Fordham Intellectual Property, Media and Entertainment Law Journal

Volume 20 *Volume XX*
Number 2 *Volume XX Book 2*

Article 4

2009

The RIAA's Troubling Solution to File- Sharing

Genan Zilkha
J.D. Candidate, Fordham University School of Law, 2010

The RIAA's Troubling Solution to File- Sharing

Cover Page Footnote
I would like to thank my advisor, Professor Willajean McLean, for her patience, guidance and support, and Professor Sonia Katyal for her insight. I would also like to thank my family for their constant encouragement.

The RIAA's Troubling Solution to File-Sharing

Genan Zilkha*

A PDF version of this Note is available online at http://iplj.net/blog/archives/volumexx/book2. Visit http://iplj.net/blog/archives for access to the IPLJ archive.

* J.D. Candidate, Fordham University School of Law, 2010; B.A., Brown University, 2003. I would like to thank my advisor, Professor Willajean McLean, for her patience, guidance and support, and Professor Sonia Katyal for her insight. I would also like to thank my family for their constant encouragement.

INTRODUCTION

In June 2009, a federal district court in Minnesota found single mother Jammie Thomas-Rasset liable for $1.92 million.[1] The jury awarded approximately $80,000 per song for 24 songs she downloaded in 2005.[2] "Shaken" by a verdict that she could not pay,[3] she retorted that collecting on the judgment would be "[l]ike squeezing blood from a turnip."[4] Although the district court "remit[ted] the damages award to $ 2,250 per song" in January of 2010,[5] Thomas-Rassett nonetheless still faces a "reduced award" in the amount of $54,000, that is, in the court's own words, "significant and harsh."[6] The *Rasset-Thomas* case was the first

---

1 Nate Anderson, *Thomas Verdict: Willful Infringement, $1.92 Million Penalty*, ARS TECHNICA, June 18, 2009, http://arstechnica.com/tech-policy/news/2009/06/jammie-thomas-retrial-verdict.ars [hereinafter Anderson, *Thomas Verdict*]; David Kravets, *Jury in RIAA Trial Slaps $2 Million Fine on Jammie Thomas*, WIRED, June 18, 2009, http://www.wired.com/threatlevel/2009/06/riaa-jury-slaps-2-million-fine-on-jammie-thomas.

2 Anderson, *Thomas Verdict*, *supra* note 1; *see also* Mike Harvey, *Single-Mother Digital Pirate Jammie Thomas-Rasset Must Pay $80,000 per Song*, TIMES ONLINE, June 19, 2009, http://technology.timesonline.co.uk/tol/news/tech_and_web/article6534542.ece.

3 Anderson, *Thomas Verdict*, *supra* note 1.

4 *Id.*; *see also* Nate Anderson, *What's Next for Jammie Thomas-Rasset*, ARS TECHNICA, June 21, 2009, http://arstechnica.com/tech-policy/news/2009/06/whats-next-for-jammie-thomas-rasset.ars.

5 Capitol Records Inc. v. Thomas-Rasset, No. 06-1497 (MJD/RLE), 2010 U.S. Dist. LEXIS 504, at *1 (D. Minn. Jan. 22, 2010).

6 *Id.* at *2. The court emphasized that

> It is a higher award than the Court might have chosen to impose in its sole discretion, but the decision was not entrusted to this Court. It was the jury's province to determine the award of statutory damages and this Court has merely reduced that award to the maximum amount that is no longer monstrous and shocking.

major victory against individual file-sharers for the Recording Industry Association of America ("RIAA"), which has been trying to stop file-sharing for the past ten years.[7] Since 1999, when high-speed Internet became common, illegal peer-to-peer file-sharing has been costly for the RIAA.[8] While the RIAA has attempted to stop peer-to-peer file-sharing through litigation and reeducation plans,[9] most of its efforts have not decreased file-sharing and instead have damaged its reputation. The RIAA's new tactic to stop file-sharing, a "graduated response" plan, raises due process and policy problems and does not guarantee a definite solution.

Part I of this Note will discuss the history of peer-to-peer file-sharing and RIAA litigation until the RIAA's recent announcement that it will stop suing file-sharers. Part I will also outline and explain the RIAA's new graduated response plan to combat file-sharing without litigation. Part II of this Note will analyze the due process and public policy problems behind the RIAA's new plan to use a graduated response method to stop file-sharing. Finally, Part III will present a solution to these problems and discuss the reasons why this proposed solution will be better for the RIAA and for music fans.

I. A HISTORY OF FILE-SHARING

A. The Internet as a Peer-to-Peer File-Sharing Network

The Internet began as a series of peer-to-peer, or "P2P" networks,[10] which allows users to share files between computers

Id. at *2–3.

7 *See infra* Part I.B.

8 *See infra* Part I.B.

9 *See infra* notes 135–36 and accompanying text.

10 Nelson Minar & Marc Hedlund, *Peer-to-Peer Models Through the History of the Internet*, *in* PEER-TO-PEER: HARNESSING THE POWER OF DISRUPTIVE TECHNOLOGIES 3, 4 (Andy Oram ed., 2001), *available at* http://oreilly.com/catalog/peertopeer/chapter/ch01.html#footnote-1. The Internet currently exists as a client/server network, where a client connects to a server to download data. *Id.* This client/server network is efficient because it prevents the client from having to have a constant connection to the Internet, but instead just requires a connection to a server that is in turn connected to the Internet. *Id.* In other words, as a client/server network, unlike a P2P network, "[the computer] just needs to know how to ask a question and listen for a response." *Id.*; *see also* How Does

without a centralized server.[11] The early Internet, known as the Advanced Research Projects Agency Network of the U.S. Department of Defense ("ARPANET"),[12] was similar to a P2P network and was established as a means of connecting different servers "as equal computing peers."[13] When the Internet left the domain of the Department of Defense, it still maintained some P2P aspects. For example, Internet newsgroups, known collectively as Usenet,[14] allowed computers to interact and exchange information directly through the Usenet network,[15] which is completely decentralized.[16] Although initially used primarily to exchange messages between users, Usenet has been utilized as a P2P system for sharing copyrighted works like song files and book manuscripts.[17] P2P systems can also be found in one of the most basic web usages, the Domain Name Systems ("DNS"),[18] which translate numerical IP addresses into domain names, and which are essential for easy navigation of the Internet.[19]

P2P systems, however, are best known as a means of illegally sharing copyrighted work.[20] Napster was the first company to popularize illegal file-sharing, but Napster was not the first tool for illegally downloading music.[21] Music was available for download on websites as early as 1994,[22] although finding the desired music was often difficult. Thus, music downloading was limited "to college students with access to fast pipes and techno geeks

---

the Web Work?, http://bid.ankara.edu.tr/yardim/www/guide/guide.10.html (last visited Apr. 21, 2009) (explaining how the client/server relationship works).

11 Minar & Hedlund, *supra* note 10, at 4–5.

12 Michael Hauben, History of ARPANET: Behind the Net—The Untold History of the ARPANET, or—The "Open" History of the ARPANET/Internet, http://www.dei.isep.ipp.pt/~acc/docs/arpa-Introduc.html (last visited Apr. 21, 2009).

13 *See* Minar & Hedlund, *supra* note 10, at 4.

14 Sascha Segan, *R.I.P Usenet: 1980–2008*, PCMAG, June 31, 2008, http://www.pcmag.com/article2/0,2817,2326849,00.asp.

15 *Id.*

16 *Id.*

17 *See* RAYMOND T. NIMMER, LAW OF COMPUTER TECHNOLOGY § 15.3 (2009).

18 Minar & Hedlund, *supra* note 10, at 7.

19 *Id.*

20 *See* NIMMER, *supra* note 17, §§ 15.5, 15.9.

21 *See* Wikipedia, Timeline of File Sharing, http://en.wikipedia.org/wiki/Timeline_of_file_sharing (last visited Apr. 21, 2009) [hereinafter Timeline].

22 *See id.*

sufficiently driven to search the Net for the latest Phish bootlegs."[23] Users could also obtain music from Usenet groups and Internet Relay Chat ("IRC")[24] through the use of programs like XDCC, which made it possible to share files between computers without requiring the users of each computer to communicate.[25]

File-sharing first became mainstream with the release of Hotline.[26] Hotline, developed in 1996, was the first user-friendly file-sharing service.[27] Hotline was popular because of its streamlined and high-speed system.[28] In 1999, however, Napster eclipsed Hotline as the most popular file-sharing service, as a result of its simplicity, increased user friendliness, and compatibility with PCs.[29] Napster's developer, Shawn Fanning, tried to simplify file-sharing by making it easier to search for music by specific artists.[30] He combined popular aspects of IRC, Microsoft Windows, and search engines.[31] Users utilized Napster's services through Napster's free "MusicShare" software, which gave them access to, among other things, technical support, a directory, and a chat room.[32] Through this MusicShare software, users could make their own music libraries available to other users, search for MP3s[33] housed on other computers, and transfer these

---

[23] Karl Taro Greenfeld, Chris Taylor & David E. Thigpen, *Meet the Napster*, TIME, Oct. 2, 2000, at 60, *available at* http://www.time.com/time/magazine/article/0,9171,998068,00.html.

[24] "IRC (Internet Relay Chat) provides a way of communicating in real time with people from all over the world. It consists of various separate networks (or 'nets') of IRC servers, machines that allow users to connect to IRC." David Caraballo & Joseph Lo, The IRC Prelude, http://irchelp.org/irchelp/new2irc.html (last visited Nov. 9, 2009).

[25] *See* Timeline, *supra* note 21; *see also* XDCC Report, http://www.xdccreport.com/about-us.php (last visited Nov. 9, 2009).

[26] Janelle Brown, *Hotline to the Underground*, SALON, Feb. 24, 1999, http://www.salon.com/tech/feature/1999/02/24/feature/index.html; *see also* Timeline, *supra* note 21.

[27] Brown, *supra* note 26.

[28] *See id.*

[29] Greenfeld et al., *supra* note 23, at 60.

[30] *See id.*

[31] *Id.*

[32] A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011–12 (9th Cir. 2001).

[33] MPEG-1 Layer 3 ("MP3") is a format for storing digital audio. CMJ: New Music First, What is MP3?, http://www.cmj.com/mp3/mp3basic.php (last visited Apr. 18, 2009). MP3 encoders compress music files by removing the inaudible parts of the sound, thereby making the music files smaller and easier to share. *Id.*

MP3s to their own computers.[34] Napster was immediately successful and grew quickly in popularity.[35] Soon it became "another appliance, like a toaster or washing machine. . . . [T]he music appliance: log on, download, play songs."[36] At one point, Napster had over 64 million users.[37] This popularity was due in part to the high prices of CDs and the inability to sample CDs before purchase.[38] Napster was so popular that it even had a marked effect on the number of CDs purchased by college students.[39] In 2001, partially as a result of Napster's success, overall CD sales decreased by 10%.[40]

Although Napster was essentially a P2P program, it was also centralized.[41] Users could download files directly from other computers, but Napster, through its MusicShare software, also maintained a directory of the music that was available from each user.[42] Napster was followed by OpenNap, which billed itself as an "open source Napster Server,"[43] and which allowed for the sharing of different types of files.[44]

Audiogalaxy was another music downloading system that was popular during the Napster era before it was shut down.

---

34 *Id.*

35 Timothy James Ryan, Note, *Infringement.com: RIAA v. Napster and the War Against Online Music Piracy*, 44 ARIZ. L. REV. 495, 501 (2002).

36 Greenfeld et al., *supra* note 23, at 60.

37 William Sloan Coats et al., *Blows Against the Empire: Napster, Aimster, Grokster & the War Against P2P File Sharing*, 765 PLI/Pat 445, 454 (2003).

38 Michael Geist, *iCraveTV and the New Rules of Internet Broadcasting*, 23 U. ARK. LITTLE ROCK L. REV. 223, 239 (2000).

39 A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 909 (N.D. Cal. 2000) ("After examining data culled from three types of retail stores near college or university campuses, Fine concluded that 'on-line file sharing has resulted in a loss of album sales within college markets.'" (quoting Expert Report, Soundscan CEO Michael Fine)).

40 Coats et al., *supra* note 37, at 447.

41 *See Napster*, 114 F. Supp. 2d at 902, 907.

42 *Id.* at 905.

43 Posting of Sharky to FileShareFreak, *OpenNap for P2P File Sharing*, http://filesharefreak.com/2008/01/04/opennap-for-p2p-file-sharing (Jan. 4, 2008, 22:02). Open source software is "released with source code under a license that ensures that derivative works will also be available as source code, protects certain rights of the original authors, and prohibits restrictions on how the software can be used or who can use it." Dan Woods, *What Is Open Source*, O'REILLY ONLAMP.COM, Sept. 15, 2005, http://www.onlamp.com/pub/a/onlamp/2005/09/15/what-is-opensource.html.

44 Posting of Sharky, *supra* note 43.

Audiogalaxy began as a File Transfer Protocol ("FTP") site and developed into a popular P2P system.[45] Similar to Napster, Audiogalaxy was a semi-centralized P2P system, where music was catalogued on the website and shared through a downloadable program called a "satellite."[46] Audiogalaxy, unlike other systems, however, courted listeners with more off-beat music tastes.[47]

The next generation of file-sharing systems was even more decentralized. In 2000, Justin Frankel and Tom Pepper of Nullsoft released Gnutella, the first completely decentralized file-sharing system, which lacked a single software platform.[48] Gnutella allowed users to exchange data directly, without having to go through "some company's rack of servers."[49] Nullsoft was then a subsidiary of AOL.[50] AOL eventually attempted to distance itself from potential file-sharing problems and tried to stop the Gnutella system, but once the system was released, it was impossible to reign in due to its decentralized nature.[51] After Gnutella was released, it was reverse-engineered and the source code quickly became public.[52]

Gnutella is based on a "node" system.[53] Computers on the Gnutella network act as nodes and communicate directly with each

---

45 *See* Michael Chamy, *I Want My MP3s: Audiogalaxy, Austin's Onetime File-Sharing Supernova*, AUSTIN CHRON., Jan. 31, 2003, http://www.austinchronicle.com/gyrobase/Issue/story?oid=oid%3A143578.

46 *See id.*

47 *Id.* For a more extensive discussion of Audiogalaxy, see Tom Kleinpeter, Spiteful.com, Always Refer to Your V1 as a Prototype, http://www.spiteful.com/2008/03/11/always-refer-to-your-v1-as-a-prototype (Mar. 11, 2008).

48 David Kushner, *The World's Most Dangerous Geek: Justin Frankel, the Man Who Popularized File-Sharing, Has Even Bigger Plans*, ROLLING STONE, Jan. 13, 2004, http://www.rollingstone.com/news/story/5938320/the_worlds_most_dangerous_geek.

49 *Id.*

50 *Id.*

51 *Id.*

52 Wikipedia, Gnutella, http://en.wikipedia.org/wiki/Gnutella (last visited Apr. 21, 2009).

53 *See* Sai Ho Kwok & Christopher C. Yang, *Searching the Peer-to-Peer Networks: The Community, and Their Queries*, 9 J. AM. SOC'Y FOR INFO. SCI. 783, 783 (2004). This is a simplification. For a more detailed explanation of how Gnutella works, see Gnutella, http://limewireblog.blogspot.com/2007/09/gnutella-network.html (last visited Nov. 14, 2009); Gnutella for Users, http://rakjar.de/gnufu/index.php/GnuFU_en (last visited Apr. 21, 2009).

other acting simultaneously as both servers and clients; thus they decreased the need for a centralized server.[54] In September 2007, Gnutella clients had a 40.5% market share.[55] Limewire, which utilizes Gnutella, is the most popular client on the Gnutella network.[56] Morpheus, another popular file-sharing client, also functioned on the Gnutella system.[57]

In 2002, another decentralized, node-based P2P system, FastTrack, was released.[58] FastTrack was best known for supporting Kazaa and Grokster clients.[59] Building on the Gnutella node system, FastTrack P2P systems used "super nodes."[60] Super nodes were computers connected to a broadband Internet connection that allowed "users in [the supernode's] neighborhood [to] automatically upload to [the] machine a small list of files they are sharing, whenever possible, using the same Internet Service Provider."[61] The supernodes acted similarly to the Napster software. Downloads took place between "the PC on which the file is shared and the PC that requested the file."[62] This made FastTrack software run faster than Gnutella software, which often suffered from "clogged pipes."[63] Kazaa, for example, became very

---

54 *Id.*

55 Eric Bangeman, *Study: BitTorrent Sees Big Growth, LimeWire Still #1 P2P App*, ARS TECHNICA, Apr. 21, 2008, http://arstechnica.com/old/content/2008/04/study-bittorren-sees-big-growth-limewire-still-1-p2p-app.ars.

56 *Id.*

57 Jon Healey, *Morpheus Throws in the Towel*, L.A. TIMES, May 1, 2008, http://opinion.latimes.com/bitplayer/2008/05/morpheus-throws.html.

58 Bradley Mitchell, *FastTrack*, ABOUT.COM, http://compnetworking.about.com/od/kazaa/g/bldef_fasttrack.htm (last visited Apr. 21, 2009).

59 *Id.*

60 *Id.*

61 Supernodes, http://www.kazaa.com/us/help/faq/supernodes.htm (last visited Apr. 21, 2009). For a diagram of how Kazaa works, see How Peer-To-Peer (P2P) and Kazaa Software Works, http://www.kazaa.com/us/help/new_p2p.htm (last visited Apr. 21, 2009); see also ABHINAV ACHARYA ET AL., A STUDY OF MALWARE IN PEER-TO-PEER NETWORKS, INTERNET MEASUREMENT CONF. (IMC) 1 (2008), *available at* http://www.imconf.net/imc-2006/papers/p33-kalafut.pdf; Nigel Wong, How Peer to Peer (P2P) Works, http://ezinearticles.com/?How-Peer-to-Peer-(P2P)-Works&id=60126 (last visited Apr. 21, 2009) (describing the different types of P2P systems).

62 Supernodes, *supra* note 61.

63 John Borland, *The P2P Myth*, CNET NEWS, Oct. 26, 2000, http://news.cnet.com/The-P2P-myth/2009-1023_3-247379.html?tag=rtcol;relnews.

popular even though the Kazaa software often came with spyware bundles, which negatively affected users' computers.[64]

BitTorrent is another decentralized P2P protocol.[65] It was so popular that at one point it was estimated that 35% of all traffic on the Internet was due to BitTorrent.[66] Programmer Bram Cohen released BitTorrent in 2001.[67] Like the other P2P protocols, users can use BitTorrent after downloading a BitTorrent application.[68] BitTorrent allows users to simultaneously upload and download fragments of files, called torrents,[69] from different sources.[70] Users are rewarded with faster downloading speeds when they offer files to be uploaded and are penalized when they do not.[71] This "torrent" system makes BitTorrent especially useful for downloading large files because it breaks them up into small fragments.[72] Users find files to download through web-based torrent search engines and share files using client software.[73] There is no single preferred BitTorrent software and because BitTorrent code is open source,[74] new clients are constantly being created.[75] Moreover, this program, like other P2P systems, has

---

64 *See* Ryan Naraine, *Spyware Trail Leads to Kazaa, Big Advertisers*, EWEEK, Mar. 21, 2006, http://www.eweek.com/c/a/Security/Spyware-Trail-Leads-to-Kazaa-Big-Advertisers. Spyware is software that, once installed on a computer, among other things, tracks a user's web usage, and slows down a user's computer. *See* Spychecker, http://www.spychecker.com/spyware.html (last visited Nov. 14, 2009). Once it is installed, it is very difficult to remove. *Id.*

65 BitTorrent, What Is BitTorrent, http://www.bittorrent.com/btusers/what-is-bittorrent (last visited Nov. 14, 2009).

66 Broadband DSL Reports, Bit Torrent: 35% of All Traffic, (Nov. 4, 2004), http://www.dslreports.com/shownews/56403 (Nov. 4, 2004) [hereinafter Bit Torrent: 35% of All Traffic].

67 Posting of Bram Cohen to Yahoo Finance, http://finance.groups.yahoo.com/group/decentralization/message/3160 (July 2, 2001, 11:30 EST).

68 What is BitTorrent, *supra* note 65.

69 Bit Torrent: 35% of All Traffic, *supra* note 66.

70 Paul Gil, *Torrents 101: The Basics of How Bittorrents Work*, ABOUT.COM, Sept. 2009, http://netforbeginners.about.com/od/peersharing/a/torrenthandbook.htm.

71 *Id.*

72 *Id.*

73 *Id.*

74 *See* Woods, *supra* note 43.

75 *See* List of BitTorrent Clients, http://en.wikipedia.org/wiki/Comparison_of_BitTorrent_software (last visited Apr. 21, 2009).

been used to facilitate copyright infringement.[76] BitTorrent is still very popular.[77]

Thus, as this section demonstrates, these numerous P2P file-sharing systems made it easier for users to trade copyrighted music files,[78] raising the ire of the RIAA.

B. A History of RIAA Litigation

The RIAA is a trade group that represents the interests of the United States recording industry, and the holders of music copyrights.[79] As soon as the RIAA realized that the availability of free MP3s for download was a threat to its business, it tried to stop MP3s from becoming easily accessible to the public.[80] In *Recording Industry Ass'n of America v. Diamond Multimedia Systems, Inc.*,[81] the RIAA tried to prevent sales of the first MP3 player, the Diamond Rio,[82] claiming that an MP3 player, and the piracy it would encourage, would have a substantial effect on music sales.[83] Previously, users who downloaded MP3s could only listen to them on their computers, but the Diamond Rio made MP3s portable.[84] Relying on the Audio Home Recording Act of 1992,[85] the RIAA tried to block the sale of the Rio.[86] It claimed that the Rio lacked a "Serial Copy Management System"[87] that

---

[76] BitTorrent Leads the Top of Copyright Infringement, P2P On! (May 13, 2009), http://www.p2pon.com/2009/05/13/bittorrent-leads-the-top-of-copyright-infringements/.

[77] Duncan Graham-Rowe, *Sniffing Out Illicit BitTorrent Files*, TECH. REV., Feb. 12, 2009, http://www.technologyreview.com/computing/22107/?a=f.

[78] *See supra* Part I.A.

[79] For a description of the RIAA, see RIAA, Who We Are, http://riaa.org/aboutus.php (last visited Nov. 12, 2009).

[80] Recording Indus. Ass'n of Am., Inc. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1074 (9th Cir. 1999).

[81] 180 F.3d 1072 (9th Cir. 1999).

[82] *Id.* at 1073.

[83] *Id.* at 1074.

[84] *Id.*

[85] Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (codified as amended at 17 U.S.C. § 1001 (2006)).

[86] *Diamond Multimedia*, 180 F.3d at 1075.

[87] 17 U.S.C. § 1002(a). A "Serial Copy Management System" is a system that was invented when DAT tapes were popular. It limits the number of duplicates that can be made from a master in order to prevent piracy. Serial Copy Management System, http://dic.academic.ru/dic.nsf/enwiki/176405 (last visited Apr. 21, 2009).

would verify the copyright status of files on the device.[88] The Ninth Circuit, however, held that the Diamond Rio did not violate the Act and therefore its production should not be enjoined.[89]

The RIAA reacted to this defeat by trying to sue a new perceived villain, the file-sharing systems themselves. The RIAA directly targeted the P2P file-sharing systems by filing two major lawsuits, one against Napster and the other against Grokster and Morpheus.[90] First, in 2000, with the growing popularity of Napster, a group of seventeen record labels filed suit against Napster for "contributory and vicarious copyright infringement."[91] In ruling on the plaintiff's motion for a preliminary injunction, the district court found that most Napster users shared copyrighted files and that "the vast majority of the music available on Napster is copyrighted."[92] The court further found that Napster was aware of this fact[93] and also that this illegal file-sharing was likely to lead to a decrease in the number of albums purchased by college students.[94] Even though Napster claimed that it existed to help promote new artists,[95] the court found that its "New Artist Program" began only after the record labels filed suit against Napster.[96]

The court therefore found that there was a reasonable likelihood of success on the plaintiffs' copyright infringement, contributory copyright infringement, and vicarious copyright

---

88 *Diamond Multimedia*, 180 F.3d at 1076.

89 *Id.* at 1081.

90 While these two cases are the landmark cases against clients, they are by no means the only cases, nor the last. In 2002, Audiogalaxy settled with the RIAA out of court. *See* Gwendolyn Mariano, *Audiogalaxy to Ask First, Trade Later*, CNET NEWS, June 18, 2002, http://news.cnet.com/2100-1023-936932.html. Audiogalaxy was eventually shut down. John Borland, *Audiogalaxy Hit by RIAA Suit*, ZDNET, May 24, 2002, http://news.zdnet.com/2100-9595_22-123030.html.

91 A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 900 (N.D. Cal. 2000). This was not the first major file-sharing copyright case. The first case was *UMG Recordings, Inc. v. MP3.Com*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000), in New York, where the court held that a company that made copies of MP3s available on its website was not protected by fair use. *Id.* at 352.

92 *Napster*, 114 F. Supp. 2d at 902–03.

93 *Id.* at 903.

94 *Id.* at 909.

95 *Id.* at 904.

96 *Id.*

infringement claims.[97] First, the court found that the plaintiffs had "established a prima facie case of direct copyright infringement" because "virtually all Napster users engage in the unauthorized downloading or uploading of copyrighted music."[98] The court then found a reasonable likelihood of success on the plaintiffs' contributory infringement claim.[99] The court defined a contributory infringer as "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another."[100] The court further found that the plaintiffs had presented "convincing evidence" that Napster had either actual or constructive knowledge of infringing activities happening on its server,[101] and that Napster let this infringement continue.[102] Finally, the court found a reasonable likelihood of success on the plaintiff's vicarious liability claims because Napster had a "direct financial interest in the infringing activity."[103]

Although Napster tried to raise defenses of fair use[104] and substantial non-infringing activity,[105] the court rejected both of these defenses.[106] In addition, Napster claimed it was protected under the Safe Harbor provisions of the Digital Millennium

---

97 *Id.* at 917, 920, 922.

98 *Id.* at 911.

99 *Id.* at 920.

100 *Id.* at 918 (quoting Gershwin Publ'g Corp. v. Columbia Artists Mgmt., 443 F.2d 1159, 1162 (2d Cir. 1971)).

101 *Id.* at 918–19.

102 *Id.* at 919.

103 *Id.* at 921–22.

104 *Id.* at 912 ("In the instant action, the purpose and character of the use militates against a finding of fair use.").

105 *Id.* The concept of substantial non-infringing uses as being a defense for liability comes from *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984). *See Napster*, 114 F. Supp. 2d at 912 (maintaining that "Sony stands for the rule that a manufacturer is not liable for selling a 'staple article of commerce' that is 'capable of commercially significant non-infringing uses'" and "[a]ny individual may reproduce a copyrighted work for a 'fair use'; the copyright holder does not possess the exclusive right to such a use").

106 *Napster*, 114 F. Supp. 2d at 912 ("[T]he court finds that any potential non-infringing use of the Napster service is minimal or connected to the infringing activity, or both. The substantial or commercially significant use of the service was, and continues to be, the unauthorized downloading . . . .").

Copyright Act ("DMCA"),[107] which shelters an intermediary from liability if it was not aware of infringing activity happening on its server.[108] The court also rejected this argument by indicating that Napster had actually encouraged illegal file-sharing.[109] As a result, the court preliminarily enjoined Napster from operating and facilitating the sharing of copyrighted materials.[110] On appeal, the Ninth Circuit largely upheld the district court's findings on the direct, contributory and vicarious infringement claims and on Napster's various defenses,[111] but nonetheless remanded because it held that the scope of the injunction was "overbroad."[112] The district court then issued a modified preliminary injunction.[113] The Ninth Circuit upheld the modified preliminary injunction as well as the district court's subsequent shut down order,[114] noting that Napster had failed to comply with the terms of the preliminary injunction.[115] Unable to survive without sharing copyrighted materials, Napster eventually filed for bankruptcy.[116]

The RIAA also succeeded in creating a viable claim against Grokster and Morpheus, even though they both ran on decentralized networks.[117] Of the files being shared on these networks, the Supreme Court agreed with the district court's findings that almost 90% were infringing and remanded.[118] On remand, the district court held that Grokster and Morpheus were

---

[107] *Id.* at 919; *see also* 17 U.S.C. § 512 (2006). For a more detailed discussion of the DMCA, see *infra* Part I.C.

[108] The court rejected this argument because the section explicitly denies protection to users who had actual knowledge of infringing activities. *Napster*, 114 F. Supp. 2d at 919 n.24.

[109] *Id.* at 919.

[110] *Id*.

[111] *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011–25 (9th Cir. 2001).

[112] *Id.* at 1027, 1029.

[113] A&M Records, Inc. v. Napster, Inc., No. C 99-05183 MHP, 2001 WL 227083, at *1–2 (N.D. Cal. Mar. 5, 2002).

[114] A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1099 (9th Cir. 2002).

[115] *See id.* at 1096.

[116] Benny Evangelista, *Napster Runs Out of Lives*, S.F. CHRON., Sept. 4, 2002, at B1.

[117] *See* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 920 (2005).

[118] *Id.* at 922.

both liable for contributory infringement[119] because they induced users to infringe on copyrights.[120] The court based this "inducement" claim on the fact that Grokster appealed to former Napster users,[121] ignored proof of infringement,[122] and profited from infringement.[123] Grokster ended up settling with the RIAA[124] and shutting down in 2005 as per the agreement.[125] Morpheus continued its legal battle until filing for bankruptcy in 2008.[126]

Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.[127] was followed by a series of lawsuits against other P2P systems.[128] While the RIAA succeeded in shutting down many of these P2P systems, it was unable to halt illegal file-sharing.[129] Other

---

[119] Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 454 F. Supp. 2d 966, 992 (C.D. Cal. 2006).

[120] *Id.* at 983.

[121] *Id.* at 985.

[122] *Id.* at 991.

[123] *Id.* at 989. The Supreme Court defined inducement as when a person "distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement." *Id.* at 983–84 (quoting *Grokster*, 545 U.S. at 919).

[124] Press Release, Recording Indus. Ass'n of Am., Music Industry Announces Grokster Settlement (Nov. 7, 2005), *available at* http://www.riaa.com/newsitem.php?news_year_filter=2005&resultpage=3&id=81648953-2457-2877-94B4-D28C93625445.

[125] Jeff Leeds, *Grokster Calls It Quits on Sharing Music Files*, N.Y. TIMES, Nov. 8, 2005, at C1. A visit to http://www.grokster.com displays the following message:

> The United States Supreme Court unanimously confirmed that using this service to trade copyrighted material is illegal. Copying copyrighted motion picture and music files using unauthorized peer-to-peer services is illegal and is prosecuted by copyright owners. There are legal services for downloading music and movies. This service is not one of them. YOUR IP ADDRESS IS XXX.XXX.XX.XXX AND HAS BEEN LOGGED. Don't think you can't get caught. You are not anonymous.

Grokster Home Page, http://www.grokster.com (last visited Apr. 21, 2009).

[126] *See* Bangeman, *supra* note 55. The Morpheus website is now offline. Morpheus Home Page, www.morpheus.com (last visited Apr. 21, 2009).

[127] 545 U.S. 913 (2005), *remanded*, 454 F. Supp. 2d 966 (C.D. Cal. 2006).

[128] *See, e.g.*, UMG Recordings, Inc. v. Lindor, No. CV-05-1095, U.S. Dist. LEXIS 83486 (E.D.N.Y. Nov. 9, 2006); *see also* Krysten Crawford, *Hollywood Steps Up Piracy Fight*, CNN MONEY, Dec. 14, 2004, http://money.cnn.com/2004/12/14/news/fortune500/piracy/.

[129] Brett Thomas, *EDonkey Bites Last Carrot*, BIT-TECH.NET, Oct. 3, 2005, http://www.bit-tech.net/news/bits/2005/10/03/edonkey_quits/1. The RIAA succeeded in shutting down many of these P2P servers through the threat of costly litigation. *Id.*

completely decentralized systems arose that were harder to sue than Napster because they lacked a centralized client that facilitated indexing, thus making it more difficult for the RIAA to pinpoint and sue a villain.[130] In addition, at this point, file-sharing had become the normal way for users to acquire music.[131] Users simply failed to personally acknowledge the illegality of file-sharing.[132] A 2003 survey found that "21% of the Internet population (26 million people) shared files over P2P networks and that two-thirds of file-sharers were unconcerned about copyright laws."[133] Users "had internalized sharing norms that transcended any particular application or network," and as a result, continued to share files on other networks after Napster was shut down.[134] The RIAA could no longer simply sue P2P systems and hope to end file-sharing; it had to stop the individual users. The RIAA initially launched a campaign to educate college students and Kazaa users against illegal file-sharing.[135] Following this campaign, on September 8, 2003, the RIAA began targeting illegal file-sharers through litigation while offering clemency to users who promised to stop sharing files.[136]

C. The DMCA as a Tool in RIAA Litigation

When the RIAA began targeting illegal file-sharers, it encountered numerous problems because it could not discover the

"Sadly, the RIAA is not winning these battles on any legal ground, but rather with threats. The RIAA sent out letters on September 15 to seven different P2P networks, stating essentially that the services comply with what they find acceptable, or they'd shut the services down." *Id.*

130 David W. Opderbeck, *Peer-to-Peer Networks, Technological Evolution, and Intellectual Property Reverse Private Attorney General Litigation*, 20 BERKELEY TECH. L.J. 1685, 1719 (2005).

131 *Id.*

132 *See id.* at 1687–88. The prevalence of file-sharing and users' lack of concern over copyright infringement highlight this indifference. *Id.*

133 *Id.* at 1714.

134 *Id.* at 1701.

135 Press Release, Recording Indus. Ass'n of Am., Recording Industry Begins Suing P2P File Sharers Who Illegally Offer Copyrighted Music Online (Sept. 8, 2003), *available at* http://www.riaa.org/newsitem.php?id=85183A9C-28F4-19CEBDE6F48E206CE8A1.

136 *Id.*

identities of the infringing users.[137] Thus, the RIAA used the DMCA[138] as a tool to require Internet service providers ("ISP"s) to provide it with the identities of illegal file-sharers. The DMCA was signed into law by President Clinton to "criminalize circumventing copyright-protection technology" and to punish online copyright infringement.[139] The DMCA reflected the concern that "left unconstrained, digital technology would soon place the power to make near-perfect and inexpensive copies into every home and office."[140] With the popularity of Napster and the other file-sharing services that followed, it seemed as though this fear was well founded.

The DMCA makes ISPs liable for infringing activity on their servers so as to stop illegal file-sharing.[141] An ISP is defined in 17 U.S.C. § 512(k) as being either "an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received," or "a provider of online services or network access."[142]

The DMCA is divided into sections that discuss ISP liability and the rights of the copyright holder. Sections 512(a)–(c) address ISP liability.[143] Sections 512(b) and 512(c) describe the types of ISPs that are exempt from liability.[144] Section 512(b) creates protection from liability for ISPs that use a cache to temporarily save infringing material on their servers, and § 512(c) creates protection from liability for ISPs that provide "storage at the direction of a user of material that resides on a system or network

---

137 Mathew Ingram, *RIAA Drops Lawsuit Strategy for "Three Strikes" Plan*, GIGAOM, Dec. 19, 2008, http://gigaom.com/2008/12/19/riaa-drops-lawsuit-strategy-for-three-strikes-plan.

138 17 U.S.C. § 512(a)–(c) (2006).

139 *10th Anniversary of the Digital Millennium Copyright Act*, FAST COMPANY, Oct. 28, 2008, at 41.

140 Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 818 (2001).

141 17 U.S.C. § 512(j).

142 *Id.* § 512(k).

143 *Id.* § 512(a)–(c).

144 *Id.* § 512(b)–(c).

controlled or operated by or for the service provider."[145] Further, § 512(a) gives complete immunity from liability to ISPs who simply transmit information from user to user without caching.[146] Section 512(a) also contains a section that exempts ISPs and other intermediaries from liability if they are not aware of the infringing activity.[147]

Because some ISPs and other servers can control information shared on their networks,[148] those companies that do not fall within the parameters set forth in § 512(a)–(c) are classified as intermediaries who can be found liable under the DMCA.[149] Moreover, 17 U.S.C. § 512(h) contains a provision that gives the RIAA the ability to track down and sue individual users by permitting the copyright holder to serve a subpoena on the ISP, asking it to identify the accused infringer.[150] The RIAA then uses information it receives from ISPs to seek damages under the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, which amended 17 U.S.C. § 504(c) to allow copyright holders to sue infringers for damages ranging from $750 to $30,000.[151]

Thus, using 17 U.S.C. § 512(h), the RIAA issued subpoenas to ISPs to obtain identifying information about their users. Although some ISPs complied with the subpoenas, Verizon refused to offer its users' information.[152] In the resulting court case *Recording*

---

145 *Id.*

146 17 U.S.C. § 512(a). It is worth mentioning that although theoretically ISPs act as passive conduits, in actuality through caching, they host materials and have the ability to remove materials or disable access to materials on their networks after being notified by the copyright holder of the existence of such infringing materials. Niva Elkin-Koren, *Making Technology Visible: Liability of Internet Service Providers for Peer-to-Peer Traffic*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 15, 38 (2006).

147 17 U.S.C. § 512(a).

148 *See* Elkin-Koren, *supra* note 146, at 68.

149 17 U.S.C. § 512(a)–(c); *see also* Elkin-Koren, *supra* note 146, at 42, 55.

150 17 U.S.C. § 512(h)(1).

151 *Id.* § 504(c); Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, 113 Stat. 1774.

152 *See In re* Verizon Internet Servs., Inc., 257 F. Supp. 2d 244, 247 (D.D.C. 2003) (discussing Verizon's argument that permitting these subpoenas violated the First Amendment); *In re* Verizon Internet Servs., Inc., 240 F. Supp. 2d 24, 28–29 (D.D.C. 2003) (noting Verizon's argument that § 512(h) does not apply to ISPs).

Industry Ass'n of America, Inc. v. Verizon Internet Services,[153] the court questioned whether 17 U.S.C. § 512(h) applied to ISPs that acted as "conduit[s]" for files, like MP3s, that were shared directly between users.[154] The court held that § 512(h) applied only to ISPs that stored infringing data on their servers, not ISPs that acted solely as intermediaries.[155] This limited the ability of the RIAA to use § 512(h) to obtain contact information about accused infringers, and as a result the RIAA began what became known as its "John Doe" lawsuits.[156]

The John Doe lawsuits that followed the *Verizon* ruling were similar in some ways to the RIAA's original lawsuits based on § 512(h).[157] The RIAA identified infringers based on their Internet Protocol ("IP") address, and then requested a subpoena from the court.[158] Once the RIAA had identified the IP owner's address, its attorneys would send a letter to the user offering him or her the chance to settle.[159] If the user refused to settle, the RIAA would continue the lawsuit after amending it to name the individual.[160] This method was preferable to the 17 U.S.C. § 512(h) subpoenas

---

153 351 F.3d 1229 (D.C. Cir. 2003).

154 *Id.* at 1233.

155 *See id.* at 1237.

156 John Borland, *Court: RIAA Lawsuit Strategy Illegal*, CNET NEWS, Dec. 19, 2003, http://news.cnet.com/2100-1027_3-5129687.html [hereinafter Borland, *RIAA Lawsuit*]. Before the *Verizon* decision came down, the RIAA had already issued more than 3,000 subpoenas. ELECTRONIC FRONTIER FOUND., RIAA V. THE PEOPLE: FOUR YEARS LATER 5 (2007), *available at* http://w2.eff.org/IP/P2P/riaa_at_four.pdf. Users who received this subpoena included a twelve-year-old girl living in a housing project in New York City, and a grandmother, whom, it was later discovered, had been wrongfully accused. *Id.* at 4. The accused were given the opportunity to settle or go to trial. *Id.* The majority of users settled for around $3,000. *Id.* One user who refused to settle faced a $22,500 judgment. Bob Mehr, *Gnat, Meet Cannon: Cecila Gonzalez Doesn't Want to Fight the Recording Industry. She Doesn't Have a Choice*, CHI. READER, Feb. 3, 2005, http://www.chicagoreader.com/chicago/gnat-meet-cannon/Content?oid=917905.

157 *See* How RIAA Litigation Process Works, http://recordingindustryvspeople.blogspot.com/2007/01/how-riaa-litigation-process-works.html#intro (last visited Feb. 16, 2010).

158 *See* Borland, *RIAA Lawsuit*, *supra* note 156. The specifications for this notification can be found at 17 U.S.C. § 512(c)(3) (2006).

159 Borland, *RIAA Lawsuit*, *supra* note 156.

160 *Id.*

though; because the court was involved, there was a certain amount of judicial oversight and due process.[161]

Because the RIAA did not have specific identifying information for the users, it initiated lawsuits in the states where the users' ISP had its offices, which was often far from the users' actual residences.[162] The RIAA usually initially identified the defendants as "Does 1–16,"[163] for example, before their contact information was obtained. These lawsuits have been neither financially, nor reputationally, advantageous.[164] The media and public have cast the RIAA as a villain that sues single mothers[165] and even the deceased.[166] The lawsuits had a devastating effect on the users who were sued, even if the lawsuits were dropped.[167] Moreover, despite the RIAA's efforts record sales have continued to decline.[168]

D. RIAA v. Tenenbaum

In 2003, Joel Tenenbaum was a seventeen-year-old high school student in Rhode Island; that year his family began receiving collection notices from MediaSentry, an online collection agency hired by the RIAA.[169] MediaSentry obtained his contact information from his ISP.[170] Tenenbaum was offered the

---

[161] *Id.*; *see also* John Schwartz, *Music Industry Returns to Court, Altering Tactics on File Sharing*, N.Y. TIMES, Jan. 22, 2004, at C1.

[162] *See* Beckerman, *supra* note 157. See *id.* for a more detailed explanation of the John Doe lawsuits.

[163] Index of Litigation Documents, http://recordingindustryvspeople.blogspot.com/2007/01/index-of-litigation-documents.html (last visited Nov. 22, 2009).

[164] Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, at B1.

[165] Heather Green, *Does She Look Like a Music Pirate?*, BUS. WK., Apr. 24, 2008, http://www.businessweek.com/magazine/content/08_18/b4082042959954.htm.

[166] Nate Mook, *RIAA Sues Deceased Grandmother*, BETANEWS, Feb. 4, 2005, http://www.betanews.com/article/RIAA_Sues_Deceased_Grandmother/1107532260.

[167] *See, e.g.*, *Minnesota Woman Caught in Crackdown on Music Downloaders*, USA TODAY, May 26, 2004, http://www.usatoday.com/tech/webguide/music/2004-05-26-riaa-vs-minnesotan_x.htm.

[168] McBride & Smith, *supra* note 164.

[169] Thomas Grillo, *Prof: Penalty Unfair; Will Help with $1M Download Lawsuit*, BOSTON HERALD, Nov. 4, 2008, at 31.

[170] *Id.*

opportunity to settle with the RIAA for $3,500.[171] He counter-offered with $500, but this counter-offer was refused.[172] Tenenbaum decided to fight the RIAA *pro se*.[173] Tenenbaum counterclaimed, "asserting abuse of federal power and that the excessive damages were unconstitutional."[174] A judge ordered Tenenbaum and the RIAA to settle.[175] The RIAA refused to settle for less than $10,500, an amount Tenenbaum refused to pay.[176] As a result of this lawsuit, Tenenbaum was faced with nearly $1,000,000 in fines for uploading seven songs.[177] The cost of purchasing these songs on iTunes would have been about $6.93.[178]

On September 18, 2008, Harvard Law Professor Charles Nesson, a vocal critic of the RIAA, officially became Tenenbaum's counsel.[179] With Professor Nesson's help, Tenenbaum challenged the constitutionality of the Digital Theft and Deterrence Act,[180] arguing that it was "essentially a criminal statute, punitively deterrent in its every substantive aspect," because it "mandate[ed] grossly excessive statutory damage awards."[181] Tenenbaum alleged that the Digital Theft and Deterrence Act gave the RIAA the opportunity to prosecute users

---

171 Joel Fights Back, About the Case, http://joelfightsback.com/about-the-case (last visited Apr. 21, 2009).

172 *Id.*

173 *Id.*

174 *Id.*

175 *Id.*

176 *Id.*

177 Svetlana Gladkova, *RIAA Seeking $1 Million in Damages from a Student for Sharing 7 Songs on Kazaa*, PROFY, Dec. 15, 2008, http://profy.com/2008/12/15/riaa-seeking-1-million-in-damages-from-a-student-for-sharing-7-songs-on-kazaa.

178 *Harvard Law School vs. RIAA . . . Fight!!*, GAMEPOLITICS, Dec. 15, 2008, http://www.gamepolitics.com/2008/12/15/harvard-law-school-vs-riaa-fight.

179 Joel Fights Back, Timeline, http://joelfightsback.com/about-the-case/timeline (last visited July 6, 2009). The case between the RIAA and Joel Tenenbaum is still progressing. This case can be followed at the Joel Fights Back website, http://joelfightsback.com (last visited Jan. 21, 2010).

180 Defendant's Opposition to Plaintiff's Motion to Dismiss Counterclaims at 3, Sony BMG Music Entm't v. Tenenbaum, No. 1:07-cv-11446-NG, 2009 U.S. Dist. LEXIS 112845 (D. Mass. Dec. 7, 2009); *see also* Posting of Richard Koman to ZDNET, *Harvard's Charlie Nesson Raises Constitutional Questions in RIAA Litigation*, Oct. 29, 2008, http://government.zdnet.com/?p=4152 (Oct. 29, 2008, 12:16 PST).

181 Defendant's Opposition to Plaintiff's Motion to Dismiss Counterclaims, *supra* note 180, at 3.

by allowing the RIAA to sue users for excessive amounts.[182] Nesson analogized this to

> a law that provides the following regime for speeders: (1) a $750 fine for every mile over the speed limit, escalating to $150,000 per mile if the speeder knew he was speeding; (2) the fines are not publicized and few drivers know they exist; (3) enforcement not by the government but by a private police force that keeps the fines for itself and that has no political accountability.[183]

The *Sony Corp. v. Tenenbaum* trial began on July 27, 2009.[184] Prior to the trial, Tenenbaum attempted to raise a fair use defense.[185] Tenenbaum claimed that when he downloaded music for his own "personal use" this "qualified for a 'fair use' exemption to U.S. copyright law."[186] The RIAA sought summary judgment against the fair use claim, and Judge Gertner granted it.[187] Her rationale for granting summary judgment was that the defense was so "broad that it would swallow the copyright protections that Congress [has] created."[188] Tenenbaum's conception of the defense would have "almost no limiting principle: His rule would shield from liability any person who downloaded copyrighted songs for his or her own private

---

182 *See id.*

183 Posting of Richard Koman, *supra* note 180 (summarizing Tenenbaum's argument in Defendant's Opposition to Plaintiff's Motion to Dismiss Counterclaims, *supra* 180, at 5–6).

184 *See* Jonathan Saltzman, *Record Labels Battle BU Grad Student in Federal Court*, BOSTON.COM, July 27, 2009, http://www.boston.com/news/local/breaking_news/2009/07/record_labels_b.html.

185 Sony BMG Music Entm't v. Tenenbaum, No. 1:07-cv-11446-NG, 2009 U.S. Dist. LEXIS 112845, at *2–3 (D. Mass. Dec. 7, 2009); Nate Anderson, *Judge Rejects Fair Use Defense as Tenenbaum P2P Trial Begins*, ARS TECHNICA, July 27, 2009, http://arstechnica.com/tech-policy/news/2009/07/judge-rejects-fair-use-defense-as-tenenbaum-p2p-trial-begins.ars [hereinafter Anderson, *Tenenbaum*].

186 Anderson, *Tenenbaum*, *supra* note 185; *see Tenenbaum*, 2009 U.S. Dist. LEXIS 112845, at *2–3; *see also* 17 U.S.C. § 107 (2006).

187 *Tenenbaum*, 2009 U.S. Dist. LEXIS 112845, at *61–62; *see also* Anderson, *Tenenbaum*, *supra* note 185.

188 *Tenenbaum*, 2009 U.S. Dist. LEXIS 112845, at *9.

enjoyment."[189] During the trial, Joel admitted that he had downloaded the music in question,[190] leaving as the sole issue for the jury the amount of damages he owed.[191] The jury awarded the RIAA $675,000, or $22,500 per song.[192] On December 7, 2009, Judge Gertner finalized the verdict against Joel and issued an injunction preventing him from file-sharing, while still permitting him to speak publicly about his trial.[193]

E. The End of RIAA Litigation

In December 2008, the RIAA announced that it would no longer pursue litigation as a means of combating illegal file-sharing, although it would continue to litigate any outstanding cases.[194] The RIAA has brought numerous suits against infringers, but only two cases have gone to trial.[195] Instead, as an alternative to litigation, the RIAA has declared it will, through agreements with the ISPs, coordinate termination of Internet access for infringers.[196] This approach, known interchangeably as the "three strikes"[197] or graduated response plan,[198] is an initiative that operates through agreement between the RIAA and select ISPs.[199] The RIAA will note IP addresses of infringers and notify the

---

189 Anderson, *Tenenbaum*, *supra* note 185. It is worth noting that, prior to trial, Judge Gertner also rejected Tenenbaum's claims about the constitutionality of the Digital Theft and Deterrence Act by relying on the doctrine of constitutional avoidance. *See* Capitol Records, Inc. v. Noor Alaujan, 626 F. Supp. 2d 152, 153–55 (D. Mass. 2009).

190 *Student Ordered to Pay $675k for Downloads*, CBS NEWS, July 31, 2009, http://www.cbsnews.com/stories/2009/07/31/tech/main5203118.shtml.

191 *Id.*

192 *Id.*

193 David Kravets, *Judge Finalizes $675,000 RIAA Piracy Verdict, Won't Gag Defendant*, WIRED, Dec. 7, 2009, http://www.wired.com/threatlevel/2009/12/piracy-verdict-finalized.

194 McBride & Smith, *supra* note 164.

195 *See, e.g.*, Capitol Records, Inc. v. Thomas, 579 F. Supp. 2d 1210 (D. Minn. 2008).

196 Eliot Van Buskirk, *RIAA to Stop Suing Music Fans, Cut Them Off Instead*, WIRED, Dec. 19, 2008, http://blog.wired.com/business/2008/12/riaa-says-it-pl.html [hereinafter Van Buskirk, *RIAA to Stop Suing*].

197 Ingram, *supra* note 137.

198 Nate Anderson, *RIAA Graduated Response Plan: Q&A with Cary Sherman*, ARS TECHNICA, Dec. 21, 2008, http://arstechnica.com/old/content/2008/12/riaa-graduated-response-plan-qa-with-cary-sherman.ars.

199 *Id.*

ISPs.[200] The ISPs will then contact the users and give them three chances to stop their infringing activities.[201] If they do not stop, the ISP will cut off their Internet access through the ISP's server.[202]

II. PROBLEMS WITH THE RIAA'S ATTEMPT TO STOP FILE-SHARING THROUGH THE GRADUATED RESPONSE PLAN

Currently, the RIAA is attempting to deter users from stealing music through the graduated response plan, which threatens users with the possibility of losing their access to the Internet, rather than with the threat of lawsuits.[203] Through the graduated response plan, the RIAA is trying to counteract years of negative public relations against it that stemmed from its unsuccessful litigation campaign and to defeat the perception that it was only attacking single mothers and college students.[204] Unfortunately, its new plan raises several problems because it potentially deprives users, who are affected by this process, of liberty without due process of law. Moreover, the graduated response plan uses faulty methodology in targeting infringing users,[205] which further underscores this plan's deficiencies. The new plan also creates public policy problems because it goes against President Obama's plan to make broadband Internet widely available. It has also been condemned in other countries and by the E.U., is not supported by all ISPs, and may lead to the shutdown of small ISPs who cannot afford to lose the business of repeat file-sharers, whose Internet access they would have to cut off.

When discussing the RIAA's graduated response plan, it is important to note that it has not yet been openly adopted by the majority of ISPs, which may not want to assist the RIAA for a variety of reasons. For example, an ISP in a metropolitan area,

---

200 *See* Ingram, *supra* note 137.

201 *Id.*

202 *Id.*

203 *Id.*

204 *See* Fred von Lohmann, *Suing Your Customers a Good Idea?*, LAW.COM, Sept. 29, 2004, *available at* http://www.boycott-riaa.com/article/print/14369 [hereinafter von Lohmann, *Suing Your Customers*]; *see also* McBride & Smith, *supra* note 164.

205 *See* von Lohmann, *Suing Your Customers*, *supra* note 204.

where users have a choice between multiple ISPs, might be afraid to risk losing their users to competing ISPs who might not have implemented such a program. In addition, smaller ISPs will not want to bear the cost of cutting off service to users.

If ISPs do not agree to implement the graduated response plan, however, the RIAA can compel them to comply by invoking 17 U.S.C. § 512(j)(1)(A)(ii). This subsection of the DMCA permits the copyright holder, or in the RIAA's case, the copyright holder's representative, to go to court and get

> an order restraining the service provider from providing access to a subscriber or account holder of the service provider's system or network who is engaging in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.[206]

Although the copyright holder must get a court order to terminate Internet access, a preliminary injunction can be issued without a trial.[207] Furthermore, the injunction is against the ISP, rather than the user.[208] The user never gets the chance to have his or her day in court. The RIAA can also threaten the ISPs with liability, under § 512(j), unless the ISPs cut off their users' Internet access.[209] Using § 512(j) thus transforms a contract issue between the users and the ISPs[210] into a statutory deprivation of rights; the user therefore bears the brunt of the loss. Section 512(j) therefore creates a system where copyright holders can get an "extra-judicial temporary restraining order, based solely on the copyright holder's allegation of copyright infringement."[211]

---

206 17 U.S.C. § 512(j)(1)(A)(ii) (2006).

207 *See id.*

208 *See id.* The statute allows the copyright holder to get "[a]n order restraining the service provider from providing access to a subscriber or account holder of the service provider's system or network who is engaging in infringing activity." *Id.* There is no mention of an injunction against the user himself.

209 *See supra* text accompanying note 202.

210 For a discussion about the contract agreements between users and ISPs that permit the ISPs to cut off service at will to users, see *infra* notes 268–62 and accompanying text.

211 Jennifer M. Urban & Laura Quilter, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621, 639 (2006).

When the DMCA was passed, the focus was placed on protecting the rights and property of the ISPs and the copyright holders, but little attention was placed on the importance of Internet access for the common user. As a result, the protections afforded to users are limited unless each of the following three things happen: the user "elects to submit a counternotice; the complainant then files suit; and a court reviews the issue."[212]

A. The RIAA's Graduated Response Plan Threatens Citizens' Rights

If put into action, the RIAA's graduated response plan conflicts with the rights granted to United States citizens because it potentially deprives Internet users of liberty without due process of law. Due process of law protects people against "arbitrary deprivation of life, liberty or property, without the proper procedural norms prior to the deprivation of the right."[213] This plan does not "afford consumers the protections of standards of legal proof or due process."[214]

1. Internet as a Liberty

Some argue that Internet access is a form of liberty[215] because it provides, inter alia, education and communication for those who cannot otherwise access it.[216] Academic writings, as well as the

---

[212] *Id.* at 628.

[213] Bryan W. Hudson, *Ocean State Libertas: Temporary Guardianship as Unconstitutional*, 58 R.I. B.J. 5, 6 (2009).

[214] Mark F. Schultz, *Reconciling Social Norms and Copyright Law; Strategies for Persuading People to Pay for Recorded Music*, 17 J. INTELL. PROP. L. 59, 79 (2009).

[215] Liberties have been defined as

> [P]olitical liberty (the right to vote and to be eligible for public office) together with freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold (personal) property; and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law.

JOHN RAWLS, A THEORY OF JUSTICE 61 (1971).

[216] *See* Molly Beutz Land, *Protecting Rights Online*, 34 YALE J. INT'L L. 1, 23 (2009). A current political movement, known as the Access to Knowledge ("A2K") Movement has emphasized the importance of Internet access in this way for users.

> Capacity [a term used by A2K], in this sense, refers to the resources individuals have available to them to fulfill their basic human needs . . . . In the context of the Internet, capacity refers to the ability of

Supreme Court, have emphasized that Internet access has "democratizing potential" that can be used by the disenfranchised as an equalizer to share diverse ideas with a broad and diverse audience.[217] In addition, Internet access has been promoted as a liberty throughout the world, and the FCC has spoken out about the importance of open access to the Internet.[218] The graduated response plan is problematic because the RIAA is trying to convince the ISPs, through the threat of contributory infringement,[219] to cut off Internet access to users who repeatedly infringe.[220] As discussed above, 17 U.S.C. § 512(j)(1)(A)(ii)[221] allows the RIAA to force ISPs to terminate the accounts of repeat

> individuals to *take advantage of new ways of communicating* and creating knowledge, *which can affect a variety of rights*, including the right to education. The extension of intellectual property rights and, in particular, the limits placed on whether, in what modalities, and how frequently users can share works in digital form, has significant consequences for a variety of human rights.

Id. at 20 (emphasis added).

[217] Madhavi Sunder, *IP*^{3}, 59 STAN. L. REV. 257, 277 (2006) (discussing the technological features that provide social and cultural benefits). Additionally, the Eastern District of Pennsylvania, in a case that eventually went up to the United States Supreme Court, stated that:

> It is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen. The plaintiffs in these actions correctly describe the "democratizing" effects of Internet communication: individual citizens of limited means can speak to a worldwide audience on issues of concern to them. Federalists and Anti-Federalists may debate the structure of their government nightly, but these debates occur in newsgroups or chat rooms rather than in pamphlets. Modern-day Luthers still post their theses, but to electronic bulletin boards rather than the door of the Wittenberg Schlosskirche. More mundane (but from a constitutional perspective, equally important) dialogue occurs between aspiring artists, or French cooks, or dog lovers, or fly fishermen.

Am. Civil Liberties Union v. Reno, 929 F. Supp. 824, 881 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

[218] *See infra* notes 230–33 and accompanying text.

[219] Under 17 U.S.C. § 512(c) (2006), an ISP can be found liable for contributory infringement "by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider" if it is aware of infringement and fails to take certain actions to halt it. *Id.*

[220] *Id.* § 512(j)(1)(A)(ii).

[221] *Id.*

infringers.[222] Users therefore are deprived of liberty without having their day in court. Although there is no "right to Internet" in the Constitution, other countries do have a right to Internet in their constitutions.[223] In addition, the United Nations has spoken out about the importance of the Internet by stating that all people should have "universal access to basic communication and information services."[224] Moreover, there has been an international push to transform Internet access into something that is akin to a human right.[225] For example, in 2000, the Estonian Parliament declared that its citizens should be guaranteed access to the Internet as a fundamental right.[226] Similarly, in Greece, access to the "information society" is a fundamental right, and providing such access is "an obligation of the State."[227] Finland also recently "made 1-megabit broadband Web access a legal right."[228] Finally, the European Parliament has also voiced its belief in the importance of Internet access.[229]

---

[222] *See id.*; *see also* Van Buskirk, *RIAA to Stop Suing*, *supra* note 196.

[223] *See* Constitution of the Republic of Estonia, § 45, *available at* http://www.president.ee/en/estonia/constitution.php?gid=81907 (guaranteeing the right to freely disseminate ideas, opinions and beliefs by any means); 1975 Syntagma [SYN] [Constitution] 2, Art. 5A (Greece), *available at* http://www.nis.gr/npimages/docs/Constitution_EN.pdf (guaranteeing a right to participate in the Information Society including electronic transmissions); Press Release, Ministry of Transp. and Commc'ns of Fin., Minimum of 1 Mbit Internet Connection Available to Everyone (Oct. 16, 2009), *available at* http://www.lvm.fi/web/en/news/view/920307 [hereinafter Finland Press Release] (declaring broadband web access a legal right).

[224] Michael L. Best, *Can the Internet Be a Human Right?*, 4 HUM. RTS. & HUM. WELFARE 23, 24 (2004).

[225] According to the United Nations Declaration of Human Rights, fundamental human rights include the right to a trial before an impartial tribunal in criminal cases, the right to "freedom of movement," the right to own property, the right to fair labor standards, and other similar rights. The Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948), *available at* http://www.un.org/Overview/rights.html.

[226] Colin Woodard, *Estonia, Where Being Wired Is a Human Right*, CHRISTIAN SCI. MONITOR, July 1, 2003, at 7, *available at* http://www.csmonitor.com/2003/0701/p07s01-woeu.html.

[227] 1975 Syntagma [SYN] [Constitution] 2, Art. 5A (Greece), *available at* http://www.nis.gr/npimages/docs/Constitution_EN.pdf.

[228] Finland Press Release, *supra* note 223; *see also* Don Reisinger, *Finland Makes 1Mb Broadband Access a Legal Right*, CNET NEWS, Oct. 14, 2009, http://news.cnet.com/8301-17939_109-10374831-2.html.

[229] *See infra* notes 260–64 and accompanying text.

Although there is not a right to Internet access in the Constitution, the Federal Communications Commission ("FCC"), Congress and the President have continually emphasized the importance of users' access to the Internet. In 2005, the FCC adopted Policy Statement 05-515, which encourages the preservation of the "open and interconnected nature of the public Internet."[230] In the Policy Statement, the FCC emphasized that users should be permitted "to access the lawful Internet content of their choice . . . to run applications and user services of their choice," and to have access to competing "network providers, application and service providers, and content providers."[231] The Policy Statement concluded with a reaffirmation of the FCC's duty to "preserve and promote the vibrant and open character of the Internet."[232] In keeping with these policies, the FCC also determined in a recent ruling that Comcast, an ISP that was accused of slowing down Internet speed for BitTorrent users, was acting illegally and forced them to stop.[233]

Similarly, Congress has found that access to the Internet plays an important role in the lives of most Americans.[234] In the "findings" section of the Telecommunications Act of 1996, Congress established that:

> The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in

---

230 FEDERAL COMMUNICATIONS COMMISSION POLICY STATEMENT, FCC 055-151, at 3 (2005), *available at* hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf [hereinafter FCC POLICY STATEMENT].

231 *Id.*

232 *Id.*

233 Declan McCullagh, *FCC Formally Rules Comcast's Throttling of BitTorrent Was Illegal*, CNET NEWS, Aug. 1, 2008, http://news.cnet.com/8301-13578_3-10004508-38.html; Press Release, Fed. Commc'ns Comm'n, Commission Orders Comcast to End Discriminatory Network Management Practices (Aug. 1, 2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-284286A1.pdf. On January 8, 2010, however, the Court of Appeals for the D.C. Circuit heard oral arguments in Comcast's appeal of the FCC's Comcast decision. *See* Marguerite Reardon, *Judges Question FCC Authority in Comcast Case*, CNET NEWS, Jan. 8, 2010, http://news.cnet.com/8301-30686_3-10430647-266.html. The judges appeared skeptical of the FCC's actions. *See id.*

234 *See* 47 U.S.C. § 230 (2006).

> the availability of educational and informational resources to our citizens.
>
> . . . .
>
> . . . Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.[235]

Congress thus has established a policy of furthering "the continued development of the Internet and other interactive computer services and other interactive media."[236]

President Obama has also spoken out for the freedom of the Internet.[237] He has pledged to support a plan to expand access to the Internet to people in rural areas.[238] His plan includes providing tax incentives to ISPs who offer faster Internet or who provide high speed Internet access in areas where there is no Internet access.[239] Thus, the FCC, Congress, and the President have all emphasized the importance of access to the Internet, and freedom of the Internet.

As described above, the FCC, Congress, and the President, as well as human rights advocates, have all spoken out about the importance of access to the Internet. Although not guaranteed by the Constitution, one could argue that it is a form of "liberty" that is entitled to protection. This liberty exists through the importance of users' access to information. Without Internet access, users would be deprived of the ability to share their ideas, or learn about other ideas.[240] When the RIAA, through the use of the federal statute, forces the ISPs to cut off Internet access for users, without allowing the users to present their cases in court, it is depriving the

---

235 *Id.* § 230(a)(1), (5).

236 *Id.* § 230(b)(1).

237 Graham Finnie, *Obama on Broadband*, LIGHT READING, Nov. 24, 2008, http://www.lightreading.com/document.asp?doc_id=168471.

238 *Obama Pledges Universal Broadband*, http://www.benton.org/node/13539 (Aug. 7, 2008, 11:42 EST).

239 Arik Hesseldahl, *Obama's Broadband Plan*, BUS. WK, Jan. 7, 2009, http://www.businessweek.com/magazine/content/09_03/b4116027365196.htm?campaign_id=rss_daily.

240 *See supra* notes 215–17 and accompanying text.

users of "liberty." This is tantamount to a private action deprivation of due process.

2. The RIAA's Method of Finding File-Sharers Is Faulty and Lacks Accountability, Making It an Untrustworthy Method of Depriving Users of Their Rights

17 U.S.C. § 512(j), which permits the copyright holder to seek injunctive relief against infringers, and the RIAA's new graduated response plan are particularly troubling not only because they cut off Internet access to users without a trial, but also because they use methods that are notoriously faulty.[241] In a study by the University of Washington, three computer scientists found that the RIAA method of tracking illegal file-sharers and sending them takedown notices was unreliable and "inconclusive."[242] These scientists were able to convince the RIAA through manipulations that machines that were not sharing files actually *were* sharing files.[243] The scientists also found that while some users were caught even though they were not doing anything illegal, other users could intentionally avoid being tracked.[244] For example, the Pirate Bay,[245] a widely used BitTorrent tracker, has offered a virtual private network ("VPN") subscription service, called IPREDator, that claims to mask IP addresses of subscribers so that they can escape RIAA detection.[246] The University of Washington scientists further found that "it is possible for a malicious user (or

---

[241] MICHAEL PIATEK ET AL., CHALLENGES AND DIRECTIONS FOR MONITORING P2P FILE SHARING NETWORKS—OR—WHY MY PRINTER RECEIVED A DMCA TAKEDOWN NOTICE 1, *available at* http://dmca.cs.washington.edu/dmca_hotsec08.pdf.

[242] *Id.*

[243] *See id.* at 2–4.

[244] *See id.* at 4–5.

[245] Interestingly enough, in April 2009, co-founders of the Pirate Bay were found guilty of copyright infringement in a Swedish court. Jemima Kiss, *The Pirate Bay Trial: Guilty Verdict*, GUARDIAN (U.K.), Apr. 17, 2009, http://www.guardian.co.uk/technology/2009/apr/17/the-pirate-bay-trial-guilty-verdict. Although the co-founders tried to appeal, their appeal was denied. *No Retrial in the Pirate Bay Case*, LOCAL (Swed.), June 25, 2009, http://www.thelocal.se/20280/20090625/.

[246] Michael Horton, *Meet iPredator—Secure Anonymous VPN from Pirate Bay*, TECH FRAGMENTS, Mar. 26, 2009, http://techfragments.com/news/662/Software/Meet_iPredator_-_Secure_Anonymous_VPN_from_Pirate_Bay.html; *see also* IPREDator Homepage, http://ipredator.se (last visited Apr. 21, 2009).

buggy software) to implicate (frame) seemingly any network endpoint in the sharing of copyrighted materials."[247] A study by Google found that 57% of takedown notices it received under the DMCA were sent by business competitors who were trying to undercut each other,[248] and that 37% of notices were "not valid copyright claims."[249] The RIAA has even admitted that it has sent out mistaken takedown notices in the past. In a particularly embarrassing case, the RIAA sent a takedown notice to Penn State University, stating that someone in the "astronomy and astrophysics department had illegally uploaded songs by the artist [Usher] for free distribution"[250] based on the existence of a file entitled "Usher." In reality, the file was an a cappella song uploaded by Professor Usher. After apologizing, the RIAA admitted that it had "sent out dozens of mistaken notices in the past, and at times, did not always fully confirm a suspected case of infringement."[251] Faulty methodology thus undermines the strength of the RIAA's claims.

The RIAA's reliance on such an imperfect methodology makes 17 U.S.C. § 512(j) especially troubling. Although the RIAA has discussed creating administrative hearings for users to appeal their Internet access termination,[252] these hearings may lack accountability and neutrality because they may rely on the RIAA's

---

247 PIATEK ET AL., *supra* note 241.

248 Ted Gibbons, *Google Submission Hammers Section 92A*, PC WORLD, Mar. 16, 2009, http://pcworld.co.nz/pcworld/pcw.nsf/feature/93FEDCEF6636CF90CC25757A0072B4B7.

249 *Id.* A senior attorney at the Electronic Frontier Foundation voiced his concern about basing access to the Internet on an unreliable system:

> The problem is the lack of due process for those accused. In a world where hundreds of thousands, or millions, of copyright infringement allegations are automatically generated and delivered to ISPs, mistakes are going to be made. Anyone who has ever had to fight to correct an error on their credit reports will be able to imagine the trouble we're in for.

JR Raphael, *RIAA's New Piracy Plan Poses a New Set of Problems*, PC WORLD, Dec. 19, 2008, http://www.pcworld.com/article/155820/riaas_new_piracy_plan_poses_a_new_set_of_problems.

250 Sonia K. Katyal, *Filtering, Piracy Surveillance and Disobedience*, 32 COLUM. J.L. & ARTS 401, 414 (2009).

251 *Id.*

252 *See* David Kravets, *No ISP Filtering Under New RIAA Copyright Strategy*, WIRED, Dec. 19, 2008, http://blog.wired.com/27bstroke6/2008/12/no-isp-filterin.html.

own data and statistics compiled by questionable methods, and therefore will not be completely neutral. Even if the RIAA and the ISPs want to mandate arbitration for users who lose their Internet access, arbitration also might not be entirely trustworthy.[253] Arbitrator bias is a significant problem in mandatory binding arbitration. Arbitration organizations are businesses who, in order to succeed, need to "establish policies that attract and retain clients."[254] An arbitrator that is seen as too consumer friendly will risk isolating future paying clients.[255] Thus, the RIAA could choose an arbitration provider who would value its repeat business and generally rule in its favor by relying on its faulty methodology.

B. Graduated Response Plan's Public Policy Problems

1. Graduated Response Plans Abroad: Mixed Success and Criticism

The graduated response plan for handling Internet piracy is not new, nor is it unique to the United States. Similar graduated response plans have also been proposed or implemented in Ireland,[256] Japan,[257] and France.[258] Similarly, in Britain, Virgin

---

[253] *See* Mandatory Arbitration Clauses Devastating Consumer Rights, National Consumer Law Center (July 28, 2003), http://www.consumerlaw.org/issues/model/arbitration.shtml; GIVE ME BACK MY RIGHTS! The Dangers of Binding Mandatory Arbitration (BMA) Clauses, http://www.givemebackmyrights.org (last visited Nov. 12, 2009).

[254] Joshua T. Mandelbaum, *Stuck in a Bind: Can the Arbitration Fairness Act Solve the Problems of Mandatory Binding Arbitration in the Consumer Context?*, 94 IOWA L. REV. 1075, 1090 (2009).

[255] *Id.* at 1091.

[256] John Collins & Mary Carolan, *Internet Users Face Shutdown over Illegal Music Downloads*, IRISH TIMES, Jan. 29, 2009, http://www.irishtimes.com/newspaper/frontpage/2009/0129/1232923373331.html; *see also* Eircom Irma Briefing Note March 2009, http://www.scribd.com/doc/13630351/Eircom-Irma-Briefing-Note-March-2009 (last visited Nov. 13, 2009) (displaying a Briefing Note on an arrangement between Eircom and the Irish Recorded Music Association ("IRMA") with regard to copyright infringement).

[257] *See WinNY Copiers to Be Cut Off from Internet*, DAILY YOMIURI (Tokyo), Mar. 15, 2008; Chris Williams, *Japanese ISPs Agree Three Strikes-Style Anti-Piracy Regime*, REGISTER, Mar. 17, 2008, http://www.theregister.co.uk/2008/03/17/japan_three_strikes.

[258] The proposed French piracy law, known as the "HADOPI" law, was especially harsh, cutting off Internet access for a year. *See* Danny O'Brien, *The Struggles of France's Three Strikes Law*, ELECTRONIC FRONTIER FOUND., May 9, 2008,

Media (an ISP) and Universal Music Group (a recording company) recently reached an agreement that would, in part, use a graduated response plan.[259]

Some countries, however, do not support graduated response plans. The graduated response plan is not popular with the European Parliament,[260] which has both criticized[261] and opposed[262] it. On March 26, 2009, the European Parliament voted on, and passed by an overwhelming majority, a report that equated Internet access with the promotion of fundamental rights.[263] The

http://www.eff.org/deeplinks/2008/05/struggles-frances-three-strikes-law. The HADOPI law also made users liable for infringement that occurred on their networks. Law No. 2009-669 of June 12, 2009, Journal Officiel de la République Française [J.O.] [Official Gazette of France], June 13, 2009, p. 9666; *see also France May Penalize Internet Pirates*, UPI.COM, Nov. 1, 2008, http://www.upi.com/Top_News/2008/11/01/France_may_penalize_Internet_pirates/UPI-99811225519011; O'Brien, *supra*. The HADOPI law has had a tumultuous legislative history. On April 10, 2009, the law was rejected by the French National Assembly, 21–15, after the other house of Parliament, the Senate, had approved the bill. Eric Pfanner, *France Rejects Plan to Curb Internet Piracy*, N.Y. TIMES, Apr. 10, 2009, http://www.nytimes.com/2009/04/10/technology/internet/10net.html. Then, on May 13, 2009, an amended version of the HADOPI law was passed by the French National Assembly. *See* Law No. 2009-669 of June 12, 2009, Journal Officiel de la République Française [J.O.] [Official Gazette of France], June 13, 2009, p. 9666; *see also* Eric Pfanner, *France Approves Crackdown on Internet Piracy*, N.Y. TIMES, May 13, 2009, http://www.nytimes.com/2009/05/13/technology/internet/13net.html?scp=1&sq=france%20three%20strikes%20piracy&st=cse. Finally, on June 10, 2009, the French judiciary, known as the Constitutional Council, overturned this rule. CC decision no. 2009-580DC, June 10, 2009, J.O. 9675 (Fr.); *see also* Richard Wray, *French Anti-Filesharing Law Overturned*, GUARDIAN (U.K.), June 10, 2009, http://www.guardian.co.uk/technology/2009/jun/10/france-hadopi-law-filesharing.

[259] Eric Pfanner, *Universal Music and Virgin Reach a Download Deal*, N.Y. TIMES, June 15, 2009, at B2. This plan is slightly different from the HADOPI law partially because it is not state sponsored, and also because it offers users a subscription download service. *Id.*; *see supra* note 258 and accompanying text.

[260] The European Parliament is a body that "is elected by the citizens of the European Union to represent their interests." The European Parliament, http://europa.eu/institutions/inst/parliament/index_en.htm (last visited Apr. 18, 2009).

[261] Danny O'Brien, *European Parliament to Sarkozy: No "Three Strikes" Here*, ELECTRONIC FRONTIER FOUND., Apr. 10, 2008, http://www.eff.org/deeplinks/2008/04/european-parliament-sarkozy-no-three-strikes-here.

[262] *European Parliament Rejects Graduated Response*, LA QUADRATURE DU NET, Apr. 10, 2008, http://www.laquadrature.net/en/european-parliament-rejects-graduated-response.

[263] Recommendation of 26 March 2009 to the Council on Strengthening Security and Fundamental Freedoms on the Internet, EUR. PARL. DOC. P6 TA-PROV 0194 (2009), *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+

European Parliament adopted a resolution equating blocking access to Internet with deprivation of freedom of speech.[264]

In addition, the Swedish government has vehemently opposed graduated response plans.[265] Although the graduated response plan was never implemented, nor was it even suggested for Sweden, the Swedish Ministers of Justice and Culture felt a need to speak out about this issue nonetheless.[266] They concluded, in March 2008, that "ostracism from the Internet as punishment in a society whose daily activities are increasingly intertwined with the digitally networked environment is not proportional to the infringement of copyright, especially without intention for commercial gain."[267]

2. Mixed Reception for Graduated Response Plans by Large U.S. ISPs

Although the ISPs provide their users with Internet access as a result of a contract which can be terminated at will by either party, when the graduated response plan is implemented, it adds a third party who was not a part of the original agreement into the mix. Through contract, ISPs maintain the right to cut off Internet service

---

P6-TA-2009-0194+0+DOC+XML+V0//EN&language=E; s*ee also* Press Release, European Parliament Strasbourg, Security and Fundamental Freedoms on the Internet (Mar. 26, 2009) (on file with author), *available at* http://www.europarl.europa.eu/sides/getDoc.do?language=EN&type=IM-PRESS&reference=20090325IPR52612.

[264] Resolution on Cultural Industries in Europe, EUR. PARL. DOC. A6-0063 (2008), *available at* http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2008-0123&language=EN&ring=A6-2008-0063.

> [The European Parliament] calls on the Commission and the Member States to recognize that the Internet is a vast platform for cultural expression, access to knowledge, and democratic participation in European creativity, bringing generations together through the information society; calls on the Commission and the Member States, to avoid adopting measures conflicting with civil liberties and human rights and with the principles of proportionality, effectiveness and dissuasiveness, such as the interruption of Internet access.

Id.

[265] Danny O'Brien, *Three Strikes, Three Countries: France, Japan and Sweden*, ELECTRONIC FRONTIER FOUND., Mar. 18, 2008, http://www.eff.org/deeplinks/2008/03/three-strikes-three-countries.

[266] Jérémie Zimmermann & Erik Josefsson, *ENDitorial: Will France Introduce the Digital Guillotine in Europe?*, DIGITAL C.R. EUR., Apr. 23, 2008, http://www.edri.org/edrigram/number6.8/france-digital-guillotine.

[267] *Id.*

to their users at will.[268] Most agreements between ISPs and users contain clauses that allow the ISPs to cut off Internet service for any reason at their own discretion.[269] When the RIAA becomes involved, and if the ISP refuses to cooperate, the RIAA can invoke 17 U.S.C. § 512(j).[270] This action circumvents contractual clauses by utilizing a federal statute in what is normally an issue between two private actors—the ISP and the Internet user. Furthermore, this creates an action for contributory infringement against ISPs who do not adopt and implement "a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers."[271]

In order for the RIAA's graduated response plan to function efficiently without using § 512(j), and therefore these potential problems, the RIAA must have the full cooperation of ISPs in withholding services from repeat infringers. ISPs, however, seem to vacillate between acceding to the RIAA's demands for fear of being found contributorily liable, and protecting users' rights and their own business interests. On the one hand, some ISPs seem to support the RIAA. Recently, AT&T, a large ISP, agreed to work with the RIAA to stop file-sharing.[272] As of now, AT&T has just begun to forward takedown notices to users without suspending their Internet service,[273] but it is unclear whether it will go further to aid the RIAA's initiatives.

Some ISPs even implement their own unsolicited graduated response policies. For example, in October 2007 Comcast implemented a similar policy; it blocked both legal and illegal P2P

---

[268] When users sign up for Internet access with ISPs, they agree to the terms of service, which set forth certain limits to the users' usage, and certain rights maintained by the ISP. *See, e.g.*, Cox Communications Acceptable Use Policy, http://www.cox.com/policy/#termination (last visited Apr. 21, 2009).

[269] *See id.* The user also retains the right to terminate service. "Either party may terminate this Agreement at any time without cause by providing the other party with no less than twenty-four (24) hours written notice of such termination." *Id.*

[270] 17 U.S.C. § 512(j) (2006).

[271] *Id.* § 512(i)(1)(A).

[272] Greg Sandoval, *AT&T First to Test RIAA Antipiracy Plan*, CNET NEWS, Mar. 24, 2009, http://news.cnet.com/8301-1023_3-10203799-93.html?tag=mncol;txt.

[273] *Id.*

applications.[274] Moreover, Cox Communications, which was disrupting P2P traffic as early as 2007,[275] has already instituted a graduated response plan independent of the RIAA.[276] Using the notice and takedown provisions of the DMCA,[277] Cox notifies users that "under the DMCA, we have the responsibility to temporarily disable your Internet access, until such time as you take the necessary steps to remove the infringing files and to prevent further distribution of copyrighted material."[278] Cox's plan, unlike the RIAA's graduated response plan, temporarily disables Internet access for first time offenders who receive takedown notices.[279] After three takedown notices, users will have their Internet access terminated.[280] As a result, they will no longer be able to purchase Internet access from their current ISP, either for a predetermined amount of time or permanently.[281] Cox is one of the largest ISPs, with over 3.5 million users;[282] thus, this plan will affect a large number of people. Cox users who have lost their Internet access as a result of its graduated response plan have had difficulty being reconnected and often never get reconnected to the

[274] Peter Svensson, *Comcast Blocks Some Internet Traffic*, S.F. GATE, Oct. 19, 2007, http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2007/10/19/financial/f061526D54.DTL&feed=rss.business. This issue arose in the context of net neutrality. A test conducted by the AP determined that Comcast was blocking or slowing down certain P2P systems. Cox Communications has been accused of the same. Net neutrality is a concept that supports preventing ISPs from charging different prices to transmit different data according to the size of the data and its use. *See* Ryan Singel, *FCC Backs Net Neutrality—and Then Some*, WIRED, Sept. 21, 2009, http://www.wired.com/epicenter/2009/09/net-neutrality-announcement. *But see* Reardon, *supra* note 233.

[275] Broadband DSL Reports, Cox Also Disrupting P2P Traffic (Nov. 15, 2007), http://www.dslreports.com/shownews/89481. Cox claimed, however, that it was limiting P2P file-sharing to preserve bandwidth. *Id.*

[276] Broadband DSL Reports, Cox Employs 'Three Strikes' DMCA Policy (Oct. 1, 2008), http://www.dslreports.com/shownews/Cox-Employs-Three-Strikes-DMCA-Policy-98121.

[277] 17 U.S.C. § 512(c)(3) (2006).

[278] *Cox Disconnects Alleged Pirates from the Internet*, TORRENTFREAK, Sept. 30, 2008, http://torrentfreak.com/cox-disconnects-alleged-pirates-from-the-internet-080930.

[279] *Id.*

[280] *Id.*

[281] *Id.*

[282] *Id.*

Internet through Cox, even after they remove the infringing files.[283]

In December 2009, Verizon announced that it would begin forwarding copyright infringement notices it receives from copyright holders.[284] According to the announcement, if Verizon receives multiple notices regarding alleged infringement, these users might "risk having their Internet service interrupted or turned off and [face] serious legal consequences if the copyright owner decides to sue over the alleged infringement."[285] On January 20, 2010, Verizon admitted that it had cut off service to a number of people who had been accused of sharing files. The Verizon spokesperson, Bobbi Henson, disclosed that Verizon had "cut some people off"[286] although she admitted the number of people who had their internet access cut off was very small.[287]

On the other hand, sometimes users find the ISPs on their side. Indeed, some ISPs expressly protect users' interests.[288] For example, notwithstanding its agreement to work with the RIAA, AT&T protects its users' Internet access by requiring that the RIAA provide a court order from a judge before it will terminate users' Internet access.[289] Moreover, other ISPs have not openly agreed to help the RIAA,[290] and have even gone so far as to state that they will not assist the RIAA in its graduated response plan.[291] While users who have had their Internet service cut off are not entirely without recourse because they may seek reinstatement by

---

283 *Id.*

284 Verizon, Support, Announcements, https://www.verizon.net/central/vzc.portal?_nfpb=true&_pageLabel=vzc_help_announcement&id=copyright (last visited Jan. 4, 2009).

285 *See id.*

286 David Carnoy, *Verizon Ends Service of Alleged Illegal Downloaders*, CNET NEWS, Jan. 20, 2010, http://news.cnet.com/8301-1023_3-10437176-93.html.

287 *Id.*

288 Posting of Soulskill to Slashdot, *AT&T Won't Terminate User Service for RIAA Without a Court Order*, http://tech.slashdot.org/article.pl?sid=09/03/29/1214201&from=rss (Mar. 29, 2009, 9:26 EST).

289 *Id.*

290 David Kravets, *Top Internet Providers Cool to RIAA 3-Strikes Plan*, WIRED, Jan. 5, 2009, http://blog.wired.com/27bstroke6/2009/01/draft-verizon-o.html.

291 Chloe Albanesius, *Comcast, Others Deny 'Three Strikes' Piracy Plan*, PCMAG, Mar. 27, 2009, http://www.pcmag.com/article2/0,2817,2343977,00.asp.

challenging the ISPs in court,[292] having ISPs protect their interests acts as a better prophylactic against unwarranted RIAA intrusion. Thus, this support further shows ISPs' ambivalence or even downright hostility towards RIAA policies.

3. The Graduated Response Plan's Detrimental Impact on Small ISPs

In order for the RIAA's new anti-piracy initiative to succeed, the RIAA needs cooperation from both large ISPs and small ISPs, who might be less likely to agree to work with the RIAA.[293] While some larger ISPs, like AT&T, have either already begun to work with the RIAA, or may at some point begin to work with the RIAA to shut down file-sharers,[294] smaller ISPs might be unable to manage the financial burden of lost revenue[295] and the cost of sending takedown notices to users.[296] The RIAA uses an ISP's resources to track down and punish users, without offering the ISPs any reason to help them, besides the threat of contributory infringement[297] and the argument that pirating music is wrong.[298] The RIAA is basically hiring ISPs to act as its private, unpaid police force to police their users.

Some smaller ISPs have already reacted against the RIAA's demands. For example, Jerry Scroggin, owner and operator of Bayou Internet and Communications, an ISP in Louisiana, has refused to comply with the RIAA throughout its previous litigation

---

[292] *Id.*

[293] *See* Andrew Lyle, *RIAA to Stop Suing Users, Cuts Them Off Instead*, NEOWIN, Dec. 19, 2008, http://www.neowin.net/news/main/08/12/19/riaa-to-stop-suing-users-cuts-them-off-instead.

[294] *See* Greg Sandoval, *Sources: AT&T, Comcast May Help RIAA Foil Piracy*, CNET NEWS, Jan. 28, 2009, http://news.cnet.com/8301-1023_3-10151389-93.html?part=rss&subj=news&tag=2547-1_3-0-20 [hereinafter Sandoval, *Sources*] ("AT&T and Comcast, two of the nation's largest Internet service providers, are expected to be among a group of ISPs that will cooperate with the music industry in battling illegal file sharing . . . .").

[295] Matt Buchanan, *AT&T and Comcast Agree to Do the RIAA's Dirty Work*, GIZMODO, Jan. 28, 2009, http://i.gizmodo.com/5141056/att-and-comcast-agree-to-do-the-riaas-dirty-work.

[296] *See* Sandoval, *Sources*, *supra* note 294.

[297] Greg Sandoval, *Copy of RIAA's New Enforcement Notice to ISPs*, CNET NEWS, Dec. 19, 2008, http://news.cnet.com/8301-1023_3-10127050-93.html.

[298] *Id.*

initiative, and currently will not participate in the graduated response plan.[299] In the past, when Scroggin received notices from the RIAA, he would respond to the notices with a request for a billing address because he believed that the RIAA should share the cost of serving the notice.[300] He never received any response to this query.[301] While Bayou Internet and Communications does not support illegal file-sharing, it does not have the financial ability or the manpower to use IP addresses to track down file-sharers.[302] Scroggin also cannot bear the cost of losing paying customers.[303] Indeed, a company like Bayou, which has between 10,000 and 12,000 paying customers, needs each customer's monthly payment.[304] If the RIAA continues to put pressure on small ISPs to function as their unpaid, copyright enforcement crew,[305] it is likely that fewer small ISPs like Bayou will stay in business and that fewer people are going to enter the ISP business. Eventually, smaller ISPs will shut down and leave an oligarchy of large ISPs who control the Internet and who can afford to lose customers and track down infringers. Once small ISPs are shut down, people in areas not serviced by large ISPs may then lose access to the Internet. As discussed above, President Obama announced a plan to expand the availability of broadband Internet for people in rural areas. This will be impossible if there are no smaller ISPs to service these users.[306]

While most small ISPs will reject the graduated response plan as being prohibitively costly, it is possible that some small ISPs might enjoy some benefit from losing file-sharing customers. Some smaller ISPs might not mind losing file-sharing users who occupy large amounts of bandwidth or more bandwidth than non-

---

299 Greg Sandoval, *One ISP Says RIAA Must Pay for Piracy Protection*, CNET NEWS, Dec. 22, 2008, http://news.cnet.com/8301-1023_3-10127841-93.html?tag=mncol;txt.

300 *Id.*

301 *Id.*

302 *Id.*

303 *Id.*

304 *Id.* ("[E]ntertainment companies want Scroggin to simply wave goodbye to a customer who might have signed up for a three-year plan. At $40 per month, that customer is potentially worth $1,440 to Scroggin over the life of the plan.").

305 *See, e.g.*, *id.* ("[H]e's not a cop and he doesn't work for free.").

306 *See* Hesseldahl, *supra* note 239.

file-sharers.[307] Bandwidth use is measured by the size of the files shared.[308] When a lot of big files are shared, it causes congestion and slows down the flow of information.[309] If small ISPs are able to get rid of users who use excessive bandwidth, it might speed up their networks, and allow more users to share information quickly, without congestion.[310] At the same time, however, the cost of losing countless users, and of tracking down users based on the IP addresses, will most likely outweigh any benefits derived from shedding users who utilize excessive bandwidth. Therefore, the RIAA's graduated response plan is problematic because it places a heavy financial burden on smaller ISPs.

III. MUTUALLY BENEFICIAL ALTERNATIVES TO THE GRADUATED RESPONSE PLAN

The RIAA's graduated response plan is flawed because it deprives users of access to the Internet, while not necessarily solving the file-sharing problem. The RIAA should abandon its new graduated response anti-piracy initiative and replace it with a system that will decrease piracy by working with users rather than against them. The RIAA's earlier lawsuits were unpopular

---

[307] Some smaller and larger ISPs have instituted bandwidth limits to prevent people from downloading large files to speed up the flow of information on the server. *See* Andre Yoskowitz, *Small American ISP Adds Bandwidth Cap?*, AFTERDAWN.COM, Aug. 9, 2008, http://www.afterdawn.com/news/archive/15041.cfm; *see also* Announcement Regarding an Amendment to Our Acceptable Use Policy, Comcast.net Network Management Policy, http://www.comcast.net/terms/network/amendment/ (last visited July 7, 2009).

[308] A person who downloads 100 3MB songs will be using 300 MB of bandwidth. For an explanation of how bandwidth use is calculated, see Hoover Web Design, Bandwidth Explained, http://www.hooverwebdesign.com/templates/tutorials/tips/what-is-bandwidth.html (last visited Apr. 21, 2009).

[309] Todd Spangler, *Cox to Test Bandwidth-Throttling System*, MULTICHANNEL NEWS, Jan. 28, 2009, http://www.multichannel.com/article/162872-Cox_To_Test_Bandwidth_Throttling_System.php.

[310] In 2007, Comcast was accused of blocking BitTorrent applications in order to stop congestion. PETER ECKERSLEY ET AL., ELECTRONIC FRONTIER FOUND., PACKET FORGERY BY ISPS: A REPORT ON THE COMCAST AFFAIR 1 (2007), http://www.eff.org/files/eff_comcast_report2.pdf. The FCC opposed this practice in its Policy Statement. *See* FCC POLICY STATEMENT, *supra* note 230.

because they were seen as being one-sided and unfair,[311] attacking people who may have been often wrongfully accused.[312] If the RIAA were to cut off Internet access to people who depend on it, especially using the same faulty methods it used before, the general public may see this plan as being just as unfair as the earlier RIAA litigation campaign. Additionally, the RIAA's graduated response plan will undermine President Obama's initiative to make fast broadband Internet available to people in rural areas by giving the RIAA the ability to potentially cut off Internet access to some of these users.

Additionally, if the RIAA continues with this campaign, smaller ISPs may be forced to comply with the RIAA's demands because they will be afraid of being found liable for contributory infringement under the DMCA.[313] At the same time, they will be unable to undertake the financial burden of tracking down users and cutting off their service.[314] Internet access will be provided by a few major ISPs, who will be able to charge high prices for their services because they will not have any competition. At the same time, technologically savvy users who download programs like IPREDator[315] will continue to share files and avoid detection.[316]

This Note proposes that the RIAA abandon its method of deterring users from downloading files through fear of either litigation or of having their Internet access cut off. Instead, the RIAA should work with the ISPs and the users to create a system where the RIAA can profit from P2P file-sharing, for example by mimicking other popular music services, like iTunes and eMusic, or approaching the problem from a creative angle. Popular media downloading service iTunes,[317] one of many legal downloading

311 Press Release, FindLaw, FindLaw Survey Reveals RIAA Lawsuits Unpopular with Americans (June 29, 2004), http://company.findlaw.com/pr/2004/062904.music piracy.html.

312 *See* PIATEK ET AL., *supra* note 241 (discussing the University of Washington study that revealed faultiness in the RIAA's method to track down music pirates).

313 17 U.S.C. § 512(j) (2006).

314 *See supra* notes 299–306 and accompanying text.

315 *See* Horton, *supra* note 246.

316 *Id.* (discussing a method for users to hide their IP addresses).

317 Michael Rappa, Managing the Digital Enterprise, Case Study: iTunes Store (May 31, 2009), http://digitalenterprise.org/cases/itunes.html.

sites,[318] has built a customer base of people who might have previously illegally downloaded music, but who are now willing to pay for it.[319] iTunes and other file-sharing systems have also become popular with many of the copyright holders who the RIAA represents.[320] Subscription services, like eMusic, which allow users to download a number of songs for a flat fee every month,[321] have surged in popularity,[322] often capturing former Napster users.[323]

Another possible way for the RIAA to counteract illegal file-sharing is to embrace file-sharing as a means of selling music. In January 2009, the government of the Isle of Man[324] announced that it would take the subscription service concept further by creating a system where users can download an unlimited number of MP3s for a low rate.[325] Once the system goes into effect, Isle of Man residents will pay an additional $1.45 weekly tax on their Internet service, and as a result they will be able to download unlimited music.[326] The money collected will be sent to a special government agency who will then distribute it among copyright

[318] For a list of legal music downloading sites, see Campus Downloading, http://www.campusdownloading.com/legal.htm (last visited Apr. 21, 2009).

[319] *See, e.g.*, *Study: iTunes More Popular than Many P2P Sites*, CNET NEWS, June 7, 2009, http://news.cnet.com/Study-iTunes-more-popular-than-many-P2P-sites/2100-1027_3-5735493.html; *UK SURVEY: 54% of File-Sharers Buy Music on iTunes*, ZEROPAID, Feb. 26, 2009, http://www.zeropaid.com/news/10030/uk_survey_54_of_file sharers_buy_music_on_itunes (attributing the popularity of iTunes, at least in part, to fear of RIAA litigation).

[320] Brian Charlton, *Online Holdouts Give in as iTunes Popularity Surges*, LJ WORLD, Aug. 20, 2006, http://www2.ljworld.com/news/2006/aug/20/online_holdouts_give _itunes_popularity_surges.

[321] Jon Iverson, *EMusic's MP3 Subscription Service: All You Can Eat for $10*, STEREOPHILE, Oct. 22, 2000, http://www.stereophile.com/news/10877.

[322] Jefferson Graham, *EMusic's Pitch: Download Song—and Own It*, USA TODAY, July 30, 2006, at 3B.

[323] Jari Ketola, *EMusic Offers Free MP3s to Lure Napster Users*, AFTERDAWN.COM, Mar. 12, 2001, http://www.afterdawn.com/news/archive/1896.cfm.

[324] The Isle of Man is a small island in the Irish Sea and is a country independent of the U.K. and Ireland. Isle of Man Guide, Frequently Asked Questions, http://www. iomguide.com/faq.php (last visited July 6, 2009).

[325] Eric Pfanner, *A Fix for Music Piracy: Tack a Fee on Broadband*, N.Y. TIMES, Jan. 26, 2009, at B4.

[326] Michael Seaver, *Across Irish Sea: Two Bold Tactics Against Music Piracy*, CHRISTIAN SCI. MONITOR, Feb. 4, 2009, http://features.csmonitor.com/innovation/2009/02 /04/across-irish-sea-two-bold-tactics-against-music-piracy.

holders.[327] The ISPs will track how often a file is downloaded and the copyright holders will be paid accordingly.[328] As a rationale for this new system, the Director of Inward Investment for the Isle of Man pointed out that, so far, none of the other methods used by the RIAA have worked to raise record sales or stop piracy.[329]

Although, unlike the Isle of Man, the United States Government cannot force the RIAA and the ISPs to enter into such an agreement, the RIAA should consider working with the ISPs to implement something like this system.[330] If a similar plan were implemented in the United States, the RIAA would no longer have to track *who* is downloading the music, but instead, just *what* music is being downloaded through which ISP. Rather than punishing users who share files via file-sharing services like Limewire, the RIAA could turn a profit.[331]

Additionally, unlike previous methods of hunting down file-sharers, this method would be less costly for the ISPs. Similar to the Isle of Man's solution, the RIAA could track the files being downloaded on specific ISPs and work out payment accordingly. On the Isle of Man, ISPs will be required to "install special hardware that monitors network/P2P traffic for shared music files, offering proportional 'compensation' for appropriate artists. The providers themselves would also get a cut of any revenue."[332] ISPs would no longer be responsible for tracking down users and serving them subpoenas or cutting off their Internet service, but would rather be able to profit from their file-sharing.

---

[327] Pfanner, *supra* note 325.

[328] *Id.*

[329] *Id.*

[330] Ideally the U.S. government could get involved and compel the ISPs and the RIAA to work together on a project like this, but that could also raise due process concerns under the Fifth Amendment. In the Isle of Man, there is no constitutional provision analogous to our Fifth Amendment, so this is not an issue.

[331] Currently, the RIAA tracks file-sharers in part by noting how many of the copyright holder's files are available on services like Limewire. *See* Catherine Rampell, *How It Does It: The RIAA Explains How It Catches Alleged Music Pirates*, CHRON. HIGHER EDUC., May 13, 2008, http://chronicle.com/article/How-It-Does-It-The-RIAA/786/.

[332] Mark Jackson, *Isle of Man Details Legal P2P Music Download Service*, ISPREVIEW, Feb. 27, 2009, http://www.ispreview.co.uk/news/EkFVZklyyySFOYVMls.html.

In the U.K., Virgin Media, an ISP, and Universal Music Group, a copyright holder, devised a similar subscription service plan.[333] In mid-June 2009, the companies announced a joint venture whereby Virgin Media customers would pay a flat subscription fee in exchange for unlimited downloads from the Universal Catalogue, with the hope that other record companies would eventually also join.[334] In exchange for access to Universal's catalogue, Virgin has promised to implement a graduated response plan under which people caught stealing music multiple times would lose Internet access.[335] This plan, therefore, would allow users to download MP3s without fear of reprisal by copyright holders, as long as customers pay the required subscription fee.[336]

An innovative file-sharing plan is also in the works for college campuses in the United States. In December 2008, before the Isle of Man began its subscription service, and well before the Virgin/Universal deal, Jim Griffith, an innovator in the field of digital music[337] announced that he would begin working on a subscription service between copyright holders and universities.[338] Through this service, called Choruss, universities may charge an additional tuition fee that will include unlimited music downloads.[339] Unlike the state-based Isle of Man service, this one would be run entirely through private actors.[340] In exchange for collecting this fee, the copyright holders will agree not to sue students for illegal file-sharing.[341] Although this system will not

---

333 *Anti-Piracy Music Deal for Virgin*, BBC NEWS, June 15, 2009, http://news.bbc.co.uk/2/hi/8100394.stm.

334 *Id.*

335 *Id.*

336 *Id.*

337 *See* Jim Griffin—Biography, http://www.onehouse.com/bio.htm (last visited Sept. 8, 2009).

338 Eliot Van Buskirk, *Three Major Record Labels Join the 'Choruss,'* WIRED, Dec. 8, 2008, http://blog.wired.com/business/2008/12/warner-music-gr.html [hereinafter Van Buskirk, *Choruss*].

339 *Id.* This fee has been estimated at $5 per month. *Id.*

340 *Id.*

341 Sam Gustin, *Warner/Griffin "Music Tax" Needs Public Debate*, PORTFOLIO MAG., Dec. 8, 2008, http://www.portfolio.com/views/blogs/the-tech-observer/2008/12/08/warnergriffin-music-tax-needs-public-debate. Even though the RIAA has officially announced that it has ceased its litigation campaign, it has continued to sue individuals

create compulsory licenses,[342] it will end prosecution for an already common activity.[343] Furthermore, this program could possibly pave the way towards a similar agreement between ISPs and users.[344]

Choruss hopes to be more successful than Ruckus,[345] a subscription service launched on college campuses in 2003.[346] Under that service, students paid $15 per semester for access to countless music and video files.[347] Choruss has a better chance for success because, unlike Ruckus,[348] it allows users to transfer downloaded music onto MP3 players, or burn them onto CDs.[349] Ruckus shut down on February 6, 2009.[350]

Indeed, college campuses should be the testing ground for new approaches to file-sharing. They have often embraced new technology before such technology was embraced by the

for file-sharing. Jared Moya, *RIAA STILL Suing File-Sharers*, ZEROPAID, Mar. 6, 2009, http://www.zeropaid.com/news/10044/riaa_still_suing_filesharer.

342 A compulsory license permits a user to obtain a license to file for a fee. Radio stations use compulsory licenses to play music on the air. Fred von Lohmann, *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing*, ELECTRONIC FRONTIER FOUND., Apr. 30, 2008, at 2, http://www.eff.org/files/eff-a-better-way-forward.pdf.

343 *See id.* at 1–2.

344 Van Buskirk, *Choruss*, *supra* note 338. A Wired.com poll found that 70% of their readers would pay $10 a month for legal, unlimited music downloads. *Id.* The Electronic Frontier Foundation, who has been at odds with the RIAA for years, has even endorsed this plan. Fred von Lohmann, *Labels Open to Collective Licensing on Campus*, ELECTRONIC FRONTIER FOUND., Dec. 10, 2008, http://www.eff.org/deeplinks/2008/12/labels-open-collective-licensing-campus [hereinafter von Lohmann, *Licensing*]. *But see* Mike Masnick, *Choruss' Music Tax Plan: Bait-And-Switch*, TECH DIRT, Mar. 18, 2009, http://www.techdirt.com/articles/20090318/0304264167.shtml (discussing potential problems with Choruss).

345 Sara Tracey, *Ruckus Music Site Goes Under*, DAILY ORANGE, Feb. 11, 2009, http://media.www.dailyorange.com/media/storage/paper522/news/2009/02/11/News/Ruckus.Music.Site.Goes.Under-3623854.shtml.

346 *Id.*

347 Louis Hau, *Ruckus Offers Students Free Music*, FORBES.COM, Jan. 22, 2007, http://www.forbes.com/2007/01/21/free-music-downloads-tech-mediacx_lh_0121ruckus.html.

348 Ruckus users were not allowed to transfer downloaded files to their iPods or burn them onto CDs. *Id.* (noting that Ruckus users could only download music to their PCs).

349 *See* von Lohmann, *Licensing*, *supra* note 344.

350 *See* Tracey, *supra* note 345.

mainstream.[351] For example, colleges offered high speed Internet to students well before such a service was common in most homes.[352] Colleges often included a mandatory technology fee for students, to cover dorm room Internet access.[353] College students also were the first users to embrace Napster[354] and other illegal file-sharing services before they became ubiquitous.[355] The only way to know definitively if this subscription service will work in the real world is to test it out in the place where illegal file-sharing initially began.

CONCLUSION

P2P file-sharing has had an undeniable influence on the Internet since its inception.[356] Through Usenet, and other similar P2P systems, users were able to share files directly with each other.[357] As the costs of purchasing music grew, users began to create file-sharing systems so that they could share music for free.[358] Although the RIAA has tried in a number of ways to stop illegal file-sharing, no single method has substantially decreased file-sharing and simultaneously raised record sales.[359] The RIAA's constant litigation against suspected file-sharers only damaged its public image.[360] Further, its new practice of working with the ISPs to cut off Internet access to repeated infringers will only punish people who are possibly innocent, while raising troubling due process and public policy problems and generating a lukewarm response (at best) from the public, the international community,

---

351 *See supra* note 23 and accompanying text.

352 In the late 1990s, high speed Internet was common on college campuses, well before it was common in households. PEW INTERNET AND AMERICAN LIFE PROJECT, THE INTERNET GOES TO COLLEGE 8 (2002).

353 *See, e.g.*, Seth Owens, *An Arm and a Leg for Dorm WiFi*, Dec. 7, 2006, DAILY TEXAN, http://www.dailytexanonline.com/opinion/an-arm-and-a-leg-fordormwifi1.962597.

354 *See supra* note 39 and accompanying text.

355 *See* Timeline, *supra* note 21.

356 *See supra* notes 10–19 and accompanying text.

357 *See* Segan, *supra* note 14.

358 *See* discussion *supra* Part I.A.

359 *See supra* note 168 and accompanying text.

360 *See supra* notes 164–67 and accompanying text.

and even the ISPs themselves.[361] The FCC, Congress, and President Obama have emphasized the importance of Internet access for users and the value of a free and open Internet.[362] Moreover, although graduated response systems like the RIAA's proposed plan have been implemented in parts of Europe, they have been condemned by the European Union.[363]

If the RIAA were to work with the ISPs to create compulsory licenses or covenants not to sue, this would be beneficial for both the users and the RIAA.[364] The RIAA would be able to counteract its falling record sales by collecting money from shared files. ISPs would no longer have the burden of tracking down users and cutting off their Internet. Smaller ISPs might thrive and create competition to lower prices for Internet access. Most importantly, users would no longer have to fear constant, and often misdirected, litigation and punishment.

361 *See* discussion *supra* Part II.

362 *See supra* notes 230–39 and accompanying text.

363 *See supra* notes 260–64 and accompanying text.

364 *See supra* note 342 and accompanying text.