the software on her computer, she can download songs from other connected users simply by searching the P2P network for a particular file and then clicking on that file.¹⁶¹ The user can also allow others to download songs from her computer by uploading her collection of music onto a shared folder.¹⁶² Other users can then search the shared folder and download whatever files they like.¹⁶³

There are essentially two types of P2P networks: centralized servers like Napster, and decentralized servers like Aimster, Grokster, and Kazaa. Centralized servers like Napster operate by storing an index of available files on a central database.¹⁶⁴ Although the central server maintains a list of file names, the actual files remain on the users' computers.¹⁶⁵ When a user requests a specific file, the request goes through the central server, which searches through the list until it

154. See Aaron M. Bailey, Comment, *A Nation of Felons?: Napster, the Net Act, and the Criminal Prosecution of File-Sharing*, 50 Am. U. L. Rev. 473, 479 (2000).

155. Damon Lussier, *Beyond Napster: Online Music Distribution and the Future of Copyright*, 10 U. Balt. Intell. Prop. L.J. 25, 28 (2001).

156. Peter Jan Honigsberg, *The Evolution and Revolution of Napster*, 36 U.S.F. L. Rev. 473, 474 (2002).

157. *Id.*

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

159. Timothy James Ryan, *Infringement.com: RIAA v. Napster and the War Against Online Music Piracy*, 44 Ariz. L. Rev. 495, 520 (2002).

160. All of the most popular P2P networks, including Kazaa, Morpheus, eDonkey, and Limewire, offer their file-sharing software free of charge.

161. See generally Amedeo, *supra* note 140, at 311-12; David Balaban, *The Battle of the Music Industry: The Distribution of Audio and Video Works via the Internet, Music and More*, 12 Fordham Intell. Prop. Media & Ent. L.J. 235, 243-45 (2001); Wikipedia, File Sharing, at http://en.wikipedia.org/wiki/File_sharing (last visited Feb. 12, 2005).

162. See generally Kevin Michael Lemley, *Protecting Consumers from Themselves: Alleviating the Market Inequalities Created by Online Copyright Infringement in the Entertainment Industry*, 13 Alb. L.J. Sci. & Tech. 613, 623 (2003).

163. See *id.* Because uploading users essentially make copyrighted works available for everyone else to download, the recording industry has targeted uploaders in its infringement lawsuits. See Katie Dean, *RIAA Legal Landslide Begins*, Wired News, Sept. 8, 2003, at <http://www.wired.com/news/digiwood/0,1412,60345,00.html>.

164. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1012 (9th Cir. 2001).

165. *Id.*

finds a match.¹⁶⁶ The server then communicates the host user's address to the requesting user, and the requesting user's computer establishes a connection with the host computer through which the user downloads the file.¹⁶⁷ Thus, while the actual file transfer is peer-to-peer, the system accomplishes that transfer through centralized searching.

In contrast, decentralized networks, as their name suggests, do not maintain a central server.¹⁶⁸ Rather, these networks use either decentralized indexing systems, under which each user's computer maintains a list of files available on that computer only; or "supernode" systems, under which a select number of users' computers act as indexing servers.¹⁶⁹ Another important feature of decentralized networks is their use of encryption technology.¹⁷⁰ Encryption conceals the name and contents of the files being shared as well as the identity of the sharing users.¹⁷¹ Thus, it allows P2P transactions to occur without the network knowing what files are being traded or by whom.¹⁷²

P2P technology is clearly among the greatest challenges facing copyright law today, and has proven to be a true hydra for the entertainment industry. Indeed, no sooner had Napster disappeared than a whole new crop of P2P networks sprung up to take its place.¹⁷³ Currently, there are many dozens of file-sharing services in operation, each of which boasts several thousand to several million users.¹⁷⁴

In its fight against the growing threat of P2P, the recording industry has sought relief from both individual file sharers¹⁷⁵ and the file-sharing networks themselves.¹⁷⁶ That individual P2P users are liable for exchanging copyrighted files has not been seriously contested since

166. *Id.*

167. *Id.*

168. *See* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd., 380 F.3d 1154, 1158-59 (9th Cir.), *cert. granted*, 125 S. Ct. 686 (2004).

169. *Id.*

170. *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, 60 (2001).

171. *See generally* Jack Germain, *Encrypted File Sharing: P2P Fights Back*, TechNewsWorld, May 27, 2004, at <http://www.technewsworld.com/story/34052.html>.

172. *See* Tanaka, *supra* note 170, at 61 (noting the difficulty in detecting copyright infringement and enforcing copyright law because of the encryption of decentralized P2P networks).

173. Geraldine Szott Moehr, *The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory*, 83 B.U. L. Rev. 731, 770 (2003).

174. Indeed, over 200 million users have downloaded file-sharing software. Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 Cornell L. Rev. 1278, 1280 (2003); *see also* Thomas Mennecke, *eDonkey/Overnet Rapidly Approaching FastTrack*, Slyck.com, May 13, 2004, at <http://www.slyck.com/news.php?story=477>.

175. *See supra* note 14.

176. *See infra* notes 248-74 and accompanying text.

the U.S. Court of Appeals for the Ninth Circuit ruled in *A&M Records, Inc. v. Napster, Inc.*¹⁷⁷ that file sharing was an illegal activity.¹⁷⁸ Whether P2P networks are contributorily liable for infringement occurring on their systems is a much murkier issue. The Ninth Circuit held in *Napster* that centralized servers were contributorily infringers,¹⁷⁹ but came to the opposite conclusion about decentralized networks in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*¹⁸⁰ Prior to the Ninth Circuit's disposition in *Grokster*, the Seventh Circuit had ruled that even decentralized networks were subject to liability for contributory infringement.¹⁸¹ To resolve these issues, the Supreme Court granted certiorari in *Grokster* on December 10, 2004.¹⁸²

Much of the confusion surrounding liability in this context stems from P2P's radically enhanced capacity for mass-scale copyright infringement. The innovations of P2P challenge traditional notions of copyright, as well as traditional enforcement mechanisms. The existing regimes of the United States and Canada are in jeopardy, and new ones are emerging to take their place.

II. P2P AND THE EMERGING COPYRIGHT REGIMES IN THE UNITED STATES AND CANADA

The introduction of P2P has undoubtedly produced fundamental shifts in American and Canadian copyright consciousness. In the United States, copyright has become increasingly focused on enforcing existing laws and protecting existing methods of the distribution of creative works. In many cases, this approach involves an expansion of the rights and remedies of copyright holders.¹⁸³ In Canada, however, copyright has become increasingly flexible, and increasingly focused on the rights of users.¹⁸⁴ There are three central considerations that form the response of each country to the P2P

177. 239 F.3d 1004 (9th Cir. 2001).

178. The *Napster* court rejected all of Napster's arguments regarding the legality of file-sharing activity. See *infra* notes 185-201 and accompanying text.

179. 239 F.3d at 1019-22.

180. 380 F.3d 1154, 1165-66 (9th Cir.), *cert. granted*, 125 S. Ct. 686 (2004).

181. *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003), *cert. denied sub nom. Deep v. Recording Indus. Ass'n of Am.*, 540 U.S. 1107 (2004).

182. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 125 S. Ct. 686 (2004).

183. See *infra* notes 305-49 and accompanying text. The recording industry (the RIAA in the United States and CRIA in Canada) is both the plaintiff in all of the below-mentioned P2P cases, and the lobbying force behind the legislation currently before Congress and the Canadian Parliament. This is unsurprising, given that it is the recording industry's interests that are primarily at stake in the P2P wars. Artists, whose interests are also at stake, do not always approve of the RIAA's actions, however. See Neil Strauss, *File-Sharing Battle Leaves Musicians Caught in the Middle*, N.Y. Times, Sept. 14, 2003, § 1 (Magazine), at 1, available at <http://www.nytimes.com/2004/09/14/technology/14MUSI.html>.

184. See *infra* notes 202-44 and accompanying text.

crisis, which this Note addresses in turn. Specifically, Part II.A discusses the legality of file sharing as an activity, Part II.B addresses the liability of file-sharing networks for infringement occurring on their systems, and Part II.C examines proposed responses to the P2P crisis.

A. *The Legality of File Sharing*

On both centralized and decentralized P2P networks, the capacity for large-scale copyright infringement is indisputable. Moreover, in the United States at least, there is no doubt that sharing copyrighted musical works over P2P networks is illegal. The Ninth Circuit in *Napster*, the first case to address liability for P2P networks, effectively ruled on the illegality of file sharing by rejecting all of Napster's affirmative defenses on the issue.¹⁸⁵

Regarding fair use, the *Napster* court found that all of the factors in the fair use analysis¹⁸⁶ established that file sharing was not entitled to protection.¹⁸⁷ First, the purpose of the use was non-transformative and commercial, because users were getting for free something which they would ordinarily have to buy.¹⁸⁸ Second, the nature of the copyrighted songs was creative and thus deserved a high degree of protection.¹⁸⁹ Third, users typically downloaded entire songs, rather than short samples.¹⁹⁰ Finally, file sharing had a harmful effect on the market for the copyrighted works because it both reduced audio CD sales and made it more difficult for copyright holders to create legitimate digital markets for their works.¹⁹¹

Additionally, the court rejected Napster's claims that using P2P networks to "sample" music before purchasing a CD was fair use.¹⁹² Regardless of whether users eventually purchased the CD, the court noted that the copying of entire songs remained a commercial use.¹⁹³ Even if Napster could have shown that sampling increased audio CD sales, that fact should not deprive the copyright holder of the right to license the material.¹⁹⁴

185. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013-20, 1024-27 (9th Cir. 2001).

186. The four factors in the fair use analysis are: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107 (2000).

187. *Napster*, 239 F.3d at 1014-19.

188. *Id.* at 1015.

189. *Id.* at 1016.

190. *Id.*

191. *Id.* at 1016-17.

192. *Id.* at 1018.

193. *Id.*

194. *Id.*

Furthermore, copyright holders generally regulated, and were entitled to regulate, the market for promotional downloads.¹⁹⁵ Allowing users to sample music on P2P networks would usurp the rights of copyright holders to develop digital markets for their works.¹⁹⁶ Likewise, the practice of “space-shifting,” or downloading a song that a user already owned on a CD to a computer hard drive, was not fair use, because once a user listed a song on his computer, it became available for distribution to the general public.¹⁹⁷

Notably, the court also held that the AHRA did not exempt file sharers from liability for copyright infringement.¹⁹⁸ A computer hard drive was not an “audio recording medium” within the AHRA’s plain meaning, because it was not primarily marketed or most commonly used for recording.¹⁹⁹ The court also cited a Senate Report for the conclusion that a “digital music recording” under the AHRA does not include songs fixed onto computer hard drives.²⁰⁰ The *Napster* court’s adjudication of these affirmative defenses established liability for file sharing so clearly that, in the two major cases involving P2P networks following the *Napster* decision, the defendants did not even raise the defenses of fair use or exemption under the AHRA.²⁰¹

In Canada, however, the legality of file sharing is slightly murkier. In December 2003, the Copyright Board of Canada issued an opinion stating that downloading music from P2P networks²⁰² fell within Canada’s private copying exception.²⁰³ Specifically, the Board noted that the private copying exception only addresses end copies; it does not consider the source of the copied material.²⁰⁴ Thus, there is no requirement that the source be a noninfringing copy, and, as a result, no liability ensues for copying pirated songs from P2P networks.²⁰⁵

A few months later, in March 2004, the federal court decided in *BMG Canada Inc. v. John Doe* that neither downloading nor uploading copyrighted musical works onto a P2P network constitutes

195. *Id.*

196. *Id.*

197. *Id.* at 1019.

198. *Id.* at 1024-25. For a discussion of the AHRA and its provisions, see *supra* notes 142-50 and accompanying text.

199. *Napster*, 239 F.3d at 1024.

200. *Id.* at 1024-25 (citing S. Rep. No. 102-294 (1992)).

201. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154 (9th Cir.), *cert. granted*, 125 S. Ct. 686 (2004); *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003), *cert. denied sub nom. Deep v. Recording Indus. Ass’n of Am.*, 540 U.S. 1107 (2004).

202. The Board found that private copying from the Internet constituted just under half of all private copies made, and that a significant portion of Internet copying involved P2P transactions. *Private Copying 2003-2004 Decision*, [2003] 28 C.P.R. (4th) 417, available at <http://www.cb-cda.gc.ca/decisions/c12122003-b.pdf>, at 12-14.

203. *Id.* at 20. The Board admitted, however, that the legality of P2P was ultimately for the courts to decide. *Id.* at 21.

204. *Id.* at 20.

205. *Id.*

illegal activity.²⁰⁶ In that case, the Canadian Recording Industry Association (“CRIA”) brought a motion against five Canadian ISPs to compel disclosure of the identities of twenty-nine customers who allegedly engaged in file sharing of copyrighted works.²⁰⁷ The court announced that the test for granting an equitable bill of discovery involved five criteria: (1) the applicant must establish a prima facie case against the alleged wrongdoer; (2) the person from whom discovery is sought must be involved in the matter as more than an innocent bystander; (3) the person from whom discovery is sought must be the only practical source of the requested information; (4) the person from whom discovery is sought must be reasonably compensated for expenses arising out of compliance with the discovery order; and (5) the public interest in disclosure must outweigh legitimate privacy concerns.²⁰⁸ The court found that CRIA’s affidavit was deficient in several respects,²⁰⁹ and that privacy concerns trumped the public interest in disclosure.²¹⁰

The most controversial part of the opinion, however, addressed whether CRIA had successfully established a prima facie case of infringement. The court agreed with the Copyright Board’s decision that downloading a song for personal use fell within the private copying exception in Canada’s Copyright Act.²¹¹ The court then went on to say that uploading copyrighted musical files did not constitute

206. *BMG Canada Inc. v. John Doe*, [2004] 3 F.C.R. 241, 258-61 (Trial Div.) (Can.).

207. *Id.* at 249. In the United States, the RIAA filed hundreds of John Doe lawsuits against alleged file sharers, using the American version of the Canadian motion at issue in *BMG Canada*. See *supra* note 14. Initially, the RIAA tried to subpoena the identity of these file sharers from ISPs using 17 U.S.C. § 512(h) (2000) (the subpoena provision of the DMCA). However, the D.C. Circuit Court of Appeals held in *Recording Industry Ass’n of America v. Verizon Internet Services*, 351 F.3d 1229 (D.C. Cir. 2003), cert. denied, 125 S. Ct. 309 (2004), that a copyright holder could only issue a § 512(h) subpoena to an ISP that stores infringing material on its servers, and not to an ISP that merely serves as a conduit for material stored on a user’s computer. Thus, the RIAA was relegated to using John Doe lawsuits, which identify defendants only by their numerical IP addresses, to get at alleged infringers. Kao, *supra* note 7, at 418. The John Doe procedure offers greater protections for potential defendants than § 512(h) subpoenas, which copyright holders could have abused because of the minimal judicial oversight afforded under the DMCA. *Id.* at 418-19.

208. *BMG Canada*, [2004] 3 F.C.R. at 254.

209. Specifically, the court found that CRIA had failed to provide affidavits from individuals with personal knowledge of the material facts, in contravention of the best evidence rule, and had failed to establish a causal link between P2P pseudonyms and IP addresses. *Id.* at 256-57.

210. The court noted that “the protection of privacy is of utmost importance to Canadian society.” *Id.* at 264. CRIA had gathered the evidence it presented in October, November, and December of 2003, but had not filed the motion requesting disclosure until February of 2004. As a result, the court found that the age of the data made it unreliable. *Id.* at 266-67. Moreover, because CRIA had failed to establish a causal link between P2P pseudonyms and IP addresses, there was an unacceptable risk that an innocent account holder would be identified. *Id.*

211. *Id.* at 259.

infringement either.²¹² CRIA had put forward two grounds for liability for uploading music: (1) authorization of copyright infringement and (2) distribution of infringing copies.²¹³

Canada punishes those who authorize infringement in much the same way that the American system punishes contributory infringers,²¹⁴ but the Canadian cause of action for authorization is generally narrower. Contributory infringement in America requires only that the contributory infringer have knowledge of direct infringement and materially contribute to that infringement.²¹⁵ Authorizing infringement in Canada, however, requires a high degree of intent. The Canadian Supreme Court stated in *Muzak Corp. v. Composers, Authors and Publishers Ass'n of Canada* that authorization requires that a person have sanctioned, approved, and countenanced copyright infringement.²¹⁶ In *CCH Canadian*, the court noted that authorization “must be understood in its strongest dictionary meaning.”²¹⁷

Furthermore, a person does not authorize infringement by merely authorizing the use of equipment that could be used to infringe copyright.²¹⁸ Indeed, Canadian courts presume that a person who authorizes an activity does so only as far as is consistent with the law.²¹⁹ A plaintiff may rebut this presumption, however, by showing the existence of a certain relationship or degree of control between the alleged authorizer and the direct infringer.²²⁰

The *BMG Canada* court refused to find authorization in uploading music to a file-sharing network.²²¹ Drawing on the Canadian Supreme Court’s holding in *CCH Canadian*, the *BMG Canada* court held that there was

[no] real difference between a library that places a photocopy machine in a room full of copyrighted material and a computer user that places a personal copy on a shared directory linked to a P2P service. In either case the preconditions to copying and

212. *Id.* at 259-60.

213. *Id.* at 258.

214. Under the Canadian Copyright Act, an individual may be found guilty of direct infringement for “authorizing” the reproduction of an infringing work. Copyright Act, R.S.C., ch. C-42, § 3(1) (1985) (Can.).

215. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1160 (9th Cir.), *cert. granted*, 125 S. Ct. 686 (2004). For a more detailed discussion of contributory infringement in the P2P context, see *infra* notes 248-92 and accompanying text.

216. *Muzak Corp. v. Composers, Authors and Publishers Ass'n of Canada*, [1953] 2 S.C.R. 182, 193 (Can.).

217. *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 361 (Can.).

218. *Id.*

219. *Id.*

220. *Id.*

221. *BMG Canada Inc. v. John Doe*, [2004] 3 F.C.R. 241, 260 (Trial Div.) (Can.).

infringement are set up but the element of authorization is missing.²²²

Absent a relationship of control or some positive act evincing the intent to sanction copyright infringement, the court held that individuals who uploaded files onto a P2P network did not authorize the reproduction of those files.²²³

They also did not distribute those files, the court found, merely by placing them in a shared directory where other file sharers could access them.²²⁴ Rather, distribution required some positive act by the uploading user, such as sending out copyrighted songs or advertising that they were available for downloading.²²⁵ This is so, under the court's reasoning, because the Canadian Copyright Act does not give the copyright holder the exclusive right to make his or her work available.²²⁶ In the absence of such a right, a person who uploads music does not violate any of the creator's exclusive rights.²²⁷ Although the World Intellectual Property Organization Copyright Treaty ("WCT"), which Canada signed in 1997, includes a "making available" right,²²⁸ Canada has yet to ratify the WCT.²²⁹ Thus, it does not currently form any part of the Canadian Copyright Act,²³⁰ making file sharing legal, in the court's opinion, under Canadian copyright law.²³¹

From a common sense perspective, the ruling in *BMG Canada* is shocking. It scarcely seems logical to argue that the copying and exchange of copyrighted songs on a network open to the general public is somehow not copyright infringement. From a Canadian legal perspective, however, the decision makes some sense. As the Copyright Board noted, downloading music from P2P networks is legal, because Canada's private copying regime does not require that the source of the copy be noninfringing.²³²

Regarding uploading, in the absence of a "making available" right for copyright holders, a user must either authorize or distribute a copyrighted work to be liable for copyright infringement.²³³ The Canadian cause of action for authorization of copyright infringement

222. *Id.*

223. *See id.*

224. *Id.* at 260-61.

225. *Id.*

226. *See id.*

227. *See id.*

228. World Intellectual Property Organization Copyright Treaty, Apr. 12, 1997, art. 6(1), S. Treaty Doc. No. 105-17 (1997), available at <http://www.wipo.org/en/diplconf/distrib/94dc.htm>.

229. *BMG Canada*, [2004] 3 F.C.R. at 261.

230. *Id.*

231. *See id.* at 259.

232. *Private Copying 2003-2004 Decision*, [2003] 28 C.P.R. (4th) 417, available at <http://www.cb-cda.gc.ca/decisions/c12122003-b.pdf>.

233. *See BMG Canada*, [2004] 3 F.C.R. at 258.

requires a high level of intent, which the *BMG Canada* court declined to find merely from the fact that a user had, intentionally or not, made his or her songs available in a shared folder.²³⁴ In its pending appeal, CRIA argues that the act of installing and using file-sharing software, knowing the capacity of such software to facilitate the distribution of copyrighted material, is sufficient for authorization.²³⁵

Given the presumption, however, that a person authorizes an activity only so far as is in accordance with the law,²³⁶ the use of file-sharing software alone may not be sufficient to evince intent to sanction copyright infringement, particularly if downloading copyrighted works from those networks is legal.²³⁷ If the Federal Court of Appeal views P2P systems as capable of both infringing and noninfringing uses, it seems unlikely that the mere use of file-sharing software is enough for authorization.

This is particularly true, given that some P2P networks, like Kazaa, place a user's downloaded songs in a shared folder by default.²³⁸ The user may not know where the shared folder is located on her computer, or even be aware that her files are available for download.²³⁹ This "passive" file sharing does not appear to evince the high level of intent necessary for authorization of copyright infringement.

The *BMG Canada* court's holding on the issue of distribution is considerably more contentious. The court rejected CRIA's argument that a user distributed copyrighted works by placing them in a shared folder which other users could access.²⁴⁰ In the absence of positive acts by the user, such as sending out copies of songs or advertising their availability for download, the court held that there was no distribution.²⁴¹ CRIA maintains on appeal that placing copyrighted works in a shared folder is tantamount to intent to distribute them, or at the very least, intent to use them for purposes other than the private use exempted under the Canadian Copyright Act.²⁴² CRIA contends that the evidence shows that the alleged infringers placed

234. *Id.* at 260-61.

235. *BMG Canada*, [2004] 3 F.C.R. at 241, *appeal docketed*, No. T-292-04 at *8-9 (Federal Ct. App. Apr. 13, 2004), *available at* <http://www.cippic.ca/en/projects-cases/file-sharing-lawsuits/criaappealnotice.pdf>.

236. *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 361 (Can.).

237. *See supra* note 232 and accompanying text.

238. Brief of Amicus Curiae Berkman Center for Internet & Society at Harvard Law School at 9-10, *Capitol Records, Inc. v. Alaujan*, No. 1:03-CV-11661-NG (D. Mass. May 24, 2004).

239. *Id.*

240. *BMG Canada*, [2004] 3 F.C.R. at 260-61.

241. *Id.*

242. *BMG Canada*, [2004] 3 F.C.R. at 241, *appeal docketed*, No. T-292-04 at *7 (Federal Ct. App. Apr. 13, 2004), *available at* <http://www.cippic.ca/en/projects-cases/file-sharing-lawsuits/criaappealnotice.pdf>.

the files into the shared folders for the purpose of distributing them to the public, in violation of the copyright holder's exclusive rights.²⁴³

How successful these arguments will be on appeal depends to some degree on how much credit the Federal Court of Appeal gives to the passive file-sharing argument that appears to have impressed the trial court—that is, the argument that a user does not necessarily even know that the songs he downloaded are automatically uploaded as well. In the case of passive file sharing, there is no intent to distribute, and there are no positive acts of distribution.

Because of the systematically passive nature of distribution over file-sharing networks, the presence or absence of overt acts of distribution is largely immaterial in the P2P context. File sharers never need to advertise or send out copies of their songs—requesting users can find the files they want simply by searching the network for them.²⁴⁴ If the appellate court requires positive acts for distribution on P2P networks, it is unclear whether an uploading user would ever be liable for copyright infringement.

B. *Liability for P2P Networks*

Another important legal issue regarding P2P is whether the providers of file-sharing software are liable under theories of secondary infringement. In the United States, there is no doubt that centralized networks are subject to contributory liability.²⁴⁵ The federal circuit courts are split, however, on whether decentralized networks are also liable.²⁴⁶ In contrast, although there have been no Canadian cases addressing secondary liability for P2P providers, the high standard of intent for authorization of copyright infringement makes it unlikely that such a suit would succeed in Canada.²⁴⁷

1. Contributory Liability in the United States

In the United States, the RIAA, faced with costly and time-consuming litigation against individual file sharers, has attacked P2P software providers,²⁴⁸ hoping to get the recent wave of decentralized

243. *See id.*

244. Indeed, CRIA points out in its appeal that the very nature of the file-sharing network effectively advertises the availability of copyrighted files to millions of users. *Id.* at *9.

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

246. *Compare In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003) (holding decentralized P2P network Aimster liable for contributory infringement), *cert. denied sub nom.* Deep v. Recording Indus. Ass'n of Am., 540 U.S. 1107 (2004), *with* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd., 380 F.3d 1154 (9th Cir.) (holding decentralized P2P network Grokster not liable for contributory infringement), *cert. granted*, 125 S. Ct. 686 (2004).

247. *See infra* notes 293-95 and accompanying text.

248. The high volume of illegal file sharing, and the low return from suing individuals, makes it far more cost-effective for the RIAA to pursue litigation against

networks to die in the same way that Napster died. In this endeavor, the RIAA has met with varied success, depending on whether the network at issue is centralized or decentralized,²⁴⁹ and what rule of secondary liability the particular circuit decides to adopt.²⁵⁰

a. *Napster*

Clearly, centralized P2P networks like Napster are liable for contributory infringement in the United States, because the architecture of their systems allows such networks to both know of infringing files on their servers and materially contribute to illegal file-sharing transactions.²⁵¹ In addition, the *Napster* court rejected all of the affirmative defenses that Napster asserted, effectively ruling on the illegality of file sharing as an activity.²⁵²

This left Napster with only the *Sony* defense as a possible protection. When the RIAA took Napster to court, Napster raised this defense, arguing that its technology had “substantial noninfringing uses” and should therefore be protected against contributory liability.²⁵³ The Ninth Circuit, however, disagreed with Napster’s characterization of the scope of the *Sony* defense.²⁵⁴ Rather, the court held that *Sony* mandated only that courts could not impute knowledge of infringing activity to Napster simply because its technology could be used to infringe copyright.²⁵⁵ In other words, constructive knowledge of infringement, merely because of a technology’s capacity for infringing uses, was not sufficient for contributory liability.²⁵⁶

The court went on to find, however, that Napster had actual knowledge of infringing files on its servers.²⁵⁷ It also had the capacity, as a centralized network, to remove those files, and to block the users who supplied them from accessing the system.²⁵⁸ By failing to do so, and by providing the “site and facilities” for infringement, Napster

the networks that facilitate P2P transactions. Lemley & Reese, *supra* note 150, at 1349.

249. Compare *Napster*, 239 F.3d at 1021, with *Grokster*, 380 F.3d at 1162.

250. See *supra* note 246.

251. *Napster*, 239 F.3d at 1021.

252. See *supra* notes 185-200 and accompanying text.

253. *Napster*, 239 F.3d at 1020.

254. *Id.* at 1020-21.

255. *Id.*

256. See *id.*

257. Specifically, the district court found evidence of actual knowledge in two documents. One was a document authored by Sean Parker, a Napster co-founder, speaking of the need to remain ignorant of users’ real names and IP addresses because they were exchanging pirated music. The second document was from the RIAA, informing Napster of more than 12,000 infringing files on its network. *Id.* at 1020 n.5.

258. *Id.* at 1022.

materially contributed to that infringement, and was therefore secondarily liable.²⁵⁹

b. *Aimster*

The contributory infringement question is more difficult to answer when the P2P network is decentralized, because the encryption system will shield the network from actual knowledge of infringement.²⁶⁰ The network also cannot remove infringing material, because it does not maintain control over indexing servers.²⁶¹ Not surprisingly, the federal circuit courts are split on whether such networks are contributorily liable for copyright infringement.²⁶²

The Seventh Circuit, on the one hand, held decentralized network *Aimster* liable for contributory infringement.²⁶³ On the issue of knowledge, the court stated that *Aimster* could not immunize itself from liability through the “willful blindness” of its encryption system.²⁶⁴ Rather, because *Aimster* knew or should have strongly suspected that many or all of its users were copyright infringers, its deliberate efforts to shield itself from knowledge of the full extent of the infringement did not protect it from liability.²⁶⁵

On the issue of material contribution, the court concluded that *Aimster* had to prove not only that its software was capable of substantial noninfringing uses, but that it was actually put to such uses.²⁶⁶ Moreover, even if the actual use of *Aimster*’s software was substantially noninfringing, the court would still have required *Aimster* to show that it would have been disproportionately costly for *Aimster* to eliminate or reduce the remaining infringing uses before it could escape contributory liability.²⁶⁷

259. *Id.* at 1021-22.

260. *See supra* notes 170-72 and accompanying text.

261. *See supra* notes 168-69 and accompanying text.

262. *See supra* note 246.

263. *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003), *cert. denied sub nom.* *Deep v. Recording Indus. Ass’n of Am.*, 540 U.S. 1107 (2004).

264. *Id.* at 650.

265. *Id.*

266. In the court’s words:

It is not enough, as we have said, that a product or service be physically capable, as it were, of a noninfringing use. *Aimster* has failed to produce any evidence that its service has ever been used for a noninfringing use, let alone evidence concerning the frequency of such uses.

Id. at 653.

267. *Id.*

c. *Grokster*

The Ninth Circuit, in contrast, held in *Grokster* that decentralized P2P network Grokster was not a contributory infringer.²⁶⁸ In accordance with *Napster*, the court required the RIAA to prove that Grokster had actual knowledge of infringing files on its system.²⁶⁹ However, because contributory infringement requires both knowledge and material contribution, the RIAA also had to show that Grokster had actual knowledge of infringement at a time when it contributed to the infringement and could have done something to stop it.²⁷⁰

As a decentralized network, Grokster could have neither facilitated nor impeded copyright infringement on its system.²⁷¹ Indeed, the court noted that, even if Grokster deactivated its system's computers, users could continue to exchange files over the network with little interruption, because Grokster did not maintain any control over indexed files.²⁷² As a result, its knowledge of specific infringing files was irrelevant, and its ability to materially contribute to infringement nonexistent.²⁷³ The court therefore held that Grokster was not secondarily liable.²⁷⁴

d. *P2P and the Sony Doctrine*

Each of the three cases confronting the question of contributory liability for P2P technology has felt it necessary to discuss whether and to what extent the *Sony* doctrine may protect file-sharing networks.²⁷⁵ Indeed, the Supreme Court's decision in *Sony* provides the foundation for determining contributory liability for copying technologies, and has become central to much of the discussion surrounding liability for P2P networks.²⁷⁶ The difference in the interpretation of the *Sony*

268. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154 (9th Cir.), cert. granted, 125 S. Ct. 686 (2004).

269. *Id.* at 1162.

270. *Id.*

271. *Id.*

272. *Id.* at 1163.

273. *Id.*

274. *Id.* at 1157. The Supreme Court has since granted certiorari. 125 S. Ct. 686 (2004).

275. See *Grokster*, 380 F.3d at 1161-62; *In re Aimster Copyright Litig.*, 334 F.3d 643, 653-54 (7th Cir. 2003), cert. denied sub nom. *Deep v. Recording Indus. Ass'n of Am.*, 540 U.S. 1107 (2004); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020-21 (9th Cir. 2001).

276. See, e.g., *Aimster*, 334 F.3d at 649-53; *Napster*, 239 F.3d at 1020-21; Jesse M. Feder, *Is Betamax Obsolete?: Sony Corp. of America v. Universal City Studios, Inc. in the Age of Napster*, 37 Creighton L. Rev. 859 (2004); Brandon Michael Francavillo, Comment, *Pretzel Logic: The Ninth Circuit's Approach to Contributory Copyright Infringement Mandates that the Supreme Court Revisit Sony*, 53 Cath. U. L. Rev. 855 (2004); Elizabeth Miles, Note, *In re Aimster & MGM, Inc. v. Grokster, Ltd.: Peer-to-Peer and the Sony Doctrine*, 19 Berkeley Tech. L.J. 21 (2004).

doctrine from circuit to circuit could possibly stem from some ambiguity in the Supreme Court's language. As a result, the scope of *Sony's* protection for file-sharing technologies varies significantly across the country.

In *Napster*, for example, the Ninth Circuit declined to interpret the *Sony* rule as an absolute shield against liability.²⁷⁷ Rather, the court held that *Sony* applied only to the knowledge requirement for contributory infringement.²⁷⁸ In so holding, the Ninth Circuit disagreed with the district court's analysis, which improperly focused on the proportion of current infringing use, as opposed to current and future noninfringing use.²⁷⁹ The proper inquiry under *Sony*, the Ninth Circuit noted, focuses on the capabilities of a product, rather than its current actual use.²⁸⁰ The *Napster* court held, however, that the mere capability of a product for substantial noninfringing use does not automatically insulate the defendant from contributory liability.²⁸¹ It only ensures that a court cannot impute knowledge of direct infringement based on the mere distribution of a product with both infringing and noninfringing uses.²⁸²

On the one hand, the *Napster* court's analysis could be seen as a derogation of the *Sony* rule, which suggests that a product capable of substantial noninfringing uses should escape liability altogether.²⁸³ Certainly, the majority in *Sony* did not intend to create a rule that only exempted products with primarily noninfringing uses, as opposed to substantially noninfringing uses. That was more or less the dissent's position.²⁸⁴ The focus of the Court's language on a product's *capability* for substantial noninfringing use suggests that the mere potentiality for commercially significant noninfringing use is sufficient to shield a defendant from contributory liability.

On the other hand, the Court was clearly influenced by the fact that the principal use of the VCR was time-shifting, which the Court found was fair use.²⁸⁵ It also drew attention to the relatively small market share of the plaintiff studios' inventory of copyrighted works, which the Court estimated at "well below 10%."²⁸⁶ Similarly, the *Napster* court was clearly influenced by the fact that the principal use of Napster's file-sharing software was the exchange of copyrighted musical works, and that the RIAA held the copyrights in over seventy

277. *Napster*, 239 F.3d at 1020-21.

278. *Id.* at 1021.

279. *Id.*

280. *See id.*

281. *Id.* at 1020-21.

282. *Id.*

283. *See Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984).

284. *Id.* at 491-92 (Blackmun, J., dissenting).

285. *Id.* at 421, 442.

286. *Id.* at 443.

percent of this material.²⁸⁷ From the perspective of copyright holders, these facts alone are sufficient to warrant a different analysis under the *Sony* rule.

Likewise, in *Aimster*, the Seventh Circuit modified the *Sony* doctrine to require that a product be more than merely capable of a substantial noninfringing use.²⁸⁸ Rather, to escape contributory liability, the court held that *Aimster* would have had to prove that its product was actually used for noninfringing purposes.²⁸⁹ Furthermore, even if a product is used for noninfringing purposes, if it is also used for substantial infringing purposes, the defendant must prove that it would have been disproportionately costly to eliminate or reduce the infringing use.²⁹⁰

Essentially, the Seventh Circuit requires P2P providers to vigorously police their networks. The court noted that, by eliminating its encryption feature, *Aimster* could have monitored the use of its system, and possibly escaped liability just as *Sony* did.²⁹¹ This would have required a substantial change in the architecture of *Aimster's* system, as it would in all decentralized networks. From the perspective of copyright holders, restructuring their systems would be the least P2P providers could do to evidence their good faith.

From the perspective of P2P providers, however, this would stunt the natural development and evolution of file-sharing technology. The pure P2P model, moreover, is largely based around notions of unregulated anonymity and free speech, to which a functioning encryption system is essential.²⁹² Asking P2P providers to monitor every transaction occurring on its system is not only onerous, but also at odds with notions of privacy and technological evolution. In general, for proponents of file-sharing networks, attacking the technology itself only stifles innovation.

287. *Napster*, 239 F.3d at 1013.

288. *In re Aimster Copyright Litig.*, 334 F.3d 643, 653 (7th Cir. 2003), *cert. denied sub nom. Deep v. Recording Indus. Ass'n of Am.*, 540 U.S. 1107 (2004).

289. *Id.*

290. *Id.*

291. *Id.* at 654-55.

292. See generally Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks*, 89 Va. L. Rev. 505 (2003); John Alan Farmer, Note, *The Specter of Crypto-Anarchy: Regulating Anonymity-Protecting Peer-to-Peer Networks*, 72 Fordham L. Rev. 725 (2003). This Note does not deal directly with the many privacy issues implicated by P2P and copyright holders' reactions to it. For a detailed discussion of these issues, see Sonia K. Katyal, *The New Surveillance*, 54 Case W. Res. L. Rev. 297 (2003); Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 Harv. L. Rev. 2055 (2004); and Bruce P. Smith, *Legal Regulation of New Technologies: Reflections on Liberty, Control, and the Limits of Law*, 2002 U. Ill. J.L. Tech. & Pol'y 281 (2002).

2. Liability for Authorization in Canada

The state of the law in Canada implicitly supports the argument that technologies are generally not to blame for the infringement that they precipitate. Although no Canadian cases have addressed the issue of liability for P2P networks, the cause of action for authorization of copyright infringement in Canada is considerably narrower than contributory infringement in the United States.²⁹³ Indeed, the Canadian Supreme Court stated in *CCH Canadian* that authorizing the mere use of equipment that could be used to infringe on copyright is not tantamount to authorizing infringement.²⁹⁴ Thus, it appears highly unlikely that a Canadian court would hold a decentralized P2P network liable for authorization of copyright infringement.²⁹⁵

C. Proposed Responses to P2P

The path that both the United States and Canada take in the future will largely be defined by their legislative responses to P2P. Currently on the table before both the American Congress²⁹⁶ and the Canadian Parliament²⁹⁷ are proposals that will push the copyright regimes of both countries into unexplored territory—territory where copyright holders have greater rights and greater remedies for infringement.

293. See *supra* notes 214-20 and accompanying text.

294. *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 361 (Can.).

295. At a time when American copyright is fighting P2P with everything it has, Canada's liberal rules on file sharing and high standard for authorization of copyright infringement may have established the country as a haven for the development of file-sharing technology. See Geltzer, *supra* note 23, at 442-43. See generally Pamela Samuelson, *Intellectual Property Arbitrage: How Foreign Rules Can Affect Domestic Protections*, 71 U. Chi. L. Rev. 223, 230 (2004); Seagrurn Smith, *From Napster to Kazaa: The Battle over Peer-to-Peer Filesharing Goes International*, 2003 Duke L. & Tech. Rev. 8, *10 (Mar. 28, 2003), at <http://www.law.duke.edu/journals/dltr/articles/PDF/2003DLTR0008.pdf>; Jeffrey L. Dodes, Note, *Beyond Napster, Beyond the United States: The Technological and International Legal Barriers to On-Line Copyright Enforcement*, 46 N.Y.L. Sch. L. Rev. 279, 297-98 (2002). If so, it is unclear whether the United States would be able to enforce its copyright law against a foreign P2P provider. In the first place, simply maintaining a website that users in several countries can access is probably insufficient to confer personal jurisdiction over P2P networks. See Dodes, *supra*, at 298. It would be difficult to argue, in the absence of services specifically targeting American users, that a P2P provider had "purposefully availed" itself of the benefits and protections of American law. *Id.* Furthermore, even if the United States rendered a judgment against a P2P network located in Canada, it would be exceedingly difficult to enforce that judgment in the absence of domestic assets. Samuelson, *supra*, at 230. It would also be nearly impossible to shut down or block access to the infringing site. Smith, *supra*, at *10. Enjoining a website providing P2P software would require the cooperation of the host country, usually in the form of a locally-rendered court order. *Id.* However, when the host country's laws do not criminalize the P2P provider's activity, getting such cooperation is unlikely. *Id.*

296. See *infra* notes 302-49 and accompanying text.

297. See *infra* notes 350-67 and accompanying text.

Some commentators have proposed alternative compensation schemes.²⁹⁸ These schemes purport, through the implementation of levy systems, to balance creators' rights to remuneration with the public interest in access to file-sharing technology. Although applying a levy in the P2P context has not yet gained the support of copyright holders,²⁹⁹ such alternative suggestions nevertheless provide an intriguing counterpoint to the proposed legislation currently before the American and Canadian governments.

1. Legislative Responses in the United States

With contributory liability for decentralized networks uncertain,³⁰⁰ and studies indicating that file sharing is on the rise,³⁰¹ a flurry of bills have come before Congress in an attempt to stem the growing P2P tide. Each of these bills is tremendously controversial, and also somewhat unique in terms of the copyright principles that preceded them. Three bills in particular have garnered a significant amount of controversy: the Protecting Intellectual Rights Against Theft and Expropriation Act of 2004 ("PIRATE Act"),³⁰² the Piracy Deterrence and Education Act of 2004 ("PDEA"),³⁰³ and the Inducing Infringements of Copyrights Act of 2004 ("Induce Act").³⁰⁴

a. *The PIRATE Act*

On June 25, 2004, the Senate passed the PIRATE Act,³⁰⁵ a bill which would authorize the Justice Department—as opposed to copyright holders themselves—to file civil lawsuits against infringers.³⁰⁶ The No Electronic Theft Act ("NET Act"), passed in 1997, authorized the Justice Department to bring criminal charges against infringers.³⁰⁷ However, in large part because of the high burden of proof associated with criminal copyright infringement,³⁰⁸ the

298. See *infra* notes 375-89 and accompanying text.

299. See *infra* notes 388-89 and accompanying text.

300. See *supra* notes 260-74 and accompanying text.

301. Study: *Music Piracy Rising*, Wired News, Jan. 16, 2004, at http://www.wired.com/news/digiwood/0,1412,61943,00.html?tw=wn_story_related.

302. S. 2237, 108th Cong. (2004).

303. H.R. 4077, 108th Cong. (2004).

304. S. 2560, 108th Cong. (2004).

305. Declan McCullagh, *Senate OKs Antipiracy Plan*, CNET News.com, June 25, 2004, at http://news.com.com/Senate+OKs+antipiracy+plan/2100-1027_3-5248333.html?tag=nefd.top.

306. S. 2237 § 2(a).

307. No Electronic Theft Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997) (codified at 17 U.S.C. §§ 101, 105-106; 18 U.S.C. §§ 2319-2320 (2000)).

308. To convict a person of criminal copyright infringement, the government must show that an individual acted "willfully" to infringe on copyright, and either did so for financial gain or distributed more than \$1000 in copyrighted material. §2(b), 111 Stat. at 2678.

Justice Department has not, to date, filed a single criminal case against a file sharer.³⁰⁹ The PIRATE Act would solve this problem by authorizing the Justice Department to bring civil suits, which require a lower burden of proof.³¹⁰ The bill is currently in the House of Representatives.

The RIAA argues that the PIRATE Act is necessary to give prosecutors the flexibility and discretion they need to launch an effective campaign of deterrence against file sharing.³¹¹ Faced with the magnitude of the P2P threat, proponents of the bill say that they need the Justice Department's support to stop the piracy.³¹² The high burden of proof associated with criminal infringement charges has made it difficult for the federal government to aid the RIAA in its campaign against P2P.³¹³ The PIRATE Act would change that.

Opponents of the bill are concerned about this possibility because it shifts the costs of infringement lawsuits from copyright holders to the American taxpayer.³¹⁴ The burden of enforcing copyright has traditionally rested with the copyright holder. The PIRATE Act, for the first time in history, would force a publicly funded government institution to bear the burden of bringing lawsuits to enforce private copyrights.³¹⁵

Another concern is that the bill would allow the use of wiretaps to investigate civil copyright claims.³¹⁶ Under current wiretap law, the RIAA, when filing its own suits, cannot intercept electronic communications.³¹⁷ The Justice Department, however, is authorized to do so while in the course of investigating a potential federal felony.³¹⁸ If the elements of criminal copyright infringement are proven,³¹⁹ that infringement is a federal felony.³²⁰ Thus, opponents of

309. Declan McCullagh, "Pirate Act" Raises Civil Rights Concerns, CNET News.com, May 26, 2004, at http://news.com.com/Pirate+Act+raises+civil+rights+concerns/2100-1027_3-5220480.html.

310. To assert a civil copyright infringement claim, the plaintiff must show only "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

311. Xeni Jardin, *Congress Moves to Criminalize P2P*, Wired News, Mar. 26, 2004, at <http://www.wired.com/news/print/0,1294,62830,00.html>.

312. Jon Newton, *Hollywood, Politics and File-Sharing Technology*, TechNewsWorld, June 2, 2004, at <http://www.technewsworld.com/story/34171.html>.

313. *Id.*

314. McCullagh, *supra* note 309; John P. Mello Jr., *Proposed Bill Would Criminalize File-Sharing*, TechNewsWorld, Mar. 30, 2004, at <http://www.technewsworld.com/story/33262.html>.

315. See Mello, *supra* note 314.

316. Ernest Miller, *PIRATE Act—Wiretaps for Civil Copyright Infringement?*, Corante, Mar. 29, 2004, at <http://www.corante.com/importance/archives/002713.html>.

317. McCullagh, *supra* note 309.

318. 18 U.S.C. § 2516(3) (2000).

319. For a list of these elements, see *supra* note 308.

320. See 18 U.S.C. § 2319.

the PIRATE Act argue that it would allow the RIAA to effectively circumvent current wiretap law and invade individual privacy using a method that would not otherwise be available to it.³²¹

b. *The PDEA*

On September 28, 2004, the House passed the PDEA.³²² Under the PDEA, file sharers who offer “for distribution to the public” \$1000 or more in copyrighted materials would be punished with prison terms of up to three years and fines of up to \$25,000.³²³ Additionally, the PDEA would allocate \$15 million to the Justice Department for the criminal prosecution of copyright infringers.³²⁴ The bill is currently in the Senate.

The PDEA would expand the remedies available to copyright holders by enhancing criminal penalties for file sharers, and lowering the burden of proof for criminal prosecutions.³²⁵ The bill would essentially criminalize the uploading of large numbers of copyrighted works, regardless of whether the works were actually downloaded or distributed. Under the PDEA, prosecutors would not have to prove that \$1000 in copyrighted material had actually been downloaded; rather, they would only need to show that such files were publicly accessible in a shared folder.³²⁶

Proponents of the PDEA argue that it would only close a loophole in the current law, which allows file sharers to escape criminal liability simply because they do not distribute copyrighted works for financial gain.³²⁷ Although file sharing can be a commercial endeavor, in that it arguably obviates the necessity of buying a CD,³²⁸ users generally trade files without any expectation of compensation.³²⁹ PDEA proponents take the position that exposing file sharers to liability for uploading brings the law in line with the reality of file sharing, and allows viable criminal charges to deter future P2P activity.³³⁰ It also

321. See McCullagh, *supra* note 309; Mello, *supra* note 314; Miller, *supra* note 316.

322. Declan McCullagh, *House Votes to Target P2P Pirates*, CNET News.com, Sept. 28, 2004, at http://news.com.com/House+votes+to+target+P2P+pirates/2100-1028_3-5387682.html.

323. H.R. 4077, 108th Cong. § 110(a) (2004).

324. *Id.* § 107.

325. *Id.* § 110(a).

326. McCullagh, *supra* note 322.

327. See David McGuire, *House Panel Moves to Criminalize Spyware, Net Piracy*, Wash. Post Online, Sept. 8, 2004, at <http://www.washingtonpost.com/wp-dyn/articles/A6091-2004Sep8.html>.

328. In fact, the *Napster* court found that file sharing was a commercial use of copyrighted materials, because it allowed users to get for free something they would otherwise have to pay for. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001).

329. McGuire, *supra* note 327.

330. The RIAA argues that criminal prosecutions will be more successful in deterring online piracy, because they would carry more weight with would-be file

encourages the Justice Department to actually file such charges by authorizing the expenditure of \$15 million for that purpose.³³¹

Critics of the PDEA argue that the existing penalties for copyright infringement are sufficiently harsh to deter, and that any further expansion of these penalties is unjustified.³³² For opponents of the bill, expanding criminal liability and expressly criminalizing the conduct of a large percentage of Americans is not the answer to the P2P problem.³³³ Finally, critics are concerned that increasing the Justice Department's role in file-sharing suits would protect the entertainment industry's interests at the expense of American taxpayers.³³⁴

c. *The Induce Act*

The most controversial of the three bills, the Induce Act, is currently awaiting final review in the Senate.³³⁵ As originally worded, the Induce Act would have expanded the doctrine of contributory infringement to include any acts that "intentionally induce" copyright infringement.³³⁶ The bill instantly drew fire from a broad range of groups.³³⁷ Eventually, the controversy became so heated that the bill was repeatedly and substantially revised.³³⁸

sharers than civil lawsuits. *See id.*; David McGuire, *Lawmakers Push Prison for Online Pirates*, Wash. Post Online, Mar. 31, 2004, at <http://www.washingtonpost.com/wp-dyn/articles/A40145-2004Mar31.html>.

331. H.R. 4077, 108th Cong. § 107 (2004).

332. *See* Xeni Jardin, *Feds Crank Up Heat on P2P*, Wired News, Mar. 31, 2004, at http://www.wired.com/news/digiwood/0,1412,62895,00.html?tw=wn_tophead_3.

333. *See id.*; Elec. Frontier Found., *Misguided Copyright Bill Moving Through Congress*, at <http://www.eff.org/effector/17/33.php#I> (Sept. 10, 2004). Some opponents of the bill also argue that it criminalizes what is now lawful use of copyrighted material. *See* Roy Mark, *House Panel Endorses P2P Criminal Penalties*, Internetnews.com, Apr. 1, 2004, at <http://www.internetnews.com/business/article.php/3334381>.

334. *See* Jardin, *supra* note 332.

335. Katie Dean, *Senate Shelves Induce Review*, Wired News, Oct. 7, 2004, at <http://www.wired.com/news/politics/0,1283,65255,00.html>.

336. S. 2560, 108th Cong. § 2(g)(1) (2004).

337. *See, e.g.*, Katie Dean, *Techies Blast Induce Act*, Wired News, July 23, 2004, at <http://www.wired.com/news/politics/0,1283,64315,00.html>; Jefferson Graham, *Copyright Bill Poses Threat to iPod's Future*, USA Today Online, July 5, 2004, available at http://www.usatoday.com/tech/news/techpolicy/2004-07-05-induce-act_x.htm; Jon Newton, *Industry Alliance Takes Stance on Induce Act*, TechNewsWorld, July 29, 2004, at <http://www.technewsworld.com/story/35456.html>; Am. Council on Educ., *Senate Targets Software Companies in Latest Effort Against Illegal File Sharing*, at <http://www.acenet.edu/hena/readArticle.cfm?articleID=867> (June 28, 2004); Ken "Caesar" Fisher, *Induce Act Seeks to Eliminate Innovation*, at <http://arstechnica.com/news.ars/post/20040618-3906.html> (June 18, 2004).

338. For the latest revised version of the Induce Act, see *Copyright Owners' Tentative Proposal*, Corante, Oct. 5, 2004, at http://www.corante.com/importance/archives/induce_copyright_owner_tentative_proposal_10-5-04.pdf.

In its current form, the Induce Act would impose liability on anyone who “manufactures, offers to the public, or provides” a P2P product when the person knows or should know that the product is “a substantial cause” of infringement.³³⁹ Additionally, the majority of the product’s revenue must result from infringement, or the principal uses of the product must be infringing.³⁴⁰ The Induce Act explicitly states that its provisions shall not enlarge or diminish the doctrine of contributory infringement, or any defenses thereto.³⁴¹ The Senate postponed its final review of the Induce Act after negotiations between the principal parties collapsed, but the bill’s sponsors have voiced their commitment to reaching a consensus.³⁴²

Not surprisingly, the RIAA supports the bill, which it believes isolates bad actors—rather than bad technology—for punishment.³⁴³ These bad actors are the P2P providers who deliberately structure their businesses to avoid secondary liability, while profiting off of the infringement that they encourage.³⁴⁴ Holding P2P companies liable for their actions is, proponents argue, the best, and possibly only, way to stop the rampant infringement on their networks.³⁴⁵

Despite substantial revisions, however, critics of the Induce Act remain adamant that the bill would only stifle technological innovation by exposing new and legitimate technologies to unjustifiably increased risks of liability.³⁴⁶ Opponents are primarily concerned about the bill’s omission of the *Sony* doctrine.³⁴⁷ As drafted, the bill does not mention *Sony*’s protection for products with substantial noninfringing uses at all, although it notes that its provisions should not diminish any defenses available to a charge of contributory infringement.³⁴⁸ Without the explicit application of

339. *Id.* § 2(g)(1).

340. *Id.* Infringement under the Induce Act refers to “widespread infringement . . . where such infringement results in copies or phonorecords from which further infringing copies or phonorecords often are made widely available using a covered peer-to-peer product.” *Id.* § 2(g)(2)(A).

341. *Id.* § 2(g)(6).

342. Dean, *supra* note 335.

343. See Michael Colangelo, Future of Music Coalition, *The Need to Strike a Balance: INDUCE Act Attempts to Protect the Content and Attack the Technology*, at <http://www.futureofmusic.org/articles/INDUCEanalysis.cfm> (Aug. 2, 2004).

344. *Id.*

345. Grant Gross, *Tech Groups Fight Copyright Infringement Bill*, ComputerWeekly.com, July 23, 2004, at <http://www.computerweekly.com/Article132192.htm>.

346. Krysten Crawford, *iPod in the Middle on Capitol Hill*, CNN/Money, Sept. 9, 2004, at <http://money.cnn.com/2004/09/07/technology/induce>; Eric Schumacher-Rasmussen, Streamingmedia.com, *Meet the New Draft, Same As the Old Draft*, at <http://www.streamingmedia.com/article.asp?id=8828> (Sept. 22, 2004).

347. Tom Zeller Jr., *Panel Considers Copyright Bill*, N.Y. Times, Sept. 30, 2004, at C1; Jason Schultz, Elec. Frontier Found., *BSA to Haich—We’re with the Tech & Telecom Industries on Induce*, at <http://www.eff.org/deeplinks/archives/001956.php> (Sept. 30, 2004).

348. *Copyright Owners’ Tentative Proposal*, *supra* note 338, § 2(g)(6).

Sony's principles to P2P software, opponents worry that the Induce Act would leave out the critical protections that the technology sector relies upon.³⁴⁹

2. Legislative Responses in Canada

The Canadian government has been slower to move on P2P issues. In October 2002, Parliament released the so-called Section 92 Report on the operation of the current Copyright Act.³⁵⁰ In May 2004, after months of hearings, Parliament issued the Bulte Report on Copyright Reform ("Bulte Report").³⁵¹ The most significant recommendation relating to P2P in both of these reports is that Canada ratify the WCT.³⁵² The WCT would grant a "making available" right to copyright holders,³⁵³ a right which does not currently form any part of either American³⁵⁴ or Canadian copyright law.³⁵⁵ As the federal court noted in *BMG Canada*, the addition of this right would most likely make the uploading of copyrighted musical files on P2P networks illegal.³⁵⁶ The WCT would also force Canada to substantially increase its blank media levies in order to equalize "national treatment" and compensate international artists, as well as Canadian artists, for lost profits due to private copying and file sharing.³⁵⁷

The Bulte Report concluded by recommending that the government introduce legislation to permit the ratification of the WCT by November 15, 2004.³⁵⁸ The Canadian federal election in June

349. Open Letter from Business Software Alliance et al., to Senators Hatch and Leahy (Sept. 29, 2004), *available at* http://www.eff.org/IP/induce/20040930_BSAInduceActLetter.pdf.

350. Ministry of Indus. Intellectual Prop. Policy Directorate & Ministry of Canadian Heritage Copyright Policy Branch, Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act (Oct. 2002) [hereinafter Section 92 Report], *available at* <http://strategis.ic.gc.ca/pics/rp/section92eng.pdf>.

351. Standing Comm. on Canadian Heritage, Interim Report on Copyright Reform (May 2004) [hereinafter Bulte Report], *available at* <http://www.parl.gc.ca/InfocomDoc/Documents/37/3/parlbus/commbus/house/reports/herirp01/04-mem-e.htm>.

352. Section 92 Report, *supra* note 350, at 43-44; Bulte Report, *supra* note 351, at Recommendation 1.

353. World Intellectual Property Organization Copyright Treaty, *supra* note 228, at art. 6(1).

354. The American Copyright Act enumerates the exclusive rights it grants to copyright holders. A "making available" right is conspicuously absent from this list. 17 U.S.C. § 106 (2000).

355. *BMG Canada Inc. v. John Doe*, [2004] 3 F.C.R. 241, 260-61 (Trial Div.) (Can.).

356. *See id.*

357. Canadian Internet Policy and Public Interest Clinic/Public Interest Advocacy Centre, Response to the May 2004 Standing Committee on Canadian Heritage, Interim Report on Copyright Reform (June 21, 2004) [hereinafter Response], *at* http://www.cippic.ca/en/news/documents/Response_to_Bulte_Report_FINAL.pdf; Section 92 Report, *supra* note 350, at 39.

358. Bulte Report, *supra* note 351, at Recommendation 9.

2004 interrupted this schedule, returning a Liberal government, but with only a minority in Parliament.³⁵⁹ The Standing Committee on Canadian Heritage has since reintroduced the report, and is hoping for quick legislative action, including an expedited schedule for ratification of the WCT.³⁶⁰

The Bulte Report argues that Canada must ratify the WCT to honor its obligation to the World Intellectual Property Organization, and to ensure that the Canadian Copyright Act stays modern.³⁶¹ Neither the Bulte Report nor Parliament as a whole have specifically addressed the impact of ratification on P2P, or discussed how a “making available” right would impact the copyright regime in general.

Some Canadian commentators are concerned about the government’s lack of discussion on this point. Copyright holders, however, have clearly expressed their views in favor of ratification. CRIA, for example, argues that Canada has fallen behind in the development of Internet laws and regulation, and that this “copyright protection gap” has affected Canadian businesses.³⁶² To remedy the problem, the addition of a “making available” right, and a higher standard of copyright protection, is necessary.³⁶³

Opponents of ratification argue that the addition of a “making available” right would expand the exclusive rights of creators without any corresponding benefit to users.³⁶⁴ Opponents are also concerned that the WCT requirement of equal national treatment would destabilize Canada’s private copying regime by forcing it to compensate foreign, as well as Canadian, artists.³⁶⁵ Ratifying the WCT “immediately,” as the Bulte Report urges,³⁶⁶ would overlook the controversy surrounding its proposed measures, at the expense of the public interest in fair access to creative works.³⁶⁷

359. *Liberals Keep “Fragile” Hold on Power*, CBC News, June 29, 2004, at http://www.cbc.ca/stories/2004/06/29/canada/elxn_tues040629.

360. Jack Kapica, *Canada Must Ratify WIPO Copyright Treaty, Committee Says*, *Globe and Mail Online* (Toronto), Nov. 4, 2004, at www.globetechnology.com/servlet/story/RTGAM.20041104.gtcopyrightnov4/BNStory/Technology.

361. Bulte Report, *supra* note 351, at Recommendation 1.

362. Reply Comment from The Canadian Recording Industry Association (CRIA), *Copyright Reform Process Reply Comments*, at <http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp00816e.html> (Oct. 30, 2001).

363. *Id.*

364. Response, *supra* note 357, at 2; Kevin Massie & Laura J. Murray, *Faircopyright.ca, Critique of Recommendations Contained in the Interim Report on Copyright Reform*, at <http://www.faircopyright.ca/interimreportcritique.html> (Sept. 2004).

365. *Id.*

366. Bulte Report, *supra* note 351, at Recommendation 1.

367. There are several reasons, apart from those related to P2P, that some groups oppose ratification of the WCT. For example, the WCT would require Canada to adopt stronger copyright protection measures, including anti-circumvention

Until Canada makes a firm decision on whether to ratify the WCT, the private copying regime remains the primary means of compensating creators for the activities of users. In the wake of *BMG Canada*, that regime may also become—at least temporarily—the primary means of compensating creators for P2P music file sharing. Yet the system suffers from at least one significant weakness: the lack of reciprocal enforcement. Canada is a net importer of copyrighted works,³⁶⁸ yet only Canadian makers and performers benefit from the levy system.³⁶⁹ From a global perspective, it seems unfair for Canadians to have the right to copy international music when Canada only compensates Canadian artists and record companies.

To equalize national treatment, however, the Copyright Board would have to substantially raise the levy on blank media.³⁷⁰ At some point, the burden to the consumer could become so great that the private copying regime would no longer make economic sense. In that case, an entirely new system would be necessary to ensure the continued vitality of the right to make private use copies. Parliament would again have to strike a bargain between copyright holders and users. If copyright holders demanded compensation in return for allowing users to make private copies, it would be difficult to envision how the system would generate such compensation in the face of WCT requirements.

Another concern with the private copying regime is whether it is fair to impose the costs for P2P and private copying on the entire population, when not all Canadians use blank media to engage in those activities.³⁷¹ To some degree, the Canadian Private Copying Collective has addressed this problem in its zero-rating scheme, which allows certain buyers to purchase blank media levy-free.³⁷²

technologies. It would also require Canada to punish the circumvention of such protective measures. Opponents of ratification argue that this would unjustifiably curtail the public's access to copyrighted materials. See Response, *supra* note 357, at 1-2; Reply Comment from Canadian Association of University Teachers (CAUT), Copyright Reform Process Reply Comments, at <http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp00797e.html> (Oct. 22, 2001).

368. Ruth Towse, Indus. Can., Assessing the Economic Impact of Copyright Reform on Performers and Producers of Sound Recordings in Canada (Jan. 20, 2004), available at [http://strategis.ic.gc.ca/epic/internet/inippd-dppi.nsf/vwapj/towes_final_e.pdf/\\$FILE/towes_final_e.pdf](http://strategis.ic.gc.ca/epic/internet/inippd-dppi.nsf/vwapj/towes_final_e.pdf/$FILE/towes_final_e.pdf) at 36.

369. See *supra* notes 130-31.

370. See Response, *supra* note 357, at 2.

371. Section 92 Report, *supra* note 350, at 38-39.

372. Among the buyers that qualify for levy-free blank media are educational institutions; broadcasters; law enforcement agencies; advertising agencies; the music, film, and video industries; courts, tribunals, and court reporters; religious organizations; telemarketing firms; software companies; duplication facilities; medical institutions; technology companies; conference and training companies; governments; and other firms duplicating audio and data for business use. Canadian Private Copying Collective, Zero-Rating & Exemptions—Zero-Rating for Buyers, at <http://cpcc.ca/english/zeroRating.htm> (last visited Feb. 12, 2005).

Notwithstanding this, however, the levy affects many users who do not engage in private copying and who also do not fall under the zero-rating exemptions.

Additionally, although there has not been a constitutional challenge to the levy, some critics argue that it is a form of tax, and therefore an ultra vires exercise of the Copyright Board's jurisdiction.³⁷³ The Copyright Board has taken the position that the levy is not a tax, because a public body does not administer it, and it is not intended for a public purpose.³⁷⁴ These arguments have been largely unsuccessful in swaying Parliament or the Copyright Board to reconsider the levy. As a result, the private copying regime is likely to remain an important component of Canadian copyright law. Whether this regime is capable of adequately compensating creators for P2P-related losses is a question that the Canadian government has yet to seriously consider. In the wake of *BMG Canada*, however, it is a question that Parliament can no longer afford to ignore.

3. Alternative Proposals

The legislative proposals of both the American and Canadian governments are obviously not the only possibilities for resolving the P2P problem. The implementation of a tariff, specifically to redress P2P infringement, is one possibility. A tariff system would be subject to many of the same criticisms that confront blank media levies: for example, charges that it does not allow for equal national treatment, is an unconstitutional tax, and is overbroad.³⁷⁵ Yet the benefits of such a system are also apparent. An alternative compensation scheme along these lines would allow users access to P2P technology, as well as ensure that creators receive a fair price for their work.

It is unclear, however, who should bear the cost of any new tariff. The Canadian Supreme Court has ruled that ISPs, as intermediaries, are not the appropriate parties to bear these costs.³⁷⁶ The reasoning for this decision parallels the treatment of ISPs in the United States.³⁷⁷

373. *Private Copying 2003-2004 Decision*, [2003] 28 C.P.R. (4th) 417, at 3, available at <http://www.cb-cda.gc.ca/decisions/c12122003-b.pdf>.

374. *Id.* at 14-15.

375. See *supra* notes 368-74 and accompanying text.

376. *SOCAN v. Canadian Ass'n of Internet Providers*, 2004 S.C.C.D.J. 2155 (Sup. Ct.) (Can.).

377. See generally Digital Millennium Copyright Act, 17 U.S.C. § 512 (2000) (providing safe harbors from infringement liability for ISPs who act as intermediaries); *Recording Indus. Ass'n of Am. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003) (holding that ISPs acting as true intermediaries, and not storing copyrighted material on their own servers, were not subject to the subpoena provision of the Digital Millennium Copyright Act), *cert. denied*, 125 S. Ct. 309 (2004); *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995) (holding that ISPs acting as a passive conduit for copyrighted material are not liable as direct infringers).

From a legal standpoint, this makes some sense—ISPs should not be liable for infringing material stored on users' computers. Practically, however, ISPs could easily add the cost of a reasonable tariff to their customer's bills and then remit the money to the required collecting society. Following the Canadian Supreme Court's decision in *SOCAN*, however, if the government implements such a tariff, another class of providers must bear the costs.

Some legal scholars have proposed systems that impose these costs on providers of P2P-related goods and services. Professor Neil Weinstock Netanel has suggested a levy upon commercial providers of any consumer product or service whose value is "substantially enhanced" by P2P.³⁷⁸ This would include computer hardware manufacturers, manufacturers of electronic devices, and so on.³⁷⁹

Professor William Fisher has proposed a similar compensation scheme. Under Fisher's proposed regime, copyright holders would register with the Copyright Office, and receive a digital watermark for their work.³⁸⁰ This watermark would assist the Copyright Office in tracking transmissions of digital copies of the work, and the Copyright Office would compensate the registered owners according to a work's popularity.³⁸¹ To pay this compensation, the government would implement a tax on Internet and media-related goods and services.³⁸²

Although a levy of this type seems very broad, it could offer substantial benefits over the existing enforcement regime. Specifically, a well-functioning levy system would satisfy both creators, who would receive compensation for their works, and users, who would gain the freedom to exchange content on P2P networks without the threat of legal sanctions.³⁸³

Furthermore, because the levy would be spread out over a variety of goods and services, the additional costs to the consumer would presumably be relatively small per good or service. A consumer of only some of the services subject to levy payments, and therefore presumably a consumer who engaged in less file sharing, would pay less. This would go at least some way to making the levy fair—that is, tailoring the levy so that it imposes the greatest costs upon the greatest infringers.

Fisher argues that a levy system, applied to P2P, would create substantial collateral benefits as well.³⁸⁴ Not only would creators

378. Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 Harv. J. L. & Tech. 1, 43 (2003).

379. *Id.*

380. William W. Fisher III, Promises to Keep: Technology, Law, and the Future of Entertainment 3 (2004), available at <http://cyber.law.harvard.edu/people/ffisher/PTKChapter6.pdf>.

381. *Id.* at 3-4.

382. *Id.* at 17.

383. See Netanel, *supra* note 378, at 6, 22.

384. Fisher, *supra* note 380, at 4.

receive fair compensation for use of their work, but artists would also be less dependent on record companies for distribution.³⁸⁵ Consequently, consumers would enjoy a broader range of content.³⁸⁶ Although the price of consumer electronic equipment and Internet access would rise somewhat, demand for these goods and services would also rise, and society at large would benefit from a sharp reduction in litigation and other transactional costs.³⁸⁷

At bottom, these levy systems function as a sort of compulsory license. From the perspective of copyright holders, compulsory licenses circumvent their exclusive right to distribute their works. In his 2001 testimony before the House Subcommittee on Courts, the Internet and Intellectual Property, country singer and songwriter Lyle Lovett stated that “[c]ompulsory licenses should be repugnant to those who believe in the free market and the sanctity of private property, including intellectual property.”³⁸⁸ Thus, it is not surprising that the RIAA, while it has thrown its lobbying weight behind the legislation currently before Congress, has not supported any proposals for alternative compensation schemes.³⁸⁹

As the recent flurry of proposed responses to the P2P crisis indicates, both Canada and the United States are now standing at a legislative and judicial crossroads. In Canada, the judiciary’s movement towards a more flexible copyright law encourages both P2P’s incorporation into the existing regime, and the adaptation of the existing regime to fit P2P. Parliament’s ambiguous response to this judicial shift suggests a slow and measured approach to the issues, the outcome of which is far from clear. What is clear, however, is that Canada’s response to the P2P problem has become increasingly focused on a careful weighing of creators’ and users’ rights. The result of these efforts has been the expansion of the weight accorded to the public interest in access to file-sharing technologies.

In the United States, almost the opposite has happened. Although there is some confusion in the courts as to whether P2P providers are contributory infringers,³⁹⁰ P2P currently exists at the margins of legality. Moreover, the push for legislative reform would almost certainly drive P2P entirely outside of the law. If Congress passes the three bills currently before it, the United States would be committing itself to an intellectual property regime that measures balance in copyright by its willingness to sacrifice some measure of user freedom

385. *Id.*

386. *Id.*

387. *Id.*

388. *Oversight Hearing on “Music On The Internet” Before the House Subcomm. on Courts, the Internet and Intellectual Property*, 108th Cong. 81 (May 17, 2001) (statement of Lyle Lovett on behalf of the American Society of Composers, Authors and Publishers), available at http://judiciary.house.gov/legacy/lovett_051701.htm.

389. See Netanel, *supra* note 378, at 19-20.

390. See *supra* notes 179-82 and accompanying text.

for greater enforcement of creators' rights. The RIAA would argue that this is precisely the kind of balance necessary to ensure the effective functioning of copyright law. If so, one thing is clear: there will be no place for today's P2P in the American copyright regime of the future.

III. BREAKING COPYRIGHT AND BENDING COPYRIGHT: WHAT THE UNITED STATES CAN LEARN FROM THE CANADIAN APPROACH TO P2P

When forty to sixty million Americans are considered "criminals" under the law, and the law could achieve the same objective—securing rights to authors—without these millions being considered "criminals," who is the villain? Americans or the law? Which is American, a constant war on our own people or a concerted effort through our democracy to change our law?³⁹¹

Both the United States and Canada acknowledge that the underlying principle of copyright is balance.³⁹² Yet the American approach to the P2P crisis has become dangerously unbalanced. When over 3000 people have been haled into court,³⁹³ the conduct of over sixty million Americans has been characterized as criminal,³⁹⁴ FBI agents are raiding private homes for computer equipment,³⁹⁵ and the manufacturers of P2P technology face liability simply for providing the public with networking software,³⁹⁶ is the American approach truly a balanced approach to copyright? Or has the American approach to P2P failed the American public?

In granting copyright holders a dangerous and unprecedented degree of control over the development of P2P, the American approach to P2P is subordinating the public interest to private rights. If the three bills before Congress pass, the result will be the entrenchment of draconian copyright rules that suppress lawful activity,³⁹⁷ burden the American public with the cost of prosecuting

391. Lessig, *supra* note 91, at 207.

392. *See supra* notes 35-42 and 66-73 and accompanying text.

393. *See supra* note 14.

394. Lessig, *supra* note 91, at 207.

395. *See supra* notes 2-6 and accompanying text.

396. *See In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003), *cert. denied sub nom. Deep v. Recording Indus. Ass'n of Am.*, 540 U.S. 1107 (2004) (holding decentralized P2P network Aimster liable for contributory infringement); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (holding centralized P2P network Napster liable for contributory infringement); *Inducing Infringement of Copyrights Act of 2004*, S. 2560, 108th Cong. (2004) (proposing liability for P2P networks which "intentionally induce" copyright infringement).

397. Many of the uses of P2P are legal. *See infra* notes 402-04 and accompanying text. The bills before Congress, however, in subjecting P2P users and providers to expansive liability, would suppress P2P's legal uses by punishing the technology itself. *See infra* notes 407-36 and accompanying text.

P2P users,³⁹⁸ and deprive the world of the benefit of a technology with the power to revolutionize information exchange.³⁹⁹ Before this takes place the United States must reconsider its approach to the P2P problem.

In this endeavor, the Canadian approach provides important lessons: namely, that a truly balanced approach to P2P must include an emphasis on users' rights as a counterweight to the rights of copyright holders. Moreover, rather than justifying outmoded copyright rules, the law must be willing to adapt to the challenges of new technologies, or risk stifling the development of innovative ideas.

Part III.A examines precisely how the American approach has failed to provide a balanced response to P2P. Part III.B then argues for the application of elements of the Canadian approach to the American context. Finally, Part III.C considers alternative compensation schemes, urging Congress to adopt one of these methods, so that it can resolve the P2P crisis in a way that satisfies both public and private interests.

A. *The Failure of the American Approach*

A truly balanced approach to copyright must ensure that the private rights of creators never grow so powerful as to stifle innovation, or override the interests of the public. Yet the three bills currently before Congress⁴⁰⁰ represent a notion of copyright that values the exclusive rights of the creator over the public interest in access to new and useful technologies.⁴⁰¹ Rather than protecting the legitimate uses of P2P, these bills would suppress lawful use of copyrighted materials in order to punish unlawful use. Rather than protecting the substantial benefits of file-sharing technology, these bills would subject P2P networks to such expansive and unprecedented liability as to make the costs of operating a file-sharing service entirely prohibitive.

398. See *supra* notes 314-15 and accompanying text.

399. See *infra* notes 402-36 and accompanying text.

400. Inducing Infringement of Copyrights Act of 2004, S. 2560, 108th Cong. (2004); Piracy Deterrence and Education Act of 2004, H.R. 4077, 108th Cong. (2004); Protecting Intellectual Rights Against Theft and Expropriation Act of 2004, S. 2237, 108th Cong. (2004).

401. Indeed, Congress and other stakeholders, rather than differentiating the legal and illegal uses of file sharing, have broadly condemned P2P technology. See, e.g., *Protecting Content in a Digital Age: Hearing Before the Senate Comm. on Commerce, Science and Transportation*, 107th Cong. 4 (2002) (statement of Jack Valenti, President of the MPAA) (referring to P2P networks as "file-stealing sites"), available at <http://commerce.senate.gov/hearings/022802valenti.pdf>; Jardin, *supra* note 311 (stating that the entertainment industry is "pushing to portray P2P networks as dens of terrorists, child pornographers and criminals," and paraphrasing Senator Orrin Hatch, a sponsor of the PIRATE Act, characterizing P2P networks as a conspiracy to lure children into committing illegal acts through the promise of free music, movies, and pornography); *supra* note 13 and accompanying text.

There is no doubt that P2P technology has substantial noninfringing uses, including the expeditious and anonymous exchange of information and ideas.⁴⁰² As a result, many companies expect P2P systems to become major technological facilitators of information exchange for academic research and business development on the Internet.⁴⁰³ File-sharing networks also offer users the opportunity to distribute public domain literary, musical, and audiovisual works to a wide audience.⁴⁰⁴

Moreover, P2P functions as an alternative to market-based proprietary control of distribution. Rather than relying on traditional industries to distribute creative works, P2P offers users the ability to become the producers and distributors of their own ideas and opinions. The information exchange efficiencies of P2P networks thus function to enhance core political values, such as autonomy, democracy, and free speech.⁴⁰⁵

The American approach, typified and carried to its logical conclusion by the proposed legislation before Congress, is willing to sacrifice these benefits to ensure that intellectual property rights remain inviolable. Rather than recognizing the ability of P2P to encourage the dissemination of ideas and information, Congress has launched an assault on both individual file sharers and P2P software providers. This is an assault that in fact began in the judiciary, where the courts allowed the weight of current infringing use on P2P networks to lead them away from the crucial protections of the *Sony* doctrine. Both the Seventh Circuit and the Ninth Circuit, addressing contributory infringement in the P2P context, refused to apply the *Sony* rule as an absolute shield to liability,⁴⁰⁶ despite the fact that this was what the *Sony* Court intended when it held that, to escape liability, a product “need merely be capable of substantial noninfringing uses.”⁴⁰⁷

As some commentators have noted, the *Sony* case stands for the proposition that creators cannot use copyright law to shut down a technological innovation, simply because some uses of that innovation

402. P2P's promise to revolutionize information and exchange “stems from its ability [to] reduce the cost of drawing information out of and inputting information back into the network.” Matthew Fagin et al., *Beyond Napster: Using Antitrust Law to Advance and Enhance Online Music Distribution*, 8 B.U. J. Sci. & Tech. L. 451, 502 (2002).

403. See Tanaka, *supra* note 170, at 60.

404. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1161 (9th Cir.), *cert. granted*, 125 S. Ct. 686 (2004).

405. Fagin et al., *supra* note 402, at 502 (paraphrasing Yale Law Professor Yochoai Benkler).

406. *In re Aimster Copyright Litig.*, 334 F.3d 643, 651 (7th Cir. 2003), *cert. denied sub nom. Deep v. Recording Indus. Ass'n of Am.*, 540 U.S. 1107 (2004); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020-21 (9th Cir. 2001).

407. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984).

are infringing.⁴⁰⁸ Under the *Sony* doctrine, the mere potential of substantial noninfringing uses—which P2P clearly has⁴⁰⁹—should be enough to protect the providers of such technology from contributory liability. Confining the *Sony* analysis to the knowledge requirement for contributory infringement, as the *Napster* court did,⁴¹⁰ fundamentally misapprehends the scope of the *Sony* doctrine. Likewise, requiring evidence of actual, significant noninfringing use of a particular technology, rather than considering the technology’s capability for substantial noninfringing use, as the *Aimster* court did,⁴¹¹ is loyal to the dissent in *Sony*, not the majority.⁴¹²

Notably, the *Sony* Court did not impose restrictions on the evolution of controversial technology. VCRs have two distinct functions: playing prerecorded videotapes, and recording television programs. The plaintiffs in *Sony* objected to the second function only because it was that function which enabled consumers to use the VCR for infringing purposes.⁴¹³ Sony could have easily avoided the entire litigation by removing the record button from its VCR. The Court must have recognized this possibility, but did not require Sony to redesign its product to reduce or remove the capability for copyright infringement.

The *Aimster* court, however, would have required Aimster to make exactly this type of alteration to its network. The court suggested that Aimster would have had to eliminate its encryption system and monitor users on its network in order to escape contributory liability.⁴¹⁴ Indeed, as a general rule, the court stated that a defendant must prove that it would have been disproportionately costly for him to eliminate or reduce the infringing uses of his product before he could escape liability.⁴¹⁵

The *Aimster* court’s decision in this regard failed to address in a more than perfunctory manner the substantial benefits of encryption.⁴¹⁶ *Sony*, in its careful consideration of the public interest in access to new technologies, did not require such alteration. The Seventh Circuit’s addition of such a requirement places a heavy and unfair burden on innovators, while impeding the progress of technological improvement. It also gives copyright holders the ability

408. Niels Schaumann, *Copyright Infringement and Peer-to-Peer Technology*, 28 Wm. Mitchell L. Rev. 1001, 1046 (2002).

409. See *supra* notes 402-04 and accompanying text.

410. *Napster*, 239 F.3d at 1020-21.

411. *Aimster*, 334 F.3d at 653.

412. See *Sony*, 464 U.S. at 491-92 (Blackmun, J., dissenting) (arguing that the correct inquiry should be whether “a significant portion of the product’s use is noninfringing”).

413. See *id.* at 420.

414. *Aimster*, 334 F.3d at 654.

415. *Id.* at 653.

416. Encryption and online anonymity are essential in the P2P context, as they foster free speech and protect privacy. See *supra* note 292.

to control the design of new technologies, and effectively veto innovations that could be used to threaten the integrity of their copyrights.

The Induce Act, in adopting and even extending the expanded liability of these cases, utterly eviscerates the *Sony* defense. Although the bill states that its provisions should not enlarge the doctrine of contributory infringement, or diminish any of its defenses,⁴¹⁷ the language of the preceding sections clearly speaks otherwise. Specifically, the Induce Act imposes liability based on an objective reasonable person standard: If a person knows or should know that the P2P product they offer derives a majority of its revenue from infringement, or infringement is the principal reason that users are attracted to the product, then such person is guilty of contributory infringement.⁴¹⁸

Notably, this section makes no mention of *Sony*'s "substantial noninfringing use" defense. In fact, the Induce Act explicitly adopts a standard of liability based on the primary use of a P2P service,⁴¹⁹ the standard of the dissent in *Sony*.⁴²⁰ In contrast, the majority's standard did not require a product's use to be primarily noninfringing, but merely substantially noninfringing.⁴²¹ The Court also considered the potential uses of a product alongside its actual uses.⁴²² The Induce Act, however, considers only actual, primary use, and thereby circumvents the *Sony* defense.

The Induce Act would erase the possibilities of P2P's promise of informational liberty by erasing P2P itself. At this time in the development of file-sharing technology, the majority of file sharers exchange copyrighted music. Users are therefore highly likely to perceive any public P2P network as available primarily for that infringing use. If they do perceive P2P networks as such, then the network faces liability under the Induce Act.⁴²³ This heavy dose of liability would be enough to cure the RIAA of P2P, but it is bad medicine for innovation, the expeditious exchange of ideas, and the rights of users.

The alternative that the Induce Act forces is the kind of network that the *Aimster* court would have required: a non-encrypted, heavily

417. *Copyright Owners' Tentative Proposal*, *supra* note 338, § 2(g)(6).

418. *Id.* § 2(g)(1).

419. *Id.*

420. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 491-92 (1984) (Blackmun, J., dissenting).

421. *Id.* at 442.

422. *Id.* (stating that, because time-shifting satisfies the substantial noninfringing use standard, the Court need not explore all of the different potential uses of the VCR).

423. *See Copyright Owners' Tentative Proposal*, *supra* note 338, § 2(g)(1)(B) (stating that contributory liability ensues for the provider of a P2P service if infringing uses are the principal reason the majority of users are attracted to the service).

policed network. Not only would this stunt the development of file-sharing technology, it would also stifle free speech by depriving users of anonymity over the network.⁴²⁴ Policed networks do not serve the public interest in the unique way that anonymous, unregulated P2P does. Instead, they exclusively serve the interests of copyright holders by ensuring the maintenance of control over methods of digital distribution. More to the point, forcing P2P networks to substantially alter the architecture of their systems to avoid liability effectively gives copyright holders a veto over the development of particular technologies.

This amount of control is not only unprecedented, it is also dangerous. If copyright holders had had this power in the past, society would never have received the benefits of the radio, cable television, or the VCR. Like these three innovations of the past,⁴²⁵ P2P threatens existing industry methods for the distribution of creative works. In each historical example, the entertainment industry reacted vociferously and argued forcefully for the proscription or criminalization of the technology.⁴²⁶ Yet in each case, Congress and the judiciary refused to comply entirely with the demands of the industry, instead fashioning a remedy that balanced the interests of the public with the interests of copyright holders. In the case of radio, the solution was a low statutory licensing fee for composers, and nothing for performers.⁴²⁷ Broadcasters likewise received a low statutory licensing fee from cable TV.⁴²⁸ Film creators received nothing from the makers of the VCR.⁴²⁹

None of these cases advocated circumscribing or criminalizing the technology itself. Rather, the solution was always to legalize the innovation and incorporate its benefits into the copyright system. In

424. As the Canadian Internet Policy and Public Interest Clinic/Public Interest Advocacy Centre ("CIPPIC") has noted:

Anonymity on the Internet allows people to engage in legitimate and often socially beneficial activities that they wouldn't otherwise engage in for fear of embarrassment, social ostracism, retribution or persecution. For example, communicating under a pseudonym allows individuals to explore their creative side, human rights workers to communicate with each other, employees to "blow the whistle" on harmful corporate practices, members of persecuted minorities (such as gays) to share experiences, and consumers to search for information on sensitive topics such as sexually transmitted diseases, hair loss, or incest without concern about disclosing their identity to others.

CIPPIC, *Online Anonymity and John Doe Lawsuits—Why Is Online Anonymity Important?*, at http://www.cippic.ca/en/faqs-resources/online-anonymity/#faq_why-anonymity-important (last visited Feb. 12, 2005).

425. For an overview of how Congress and the courts eventually settled the problems these innovations posed, see *supra* notes 91-106 and accompanying text.

426. See *supra* notes 91-106 and accompanying text.

427. See Lessig, *supra* note 91, at 74-75.

428. See *id.* at 75.

429. *Id.* at 77.

the case of the VCR, this involved acknowledging that at least some uses of the VCR would be infringing.⁴³⁰ Restricting access to a technology simply because of its capacity for substantial *infringing* use—despite it also having a capacity for substantial *noninfringing* use—places a burden on innovation that is not justified by seeking to prevent all instances of copyright infringement.

Yet this is precisely the zero-sum position that the United States has taken on the P2P issue: If substantial infringement is occurring on P2P networks, the solution is to shut them down, to bring more lawsuits, and raise the penalties. The proceedings following the Ninth Circuit's disposition of *Napster* provide a disturbingly representative example of this approach. Some months after the Ninth Circuit granted the RIAA's motion for a preliminary injunction against Napster,⁴³¹ Napster tried to get its service up and running again. It went before the district court, stating that it had developed a technology to block the transfer of 99.4% of identified infringing files.⁴³² The court denied Napster's request, on the grounds that 99.4% was not good enough—Napster had to reduce copyright infringement "to zero."⁴³³

This notion of zero tolerance is unprecedented in America's copyright history. Indeed, American copyright up until this point has always been about balance.⁴³⁴ When new technologies appear and challenge the existing copyright regime, the law has always adjusted—and should always adjust—to protect innovation, as well as the

430. The Seventh Circuit in *Aimster* neatly summed up the uses of the VCR that influenced the *Sony* Court's decision:

Sony's Betamax video recorder was used for three principal purposes The first . . . was time shifting, that is, recording a television program that was being shown at a time inconvenient for the owner of the Betamax for later watching at a convenient time. The second was "library building," that is, making copies of programs to retain permanently. The third was skipping commercials by taping a program before watching it and then, while watching the tape, using the fast-forward button on the recorder to skip over the commercials. The first use the Court held was a fair use [B]uilding a library of taped programs was infringing because it was the equivalent of borrowing a copyrighted book from a public library, making a copy of it for one's personal library, then returning the original to the public library. The third use, commercial-skipping, amounted to creating an unauthorized derivative work Thus the video recorder was being used for a mixture of infringing and noninfringing uses and the Court thought that Sony could not demix them because once Sony sold the recorder it lost all control over its use.

In re Aimster Copyright Litig., 334 F.3d 643, 647-48 (7th Cir. 2003), *cert. denied sub nom.* *Deep v. Recording Indus. Ass'n of Am.*, 540 U.S. 1107 (2004).

431. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011, 1029 (9th Cir. 2001).

432. Transcript of Proceedings at 35, *A&M Records, Inc. v. Napster, Inc.* (N.D. Cal., July 11, 2001) (Nos. MDL-00-1369, C 99-5183), *available at* <http://news.findlaw.com/hdocs/docs/napster/transcript071101.pdf>.

433. *Id.*

434. Lessig, *supra* note 91, at 74.

legitimate rights of creators.⁴³⁵ As Professor Lawrence Lessig has forcefully argued:

If 99.4 percent is not good enough, then this is a war on file-sharing technologies, not a war on copyright infringement. There is no way to assure that a p2p system is used 100 percent of the time in compliance with the law, any more than there is a way to assure that 100 percent of VCRs or 100 percent of Xerox machines or 100 percent of handguns are used in compliance with the law. Zero tolerance means zero p2p. [Zero tolerance] means that we as a society must lose the benefits of p2p, even for the totally legal and beneficial uses they serve, simply to assure that there are zero copyright infringements caused by p2p.⁴³⁶

To ensure that we do not lose file-sharing technology altogether, it is copyright that must make the compromise, not the public interest.

Not only would the Induce Act doom the development of P2P as a legitimate technology, but other proposed legislation would impose similarly harsh penalties on individual file sharers, a population which comprises huge numbers of the American public. The average college student, for example, has 1100 infringing music files on his or her computer.⁴³⁷ If those same students were to, wittingly or not, place those files in a shared folder, under the PDEA, they could face three years in prison.⁴³⁸ Even more troubling, under the PIRATE Act, American taxpayers would bear the cost of putting these students in jail.⁴³⁹

Never before in history has the public been responsible for subsidizing the cost of enforcing private, civil actions in copyright. These bills pose a great threat to privacy rights by co-opting the Justice Department, with its special ability to use wiretaps, to pursue cases of alleged civil infringement.⁴⁴⁰ Using public funds and government resources to protect private interests—particularly when those interests are adverse to the interests of the American people—is exactly the type of unjustified expansion of copyright that Congress, as guardian of the public interest, should oppose.

The draconian approach of these bills is deeply concerning. The American copyright regime, traditionally a regime devoted to the notion of copyright balance,⁴⁴¹ has become entirely subservient to the interests of the entertainment industry. Congress is leading the country down a very dangerous path, from which it will be extremely

435. *Id.*

436. *Id.*

437. McGuire, *supra* note 330.

438. H.R. 4077, 108th Cong. § 110(a), (d)(1) (2004).

439. *See supra* notes 314-15 and accompanying text.

440. *See* McCullagh, *supra* note 309; Miller, *supra* note 316.

441. *See* Lessig, *supra* note 91, at 74.

difficult to return. Before these bills pass—now, more than ever—the United States needs to reconsider its response to the P2P crisis.

B. *Rethinking P2P and Copyright: The Canadian Approach*

There is another way to think about the P2P problem—a way that Congress has utterly ignored, yet a way that does justice to the notion of copyright balance. No more than a few hundred miles from Washington, the emerging Canadian copyright regime has adopted precisely the mode of balanced analysis that is so egregiously lacking from the American discussion of P2P. The explicit focus of this analysis on the public interest in access to P2P technology provides an important counterweight to the exclusive focus on creators' rights embodied in the legislation currently before Congress.

At its core, the emerging Canadian approach to copyright emphasizes the need for a rigorous and deliberate enforcement of balance.⁴⁴² Perhaps the most potent example of this sort of judicial policing of copyright balance is the Supreme Court of Canada's decision in *CCH Canadian*. The court forcefully restated the necessity of weighing a broadly defined public interest against the limited rights of creators.⁴⁴³ In analyzing the individual's right to fair dealing in copyrighted works, the court kept a constant focus on the public interest in access to copying technology and public domain works.⁴⁴⁴

Canada's high standard of intent for authorization of copyright infringement also implicitly protects this access.⁴⁴⁵ The Canadian courts have not yet had the opportunity to consider authorization in the context of P2P providers themselves.⁴⁴⁶ Given the Canadian Supreme Court's forceful restatement of the narrowness of this cause of action, however, it does not appear that simply providing software with some—or even a majority of— infringing uses would be sufficient for authorization.⁴⁴⁷

Indeed, at least in the context of imposing liability for merely providing software with infringing uses, any cause of action for

442. See, e.g., *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 349-50 (Can.); *Théberge v. Galerie d'Art du Petit Champlain Inc.*, [2002] 2 S.C.R. 336, 355 (Can.).

443. See *CCH Canadian*, [2004] 1 S.C.R. at 349-50, 364-65.

444. *Id.* at 349-50, 371-72.

445. As the Canadian Supreme Court stated in *CCH Canadian*, merely providing software which could be used to infringe on copyright does not constitute authorization of infringement. *Id.* at 361. Rather, the alleged authorizer must evince an intent to sanction and encourage infringement, sufficient to overcome the presumption that a person who authorizes an activity does so only so far as is consistent with the law. *Id.*

446. The Federal Court of Canada has, however, addressed authorization in the context of uploading P2P users. *BMG Canada Inc. v. John Doe*, [2004] 3 F.C.R. 241, 260-61 (Trial Div.) (Can.).

447. See *id.*

secondary infringement should be narrow in scope to avoid overreaching. Canada's high standard of intent for authorization provides the limitation on liability necessary to adequately protect innovation. With the derogation of the *Sony* doctrine,⁴⁴⁸ however, American courts grant this protection only at their discretion. The Ninth Circuit, for example, protects P2P networks,⁴⁴⁹ while the Seventh Circuit does not.⁴⁵⁰ Without a standardized rule of liability, uncertainty alone will stifle the development of file-sharing technology. Worse still, even with the Supreme Court set to decide a standardized rule of liability in the *Grokster* appeal,⁴⁵¹ without a high level of requisite intent or control to protect innovation, contributory liability threatens to force P2P out of existence.

Fostering innovations like P2P ultimately requires a willingness to incorporate new technologies into the existing copyright regime, and then adapt the regime to better fit new technologies. The Canadian Copyright Board's December 2003 decision incorporated P2P downloading into the country's private copying exception, and therefore also into the levy system of compensating copyright holders.⁴⁵² Even more dramatically, the Federal Court's opinion in *BMG Canada*, in stating that uploading is also legal,⁴⁵³ endorsed the full incorporation of file sharing into the private copying system. Incorporating, rather than criminalizing, technology permits the advancement of technological innovation.

Indeed, to maintain a proper balance between users and copyright holders, society must tolerate some level of copyright infringement. The Canadian Copyright Board and the Federal Court in *BMG Canada* have taken the first step toward recognizing the legitimacy of P2P technology, notwithstanding the harm that it may do to copyright in the short run, until a viable solution is reached. Recognizing P2P as a legal technology involves accepting that some, or even currently a majority, of the uses of that technology are infringing. Both the Copyright Board and the federal court were willing to accept this reality to protect the interests of users and innovators.

Although the *BMG Canada* court did not explicitly rely on notions of copyright balance to reach its decision, as did the Canadian

448. See *supra* notes 406-22 and accompanying text.

449. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154 (9th Cir.), *cert. granted*, 125 S. Ct. 686 (2004).

450. See *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003), *cert. denied sub nom. Deep v. Recording Indus. Ass'n of Am.*, 540 U.S. 1107 (2004).

451. *Grokster*, 125 S. Ct. at 686.

452. *Private Copying 2003-2004 Decision*, [2003] 28 C.P.R. (4th) 417, available at <http://www.cb-cda.gc.ca/decisions/c12122003-b.pdf>.

453. *BMG Canada Inc. v. John Doe*, [2004] 3 F.C.R. 241, 259-61 (Trial Div.) (Can.).

Supreme Court in *Théberge* and *CCH Canadian*,⁴⁵⁴ its holding drew heavily on the principles delineated in those cases. Indeed, the *BMG Canada* court drew an analogy between a library providing photocopiers for public use—a non-infringing activity under *CCH Canadian*—and an individual file sharer making copyrighted files available in a shared folder.⁴⁵⁵ The federal court's willingness to consider P2P within the context of widely accepted technologies like photocopiers, and to incorporate the *CCH Canadian* court's protection of access to those technologies, is illustrative of an emerging Canadian consciousness about the necessity of limiting the reach of copyright to protect the rights of users.

The United States has failed to even consider the *BMG Canada* court's analysis, or otherwise try to locate P2P technology within a spectrum of useful copying or distributing technologies. The Canadian court's analogy of P2P to library photocopiers, for example, is a particularly cogent one. Both library photocopiers and P2P networks are available for unregulated public use. Both traffic in creative works, some in the public domain and some still under copyright. Moreover, both lawfully obtain the original copies of the works that they make available to the public: the library purchases books or has them donated, just as it is generally the first user on a P2P network to have purchased a song who then uploads that song for the benefit of other users.⁴⁵⁶

When an individual user uploads files onto a P2P network, that user is effectively uploading her own private library of works. Simply making this library available to others, alongside copying technology, is not significantly different from making public library works available alongside public use photocopiers. The mere fact that the uploading user makes those files available to other users should not be sufficient to proscribe the activity, because American copyright law, like Canadian copyright law, does not grant the copyright holder the exclusive right to make her work "available."⁴⁵⁷

Likewise, as the *BMG Canada* court recognized, a user is not truly distributing creative works simply by making her private library

454. See *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 349-50; *Théberge v. Galerie d'Art du Petit Champlain Inc.*, [2002] 2 S.C.R. 336, 355 (Can.).

455. *BMG Canada*, [2004] 3 F.C.R. at 260.

456. Under the Canadian copyright regime, it is not only the originally, lawfully purchased copy of a song that is legal. Downloaded copies of the original are also considered legally obtained copies, protected under the private copying exception in the Canadian Copyright Act. See *Private Copying 2003-2004 Decision*, [2003] 28 C.P.R. (4th) 417, available at <http://www.cb-cda.gc.ca/decisions/c12122003-b.pdf>.

457. See *supra* notes 354-55 and accompanying text. A "making available" right is, however, included in the WCT. World Intellectual Property Organization Copyright Treaty, *supra* note 228, at art. 6(1). Therefore, if either country were to ratify the treaty, copyright holders would gain the exclusive right to make their work available to the public. See *supra* notes 353-56 and accompanying text.

available for others to peruse.⁴⁵⁸ Certainly the uploading user has no control over whether other individuals choose to download files from her private library. More importantly, when a user is passively file sharing, she is not even aware that her files are available on the network.⁴⁵⁹ In that case, as the *BMG Canada* court noted, absent positive acts evincing an intent to distribute copyrighted works, there can be no liability.⁴⁶⁰ Similarly, there is not the requisite level of knowledge to impose liability for contributory infringement in the United States.⁴⁶¹

Indeed, the only relevant difference between photocopiers in a library and P2P networks is the scale of the possibility for infringement. While library patrons can certainly photocopy an entire book on a public use photocopier, this would be an incredibly time-consuming task. Copying a music file off of a P2P network, on the other hand, requires a matter of minutes at most. The mere difference in the scale of potential copyright infringement does not, however, render one device legal and the other illegal, as the *BMG Canada* court implicitly recognized.

If that were so, a more efficient photocopier, one that would allow an individual to photocopy an entire book within a few minutes, would be in danger of proscription. Such a result would be patently absurd. Additionally, the *Sony* doctrine protects efficient innovations of this sort. The *Sony* rule, if American courts were to apply it faithfully, would ensure that new technologies, like P2P networks or the hypothetical “efficient photocopier,” are not subject to liability simply because they have a substantial capacity for infringing use.⁴⁶² Rather, liability would depend on whether these technologies also had a substantial capacity for noninfringing use.⁴⁶³ P2P networks would clearly survive this type of scrutiny.⁴⁶⁴

It is troubling, to say the least, that neither Congress nor the American courts have undertaken an analysis along these lines. Whether or not the United States would accept wholesale the argument of the *BMG Canada* court, the dearth of alternative analyses of this kind suggests that the American system is unwilling to consider the substantial benefits of P2P, or the rights of its users,

458. *BMG Canada*, [2004] 3 F.C.R. at 260-61.

459. See *supra* notes 238-39 and accompanying text.

460. *BMG Canada*, [2004] 3 F.C.R. at 260-61.

461. Contributory infringement requires a showing of knowledge of direct infringement. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1160 (9th Cir.), cert. granted, 125 S. Ct. 686 (2004). This crucial element would be lacking in the case of passive file sharing.

462. See *supra* notes 408-12 and accompanying text.

463. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984).

464. P2P's potential for substantially noninfringing—and beneficial—use is clear, notwithstanding the fact that the majority of P2P's present use is infringing under current American law. See *supra* notes 402-05 and accompanying text.

alongside the problems that P2P currently poses for the recording industry. Such a lopsided approach to copyright threatens user freedom, as well as the public interest in the development of innovative technology.

The United States should instead be open to these benefits, and to the rigorous task of enforcing copyright balance in the P2P context. A substantial advantage of the Canadian approach is its flexibility, which is necessary to effectuate balance in copyright whenever new technologies threaten existing regimes. Rather than rigidly enforcing its copyright regime, Canada has chosen, as the United States should, to open itself to the possibility of new innovations and alternative methods of compensation.

C. *Alternative Systems of Compensation*

Exactly what type of system is appropriate to compensate copyright holders for activity on P2P networks is a difficult question. Clearly, however, file sharing is an issue that Congress must address, as it has addressed the destabilizing effects of every technological innovation. Congress's current direction, however, is the wrong one. The United States must find a place for file sharing outside of the courts, and outside of the jails. To preserve the benefits of P2P, this place must be within the copyright regime, or within an alternative system of compensation.

With the ruling in *BMG Canada*, the place for P2P in Canada, at least temporarily, is under the private copying exception of the Canadian Copyright Act. The mere subsuming of file sharing into this exception is not, however, a fully viable solution to the P2P problem. Parliament set up the blank media levy system to compensate creators for lost royalties due to at-home taping only. In 1997, when it created the system, file sharing did not yet exist.⁴⁶⁵ To adequately compensate creators for P2P transactions, a different system—although one based on the same principles of public access and users' rights—is necessary.

The types of levy systems that Netanel and Fisher have proposed present possibilities for the resolution of the P2P problem that would benefit both users and creators.⁴⁶⁶ Rather than granting copyright holders an effective veto over the evolution of file-sharing technology, a levy system would ensure that creators received adequate compensation for the use of their works on P2P systems.⁴⁶⁷ At the same time, it would protect the public's right of access to copying

465. Indeed, Napster, the first file-sharing network, did not make its Internet debut until May 1999. Lussier, *supra* note 155, at 28.

466. For an overview of these proposals, see *supra* notes 378-89 and accompanying text.

467. See Fisher, *supra* note 380, at 4.

technology, as well as guarantee the freedom to make private copies and use file-sharing networks to distribute creative works.⁴⁶⁸

This is arguably a freedom that, in a fully regulated world, government should not extend to users. The fact is, however, that users are already exercising this freedom and not paying for it. Moreover, they have shown their resolve to continue exercising this freedom despite well-publicized lawsuits against file sharers.⁴⁶⁹ Certainly it is better, under these circumstances, to ensure that users pay fairly for their actions than to take away the ability to act in this way at all.

Yet this is precisely the result that the RIAA is so vigorously arguing for in its support of the P2P bills currently before Congress. In its staunch refusal to consider alternative compensation schemes, the RIAA has consistently characterized copyright as an inalienable property right.⁴⁷⁰ This analogy of intellectual property to private real property is central to the entertainment industry's rhetoric,⁴⁷¹ but it is also false. Intellectual property is a limited statutory monopoly for the public's benefit.⁴⁷² It does not grant absolute rights, but rather strikes a balance between the rights of creators and rights of users. Compulsory licenses effectuate that balance when the market fails.

When it comes to P2P, the market's failure is obvious. Copyright holders have exercised proprietary control over creative content to the point that they now stand in a position to veto the use and development of P2P technology. Negotiated licensing costs would likely be very high, assuming that copyright holders agreed to negotiate at all—which, to date, they have not.⁴⁷³ The United States has lost its copyright balance, and the only party in a position now to bring all of the stakeholders to the table is Congress. Just as it did with radio and cable television, Congress needs to enforce the

468. See Netanel, *supra* note 378, at 6, 22.

469. Indeed, rates of file sharing have increased in recent months, just as the RIAA was haling ever-greater numbers of file sharers into court. See *Study: Music Piracy Rising*, *supra* note 301.

470. See, e.g., *supra* note 388; see also Netanel, *supra* note 378, at 22 (quoting Hilary Rosen, President of the RIAA, as saying, “[i]t is simply not fair to take someone else’s music and put it online for free distribution. No one wants their property taken from them and distributed without their permission”).

471. See Netanel, *supra* note 378, at 22.

472. See *supra* notes 35-42 and accompanying text.

473. See *Competition, Foreign Commerce, and Infrastructure Hearing: “2nd Time Change: The Future of Peer-to-Peer (P2P) Technology” Before the Senate Comm. on Commerce, Science & Transportation*, 108th Cong. 9 (June 23, 2004) (statement of Michael Weiss, Chief Executive Officer, Streamcast Networks, Inc.) (stating that the MPAA and RIAA have been unwilling to negotiate with P2P United or its members), available at http://commerce.senate.gov/hearings/testimony.cfm?id=1247&wit_id=3577; Philip S. Corwin, *Outlook for Copyright and Digital Media Legislation in the 108th Congress*, 11 SPG Media L. & Pol’y 98, 113 (2003) (pointing out that the entertainment industry views proposals for compulsory licensing schemes as “legitimizing piracy”).

copyright bargain, ensuring compensation to creators and freedom of access to users.

Following the ruling in *BMG Canada*, Canada stands in a perfect position to become the first nation to implement an alternative system of compensation along these lines. If the *BMG Canada* ruling stands, it will force CRIA to the bargaining table, because an alternative compensation scheme will become the industry's last resort. Moreover, even if the ruling does not stand, it is unclear whether CRIA will have effective legal recourse against file sharers or file-sharing technology.⁴⁷⁴ Although the industry likely would not rush to bargain immediately, instead testing out the viability of litigation options, it would eventually exhaust these options. The logical step would then be to work with, rather than against, P2P providers for the development of effective payment systems.

In the United States, pursuing alternative compensation schemes will require Congress to change its thinking about the P2P crisis. Canada's bold stance on these issues offers an alternate analysis of P2P that may ultimately guide Congress to the solution to the problems that file sharing has engendered. At this critical time, as Congress is deciding whether to stand up for the rights of users, or let innovation fall prey to an absolutist notion of copyright, the Canadian example must reinvigorate the discussion of copyright balance that the United States so sorely needs.

CONCLUSION

As Judge Alex Kozinski of the Ninth Circuit has recognized, “[i]ntellectual property rights aren’t free: They’re imposed at the expense of future creators and of the public at large.”⁴⁷⁵ If Congress chooses to pass the P2P legislation currently before it, it will inevitably be carving expanded protections for copyright out of the public domain and the legitimate rights of users. This approach to the P2P crisis has no place in a country that professes to value balance in its copyright.

474. Even if the appellate court deems uploading illegal, CRIA may still be unable to obtain the identities of the alleged infringers. ISPs can only provide the name of the account holder associated with a particular IP address. *BMG Canada Inc. v. John Doe*, [2004] 3 F.C.R. 241, 264 (Trial Div.) (Can.). However, the account holder may not be the actual person engaging in the infringing activity. *Id.* Alternatively, the account holder may be an institution, or may be linked to a local area network encompassing many users. *Id.* at 266-67. Because this possibility is inherent in the type of information that CRIA seeks, it is not clear that the public interest in disclosure would ever outweigh legitimate privacy concerns. Moreover, because of the high standard of intent necessary for authorization, it seems unlikely that a suit against a P2P network would succeed under Canadian law. *See supra* notes 293-95 and accompanying text. The Canadian legal system may therefore offer very little recourse to copyright holders whose works are shared over P2P networks.

475. *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1516 (9th Cir. 1993).

Despite the failure of Congress thus far to consider them, there are other solutions to the P2P problem which do not threaten the public interest in this way. Through its explicit focus on users' rights and its willingness to accept P2P as a legitimate technology, the Canadian example suggests alternative approaches to the P2P crisis that both protect the public interest and encourage the development of innovative methods to compensate creators. It is incumbent upon Congress to consider these alternative approaches before it makes file sharing illegal, and ultimately destroys P2P's unique capacity to revolutionize the exchange of information and ideas. It is probably impossible to put the P2P genie back into the bottle, but if legislatures start thinking outside of the copyright box to imagine creative solutions to the problem, both users and creators can ultimately get their wish.

Notes & Observations