

PROTECTING CONSUMERS FROM THEMSELVES: ALLEVIATING THE MARKET INEQUALITIES CREATED BY ONLINE COPYRIGHT INFRINGEMENT IN THE ENTERTAINMENT INDUSTRY

Chris is a twenty-four year old security director for a major trucking corporation. One day, Chris borrows one of the company's trucks, and drives into town. One hundred of his closest friends follow him. Chris pulls up to Best Buy, where he aligns the loading ramp with the entrance. Chris and his friends all grab shopping carts, and they proceed to load their carts with every CD and DVD that they can get their hands on. After a couple of hours of shopping, Chris and his friends have loaded their carts with over 30,000 CDs and DVDs. The total retail value of their selections exceeds \$500,000.00. They walk to the cash register, where a special manager is waiting to process the huge transaction. Chris shows the manager a list and says, "Somebody somewhere in the world has already bought one copy of everything we have today. Therefore, we don't have to pay anything." The manager looks at the list, and confirms that somebody, somewhere in the world, in fact, has purchased one copy of everything in the carts. He smiles, and motions them toward the door, but he demands no payment—ever.

As they leave, the manager says, "Thanks a lot guys. Come back and see us." Chris and his friends exchange smiles, and then they load the truck with the merchandise. They repeat this process at Circuit City, Blockbuster, and every other music and movie store in the city.

While this story seems ridiculous, it exemplifies exactly what some consumers expect when they go online. No one would expect to take over \$500,000.00 of goods from a store without paying, while the manager smiles about it. However, consumers expect this same practice when they use digital file sharing software. Consumers use this software to strip the exclusive rights of reproduction and distribution from copyright owners.

While notable scholars have written extensively about digital intellectual property protection, their efforts fall short of creating a concrete, definite solution for copyright owners. Excellent as

their analyses and conclusions may be, they carry little or no weight outside of the classroom. Although academia has substantially benefited from these works, copyright owners are left with the task of developing concrete solutions.

This article focuses on solving the problem of digital copyright infringement. Part I presents a continuum representation of copyright protection. Part II discusses limited liability for Internet service providers. Part III analyzes the music industry's struggle against peer-to-peer file sharing systems. Part IV discusses movement along the continuum and its effects. Part V analyzes the need for amending the Copyright Act. Part VI presents suggested legislation as well as the suggested plan for solving the problem of digital copyright infringement. Previous literary efforts against digital copyright infringement have erroneously focused on regaining copyright owners' exclusive rights to reproduction and distribution. This article presents the needed solution by presenting a new method of thinking: the true goal for copyright owners is to regain the *lost value* of their reproductive and distributive rights. Using this dynamic approach, this article picks up where previous scholars have left off, and provides the concrete, definite solution that copyright owners so desperately seek. Ironically, as the solution here demonstrates, the only way to regain the lost value of copyright owners' reproductive and distributive rights is to protect consumers from themselves.

I. CONTINUUM REPRESENTATION OF THE BUNDLE OF RIGHTS

Ownership of a copyright does not vest in the owner an absolute right of ownership; instead, a copyright is a bundle of rights.¹ The question then becomes: how much of the bundle does the copyright owner receive? Conceptually, the bundle can be easily demonstrated on a rather basic continuum:

A _____ B

On this continuum, Point A represents the point where the entire bundle of rights resides in the commons; i.e. copyright owners own nothing. Point B represents the point where the entire bundle of rights resides in the copyright owner. Consequently, the major question regarding copyright protection is how far along the continuum to the right does the law exist?

¹ 17 U.S.C. § 106 (2000).

The laws of the United States have typically favored a greater portion of the bundle of rights in copyright owners. Under the Copyright Act, copyright owners have exclusive rights to reproduction, derivative works, distribution, public display, and public performance.² Anyone who violates these exclusive rights commits direct infringement.³ With regard to online entities, contributory liability will attach if a party knows, or reasonably should know, of infringing activities occurring on the party's website, and the party materially contributes to the infringement.⁴ Vicarious liability will attach if a party has the right and ability to control infringing activities.⁵ In addition to direct infringement, contributory liability, and vicarious liability, users are afforded a substantial number of fair use defenses.⁶ The aim of this article, however, is not to analyze the vast intricacies of copyright law.

Thus, a general summary of the Copyright Act is sufficient.⁷ Therefore, the continuum for U.S. law is the following:

A _____ C _____ B

Here, Point C represents the point where U.S. law distributes the bundle of rights. U.S. law favors a greater bundle of the rights to copyright owners, and Point C lies right of center on the continuum. The distance from Point A to Point C represents the exclusive rights vested in copyright owners by the law. The distance from Point C to Point B represents the fair use provisions that the law allots to consumers.

Point C is the desired scope of copyright protection. It affords copyright owners a large portion of the bundle of rights, enabling them to significantly profit from their works. This profitability enhances copyright owners' incentives to create new works. At the same time, a substantial minority of the bundle of rights

² *Id.*

³ 17 U.S.C. § 501 (2000).

⁴ Howard P. Goldberg, Note, *A Proposal for an International Licensing Body to Combat File Sharing and Digital Copyright Infringement*, 8 B.U. J. SCI. & TECH. L. 272, 282 (2002) (noting that the standard is one of reasonableness).

⁵ *Id.*

⁶ 17 U.S.C. § 107 (2000) (identifying limitations on exclusive rights, and the factors to be considered in determining whether the use of a copyrighted work is a fair use); *see also* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 433–42 (1984) (holding that the manufacturer's sale of home videotaping recorders was not contributory infringement because, *inter alia*, the recorders were capable of many non-infringing uses).

⁷ *See generally* Jon M. Garon, *Entertainment Law*, 76 TUL. L. REV. 559, 585–611 (2002) (providing an excellent analysis of the evolution of U.S. copyright law).

resides in the commons, and provides fair uses of copyrighted materials. From an economic perspective, Point C represents the equilibrium point of *quality* of copyrighted works. Consumers demand a certain amount of copyrighted works at a certain quality. Consumers will pay a certain price for the copyrighted works that they demand. Likewise, copyright owners create and provide a certain number of works at a certain quality. Copyright owners expect a certain amount of revenue for providing the works. Consequently, the continuum represents a basic supply and demand schedule.

Point C is the equilibrium point where the supply and demand schedules intersect. Through 200 years of market forces and government regulation, the copyrighted material market naturally corrected itself to Point C. At Point C, consumers receive the maximum quality of works for the minimum price that they wish to pay, and they enjoy significant amounts of fair use. Conversely, copyright owners receive maximum compensation for the minimal effort that they wish to assert, and they enjoy government protection of their exclusive rights. Movement of Point C, like movement of price on a supply and demand schedule, creates deadweight loss. The deadweight loss can come in a number of guises: higher prices for less quality, more quality for less supply, and increased transactional costs, to name a few. As discussed below, copyright owners are able to, and will, pass on this deadweight loss to consumers.

No point on the continuum, except for A and B, remains static. The amount of copyright protection granted to owners moves along the continuum in response to various forces. Thus, the Internet presents a major problem for copyright owners: the Internet is an extremely effective tool for consumers to force Point C further left along the continuum.

A. *Pressure on the Continuum From Public Norms*

As with anything else in a market economy, one of the key forces affecting the amount of copyright protection afforded to copyright owners is the power of the consumer. Consumers, synonymous with the public, act in accordance with public norms.⁸ Public norms are rooted in rather humorous concepts. For exam-

⁸ See LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 14–17, 85–88 (1999) (providing a hypothetical example of how the Internet allows individuals to escape the norms of “real-space society” in cyberspace).

ple, Professor Robert Chapman has questioned the exuberance that students demonstrate when classes are cancelled.⁹ He comments that education is the only market in which consumers are delighted to receive less value for the same money. He explains further with a hypothetical: consider the amount of money spent for tuition here. The service provided is education; yet, once a professor cancels a few classes, nearly 10% of that service is lost. However, students are overjoyed to pay the same money for 10% less of a product. If Coca-Cola offered to sell you 10% less Coke for the same price, would you be delighted to accept?

While Professor Chapman's observation may be a little extreme (everyone loves a break from class), it is based on the humorous roots of public norms. The norms, as prescribed by consumers in regard to copyrighted materials, can be easily summarized: we want full access to everything for free. Moreover, consumers *expect* free access to everything on the Internet. Why is this so humorous? In the "real world", we all follow the maxim that there is no such thing as a free lunch. We know that we have to pay something for everything. We do not expect to take anything we want without a second thought toward actually paying for it (some consumers do, but they are arrested for theft). However, when we go online, we suddenly expect to take whatever we want absolutely free.

In addition to consumers, a class of the public exists (referred to throughout as "Technology Providers"), who provides consumers with the necessary technology to infringe copyrighted works. Technology Providers share the same beliefs as consumers that everything should be free, but they also possess the requisite skills to make everything available to consumers. Technology Providers are ready, willing, and able to crack protective encryptions, to design software to easily copy and distribute copyrighted works, and to make these technologies available to millions of users at a nominal cost. The main problem with Technology Providers is that they are not motivated by financial gains. Technology Providers derive pleasure simply from beating protective systems. Their primary goal is to deliver their technologies to consumers absolutely free. Because the Internet allows Technology

⁹ Interview with Robert Chapman, Visiting Professor, Willamette University School of Law (June 11, 2002). Professor Chapman has a L.L.M., International Business Law, University of London; a L.L.M., Tax, University of Florida; a J.D., Cumberland Law School of Samford University; and, a B.A., University of West Florida.

Providers to distribute their technologies to millions of consumers at a nominal cost, Technology Providers present an inherently dangerous threat to copyright owners.

Consumers and Technology Providers want to force Point C on the continuum to Point A, as they desire the entire bundle of rights to reside in the commons. Therefore, the desires of consumers and Technology Providers add a component to the continuum, showing forces pulling on Point C that look like this:

A _____ C _____ B

←←←←Consumers

←←Technology Providers

The concept of consumers wanting the entire bundle of rights to reside in the commons is not new. The Internet now serves as a powerful tool for consumers and Technology Providers to accomplish their goals, as demonstrated below with Internet service providers and peer-to-peer file sharing networks.

B. Pressure on the Continuum from Copyright Owners and the Government

Copyright owners naturally want the entire bundle of rights. Copyright owners want Point C to sit right on Point B. They want the absolute right to their copyrighted works, and they want absolute protection from the government. Along with copyright owners, although to a much lesser extent, the government desires a majority of the bundle of rights to reside in copyright owners. The government wants Point C to remain static (i.e., maintain the equilibrium point), but it will have to place rightward pressures on Point C to counter the leftward pressures from consumers and Technology Providers. In other words, the government will have to place rightward pressures on Point C to keep Point C in the same place. The danger to copyright owners is twofold: first, consumers greatly outnumber copyright owners, so the power of the consumer force is greater than the power of the copyright owner force. Second, while the government is aligned with the interests of copyright owners, the government falls short of being a true ally. Adding these forces, the complete continuum is clear:

A _____ C _____ B

←←←←Consumers

←←Technology Providers

Copyright owners→→

Government→

As can be seen from the continuum, the forces exerted by consumers and Technology Providers greatly outweigh the forces exerted by copyright owners and the government. Therefore, the net effect of these forces is to pull point C to the left along the continuum. In other words, the value of rights in a copyright shift from copyright owners to the commons.

II. INCREASED PROTECTION FOR INTERNET SERVICE PROVIDERS

An Internet service provider ("ISP") is a company or corporation that provides users with access to connect to the Internet.¹⁰ ISPs serve as gatekeepers for individual users to the vast number of businesses and institutions on the Internet.¹¹ The number of Internet users worldwide is growing at a substantial rate.¹² From 1990 to 1997, the number of Internet users grew from one million to seventy million, and the numbers are progressively increasing.¹³ The growth rate is so incredible that it is estimated that international commerce on the Internet may surpass three trillion dollars by 2006.¹⁴

In the face of this tremendous growth, courts are engaged in a burdensome struggle to apply traditional copyright law to the digital world.¹⁵ Digital technology creates confusion in what was once basic copyright law.¹⁶ Now it is often difficult to ascertain where and when a copyright infringement has occurred, and exactly who has committed the infringement.¹⁷ Due to the relative anonymity of Internet users, detecting individual infringers will be so costly as to not be practical.¹⁸ Copyright law was devel-

¹⁰ V.K. Unni, *Internet Service Provider's Liability for Copyright Infringement—How to Clear the MISTY INDIAN PERSPECTIVE*, 8 RICH. J.L. & TECH. 13, ¶ 5 (2001) (defining the function of an ISP), at <http://law.richmond.edu/jolt/v8i2/article1.html> (last visited Apr. 6, 2003).

¹¹ See Laura Rybka, *ALS Scan, Inc. v. Remarq Communities, Inc.: Notice and ISPs' Liability for Third Party Copyright Infringement*, 11 DEPAUL-LCA J. ART & ENT. L. 479, 483 (2001) (defining "service provider," as characterized by the Digital Millennium Copyright Act (DMCA)).

¹² Unni, *supra* note 10, ¶ 6.

¹³ *Id.* ¶ 3.

¹⁴ *Id.* ¶ 6.

¹⁵ Rybka, *supra* note 11, at 479.

¹⁶ Simon Fitzpatrick, *Copyright Imbalance: U.S. and Australian Responses to the WIPO Digital Copyright Treaty*, E.I.P.R. 2002, 22(5), 214, 217, 220 (noting that the international nature of the Internet raises potential difficulties in protecting copyrights).

¹⁷ See *id.* at 220.

¹⁸ Assaf Hamdani, *Who's Liable for Cyberwrongs?*, 87 CORNELL L. REV. 901, 910 (2002).

oped for print media, and was expanded for performances and broadcasts.¹⁹ Digital technology, specifically the advent of the Internet as the new dominant medium, presents serious problems for balancing the rights of copyright owners and the limitations of copyrights.²⁰

Congress passed the Digital Millennium Copyright Act (DMCA) in 1998 to set a standard for copyright protection on the Internet.²¹ The DMCA serves as a compromise between ISPs and copyright owners to promote the technological advances of ISPs, while at the same time providing increased protection for copyright owners over the Internet.²² The DMCA protects ISPs from liability for unknowingly transmitting or storing copyrighted material.²³ The DMCA provides safe harbors or immunities to ISPs for infringing actions from the ISPs' users.²⁴ In other words, ISPs are still liable for their direct infringement, but they cannot be held liable for contributory or vicarious infringement.²⁵ The safe harbors apply in four circumstances:

- (1) The ISP acts merely as a conduit, unknowingly transferring infringing materials;
- (2) The ISP temporarily stores infringing materials for the users' convenience;
- (3) The ISP acts as storage for infringing material, except when "the ISP knows or should know, or financially benefits from, the infringing material"; or
- (4) The ISP uses information location tools ("ILTs"), such as hyperlinks, to find infringing materials unless the ISP has actual knowledge or received notice of the infringing materials.²⁶

Furthermore, the DMCA provides a notice and takedown procedure for ISPs to remove infringing materials once the ISP acquires

¹⁹ Fitzpatrick, *supra* note 16, at 217.

²⁰ *Id.*

²¹ John T. Soma & Natalie A. Norman, *International Take-Down Policy: A Proposal for the W.T.O. and W.I.P.O. to Establish International Copyright Guidelines for Internet Service Providers*, 22 HASTINGS COMM. & ENT. L.J. 391, 411 (2000).

²² David Balaban, Note, *The Battle of the Music Industry: The Distribution of Audio and Video Works via the Internet, Music and More*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 235, 258–59 (2001).

²³ Rybka, *supra* note 11, at 483.

²⁴ Joseph A. Sifferd, Note, *The Peer-to-Peer Revolution: A Post-Napster Analysis of the Rapidly Developing File-Sharing Technology*, 4 VAND. J. ENT. L. & PRAC. 93, 97 (2002).

²⁵ *Id.*

²⁶ *Id.* (citing 17 U.S.C. §§ 512(a)–(d) (2000)).

knowledge of them.²⁷ “On notification by a rightholder of infringing material or activity, an ISP must expeditiously remove or disable access to the infringing material or activity.”²⁸

Clearly, the DMCA prescribes cumbersome measures to secure contributory or vicarious copyright infringement against an ISP.²⁹ Rather than a full-scale exemption from liability, the DMCA serves, at best, as a limitation on liability for ISPs.³⁰ As a matter of policy, the DMCA refuses to hold ISPs responsible for the colossal amount of data flowing through its network.³¹ However, when the ISP selects content or acquires knowledge of infringements, liability may be assessed.³² By doing so, the DMCA seeks to guard both the rights of copyright owners and ISPs.³³ How effective is the DMCA in striking a balance between the rights of content owners and the interests of ISPs? Although still in its infancy, it appears that the DMCA has developed the appropriate solution. In the copyright owner/copyright infringer equation, the ISP is the “middleman.” Infringers accomplish their tasks using the forum created by the ISP. While ISPs may provide infringers with access to infringe copyrighted works, the goal of an ISP is not to infringe copyrighted works. The goal of an ISP is to provide Internet access and to provide the millions of Internet users with an adequate forum for effective communication.³⁴ In this sense, ISPs are not acting to attack copyright owners. By recognizing this dynamic, the DMCA does not attempt to pit copyright owners in an ongoing battle against ISPs. Rather, copyright owners work

²⁷ Victoria McEvedy, *The DMCA and the Ecommerce Directive*, 2002 EUR. INTELL. PROP. REV. 24(2), 65, 68 (noting that the “notice and takedown” procedure “will be primarily significant to the user storage harbour [sic]”).

²⁸ *Id.*; see also 17 U.S.C. §§ 512(b)(2)(E), (c)(1)(C), (d)(3) (2000).

²⁹ See Unni, *supra* note 10, ¶ 26 (noting the difficulty in finding an ISP liable for contributory infringement).

³⁰ *Id.* ¶ 25 (stating that the DMCA takes “the form of a statutory change in the remedies available to a plaintiff”).

³¹ Soma & Norman, *supra* note 21, at 415.

³² *Id.*

³³ *Id.* at 411.

³⁴ See, e.g., Haran Craig Rashes, *The Impact of Telecommunication Competition and the Telecommunications Act of 1996 on Internet Service Providers*, 16 TEMP. ENVTL. L. & TECH. J. 49, 56–58 (1997) (noting that ISPs offer their users a number of services, including, for example, “electronic mail, file transfers, Usenet news, Internet Relay Chat (“IRC”), and the ability to browse and publish on the World Wide Web”).

with ISPs to identify infringers and to remove material that is infringing copyrighted works.³⁵

When the very basics of intellectual property protection are taught in undergraduate curricula, students are taught the maxim that a copyright is only worth the owner's legal means of protecting it. The DMCA continues to place this burden on copyright owners. Copyright owners have the initial burden of identifying infringing materials and then notifying the ISP of the violation.³⁶ If ISPs had this burden, the creativity of services offered would be greatly hindered, and the cost of providing Internet access would be greatly increased.³⁷ These costs would be passed on to all Internet users, for ISPs would certainly charge substantially greater fees to users for Internet access. ISPs would have to charge greater fees to cover potential liability.

Copyright owners should be wary of these emerging standards. The Internet provides infringers with new tools to easily infringe copyrighted materials.³⁸ Copyright owners will be responsible for identifying infringing materials.³⁹ Copyright owners will have to give ISPs notice and take an active role in the removal of infringing materials.⁴⁰ Consequently, along with the protections afforded to copyright owners, these owners will also have the increased responsibility of policing their rights on the Internet.

Copyright owners must realize that the emerging policy is to favor increased incentives for ISPs to make technological

³⁵ See Susan Hong, *The Digital Millennium Copyright Act and Protecting Individual Creative Rights: A Proposal for On-line Copyright Arbitration*, 2 CARDOZO ONLINE J. CONFLICT RESOL. 110, 111–12 (2000) (stating that the DMCA offers liability protection only if the ISPs agree to terminate infringers and to remove or disable access to allegedly infringing materials), at http://www.cardozo.yu.edu/cojcr/final_site/articles_notes/vol2_an/hong_OV.pdf (last visited Apr. 6, 2003).

³⁶ *Id.* at 113.

³⁷ See *id.* at 116 (noting that ISPs are not required to conduct a fact-intensive inquiry to determine whether copyright infringement has occurred, as it would present an excessive economic burden for the providers); see also Giovanna Fessenden, *Peer-to-Peer Technology: Analysis of Contributory Infringement and Fair Use*, 42 IDEA 391, 396 (2002) (stating that Congress enacted the safe harbor provisions to “increase Internet competition and efficiency because qualifying providers would be able to operate with reasonably low transaction costs”).

³⁸ Jennifer L. Kostyu, Comment, *Copyright Infringement on the Internet: Determining the Liability of Internet Service Providers*, 48 CATH. U. L. REV. 1237, 1257–61 (1999) (noting that the “dramatic evolution of the Internet” has created “new claims of copyright infringement against ISPs”).

³⁹ Hong, *supra* note 35, at 113.

⁴⁰ See *id.*

advances in their services provided.⁴¹ This policy will be accomplished by contracting contributory liability for ISPs. The next battle for copyright owners is against technologies designed primarily for the purpose of copyright infringement, such as peer-to-peer file sharing systems. Against these technologies, the policy will shift to favor increased copyright protection. This policy will be accomplished by expanding contributory liability against these new technologies.

III. THE MUSIC INDUSTRY'S STRUGGLE AGAINST PEER-TO-PEER FILE SHARING SYSTEMS

A peer-to-peer network, or file sharing system ("P2P"), provides a revolutionary means for copyright infringers to achieve their tasks.⁴² By digitizing copyrighted works, these works can be distributed across the globe via the Internet.⁴³ Digital contents, primarily music on compact discs ("CDs") and movies on digital versatile discs ("DVDs"), are being widely distributed over the Internet by utilizing downloading or streaming methods.⁴⁴

Music can easily be converted from a CD to individual computer file ("MP3") format.⁴⁵ An Internet user can obtain the applicable software for free from a number of sources, and can then use the software to copy music from the CD to MP3 format.⁴⁶ MP3s are individual computer files with compressed recordings of music, which require minimal memory on a computer.⁴⁷ Once in MP3 format, the music can easily be uploaded onto Napster, which is available on the Internet.⁴⁸ Once on the Internet, the MP3 can be downloaded by millions of users with a negligible loss in sound

⁴¹ See *id.* at 111–12.

⁴² See Hisanari Harry Tanaka, *Post-Napster: Peer-to-Peer File Sharing Systems: Current and Future Issues on Secondary Liability Under Copyright Laws in the United States and Japan*, 22 LOY. L.A. ENT. L. REV. 37, 38 (2001) (noting that P2P networks permit direct infringement on an individual level, as these networks allow direct file exchanges between individual users).

⁴³ *Id.* at 40, 69 (recognizing that there has been little discourse about how to manage the pervasive distribution of digitized copyrighted works over the Internet using peer-to-peer networks).

⁴⁴ *Id.* at 40; see also *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 901 (N.D. Cal. 2000) (describing how users can download music from the Internet using MP3 technology).

⁴⁵ Balaban, *supra* note 22, at 244.

⁴⁶ *Id.*

⁴⁷ *Id.* at 242.

⁴⁸ *Id.* at 244.

quality.⁴⁹ In essence, this process replaces millions of sales with just one purchase—the initial CD.

Typically, to distribute MP3 files, “Internet users must upload contents to a server.”⁵⁰ The server stores the contents, and allows users to browse or download the contents by means of File Transfer Protocol (“FTP”) or Hypertext Transfer Protocol (“HTTP”).⁵¹ However, P2P systems allow “one Internet user to directly access another individual user’s hard drive and download any files that are offered for sharing without relying on a particular central server for storage.”⁵² Unlike client-server designs, where a few computers function primarily as servers, a P2P system allots each individual computer equivalent capabilities and responsibilities by maintaining both distribution functions and receiving functions.⁵³

A. *P2Ps in the United States: A & M Records, Inc. v. Napster, Inc.*⁵⁴

Napster operated a P2P that allowed users to share and trade MP3 files at no cost.⁵⁵ MP3 files were essential to Napster’s success; earlier digital music files were so large that their transfer over the Internet was cumbersome and ineffective.⁵⁶ Under Napster’s system, a user would send a request to the Napster server, and the server would link the searching computer with the computer holding the desired file.⁵⁷ After the two computers linked, the desired file or files would be directly downloaded from the host computer to the requesting computer.⁵⁸ In essence, the P2P system designed by Napster allowed users to: “(1) make MP3 music files stored on individual computer hard drives available for copy-

⁴⁹ *Id.* at 244–45 (indicating that unlike tapes or photocopy recordings, MP3 sound recordings are almost the same quality as the original).

⁵⁰ Tanaka, *supra* note 42, at 40.

⁵¹ *Id.* at 40–41 & n.32.

⁵² *Id.* at 41.

⁵³ *Id.* (noting that the P2P system has become viable for many users due to the rapid advancements in broadband and high-speed Internet connections).

⁵⁴ 239 F.3d 1004, 1029 (9th Cir. 2001).

⁵⁵ See Sifferd, *supra* note 24, at 93 (explaining that users linked to MusicShare stored music on their hard drives and obtained new music from other connected users).

⁵⁶ *Id.*; see also Alfred C. Yen, *A Preliminary Economic Analysis of Napster: Internet Technology, Copyright Liability, and the Possibility of Coasean Bargaining*, 26 U. DAYTON L. REV. 247, 254 (2001).

⁵⁷ Sifferd, *supra* note 24, at 93.

⁵⁸ *Id.*

ing by other Napster users; (2) search for MP3 music files stored on other users' computers; and (3) transfer exact copies of the contents . . . from one computer to another via the Internet."⁵⁹

The design of the Napster system creates a huge problem in implicating liability to Napster. Although all file information is sent to an immediate server, "the copyrighted works are never copied or transferred to the Napster server."⁶⁰ Because Napster's P2P technology allows "direct file sharing between individual users without relying on a central server" for the actual infringement, "the direct infringement occurs at the level of the individual."⁶¹ Although Napster provides individuals with the effective means to make digital duplicates of copyrighted works, Napster itself never actually infringes the copyrighted works.⁶² None of Napster's actions technically constitute a direct infringement under the Copyright Act because the Napster server never actually copies or distributes MP3 files.⁶³

By delivering copied music to users, Napster strips artists of compensation for their works since users are highly unlikely to purchase an album after receiving a free copy.⁶⁴ It is estimated that up to 750 million tracks were illegally downloaded in 1999, and that the music industry consistently sustains annual losses of \$300 million due to piracy.⁶⁵ Also, it is estimated that if it had not been hampered by an onslaught of civil suits, Napster alone could have had some "75 million users by the end of 2000."⁶⁶ Napster's unbridled success resides in the fact that musical recordings exhibit the two economic traits of non-excludability and non-rivalrous consumption.⁶⁷ Non-excludability means that once a recording is distributed, those who own a copy can easily duplicate it and send it to others.⁶⁸ Non-rivalrous competition means that

⁵⁹ Tanaka, *supra* note 42, at 42.

⁶⁰ *Id.* at 42.

⁶¹ *Id.* at 38.

⁶² *See* Yen, *supra* note 56, at 256.

⁶³ *See id.* (noting that although the "responsibility for improper use . . . rests solely with its users," Napster could be held liable for copyright infringement under the doctrines of vicarious or contributory liability).

⁶⁴ David Balaban, *Music in the Digital Millennium: The Effects of the Digital Millennium Copyright Act of 1998*, 7 UCLA ENT. L. REV. 311, 314 (1999).

⁶⁵ *Id.* at 311.

⁶⁶ Balaban, *supra* note 22, at 237-38.

⁶⁷ Yen, *supra* note 56, at 260.

⁶⁸ *Id.* at 260.

the same recording can be enjoyed by an infinite number of users without a diminishment in quality for each user.⁶⁹

On February 12, 2001, the United States Court of Appeals for the Ninth Circuit set forth an in-depth analysis of Napster's liability.⁷⁰ The court found that Napster was engaged in contributory infringement because Napster had knowledge of its users' infringing activity.⁷¹ Furthermore, because Napster provides the "site and facilities" for direct infringement, Napster materially contributes to the infringing activity.⁷² The court also found Napster liable for vicarious infringement because Napster failed to exercise its right and ability to remove material from its server and to eliminate the infringing activities of the users.⁷³ The court's modified injunction held Napster liable "only to the extent that Napster . . . receives reasonable knowledge of specific infringing files . . . ; knows or should know that such files are available on the Napster system; and . . . fails to act to prevent viral distribution of the works"⁷⁴ By doing so, the court asserted the policy argument that copyright infringement on the Internet is rampant, and, if allowed to continue, will severely diminish economic incentives for intellectual innovation.⁷⁵

Even though the court established contributory and vicarious liability against Napster, the case was a far cry from victory for the record industry.⁷⁶ Before Napster incurred the duty to police its server for infringing activities, the plaintiffs had to provide notice to Napster of available copyrighted works.⁷⁷ The latest appeal in the Napster dispute was decided in late March 2002,

⁶⁹ *Id.* at 260–61.

⁷⁰ See Tanaka, *supra* note 42, at 37 (noting that the court granted the plaintiff's motion for a preliminary injunction against Napster); see also *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1029 (9th Cir. 2001).

⁷¹ Sifferd, *supra* note 24, at 99–100; see also *A & M Records*, 239 F.3d at 1020 (finding that Napster had both actual and constructive knowledge of the infringement).

⁷² Tanaka, *supra* note 42, at 45–46; see also *A & M Records*, 239 F.3d at 1022 (finding that Napster provided the "site and facilities" for direct infringement).

⁷³ See Sifferd, *supra* note 24, at 101 (explaining that Napster had failed to reasonably police its system; and, therefore, would likely be found vicariously liable).

⁷⁴ Tanaka, *supra* note 42, at 47.

⁷⁵ Yen, *supra* note 56, at 253.

⁷⁶ See Balaban, *supra* note 22, at 277–78 (describing the burden the court placed on the plaintiffs to provide notice of copyrighted work available on the Napster system).

⁷⁷ *Id.* at 278.

and the burden on the plaintiffs is evident.⁷⁸ The plaintiffs' appeal challenged the notice requirement, demanding that Napster search for and block all copyrighted files, not just the ones that the plaintiffs have provided to Napster.⁷⁹ However, the court clearly reaffirmed its holding that Napster's duty to remove material from the server is triggered only upon notice by the plaintiffs of copyrighted works and files available on the Napster system.⁸⁰ Only after months of noncompliance with the preliminary injunction did the court finally force Napster to shutdown.⁸¹

What have the plaintiffs really won against Napster? After more than two years of litigation solely on preliminary injunctions, the plaintiffs basically have earned the right to implement Napster's police powers.⁸² Furthermore, the plaintiffs did not effectively force a shutdown of Napster until months of Napster's noncompliance with the preliminary injunction had passed.⁸³ Bertelsmann, a German media corporation, who was one of the plaintiffs against Napster, is taking a unique approach to make the best of the situation.⁸⁴ Recognizing Napster's technology as the way of the future, Bertelsmann has dropped its lawsuit in exchange for the right to purchase Napster stock.⁸⁵ This new alliance will adapt the Napster system to allow members to pay a monthly fee (i.e., a licensing fee) for access to the entire BMG catalogue.⁸⁶ Bertelsmann is getting an early start, realizing that there is more to Napster than "free riding on the recording industry's content."⁸⁷ The reality is that the recording industry needs a system like Napster to fully exploit the economic potential of the Internet.⁸⁸ By utilizing Napster's system, the recording industry can readily ascertain a horde of valuable marketing information

⁷⁸ See *A & M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1096 (9th Cir. 2002) (finding that the plaintiffs do bear the burden of providing notice of copyrighted works).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 1096–97 (showing that the court failed to reduce the burden placed on the plaintiffs in the original decision).

⁸³ *Id.* at 1096.

⁸⁴ See Sifferd, *supra* note 24, at 103–04 (noting that Bertelsmann and Napster have formed an alliance).

⁸⁵ *Id.* at 104.

⁸⁶ *Id.* at 103–04.

⁸⁷ Yen, *supra* note 56, at 266.

⁸⁸ *Id.* at 267.

about the listening habits of users as well as instant access to millions of users.⁸⁹

B. Copyright Liability Beyond Napster: Decentralized P2Ps

Napster's system is a centralized P2P network, which relies on a central server,⁹⁰ but decentralized P2P networks do not require the use of a central server.⁹¹ The success of Napster ignited the development of an onslaught of decentralized P2Ps, such as Gnutella, LimeWire, and Morpheus.⁹² Decentralized P2Ps only require two users to contact one another using software programs readily available for free on the Internet.⁹³ The query process and viewing of results look extraordinarily similar to Napster, but the primary difference is that no central server is involved.⁹⁴ Without a central server, decentralized P2Ps have absolutely no means to filter or block infringing activities from users.⁹⁵

While centralized P2P networks are likely to be held liable under the precedent established by the Napster dispute, decentralized P2P networks probably will not be affected.⁹⁶ Holding these networks liable for contributory infringement will be extremely difficult "because . . . there is usually no way of 'knowing' when infringement occurs . . . and . . . there are doubts as to whether merely developing and providing software amounts to 'material contribution.'"⁹⁷ Furthermore, vicarious liability may not apply because decentralized networks typically "do not have the right or the ability to supervise or police users' activities, and . . . they do not charge any fees nor [sic] keep any userbase."⁹⁸ Moreover, even if decentralized P2P networks are found liable, they may invoke the defense established in *Sony Corporation of America v. Universal City Studios, Inc.*⁹⁹ This defense is available

⁸⁹ *Id.* (noting that there are advantages for the record industry in using information about Napster users provided by the network).

⁹⁰ Tanaka, *supra* note 42, at 49.

⁹¹ *Id.*

⁹² Sifferd, *supra* note 24, at 105.

⁹³ *Id.* at 104.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Tanaka, *supra* note 42, at 57 (surmising that software developers in the decentralized P2P area are not likely to be found liable).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* (noting that there is typically no way for distributors to prevent infringing uses even if they are cognizant of the copyright infringement); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984).

to decentralized networks because even if they are aware of infringing use, they generally have no means to prevent the uses.¹⁰⁰

In 2001, plaintiffs, comprised of over thirty music and film studios, filed the first suit against decentralized P2Ps.¹⁰¹ The plaintiffs are attacking three decentralized P2Ps: MusicCity.com (utilizing the Morpheus software), Gorkster, and Consumer Empowerment B.V.¹⁰² The plaintiffs are alleging contributory and vicarious liability for copyright infringement, similar to the claims against Napster.¹⁰³

C. *The Online Solution for the Record Industry*

Basically, the record industry is taking a non-economic, inefficient approach to the P2P problem. The plaintiffs seem concerned only with protection of their copyright rights, with a blatant disregard for the extensive costs involved. Their first problem is seeking civil liability against Napster and its descendants. The massive costs involved in obtaining civil judgments, coupled with the fact that it is unlikely that liable parties have sufficient assets to pay these lucrative judgments, defeat the entire purpose of filing civil suits.¹⁰⁴ Rather, the record industry should focus on imposing criminal liability under the DMCA against P2Ps.¹⁰⁵

¹⁰⁰ Tanaka, *supra* note 42, at 57.

¹⁰¹ Sifferd, *supra* note 24, at 107.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Tanaka, *supra* note 42, at 73–74 (listing the obstacles to legal enforcement of copyrights, including, *inter alia*, the vulnerability of filtering mechanisms, the difficulty in locating individual users, and the possibility that individuals would declare bankruptcy to avoid paying damages).

¹⁰⁵ See Sifferd, *supra* note 24, at 108 (noting that companies, such as Macrovision, have decided to press both civil and criminal charges against infringers). Dmitri Sklyarov and his employer, Elcom Ltd., were indicted August 28, 2001, “on charges of illegally trafficking in a product designed to circumvent copyright protection measures” in one of the first criminal prosecutions in this country under the DMCA set for trial in April 2002. Dana Gilbert, *Dmitry [sic] and the Digital Millennium Copyright Act*, 2002 UCLA J.L. & TECH. NOTES 29, at http://www.lawtechjournal.com/notes/2002/29_020827_gilbert.php (last visited Apr. 6, 2003); Alicia Morris Groos, *Developments in U.S. Copyright Law 2000–2001: From Revising the Old South to Redefining the Digital Millennium*, 10 TEX. INTELL. PROP. L.J. 111, 127–28 (2001); see also *California Judge Allows DMCA Criminal Case to Proceed*, 19 No. 21 ANDREWS COMPUTER & ONLINE INDUS. LITIG. REP. 6 (May 21, 2002) (stating that the case against Sklyarov was dropped in exchange for his testimony against his employer, Elcom Ltd.); *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1117 (N.D. Cal. 2002) (allowing the case against Elcom Ltd. to proceed, upholding the constitutionality of the DMCA).

Criminal liability is the only way to strip Napster and its disciples of the massive incentive to engage in copyright pirating software.¹⁰⁶ The threat of criminal liability should eliminate the emergence of future P2Ps.¹⁰⁷

Then, following the lead of Bertelsmann, the record industry should offer music online to reap the benefits of Internet commerce (the Online Solution).¹⁰⁸ As high-speed Internet access quickly gains popularity, approximately 100 million users will probably be downloading MP3 files within the next year or two.¹⁰⁹ Under the Online Solution, users should be charged an annual fee of twenty dollars (or smaller monthly fees) for unlimited downloads.¹¹⁰ By doing so, the record industry will realize \$1.34 billion of annual Internet sales,¹¹¹ as opposed to the current \$300 million of annual losses due to Internet piracy.¹¹² The Online Solution will also alleviate the pains and costs of monitoring P2Ps for infringing materials.

Bertelsmann has a huge advantage over the other record companies by recognizing an opportunity amid the Napster problem, and utilizing Napster's resources for a solution.¹¹³ The record industry should learn a valuable lesson from the *Napster* dispute: consumers want to get music online. The Internet has become fundamental to modern living, as common as a television or telephone. Moreover, the Internet will only gain popularity with more users and faster connections. Distributing music online is the way

¹⁰⁶ See, e.g., Aaron M. Bailey, Comment, *A Nation of Felons?: Napster, the Net Act, and the Criminal Prosecution of File-Sharing*, 50 A.M. U. L. REV. 473, 476 (2000) (predicting that criminal penalties may be effective in discouraging copyright infringement).

¹⁰⁷ *Id.* (suggesting that prosecuting a select few infringers may deter would-be infringers).

¹⁰⁸ See *supra* text accompanying notes 84–87.

¹⁰⁹ See, e.g., Matthew Green, Note, *Napster Opens Pandora's Box: Examining How File-Sharing Services Threaten the Enforcement of Copyright on the Internet*, 63 OHIO ST. L.J. 799, 802 (2002) (noting that by February 2001, Napster alone had some eighty million registered users).

¹¹⁰ Author's note: As the Online Solution is simply a proposal, its results will require a significant degree of estimation. For purposes of this article, it will be assumed that two-thirds of the users (approximately sixty-seven million) will pay the annual fee. An average CD costs about fifteen dollars, and the proposed fee of twenty dollars will allow users to download unlimited tracks. Therefore, the estimate of sixty-seven million users paying the annual fee would appear to be a conservative estimate.

¹¹¹ Author's Note: The \$1.34 billion is based on the estimation that sixty-seven million users will pay the \$20 annual fee imposed under the Online Solution.

¹¹² Balaban, *supra* note 64, at 311.

¹¹³ See *supra* text accompanying notes 84–87.

of the future. Basically, the record industry has two options to implement: the first is the Online Solution, and develop new methods to deliver music to consumers. The second is to maintain physical distribution of music, and face limitless Napster-style battles in the future.

Finally, the record industry must adopt measures to protect systems implemented under the Online Solution. The only effective method of protection for the Online Solution is the utilization of trusted systems.¹¹⁴ A trusted system will only allow users to perform activities allowed by the provider depending on fees paid.¹¹⁵ For example, consider the BMG system that will provide the entire BMG catalog online.¹¹⁶ Suppose the BMG system requires consumers to pay a twenty dollar annual fee for unlimited downloads. If a consumer tries to download music without paying (or any other proscribed activity), the system will simply display an error message.¹¹⁷ The true beauty of a trusted system, however, is the substantial encryption protection it offers.¹¹⁸

An effective trusted system utilizes public key cryptography.¹¹⁹ This type of cryptography involves a combination of public and private keys.¹²⁰ The private key remains available to only the trusted system provider, while public keys are made available to consumers.¹²¹ “Anything encrypted in the public key can be decrypted by the private key,” and vice versa.¹²² A mathematical algorithm generates the two keys,¹²³ and the available protection is incredible. Standard levels of encryption use 128-bit encryption, which provides two to the 128th power (340,282,366,920,938,463,463,374,607,431,070,000,000) possible combinations.¹²⁴ However, if that is not enough, even stronger

¹¹⁴ LESSIG, *supra* note 8, at 129–30 (citing Mark Stefik, *Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge us to Rethink Digital Publishing*, 12 BERKELEY TECH. L.J. 137, 139 (1997) (noting that “a trusted system follows rules governing the terms, conditions and fees for using digital works” within a digital context)).

¹¹⁵ See Stefik, *supra* note 114, at 139.

¹¹⁶ See *supra* text accompanying note 86.

¹¹⁷ Stefik, *supra* note 114, at 139.

¹¹⁸ See *id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*; see also Jennifer J. Stearman & Michael S. Yang, *The Net Effect: Electronic Signatures in Commerce*, MD. B.J., Nov./Dec. 2001, at 16, 22.

¹²¹ Stearman & Yang, *supra* note 120, at 22.

¹²² Stefik, *supra* note 114, at 139.

¹²³ Stearman & Yang, *supra* note 120, at 22.

¹²⁴ *Id.*

levels of encryption are available.¹²⁵ While public key encryption is not impossible to crack, calculating the exact algorithm is “analogized to finding a particular grain of sand in the Sahara Desert.”¹²⁶

Public key encryption offers virtually absolute protection for the Online Solution.¹²⁷ Only the public key will be available to the public.¹²⁸ Also, public key encryption is an area where technology will help copyright owners. As technology progresses, the amount of bit encryption will inevitably increase, and public key encryptions will become essentially impossible to crack. Finally, record companies could realize another financial benefit from public key encryption by charging a nominal fee to obtain a public key. If public keys were sold for two dollars, for example, consumers would certainly be willing to pay, and it would generate an additional \$200 million in industry-wide sales.

D. Feasibility of the Online Solution

All things being equal, the Online Solution will maximize the full potential of the DMCA, and serve as a security blanket to protect copyright owners from the savage cruelties of Internet copyright infringers. As with most facets of the law, however, all things are not equal. The major inequality at issue here is that decentralized P2Ps have already established an online oligopoly in the MP3 market. Consequently, the Online Solution is susceptible to a damaging flaw.

In order for the record industry to pursue the Online Solution, the industry must enter the MP3 market.¹²⁹ However, the decentralized P2P oligopoly serves as a major barrier to entry.¹³⁰ Decentralized P2Ps charge consumers a small monthly rate for unlimited downloads (comparable to the Online Solution).¹³¹ Millions of consumers pay this small charge, and the oligopoly

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Balaban, *supra* note 22, at 243 (observing that the MP3 format has become the most popular format presently available to Internet users).

¹³⁰ Grace J. Bergen, *The Napster Case: The Whole World is Listening*, 15 *TRANSNAT'L LAW.* 259, 272 (2002) (explaining the potential difficulties that the music industry's digital services will have in entering the online market).

¹³¹ *See, e.g.*, MP3U.COM (offering members unlimited movies and songs for only \$0.97 a month), at <http://www.MP3U.com> (last visited Apr. 6, 2003); *see also* KAZAA (offering free media downloads), at <http://kazaa.com> (last visited Apr. 6, 2003).

already generates significant revenues.¹³² More importantly, the oligopoly will have at least a two-year head start on the record industry in the MP3 market before any record company enacts the Online Solution. Consequently, the oligopoly can effectively undercut any new competition. When the first legitimate record company opens its online service, the company will charge rates comparable to the oligopoly rates. The oligopoly will respond by reducing its rates. Consumers seek lower prices, and they will choose the oligopoly. The oligopoly will still maintain significant revenues, while the Online Solution will not generate profits. This undercutting strategy will choke out any new entrants into the fee-based MP3 market.

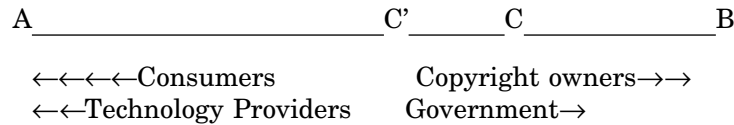
While the Online Solution mutually benefits copyright owners and consumers, the oligopoly can and will destroy the economic practicality of the Online Solution. Even though the Online Solution provides a price that favors consumers, most consumers will choose the lower oligopoly price when given the choice. Therefore, the market alone cannot correct this inequality created by digital piracy. Government regulation is necessary to make the Online Solution feasible.¹³³ The requisite government regulation is discussed in the final two sections of this article, but first we must analyze the economic effects of the DMCA and the *Napster* dispute.

IV. MOVEMENT ALONG THE CONTINUUM: THE EFFECTS OF THE DMCA AND NAPSTER

With a complete understanding of the DMCA and the *Napster* dispute, note their combined effect, as demonstrated on the copyright continuum below:

¹³² Bergen, *supra* note 130, at 261 (acknowledging that, at its peak, Napster claimed to have millions of users, and that three and a half billion files were downloaded in the month of August 2001 alone). Ipsos-Reid, an international market and social research company, determined that one-quarter of all U.S. downloaders would be willing to pay for fee-based online music. Press Release, Ipsos-Reid, US Music Downloaders Prefer a Pay-Per-Download Transaction Over Current Subscription-Based Offerings (Sept. 25, 2002), at http://www.ipsos-reid.com/media/dsp_displaypr_us.cfm?id_to_view=1631 (last visited Apr. 6, 2003).

¹³³ See Sifferd, *supra* note 24, at 107 (noting that P2P networks will continue to multiply unless policymakers further protect copyright owners by developing a means to police the P2P networks and to hold direct infringers liable for their actions).



Point C' represents the new point, where U.S. law now distributes the bundle of rights after the DMCA and the *Napster* dispute. How was Point C dragged to Point C'? Neither the DMCA nor the *Napster* dispute stripped copyright owners of any of their exclusive rights protected by the Copyright Act.¹³⁴ Likewise, consumers did not steal increased fair uses in the *Napster* dispute.¹³⁵ Rather, the shift occurred because of a cause-effect relationship created by digital piracy. The first effect, adverse to copyright owners, is that the law currently demands increased costs in the process of *enforcing* copyright rights.¹³⁶ The second effect, adverse to consumers, is two-prong: (1) copyright owners will most likely respond by increasing the costs of quality, and (2) consumers will be faced with increased transactional costs in selecting products. Before addressing these issues, we must first consider Professor Lessig's opinion that Point C' is situated *to the right of* Point C.

A. *Debating the Movement Along the Continuum*

Professor Lessig argues for the increased privatization of copyright law utilizing code.¹³⁷ Lessig is correct; his theory is essential for implementing the Online Solution proposed above. The use of public key encryption is an example of utilizing code to privatize copyright protection.¹³⁸ Because copyright owners possess the means to privatize their rights, and the law supports this privatization,¹³⁹ Lessig essentially concludes that Point C shifted to the

¹³⁴ See Balaban, *supra* note 22, at 287–88 (noting that Congress passed the DMCA to protect copyright owners' interests, and that the courts should follow Congress' lead).

¹³⁵ Russell P. Beets, Note, *RIAA v. Napster: The Struggle to Protect Copyrights in the Internet Age*, 18 GA. ST. U. L. REV. 507, 542 (2001) (noting that the circuit court did not find that Napster's users were fair users).

¹³⁶ See Benton J. Gaffney, Comment, *Copyright Statutes that Regulate Technology: A Comparative Analysis of the Audio Home Recording Act and the Digital Millennium Copyright Act*, 75 WASH. L. REV. 611, 628 (2000) (discussing the cost effectiveness of finding violators and of bringing suit against them).

¹³⁷ LESSIG, *supra* note 8, at 130 (suggesting the use of trusted systems as a privatized alternative to the law for protecting copyrights).

¹³⁸ See *id.* at 135–39 (providing a description and an example of public key encryption technology).

¹³⁹ See Matt Jackson, *One Step Forward, Two Steps Back: An Historical Analysis of Copyright Liability*, 20 CARDOZO ARTS & ENT. L.J. 367, 414 (2002)

right along the continuum.¹⁴⁰ However, Lessig's argument fails to identify the major market inequality that has developed, and fails to recognize that decentralized P2Ps have already established an effective oligopoly in the MP3 market.¹⁴¹ As discussed above, the oligopoly can and will undercut any new market entrant seeking to pursue the Online Solution.

In terms of privatization, the oligopoly's barrier to entry will render privatization moot.¹⁴² For privatization to work, consumers must utilize the record companies' services,¹⁴³ but the oligopoly's undercutting strategy will cause consumers to choose the oligopoly.¹⁴⁴ Therefore, consumers will not utilize the record companies' services. Code and the law may provide the means for privatization until the end of time, but privatization is useless without consumer participation.¹⁴⁵

While Lessig is correct that privatization *can* shift Point C rightward, this shift is impossible until government regulation can correct the market inequality.¹⁴⁶ Until regulation provides this market correction, copyright owners will face increased costs in enforcing copyright protection.¹⁴⁷ The effect is that copyright owners lose the value of their exclusive rights to reproduction and distribution.¹⁴⁸ Because of these increased costs, Point C shifts left to Point C'.

(noting that copyright owners now possess the means to privatize their rights due to an expansion in "copyright liability, coupled with an increased reliance on contract law and technology").

¹⁴⁰ See LESSIG, *supra* note 8, at 124–30 (outlining the course of action taken by copyright owners and lawmakers to protect copyright rights, and the options for the future).

¹⁴¹ See Bergen, *supra* note 130, at 272. See generally ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 102 (1997) (illustrating a deeper analysis of the doctrine of mootness).

¹⁴² See Bergen, *supra* note 130, at 272 (suggesting that savvy consumers may not be willing to pay the price of privatization when many downloads are presently available online for free).

¹⁴³ See Sifferd, *supra* note 24, at 109 (noting that the music industry must offer a viable means of Internet music distribution in order to be successful).

¹⁴⁴ See *id.*

¹⁴⁵ See *id.* (discussing the possible effect that privatization may have on consumers by allowing the music industry's lobbying power to shift the purpose of copyright protection from promoting creativity to protecting the music industry itself).

¹⁴⁶ See *id.* at 107.

¹⁴⁷ See Gaffney, *supra* note 136, at 628.

¹⁴⁸ See *id.*; see also Sifferd *supra* note 24, at 107 (noting that some P2P companies have moved offshore to escape liability in the U.S., while continuing to provide services enabling their users to download works online).

B. Increased Costs for Copyright Enforcement

The DMCA and the *Napster* dispute have increased the costs of enforcing copyright protection.¹⁴⁹ Consider the DMCA, which provides limited liability for ISPs.¹⁵⁰ In the event of online copyright infringement, the ISP is the desired target for a copyright owner to retrieve the lost value of his copyright.¹⁵¹ The ISP is easy to identify and easy to locate; but, most importantly, the ISP has the necessary funds to satisfy a judgment or a reasonable settlement.¹⁵² However, the DMCA effectively shields ISPs from contributory and vicarious infringement.¹⁵³ Copyright owners will have to pursue individual consumers to get their remedies.¹⁵⁴ Consumers are harder to identify, harder to locate, and usually do not have the requisite funds to replace the lost value of the copyright.¹⁵⁵

The *Napster* dispute poses the same problems for copyright owners. For example, while Napster can be sued directly, it cannot come close to paying the massive judgment, which is surely to be awarded against it.¹⁵⁶ Even if Napster did have adequate funds, it would be years before copyright owners see the money. So, even with contributory and vicarious liability against Napster, copyright owners will have to pursue individual consumers to seek appropriate remedies.¹⁵⁷ Aside from the problems of consumers being difficult both to identify and to locate, each consumer accounts for only a small portion of the total losses.¹⁵⁸ To regain the lost value of their rights, copyright owners would have to sue

¹⁴⁹ See Gaffney *supra* note 136, at 628.

¹⁵⁰ Sifferd, *supra* note 24, at 97 (describing the safe harbor provisions that grant ISPs immunity from their users infringing activities); see also Jonathan Band & Matthew Schruers, *Safe Harbors Against the Liability Hurricane: The Communications Decency Act and the Digital Millennium Copyright Act*, 20 CARDOZO ARTS & ENT. L.J. 295, 303–04 (2002).

¹⁵¹ Heidi Pearlman Salow, *Liability Immunity for Internet Service Providers: How is it Working?*, 6 J. TECH. L. & POL'Y 31, 32 (2001) (identifying the reasons why a copyright owner would be likely to sue an ISP rather than an individual violator).

¹⁵² *Id.*

¹⁵³ Sifferd, *supra* note 24, at 97.

¹⁵⁴ *Id.*

¹⁵⁵ Salow, *supra* note 151, at 32.

¹⁵⁶ See Tanaka, *supra* note 42, at 75 (noting that a potential judgment against Napster for copyright infringement would be astronomical, as the damages could total as much as \$150,000 per song).

¹⁵⁷ *Id.* at 73–74.

¹⁵⁸ See *id.* at 74.

millions of individual consumers.¹⁵⁹ The massive costs involved in seeking individual judgments against millions of consumers would defeat the purpose of protecting the value of copyrights.

C. *Increased Costs for Consumers*

At this point, consumers and Technology Providers might claim victory. However, the market will correct the inequalities generated by digital piracy. This correction will come in the form of increased prices for quality combined with diminished quality. Consumers and Technology Providers have forced Point C to Point C'; this shift is reflected on the supply and demand schedule. The demand schedule remains constant because consumers still demand the same quality at the same price. The supply schedule remains constant because copyright owners still demand the same revenues for quality work. The shift to Point C' represents an upward movement along the supply schedule because the oligopoly now provides additional sources of music (MP3s). This movement represents a change in *quantity supplied*, not a change in the supply schedule. The laws of economics require that such a change in quantity supplied mandates a price that exceeds the equilibrium point. A price above the equilibrium point creates deadweight loss, the difference between the actual price and the equilibrium point. Thus, the shift to Point C' creates deadweight loss, and consumers will bear the cost of this loss.

Copyright owners will regain the value of their rights in some form or fashion. In other words, copyright owners will transfer the costs of the deadweight loss to consumers. Consumers can expect to see increased prices for concert tickets, CDs, music videos, and other products and services. Additionally, consumers can expect to see diminished quality. With a loss in value of their rights, copyright owners will not work as hard. Remember, the supply and demand schedule reflects not only price and quantity, but also the quality provided. Copyright owners will diminish the quality of their work equivalent to the diminishment in the value of their works. At the end of the day, the market will force consumers to pay more money for less quality (like Chapman's example of 10% less Coke for the same price).¹⁶⁰

Additionally, consumers will suffer a long-term adverse effect. The music industry reduces selection costs for consumers. The

¹⁵⁹ *Id.*

¹⁶⁰ See discussion *supra* Part I.A.

music industry seeks out talented artists, writers, and producers. The industry serves as a filter to weed out the riffraff. Consumers can easily identify artists of exceedingly high or low quality (like trademark identification). Consumers witness a minimal selection cost because the music industry provides the service for them. Suppose for a moment that the law affords digital piracy absolute protection, and the music industry crumbles. Consumers will have to search P2P software for music. However, consumers will find phenomenal bands like Aerosmith or the Eagles, just as any local garage band that made an MP3. Consumers will have to spend significant amounts of additional time searching for high quality files. Consumers will bear the increased transactional costs in selecting quality music. Ironically, when considering the short-term and long-term market effects, consumers will suffer the most injury from the shift to Point C'.

V. FIRST THINGS FIRST: AMENDING THE COPYRIGHT ACT

The purpose of this article is to create a solution for digital copyright infringement in the entertainment industry (the "Plan"). The first objective of the Plan is to initiate a containment of available piracy software. While the DMCA takes aim against digital piracy, it fails to focus on individuals.¹⁶¹ If anything is apparent from this article, it is that individuals infringe copyrighted works without using unique circumvention technology to accomplish their tasks.¹⁶² To contain piracy software, we must prevent new technologies from emerging. Additionally, we must eliminate the means of Technology Providers, which permit wide distribution of new technologies to consumers. The only way to accomplish this is to criminalize software that carries *the potential of* mass distribution of copyrighted works. Essentially, this measure will strike at the fair use defense allocated to consumers.¹⁶³ Such a provision is justified, for consumers have abused their fair use privileges. Software like Napster, Gnutella, and others may have some legitimate fair use means, but that only clouds the issue. The real issue is that these software packages are designed to give consumers the ability to reproduce and distribute copyrighted works through only one worldwide sale of an album or movie.

¹⁶¹ Goldberg, *supra* note 4, at 287.

¹⁶² *Id.*

¹⁶³ See generally Goldberg, *supra* note 4, at 283–84 (presenting the Fair Use Defense).

Additionally, the new amendment will alleviate the inadequacy of prior legislation,¹⁶⁴ given the retaliation dynamic between copyright laws and the efforts of copyright infringers. For example, consider the liability of ISPs discussed above.¹⁶⁵ The creation of ISPs provided infringers with new methods of infringement. Consequently, the DMCA was passed in retaliation to these new methods of infringement.¹⁶⁶ Likewise with P2Ps, new laws must be developed in retaliation to determine the extent of P2P liability.¹⁶⁷ If the progress (or rather, the lack thereof) of the *Napster* dispute is any indicator, the retaliation against P2Ps will be hopelessly slow.

VI. SUGGESTED LEGISLATION: THE DIGITAL FAIR USE PROTECTION ACT¹⁶⁸

That being said, I propose the Digital Fair Use Protection Act (“DFUPA”). The DFUPA will make any software that carries *the potential for* mass distribution and reproduction by consumers, except software legitimately utilized for internal business operations, illegal. Potential for mass distribution and reproduction will refer to any software that, by direct or indirect distribution from the software creator, allows more than fifty consumers to copy and distribute files. If the software is, or has ever been, offered on the Internet, a presumption will arise that the software is available to more than fifty consumers. The DFUPA follows the lead of the No Electronic Theft (“NET”) Act.¹⁶⁹ The NET Act closed the loophole that absolved infringers from liability if they

¹⁶⁴ See, e.g., *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys. Inc.*, 180 F.3d 1072, 1073 (9th Cir. 1999) (involving the Audio Home Recording Act of 1992). The defendant, Diamond, designed the Rio, which was a portable MP3 player, and although the Rio itself did not infringe copyrights, the Rio was created to facilitate music piracy. *Id.* at 1074.

¹⁶⁵ See discussion *supra* Part II.

¹⁶⁶ Goldberg, *supra* note 4, at 286 (stating that the DMCA was intended to tackle the infringement methods emerging in the twenty-first century).

¹⁶⁷ See Tanaka, *supra* note 42, at 50 (concluding that “centralized P2P networks are likely to be held liable for contributory and vicarious infringement under the precedent established by the *Napster* cases”).

¹⁶⁸ Author’s Note: For purposes of clarity, the Digital Fair Use Protection Act is a proposal of this article. There is no such legislation currently pending.

¹⁶⁹ See Christian John Pantages, Comment, *Avast Ye, Hollywood! Digital Motion Picture Piracy Comes of Age*, 15 *TRANSNAT’L LAW.* 155, 171–72 (2002) (stating that the “NET Act changed the standard for criminal copyright infringement by removing language which previously required that the infringement be done for commercial advantage or private financial gain”).

provided their services to consumers for free.¹⁷⁰ In addition, DFUPA will make any software that is denied registration by the Advanced Technology Division (discussed below) illegal.

It is imperative for the DFUPA to make software with the potential for mass distribution and reproduction (“potentiality standard”) illegal. This standard will follow the concept of imposing strict liability for certain actions.¹⁷¹ In the case of digital piracy, violations are so rampant that P2Ps have created a multi-million dollar business selling a product (music) that they do not even own. The *Napster* court could not rely on any precedent to establish a potentiality standard. Consequently, Technology Providers retaliated by developing software that will not fall within the parameters of the *Napster* decision. As it did not include the potentiality standard, the *Napster* opinion is all but useless in the battle against decentralized P2Ps. By establishing the potentiality standard, the DFUPA will provide a solution for the retaliation dynamic between copyright laws and the efforts of copyright infringers. The DFUPA will cover any new technology that emerges after decentralized P2Ps. This way, when Technology Providers develop the next Morpheus or Gnutella, they will not be able to legally distribute the software. The DFUPA will strip these new technologies of their ability to create market inequalities.

The DFUPA will strike an important balance to re-establish equilibrium in the market: mass piracy will be eliminated, but fair use provisions will receive effective protection. Decentralized P2P software, which Technology Providers distribute via the Internet, serve the purpose of mass piracy. When we get to the heart of the issue, Technology Providers want to provide the means for millions of consumers to infringe copyrighted works. If the Technology Providers truly had fair use intentions, they would have attempted to negotiate reasonable licensing arrangements with copyright owners. These Technology Providers created the means for the market inequalities. The DFUPA will remedy the inequality by criminalizing “bad” software and systems. The DFUPA will prohibit software and systems created by Technology Providers from causing mass digital infringement. Conversely, the DFUPA will still protect “good” software. The DFUPA allows consumers to develop legitimate file sharing systems. The DFUPA allows

¹⁷⁰ *Id.* at 171.

¹⁷¹ W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 534, 551 (5th ed. 1984).

consumers to organize small file sharing systems to exchange files with a small number of friends. The DFUPA allows file sharing for legitimate business purposes. Essentially, the DFUPA promotes the benefits of fair use file sharing, while eliminating market inequalities, which are caused by Technology Providers with illegitimate motives.

The first offense of this section is a misdemeanor, carrying a \$1,000 fine plus 500 hours of community service to be performed within one year. The second offense of the DFUPA is a felony, punishable by one year of imprisonment and a \$10,000 fine, subject to future wage garnishment. These penalties will effectively provide disincentives for creation of copyright-piracy software.

The second section of DFUPA will make it a misdemeanor for a consumer to possess decentralized P2P software already available to consumers that violate the first section. This section will carry an effective date, thirty days after its passage, to give consumers adequate notice. By doing so, this provision will not violate consumers' constitutional rights. Consumers will have thirty days to erase the software from their hard drives. The first two offenses of this provision are misdemeanors, punishable by \$500 fine and 100 hours of community service to be performed within one year. Third and subsequent violations are felony offenses, each punishable by one year of imprisonment and a \$5,000 fine.

The third section of DFUPA will establish the Advanced Technology Division ("Division") of the Copyright Office.¹⁷² All file sharing systems and software must be registered with the Division. The Division will have full authority to grant or deny registration to anyone based on the merits of the application. The purpose of the Division is to register all software and systems used for legitimate business or educational purposes, and to deny registration to potential digital piracy software and systems. Registration with the Division will carry a fee of \$1,000, payable to the Division. The Division will use these funds to monitor use of registered systems. Each registration application must contain the names of all individuals who will use the software or system; each individual must sign the application, and agree to joint and several liability for all infringements committed by any user. While joint and several liability may seem harsh, it will serve as a safeguard to protect fair use. If consumers want to use file shar-

¹⁷² Author's Note: To avoid any confusion, I note that the Division is also proposal of this article. The Division is not a current office.

ing systems and software for legitimate purposes, then they should not have any reason to infringe works. Furthermore, if these consumers have no intention to commit infringement, they should not have any problem accepting the liability. Moreover, imposing joint and several liability will encourage file sharing system and software users to police themselves for infringement. Finally, each registration application must provide the Division with sufficient means of monitoring use on the system or software, which may include giving the Division the private key to a trusted system, a password, or special user access.

Any system or software denied registration will be considered per se illegal to use. Anyone who uses a system or software denied registration by the Division will commit a felony subject to one year of imprisonment and a \$10,000 fine. Anyone who uses a system or software without applying to the Division will commit a misdemeanor for the first offense, punishable by a \$5,000 fine. All subsequent violations of the same are felony offenses, punishable by one year of imprisonment and a \$10,000 fine.

A. *Effects of the DFUPA on Consumers*

Many consumers will become outraged once they hear of the DFUPA. However, a closer analysis will reveal that the DFUPA will offer sufficient protection for copyright owners and still provide adequate fair uses for consumers. The DFUPA will secure fair use provisions because consumers will still be free to make private copies. The DFUPA will not prohibit CD burners or other personal copying devices. Consumers are free to use these devices to make copies. In other words, consumers are still able to make private copies without stripping copyright owners of any significant value from their copyrights. Consumers are also free to develop legitimate file sharing systems and software. If consumers have legitimate intentions for using file sharing systems and software, they should have no problem registering with the Division. The DFUPA will allow consumers to maximize the full potential of legitimate uses of file sharing systems and software. The DFUPA will only take from consumers *the ability* to make mass copies and distributions of copyrighted works. The DFUPA will remove the potential for Technology Providers to take advantage of fair use provisions, thereby creating market inequalities. The result is that fair use remains protected for consumers to enjoy.

B. *Regulation to Attain the Equilibrium Point*

The analysis of this article has focused on the current problem of the Internet providing fast, effective means for consumers to infringe copyrighted materials by violating the exclusive copyright protections of reproduction and distribution. As demonstrated with the above cases, primarily the *Napster* dispute, copyright owners have sought traditional remedies to reinstate their exclusive rights of reproduction and distribution. Whether they are a matter of social norms or mere practicality, these efforts have failed. Therefore, this article proposes a new method of thinking for copyright owners; the desired result is not to have the exclusive rights of reproduction and distribution, but rather to attain *the value of these rights*. If anything can be learned from the above mentioned cases and the upcoming decentralized P2P cases, it should be clear that the law simply has not afforded copyright owners the full protection of their reproductive and distributive rights. However, the law can and should grant copyright owners the value of these rights. The Plan is fairly simple when compared to the advanced issues facing the modern copyright owner.

C. *Suggested Senate Oversight Committee*¹⁷³

The plan starts with a new committee on digital copyright protection (“Committee”). The Committee will consist of five members of the United States Senate. The first duty of the Committee is to determine the dollar value of sales lost per annum by each of the music and movie industries. The task will prove cumbersome, as different parties with different allegiances will provide differing results. Along with testimony from the Recording Industry Association of America (“RIAA”) and the Motion Picture Association (“MPA”), the Committee must also consider testimony from “Napster-friendly” groups,¹⁷⁴ who will certainly make themselves readily available to the Committee. Additionally, this task will demand annual re-evaluation of financial reports and the testimony of industry and market experts. As will be discussed in sub-

¹⁷³ Author’s Note: The new senate oversight committee discussed here is a proposal of this article. No such committee exists.

¹⁷⁴ “Napster-friendly” groups are groups that support free online file sharing. It is imperative for the Committee to hear testimony from some of these groups. The RIAA, MPA, and “Napster-friendly” groups will attempt to distort the truth to benefit their respective causes; therefore, the Committee will need extensive testimony to determine, as closely as possible, the true market effect of digital piracy.

sequent sections, determination of these figures is crucial to implement the Plan.

The second duty of the Committee is to direct disbursements from the Entertainment Copyright Protection Association, Inc., to individual companies within the music and movie industries. Acquiring the necessary information for this direction is discussed below. The task is rather mundane, but it removes the potential for abuse from the Entertainment Copyright Protection Association, Inc.

D. The Entertainment Copyright Protection Association, Inc.

The music and movie industries will form a not-for-profit corporation, the Entertainment Copyright Protection Association, Inc. ("Corporation"). The Corporation will consist of a three-member board of directors: two directors from the RIAA and one director from the MPA.¹⁷⁵ If either the RIAA or MPA cannot select a director, the Committee will appoint directors as needed. The Corporation will serve three primary purposes. The first purpose is to create a checking account to deposit royalty payments made to the Corporation from ISPs. From this account, the Corporation will disburse the payments, as directed by the Committee.

The Corporation's second purpose is to research and develop the means to disengage decentralized P2P software already in the market. Once developed, the Corporation must share these means with every company in the music and movie industries. By pooling the resources of the RIAA and MPA, a practical solution should be developed within a year. The best solution is to create an Internet worm or virus ("worm") to erase or disable only the illegal software.¹⁷⁶ The Corporation should seek and employ "technology mercenaries" to develop the worm.¹⁷⁷ For the right

¹⁷⁵ Due to content restraints, this article does not analyze digital piracy in the movie industry. See generally Pantages, *supra* note 169 (analyzing, in detail, digital piracy in the movie industry); Ryan L. Van Den Elzen, *Decrypting the DMCA: Fair Use as a Defense to the Distribution of DeCSS*, 77 NOTRE DAME L. REV. 673 (2002). The music industry suffers more losses than the movie industry to digital piracy because MP3 files are easier to distribute than DivX files; therefore, the RIAA gets two directors, while the MPA gets one director in the Corporation.

¹⁷⁶ See generally Carol L. Schlein, *Bump in the Night . . . Dealing with Viruses, Worms & Other Perils*, LAW. PC, Oct. 15, 2001, at 1 (defining "virus", and noting that some of these virus programs can be incredibly destructive).

¹⁷⁷ See Robert W. Gomulkiewicz, *Legal Protection for Software: Still a Work in Progress*, 8 TEX. WESLEYAN L. REV. 445, 445 (2002) (recognizing that there are such technology mercenaries, who can "use their craft to corrupt software with

price, the Corporation can persuade some Technology Providers to assist in the Corporation's cause. It would behoove the Corporation to turn adversaries into allies and make technology work for copyright owners.

A key problem with this solution is the worm will violate consumers' constitutional rights. However, the Corporation can alleviate this problem. The worm will perform its work at a fast pace, as we have all seen with previous worms and viruses.¹⁷⁸ It will take a significant amount of time before consumers can mount a constitutional charge against the Corporation. By the time consumers can file the claim, the DFUPA will have criminalized the damaged software. Consequently, the only harm consumers will have suffered is the loss of illegal software. Essentially, consumers will have suffered no legal harm that could be remedied, and the Corporation can dismiss the claim as moot.¹⁷⁹

The third purpose of the Corporation is to establish the Fair Use Protection Fund ("Fund"). The Corporation will use the Fund to launch a marketing campaign to educate consumers about the digital piracy problem.¹⁸⁰ While the Fund will likely achieve limited success, copyright owners need to educate consumers about digital piracy. Consumers need to realize that they ultimately suffer the most harm and bear the greatest burden of costs of digital piracy. With a better understanding of the costs involved, consumers may not openly embrace the next technology that emerges after decentralized P2Ps.

E. Royalty Tax Placed on ISPs

Royalty payments are a staple to regaining the value of copyright distributive and reproductive rights. In August 2001, radio broadcasters that streamed AM/FM broadcasts over the Internet were forced to pay royalties for use of copyrighted materials.¹⁸¹ While the case is still working its way through the appellate pro-

viruses, break into computer systems to steal data, and shut down entire computer networks").

¹⁷⁸ Schlein, *supra* note 176, at 1.

¹⁷⁹ See *supra* note 140.

¹⁸⁰ See Jennifer Burke Sylva, *Digital Delivery and Distribution of Music and Other Media: Recent Trends in Copyright Law; Relevant Technologies; and Emerging Business Models*, 20 LOYOLA L.A. ENT. L. REV. 217, 240 (2000) (noting programs that the music industry has already created to educate the public, especially students, about online copyrighted materials).

¹⁸¹ Brian LaCorte, *The Great Race: Copyright and Online Third-Party Works*, ARIZ. ATT'Y, May 2002, at 34, 36.

cess, royalty payments are now mandated for online streaming.¹⁸² On June 26, 2000, the MPA sued RecordTV.com for recording movies and streaming them online without permission.¹⁸³ The two parties reached a \$50,000 settlement on April 17, 2001, and RecordTV.com discontinued its practice of streaming copyrighted works without the MPA's permission.¹⁸⁴

Consumers are the cause of digital copyright infringement. ISPs provide consumers with the means to infringe, but receive great protection from the DMCA. The consensus is that ISPs are not the primary wrongdoers, and they should not be assigned the burden of internalizing the social costs of user misconduct.¹⁸⁵ While this observation is correct, ISPs do indirectly cause online copyright infringement by providing infringers with the means to perform their social wrongs. As a result, ISPs must *indirectly* undertake the burden of internalizing the social costs of user misconduct. Consequently, a copyright royalty tax ("Tax") will be placed upon all ISPs.¹⁸⁶ The tax will consist of a one-dollar monthly charge for each subscriber. The Tax will function as a bare minimum cost to each consumer, and yet it will generate \$600 million dollars annually.¹⁸⁷ ISPs will pay the proceeds of the Tax to the Corporation on a monthly basis.

F. *Disbursing the Proceeds from the Tax*

The Plan directs the Corporation to disburse proceeds from the Tax in accordance with directions from the Committee. This article will analyze the procedures of the Plan through an example. Assume the following set of facts. The Committee determines that

¹⁸² *Id.*

¹⁸³ *Id.* at 37.

¹⁸⁴ *Id.*

¹⁸⁵ Hamdani, *supra* note 18, at 916.

¹⁸⁶ While the idea of this particular ISP tax is an independent thought, Raymond Shih Ray Ku has already proposed the idea of imposing a tax on ISPs. However, Ku also calls for a massive tax covering several industries that would cost consumers nearly \$1.3 billion. Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 313 (2002). When considered with Ku's proposal, the Tax proposed here provides a reasonable solution, while minimizing the costs to consumers.

¹⁸⁷ See David C. Scileppi, *Anonymous Corporate Defamation Plaintiffs: Trampling the First Amendment or Protecting the Rights of Litigants?*, 54 FLA. L. REV. 333, 360 (2002) (stating that there are currently 142 million Internet users in the U.S.). Based on this figure, this article will assume that there are 50 million subscribers in the United States. Therefore, the \$600 million is calculated by the following formula: 50,000,000 x \$1.00 x 12 = \$600 million.

the music industry loses \$300 million and the movie industry loses \$200 million per annum to digital infringement. The Corporation has received payments of \$600 million in the ISP account.

1. The Initial Disbursement From the Corporation

The Committee will now direct the Corporation to distribute the funds in the ISP royalty account. The Corporation will disburse \$300 million to the companies in the music industry, based on a pro rata share of each company's percentage of industry sales. Likewise, the Corporation will distribute \$200 million to the companies in the movie industry, based on a pro rata share of each company's percentage of industry sales. In this example, there is a \$100 million surplus. From this surplus, the Committee will direct the Corporation to pay all its outstanding salaries and expenses. The Corporation will utilize any further surplus for researching and developing means of disabling illegal software. Additionally, this surplus will finance the Fund.

In the event of a deficit where proceeds from the Tax are inadequate to pay the industries, the Corporation will distribute the proceeds on a pro rata share. For example, assume that the Committee determines that the music industry loses \$400 million and that the movie industry loses \$300 million to digital infringement. In this example, there is a \$100 million deficit. The Corporation will allocate the \$600 million on a pro rata basis according to the Committee's directions. The Corporation will allocate \$342.86 million (four-sevenths of the Tax proceeds) to the music industry and \$257.14 million (three-sevenths of the Tax proceeds) to the movie industry. Then the funds are disbursed to each company in each industry, based on a pro rata share of each company's percentage of industry sales.

2. The Disbursement From Individual Companies

From this point, each company must distribute its share of the Tax to artists, writers, etc., based on a pro rata share of the total royalty payments from its financial records, plus a two-percent fee to cover extra record keeping expenses. To illustrate, suppose Music Company A ("Company"), after analyzing its financial records, pays ten-percent of gross sales to royalty payments to its artists and writers. Also, suppose Company's share of the Tax is \$10 million. Company keeps \$9.2 million (their normal ninety-percent plus two-percent costs fee) and must pay the remaining \$800,000 to royalty payees. Company then looks at total royalty

payments Company paid that year. Then Company distributes the \$800,000 on a pro rata share to its royalty payees, based on their respective royalty payments throughout the year.

3. Required Accounting Measures

For the Plan to work, the RIAA, MPA, and every company within the music and movie industries must maintain accurate accounting measures. The RIAA and MPA must provide the Committee with the exact pro rata share of industry sales that each company within the industry accumulates. This way, the Committee will accurately direct disbursement of the Tax from the Corporation. Each company must maintain accurate accounting on three figures: (1) percentage of gross sales paid to royalties; (2) total royalties paid; and (3) each royalty payee's pro rata share of royalty payments. As the individual companies have a greater accounting burden, they receive the bonus two-percent from the Tax.

G. Effects of the Plan

The Plan serves five distinctive goals. The first is that copyright owners receive, as fairly as possible, the value of their exclusive rights to reproduction and distribution. While the Plan is not perfect, copyright owners will recover the majority of their lost royalties amid the onslaught of digital infringement. Second, consumers bear the cost of the Plan because consumers are responsible for digital infringement. The cost is nominal to each consumer, but it generates sufficient revenues to retain the value of copyrighted works. Third, the Plan greatly simplifies the litigation involved in digital copyright infringement. Legal actions under the Plan will consist of basic breach of contract or breach of fiduciary duty claims among the companies within the music and movie industries, instead of complex litigation concerning contributory and vicarious liability over the Internet. Fourth, the Plan preserves fair use for consumers by re-establishing the equilibrium point on the supply and demand schedule. Finally, the Plan utilizes criminal liability to eradicate the oligopoly's market control, and allows the music industry to effectively pursue the Online Solution. Effective implementation of the Plan will re-establish Point C as the equilibrium point, and cure the market inequalities created by online copyright infringement. Fair use provisions will survive, and consumers will avoid the costly measures of paying for deadweight loss that they create.

VII. CONCLUSION

Online copyright infringement by consumers has spurred years of litigation and hundreds of millions of dollars in legal expenses. Lawmakers and legal scholars have struggled to find an answer to this complex problem. While brilliant theories and publications have resulted, copyright owners have been left without a concrete solution. By focusing on the value of reproductive and distributive rights, rather than the rights themselves, the Plan gives copyright owners the solution that they so desperately need. The true answer lies in a combined analysis of legal and economic theories. While digital infringement grants consumers a short-term gain, the long-term effects will severely injure consumers. In order to protect copyright owners, to lower prices for consumers, and to maintain incentives for quality works, government regulation is required to protect consumers from themselves.

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* LL.M. expected May 2004, University of Houston; J.D. expected May 2003, University of Arkansas at Little Rock. I would like to thank my wife, Jenny, whose love makes every day shine brighter. I would like to thank Michael Lemley for teaching me about unsinkable ships and Susie Lemley, Kyle Lemley, and Nanny for their support. I would also like to thank Mark A. Drumbl and Rohit Khanna for their incredible teaching methods. Finally, I would like to thank the outstanding staff of the Albany Law Journal of Science & Technology for their superior work and commitment to their authors.

