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## Beyond Napster: Using Antitrust Law to Advance and Enhance Online Music Distribution

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# ARTICLE

## BEYOND NAPSTER: USING ANTITRUST LAW TO ADVANCE AND ENHANCE ONLINE MUSIC DISTRIBUTION

MATTHEW FAGIN,\* FRANK PASQUALE, & KIM WEATHERALL

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INTRODUCTION

*People all over the world have always shared music with friends.* Sharing a passion, discovering a new genre or a new performer by serendipity or word of mouth, and spreading the word further – these have long been sources of joy for individuals, and essential parts of the formation and propagation of culture. On the other hand, *people have not always shared music with friends all over the world.* The development of peer-to-peer (P2P) applications – Napster and its ilk – was a technological revolution, a significant innovation that demonstrated beyond a shadow of a doubt the exciting possibilities of networked technology and networked people in a context in which, in accordance with Moore’s Law,<sup>1</sup> processor speed and memory are becoming rapidly less expensive.

That this revolutionary technology created upheaval in copyright law is well-known. That P2P technology has also raised important questions for antitrust law and antitrust regulators – by shaking up the industry and accelerating coordination in an already concentrated industry – however, is less well known and less well examined in the literature.

Questions arising at the intersection of copyright and antitrust must now be addressed. The Antitrust Division of the DOJ has launched an investigation of leading players in the recording industry (the “big five labels”), their industry association, and their new joint ventures for licensing music on the web.<sup>2</sup> European authorities are also publicly monitoring the industry.<sup>3</sup> Regardless of the outcome of these particular investigations, the issues are not likely to go away. Even Napster has gotten into the act, diverting judicial attention from its own copyright infringement to the industry practices which made legitimate

<sup>1</sup> See Gordon E. Moore, *Cramming More Components Onto Integrated Circuits*, ELECTRONICS, Apr. 19, 1965, available at <http://www.intel.com/research/silicon/mooreslaw.htm> (last visited May 11, 2002). Moore, co-predicted that the number of transistors per integrated circuit – and thus the processing power – would double every couple of years. “Moore’s Law,” as it has become known, proved remarkably prescient, and is still frequently referenced. See *Moore’s Law, Overview*, at [www.intel.com/research/silicon/mooreslaw.htm](http://www.intel.com/research/silicon/mooreslaw.htm) (last visited May 11, 2002) (explaining the “Law”).

<sup>2</sup> See Matt Richtel, *U.S. Inquiry Is Under Way on Online Music Business*, N.Y. TIMES, Oct. 16, 2001, at C2.

<sup>3</sup> See Veronica Garcia-Robles, *European Union Considers Banning Internet Music Services Pressplay and Musicnet*, EUROPEMEDIA.NET, at <http://www.europemedia.net/shownews.asp?ArticleID=6072> (Oct. 15, 2001).

online music distribution so difficult.<sup>4</sup> But what should antitrust regulators be doing here?

This article argues that there is a potential role for antitrust authorities in this context. These institutions have particular strengths that are worth exploring. Given the strengthening of the “property rights” of copyright owners in this context, and given the possibly detrimental results of this strengthening for consumer welfare, there may be a role for antitrust regulators in imposing some controls. Matters historically viewed as issues of pure copyright policy may best also be seen as basic questions of consumer welfare and a legitimate concern for antitrust regulators. Where, as we will argue, a highly nuanced response to the particular problems of this industry is required, the “one size fits all” approach of copyright law should be supplemented by the more fact-intensive and fact-sensitive approach of antitrust.

In this paper, then, we seek to ask a number of questions.

First, what should be the broad principles guiding copyright and competition policy in the context of the recording industry online? In short, what are the key concerns or values that we want preserved in relation to the distribution of music online? We will outline the background to the present investigations and existing law in Part I and argue in Part II that these concerns can be encapsulated in two broad areas: (1) the preservation of some scope for private and personal use and (2) the encouragement and growth of a diverse sector for the distribution of copyrighted works online. We also argue that, at least at present, the proper balance has not been achieved in *either* area. The *particular* principles we identify as important for promoting competition in the music industry include maximizing (1) content availability, (2) distribution technology, (3) fair individual use of content, and (4) the welfare of all stakeholders, as well as minimizing technologies of control that invade users’ privacy or unduly restrict use of content. Of course, regulators do not have free reign to pursue these principles. Current law and market structure constrain them. Our next question then moves from the realm of the ideal to the real: What should be the minimum terms of settlement? In Part III, we propose three key concessions from the recording industry, including the

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<sup>4</sup> See *In re Napster, Inc. Copyright Litigation*, 191 F. Supp. 2d 1087, 1102-13 (N.D. Cal. 2002) (considering the conduct of the recording industry in the context of Napster’s allegations of copyright misuse and ordering the plaintiffs to provide further discovery in that regard). The doctrine of copyright misuse is closely related to, though not co-extensive with, antitrust law. See *id.*

<sup>5</sup> See Lawrence A. Sullivan, *Is Competition Policy Possible in High Tech Markets?: An Inquiry into Antitrust, Intellectual Property, and Broadband Regulation as Applied to ‘The New Economy,’* 52 CASE W. RES. L. REV. 41, 62 (2001) (“[A]ny harm from excessive IP protection is amplified [in the new economy]. For this reason, those who value effective competition must take seriously the task of understanding and evaluating the actual allocative and consumer welfare results of the IP system. This is imperative because, unlike antitrust, IP is anything but supple. Its ‘one size fits all’ rules leave courts painfully little discretion to weigh costs and benefits before applying them.”).

agreement 1) not to sue small and limited forms of digital music file sharing (known as virtual private networks), 2) to include consumer groups on industry standard-setting bodies, and 3) to disclose and limit digital rights management techniques.

Second, we ask: How can we evaluate the means possible to achieve these ends? We contend that proposed reforms should be evaluated along axes of *plausibility* and *comprehensiveness*. As we will argue, those proposals which are most comprehensive – that is, the proposals most likely to achieve our stated aims in full – are also least plausible in the current institutional and legal environment. This motivates us to look for more realistically achievable, albeit less comprehensive goals. In other words, we would like to explore not just principle, but also issues of what, pragmatically, can be done in light of existing institutions and path dependence as well as principle.

Third, we ask: What institutions are available that can plausibly promulgate and effectively apply regulations to achieve these ends? It is here in Part III that we turn to the antitrust authorities as potential promulgators of regulations embodying our preferred outcomes. We will argue that, in the context of these technological developments, in the area of copyright law, *neither* the legislature, nor the courts, are going to strike the right balance. We therefore look to regulatory agencies, and in particular, the antitrust agencies, which are less likely in this context to be subject to “capture” by copyright interests. In Part IV, we outline the relative competencies and liabilities of Congress, the courts, and a range of administrative agencies in applying such regulation. We conclude by endorsing an expanded role for administrative agencies and a more restricted one for the courts.

The reader will appreciate that this is a highly controversial area. There are few areas of antitrust policy which are currently less contentious than the proper relationship between antitrust and intellectual property law. Even if both sets of doctrine have a common goal – the promotion of innovation – they tend to use different techniques for achieving that end. Given the problems we will point out with copyright policy-making institutions, however, the relationship and the possible role of antitrust regulators are worth exploring. Even if the reader rejects these speculations regarding the possible role of antitrust regulators, this paper reaches further in its scope. We set out a number of policy goals that we consider plausible and that could be pursued by other means – legislation, or other action by administrative agencies such as the Library of Congress. Moreover, we consider in detail the weaknesses and strengths of existing copyright institutions – considerations relevant for any proposals of reform in this difficult area.

As music distribution becomes digitized, the relative costs of communication, reproduction, and use of works will be fundamentally altered. Owners and consumers of copyrighted works must reach a new equilibrium of rights and obligations. Governmental regulators can play a key role in the new environment. If they are guided by the right principles, antitrust law and institutions can both advance and enhance online music distribution.

## I. BACKGROUND

The Internet has radically expanded the methods for finding and experiencing music. The development of Peer-to-Peer (“P2P”) technology has made public distribution of music to the world as easy as sharing music with a friend. In response, copyright owners have directed resources at both “law” and “code” – litigation and developing technologies that enable ever-tighter control over their works. Such digital rights management (“DRM”), backed by the Digital Millennium Copyright Act,<sup>6</sup> has the potential to change the face of copyright law. Copyright owners who can dictate the terms of use of copyrighted works can prevent even uses that would be legal under extant copyright law,<sup>7</sup> particularly under such well-known doctrines as fair use.

Both P2P technology and DRM have profoundly affected the prospects for online music distribution. In the past two years, the revolutionary changes affecting the music industry have moved from specialized publications like *Billboard* and *Rolling Stone* to the covers of *Time* and *Newsweek*.<sup>8</sup> To put these developments in perspective, it is necessary to review 1) the new technology, 2) the key institutions generating and implementing copyright policy, and 3) the relevant law. This introduction gives a brief history of the latest developments in online music distribution, and discusses the key players and institutions that will shape its future. The aim is not to provide a detailed exposition of the law, which may be found elsewhere,<sup>9</sup> but rather, to present an overall picture of recent legal and factual developments, and to place those developments in their institutional context.

### A. *The Nature and Significance of the Technology*

#### 1. A Brief Recent History of Unauthorized Online Music Distribution, and its Threat to Copyright Owners’ Interests

Digital technology has made the reproduction and dissemination of copyrighted works infinitely easier and almost costless. Each digital copy is identical, and is therefore capable of generating infinite further reproductions.

<sup>6</sup> Pub. L. No. 105-304, 1122 Stat. 2860 (Oct. 28, 1998).

<sup>7</sup> See Dan L. Burk and Julie E. Cohen, *Fair Use Infrastructure for Rights Management*, 15 HARV. J.L. & TECH. 41 (2001).

<sup>8</sup> See Eileen Fitzpatrick, *Napster Ruling May Affect Other Sites*, BILLBOARD, Aug. 5, 2000; *Napster’s Boy Wonder: The Most Dangerous Man in the Music Biz*, ROLLING STONE, Jul. 6-20, 2000; *Meet the Napster*, TIME, Oct. 2, 2000, at 60; Steven Levy, *The Noisy War over Napster*, NEWSWEEK, June 5, 2000, at 46.

<sup>9</sup> See generally Jane Ginsburg, *Copyright Use and Excuse on the Internet*, 24 COLUM.-VLA J. L. & ARTS 1 (2000); Joseph A. Sifferd, *The Peer-to-Peer Revolution: A Post-Napster Analysis of the Rapidly Developing File-Sharing Technology*, 4 VAND. J. ENT. L & PRAC. 93 (2002); see also Fred Von Lohmann, *Peer to Peer File Sharing and Copyright Law After Napster*, ELECTRONIC FRONTIER FOUNDATION available at [http://www.eff.org/IP/P2P/Napster/20010309\\_p2p\\_exec\\_sum.html](http://www.eff.org/IP/P2P/Napster/20010309_p2p_exec_sum.html) (last visited Apr. 19, 2002).



Once networked, everyone is a potential “publisher” – not only to a few friends, but to millions. Music, in particular, has borne the brunt of early developments. While digital music existed even in the very early days of the Internet, the real breakthrough came with compression technology, notably MP3,<sup>10</sup> which makes digitized songs into smaller, easily transferable files, notably free of any restrictive copy-management technology. In conjunction with readily available “ripping” software that converts CDs to MP3 digital files, compression technology has effectively removed the “box”<sup>11</sup> from sound recordings.

MP3 files were not always easy to find. Internet entrepreneurs, however, saw opportunities to provide easy access to such files. Digital music companies of various sorts, some funded with venture capital, sprang up to seize these opportunities. A major shake-out has ensued, in which many of these companies have since disappeared or been acquired.<sup>12</sup> The past three years have brought dynamic technological developments – and ensuing litigation.

Chief among the technological developments has been P2P technology, the sheer scale of which has brought conflicts over online distribution of music to a crisis point. P2P file-sharing represents a challenge to copyright law because it allows users to search for and retrieve files from the hard drives of other users in a network. “Nodes” (usually personal computers) at the edges of the network have significant autonomy, potentially rendering centralized servers superfluous.<sup>13</sup> File-sharing threatens copyright interests by removing bottlenecks that have been the locus of copyright control over works, and by

<sup>10</sup> “MP3” is shorthand for “MPEG-1 layer-3.” See Jocelyn Dabeau, *An Introduction to MP3*, at [http://www.law.harvard.edu/Academic\\_Affairs/coursepages/tfisher/music/MP3.html](http://www.law.harvard.edu/Academic_Affairs/coursepages/tfisher/music/MP3.html) (last visited May 16, 2002). MPEG stands for the Moving Pictures Experts Group, a working group directed by the International Standards Organization and the International Electro-Technical Commission. See *id.* A three-minute song that requiring about 32 megabytes in original form can be compressed to about three megabytes without a noticeable reduction in sound quality. See *id.* MP3 is the presently dominant but not the only form of compression technology. Matthew Graven & Carol Mangis, *Music by MP3*, PC MAGAZINE, May 8, 2001 (describing “wma” and “aac” files).

<sup>11</sup> Or the bottle, to use John Perry Barlow’s famous metaphor. See John Perry Barlow, *Selling Wine Without Bottles: The Economy of the Mind on the Global Net*, at [http://www.eff.org/pub/Publications/John\\_Perry\\_Barlow/HTML/idea\\_economy\\_article.html](http://www.eff.org/pub/Publications/John_Perry_Barlow/HTML/idea_economy_article.html) (last visited Feb. 14, 2002).

<sup>12</sup> MP3.com, for example, was acquired by Vivendi-Universal. See *Bertelsmann In Deal To Buy Music Start-Up*, N.Y. TIMES, May 30, 2001; Napster, having been supported by loans from Bertelsmann, filed for Chapter 11 bankruptcy protection in June 2002. See *Upheaval at Bertelsmann May End Plans for Acquisition of Napster*, N.Y. TIMES, July 31, 2002. The developer of Aimster (later Madster) also filed for bankruptcy. See *In re Deep*, 279 B.R. 653, 656 (N.D.N.Y. 2002) (outlining the circumstances the Chapter 13 petition of Aimster founder Johnny Deep).

<sup>13</sup> See generally PEER-TO-PEER: HARNESSING THE BENEFITS OF A DISRUPTIVE TECHNOLOGY (Andy Oram, ed., O’Reilly & Associates, Inc. 2001).

massively increasing the efficiency and scale of “viral distribution.”<sup>14</sup> P2P also blurs the differences between the kinds of public distribution traditionally controlled by copyright owners, and private uses including “sharing music” with friends. A number of different P2P file-sharing models have developed.

In early 1999, Shawn Fanning developed the software that became Napster.<sup>15</sup> Napster represented a technological revolution. Napster’s “MusicShare” software exponentially increased both the files available and the convenience of searching for MP3 files, by opening access to users’ hard drives and creating a centralized database, updated in real time, of the files thus made available by users connected to the network at any given time.<sup>16</sup> In the Napster system, filenames of files that individual users were willing to share were uploaded to Napster servers. This central list of filenames was then searched by other users. When a user chose a file, the Napster server conveyed the Internet Protocol (IP) address of the sharing user to the requesting user. Thus while the file transfer was peer-to-peer, the system depended on centralized searching. The technology gained popularity, and users rapidly formed a network of millions sharing music files – the vast majority copyrighted.

In December 1999, the record companies filed suit, alleging contributory and vicarious copyright infringement on a massive scale.<sup>17</sup> A long period of litigation has ensued, which continues at the time of writing. At first instance, the trial judge found that the copyright owners had shown they were likely to

<sup>14</sup> “Viral Distribution” refers to the phenomenon where files can be rapidly replicated, and each replica in turn can be rapidly replicated, allowing redistribution by each recipient of a copy. On the analogy with viral propagation, *See generally* Margaret Jane Radin, *Humans, Computers, and Binding Commitment*, 75 *IND. L. J.* 1125, 1132 (1999); *Universal City Studios, Inc v Reimerdes*, 111 F. Supp. 2d 294, 331-32 (2000).

<sup>15</sup> *See* Warren Cohen, *Napster is Rocking the Music Industry: The Popular Web Site has Powerful Enemies*, *US NEWS & WORLD REPORT*, Mar. 6, 2000, available at 2000 WL 7717576; Peter Jan Honigsberg, *The Evolution and Revolution of Napster*, 36 *U.S.F. L. REV.* 473, 484-89 (2002).

<sup>16</sup> *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011-13 (9th Cir. 2001) (describing the Napster system in its present and pre-injunction incarnation). Subsequently, the Napster system has undergone a number of changes, including the introduction of different filters, and, most recently, the testing of a subscription model. *See* Jon Healey, *Napster Launches New Version; Internet: Trial Subscription Service Will Pay For Music But Have Far Fewer Songs to Download*, *L.A. TIMES*, Jan. 10, 2002, at B3-5; *see also* Peter Honigsberg, *supra* note 15, at 489 (noting that a subscription service was trialed in January 2002). These trials have been overtaken by Napster’s subsequent filing for Chapter 11 bankruptcy protection. *See Upheaval at Bertelsmann May End Plans for Acquisition of Napster*, *N.Y. TIMES*, July 31, 2002. In all these incarnations, however, including the trial subscription model, the basic system remains the same, with file-swapping occurring between computers, using a centralized database.

<sup>17</sup> *See A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 900 (N.D. Cal. 2000) (explaining facts taken from judgment of the District Court). The music publishers joined in January 2000. *See id.*

succeed in demonstrating contributory infringement and vicarious liability, and that Napster's defenses were likely to fail.<sup>18</sup> On this basis, District Judge Patel granted a preliminary injunction in favor of the copyright owners.<sup>19</sup> This decision was largely upheld by the Ninth Circuit in February 2001, although the injunction was remanded to the district court for modification to recognize possible limits on Napster's liability.<sup>20</sup> The preliminary injunction, the Ninth Circuit held, must require copyright owners to take some of the burden by identifying specific infringing files and notifying these to Napster.<sup>21</sup> A modified injunction was accordingly entered by the district court on March 5, 2001.<sup>22</sup> After three months of monitoring Napster's compliance with the injunction, the district court found that Napster was not in satisfactory compliance with the modified injunction, and in July 2001 ordered Napster to disable its file transferring service until certain conditions were met.<sup>23</sup> The modified form of the injunction, and the shut down order, were both upheld by the Ninth Circuit in March 2002.<sup>24</sup> Napster has not re-commenced its free file-sharing service; it is now part-owned by Bertelsmann, and has attempted to "go legitimate" - focusing on the development of a subscription model, and obtaining some licenses to include works.<sup>25</sup>

Meanwhile, in March 2000, an AOL subsidiary posted a beta version of an open-source file-sharing program.<sup>26</sup> Though the program was taken down within hours,<sup>27</sup> downloads made during that brief period were the source of the Gnutella open-source file-sharing application.<sup>28</sup> Like Napster, Gnutella is a peer-to-peer system; unlike Napster, Gnutella does not rely on a centralized database of files available.<sup>29</sup> In the Gnutella model, individual users send out

<sup>18</sup> See *id.* at 912, 916-20, 922-25 (discussing Napster's fair use, contributory infringement, vicarious infringement, and waiver defenses as well as defenses premised on *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), and the Audio Home Recording Act of 1992, 17 U.S.C. §§ 1001-1010 (2000).

<sup>19</sup> See *id.* at 927.

<sup>20</sup> *A&M Records, Inc. v. Napster, Inc.* 239 F.3d 1004, 1027-1028 (9th Cir. 2001).

<sup>21</sup> See *id.* at 1027.

<sup>22</sup> *A&M Records, Inc. v. Napster, Inc.*, 2001 WL 227083 (N.D. Cal. Mar. 5, 2001).

<sup>23</sup> *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1095-96 (9th Cir. 2002) (outlining the history since March 2001).

<sup>24</sup> *Id.*

<sup>25</sup> Matt Richtel, *If Bertelsmann Wed Napster, It Could Sue Itself, and More*, N.Y. TIMES, Apr. 22, 2002, at C1.

<sup>26</sup> See D. Ian Hopper, *Open Source Napster-like Product Disappears After Release*, CNN.COM, at <http://www.cnn.com/2000/TECH/ptech/03/15/gnutella> (Mar. 15, 2000).

<sup>27</sup> See Christopher Jones, *Open Source 'Napster' Shut Down*, WIRED NEWS, at <http://www.wired.com/news/technology/0,1282,34978,00.html> (Mar. 15, 2000).

<sup>28</sup> *What is Gnutella?*, Gnutella.COM, at <http://www.gnutella.com/news/4210> (Dec. 3, 2001).

<sup>29</sup> See *id.*

queries “broadcast” or viral fashion.<sup>30</sup> Each computer sends the query to other logged in users it is connected with, then each computer receiving such a query does the same.<sup>31</sup> A host of particular applications offered access to the Gnutella network, including LimeWire and BearShare.<sup>32</sup> By late 2000, it was estimated that Napster had tens of millions of users,<sup>33</sup> and the Gnutella network was comprised of thousands of “peers” at any given time.<sup>34</sup> Gnutella has its problems, however: Viral queries consume large amounts of bandwidth, and non-sharing “free riders” have a negative impact on the system.<sup>35</sup>

The technology continues to evolve at an extremely rapid pace. In the wake of the Napster litigation, more efficient distributed systems have developed. A number of services use the very popular FastTrack software, including MusicCity.com (now known as StreamCast Networks, Inc.), KaZaA, and Grokster (collectively, the “FastTrack providers”).<sup>36</sup> Like Napster, the FastTrack user interface is simple and intuitive, and provides users who have downloaded the software, and who connect to the network, with the ability to search for and download files – in this case music files, but also audio-visual and graphics files. Unlike Napster’s MusicShare, however, the FastTrack providers neither compile nor control any single centralized database of available files.<sup>37</sup> Instead, the system is to some extent ‘self-organizing.’ Users connect to “SuperNodes” – computers of other users – and those SuperNodes compile an index of digital data made available for download by users.<sup>38</sup> The FastTrack providers, moreover, claim only to make and distribute software,

<sup>30</sup> See *id.*

<sup>31</sup> See *id.*

<sup>32</sup> See generally Matt Richtel, *With Napster Down, Its Audience Fans Out*, N.Y. TIMES, July 20, 2001; Scott Rosenberg, *Revenge of the File Sharing Masses!*, SALON.COM, at [http://dir.salon.com/tech/col/rose/2001/07/20/napster\\_diaspora/index.html](http://dir.salon.com/tech/col/rose/2001/07/20/napster_diaspora/index.html) (July 20, 2001) (last visited September 2, 2002).

<sup>33</sup> See Amy Harmon, *Napster Users Mourn End of Free Music*, N.Y. TIMES, Nov. 1, 2000 (noting that in 18 months, Napster had acquired 38 million users).

<sup>34</sup> Eytan Adar & Bernardo A. Huberman, *Free Riding on Gnutella*, 5(1) FIRST MONDAY, Oct. 2000, available at [http://firstmonday.org/issues/issue5\\_10/adar/index.html](http://firstmonday.org/issues/issue5_10/adar/index.html) (last visited May 5, 2002) (discussing experimental results showing over 30,000 users at any given time).

<sup>35</sup> Eytan Adar and Bernardo A. Huberman, *Free Riding on Gnutella*, 5(1) FIRST MONDAY (Oct. 2000), available at [http://firstmonday.org/issues/issue5\\_10/adar/index.html](http://firstmonday.org/issues/issue5_10/adar/index.html) (last visited May 5, 2002).

<sup>36</sup> See Rosenberg, *supra* note 32; see also the description of FastTrack in Honigsberg, *supra* note 15, at 476, n.16.

<sup>37</sup> See *id.*

<sup>38</sup> KaZaA BV’s Answer to Complaint and Counterclaim for Declaratory Relief, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., Case No. CV 01-08541 SWB (RNBx) (C.D. Cal. Jan. 2, 2002), available at [http://www.eff.org/IP/P2P/MGM\\_v\\_Grokster/](http://www.eff.org/IP/P2P/MGM_v_Grokster/) (last visited May 22, 2002).

and to play no role in file-trading by users of the software.<sup>39</sup> The degree of control that Napster was able to exercise over its users and network was a key holding in the Ninth Circuit decision;<sup>40</sup> a service with less control over its users may be less likely to be held vicariously liable for their copyright infringement. This distinction received some support from a Netherlands Appellate Court holding that KaZaA developers were not liable for copyright infringement that occurs when people use the software.<sup>41</sup> However, twenty-eight of the world's largest entertainment companies (including movie studios and record companies) in a suit filed against the various FastTrack providers in October 2001 allege that the software developers have sufficient control over the network to be liable for contributory and vicarious copyright infringement.<sup>42</sup> The United States' case remains to be heard later in 2002.

The final P2P development of significance was the "virtual private network" format: a different kind of peer-to-peer application embodied in the application Madster, formerly known as Aimster.<sup>43</sup> This application, rather than creating a world-wide file-sharing network open to all comers, instead created what we might call a "virtual private network" by allowing users of AOL's AIM instant messaging service to share files among those on their "buddy lists." The system is more "private" in the sense that only "invited" users can view an individual's files, although it can still create a virtual private network of up to 160 people at once.<sup>44</sup> Madster, too, is the subject of copyright litigation and the legal case remains outstanding. Its developer, Johnny Deep, has filed for bankruptcy.<sup>45</sup>

Other non-P2P developments in music distribution and business on the Internet also sprang up during this same 1999 to 2002 period. Most significant

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<sup>39</sup> Jasper Koning, *KaZaA Plays on Despite Threat of Fines*, CNET NEWS, at <http://news.com.com/2102-1023-277300.html> (Dec. 20, 2001).

<sup>40</sup> *A&M Records, Inc. v. Napster, Inc.* 239 F.3d 1004, 1023-24 (9th Cir. 2001) (noting that Napster had the "the right and ability to supervise its users' conduct").

<sup>41</sup> Brad King, *The KaZaA Ruling: What It Means*, WIRED NEWS, at <http://www.wired.com/news/mp3/0,1285,51457,00.html> (Apr. 2, 2002).

<sup>42</sup> Complaint, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, Case No. CV 01-08541 SWB (RNBx), ¶ 1, (C.D. Cal. Oct. 2, 2001), available at [http://www.eff.org/IP/P2P/MGM\\_v\\_Grokster/](http://www.eff.org/IP/P2P/MGM_v_Grokster/) (last visited May 31, 2002).

<sup>43</sup> After a dispute between the developer Johnny Deep and AOL (who run the AIM Messenger Service), the domain name "aimster.com" (*inter alia*) was transferred after a decision under ICANN's Uniform Dispute Resolution Policy. The decision, dated May 14, 2001, is online at the Arbitrator's website. See National Arbitration Forum, *America Online, Inc. v. John Deep d/b/a Buddy USA, Inc.*, at <http://www.arbitration-forum.com/domains/decisions/96795.htm> (last visited May 31, 2002).

<sup>44</sup> See P. J. Huffstutter, *File-Swapping Aimster Offers Promise, Peril*, L.A. TIMES, Dec. 18, 2000.

<sup>45</sup> See Brian Garrity, *Sites + Sounds*, BILLBOARD, Apr. 6, 2002, at 60 (discussing the filing of a Chapter 11 action in an U.S. Bankruptcy Court in Albany, N.Y. by Aimster founder Johnny Deep on behalf of his companies AbovePeer and Buddy USA).

among these was My.MP3.com, a service which allowed consumers to listen to streamed audio of music after proving they had a physical copy of the CD by inserting it into their CD-ROM Drive. In order to provide this service, My.MP3.com stored unauthorized reproductions of all the songs for their centralized database; the service was successfully sued by the record companies for infringement of copyright by reproduction. The court rejected My.MP3.com's reliance on users alleged 'fair use' rights to 'space shift.'<sup>46</sup>

In short, especially since 1999, music has been widely distributed without copyright owners' authorization and certainly against their wishes, most spectacularly via P2P technology. No doubt, after publication of this article, there will be numerous further developments. Copyright owners have aggressively litigated against such outbreaks of viral distribution. Although there have been few suits against individual users<sup>47</sup>—this is not an attractive option for record companies<sup>48</sup>—commercial P2P systems have been devastated by the litigation. The litigation, has driven internet entrepreneurs away from the field and deterred investment from venture capitalists.<sup>49</sup> Nevertheless, it does not appear to be stopping the underlying file-trading,<sup>50</sup> which may be 50% greater than the trading that occurred at Napster's peak.

For the present, we can divide music distribution online into four rough categories. First, there is the inevitable "underground" distribution that is, most likely, largely uncontrollable. Second and third we have the two extremes to which file-sharing technologies have been driven as a result of the litigation against Napster and its brethren. One direction is toward less legally

<sup>46</sup> See *UMG Recordings, Inc v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000). In another high-profile case around the same time, RealNetworks obtained a preliminary injunction against Streambox, which developed software allowing recording of streamed music online. See *RealNetworks, Inc v Streambox, Inc.*, 2000 U.S. Dist LEXIS 1889 (W.D. Wash. Jan. 18, 2000). Both cases are considered in some detail in Jane Ginsburg, *Copyright Use and Excuse on the Internet*, 24 COLUM.-VLA J. L. & ARTS 1, 2-5, 22-29 (2000).

<sup>47</sup> Cf. Janelle Brown, *The Gnutella Paradox*, SALON.COM, at [http://www.salon.com/tech/feature/2000/09/29/gnutella\\_paradox](http://www.salon.com/tech/feature/2000/09/29/gnutella_paradox) (Sept. 29, 2000) (highlighting Gene Kan, who likens Gnutella to a "communications protocol" and argues that the idea of suing Gnutella is like "suing English"). Kan's analogy is an exaggeration, as it might be possible instead to bring suit against the better known (and more user friendly) portals; rendering the system deeply user-unfriendly is likely to achieve many of the same ends for content owners.

<sup>48</sup> But see *GigaMedia, EMI to Form Online Music Venture*, CHINA POST, May 15, 2001 (describing recent Taiwanese raids on students' computers in relation to file-sharing). In the United States, an Oregon student became the first individual convicted in 1999. See Joseph A. Sifferd, *The Peer-to-Peer Revolution: A Post-Napster Analysis of the Rapidly Developing File-Sharing Technology*, 4 VAND. J. ENT. L. & PRAC. 93, 97-98 (2002) (describing the case).

<sup>49</sup> Brian Garrity, *Victory Eludes Legal Fight over File Swapping*, BILLBOARD, Apr. 13, 2002 (noting that "[m]ost investment in peer-to-peer technology has dried up during the past 18 months, partly as a result of the threat of litigation.").

<sup>50</sup> *Id.* (noting that P2P music trading has risen as much as 18 million monthly unique users).

vulnerable systems such as those outlined above. The other is toward the development of closed systems operating under industry approval and license, such as eMusic. The latter seek to replicate the benefits of file-sharing – such as sharing of interests with other users – while maintaining control over the copyrighted works available, for example, by only allowing the sharing of files listed on a central database.<sup>51</sup> Finally, we have the copyright owners' own, tentative steps towards online distribution. We turn to those developments now.

## 2. Music Distribution Online: The Authorized Biography

Copyright owner-sanctioned digital distribution has been rather slower to emerge than its unauthorized relatives.<sup>52</sup> In the wake of the Napster court decisions and the shut-down of the service which had demonstrated enormous demand for the convenience and efficiency of music distribution through digital mechanisms, the recording industry felt the pressure – from the public and some members of Congress – to provide some kind of authorized alternative.

On April 3, 2001, the Senate Judiciary Committee under the Chairmanship of Senator Orrin Hatch held a hearing, *Online Entertainment: Coming Soon to a Digital Device Near You*.<sup>53</sup> In the days leading up to the hearing several new initiatives were announced, including plans for MTV to provide licensed digital music downloads for purchase by consumers.<sup>54</sup> RealNetworks, AOL Time Warner, Bertelsmann AG, and the EMI Group announced “MusicNet,” an online subscription music service formed as a joint venture of the three labels and RealNetworks.<sup>55</sup> The other two of the “big five” recording studios,

<sup>51</sup> An example is Wippit, which is based on a flat-fee subscription model which claims to take “the best aspects of peer-to-peer thinking” and add in clearing house accounting in the style of performing rights associations, to provide revenue for music companies and artists. See WIPPET.COM, at <http://www.wippit.co.uk> (last visited June 4, 2002). Performing rights associations have long assured compensation to creators unable to control the use of their works—such as composers and lyricists. See M. WILLIAM KRASILOVSKY & SIDNEY SHEL, *THIS BUSINESS OF MUSIC* 232 (Watson-Guptill, 7th ed. 1995) (1964).

<sup>52</sup> See generally *Music on the Internet: Is There an Upside to Downloading?: Hearing Before the Senate Comm. on the Judiciary*, 106th Cong. 2 (2000); Brian Garrity, *Victory Eludes Legal Fight over File Swapping*, BILLBOARD, Apr. 13, 2002 (quoting one source as suggesting that “[h]aving labels administer stuff like this is like having it administered by the registry of motor vehicles.”).

<sup>53</sup> See Statement of the Hon. Orrin Hatch, in *Online Entertainment: Coming Soon to a Digital Device Near You: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (2001), available at <http://judiciary.senate.gov/hearing.cfm?id=198> (last visited September 2, 2002).

<sup>54</sup> See Brad King, *MTV Gets Down with Downloads*, WIRED NEWS, at <http://www.wired.com/news/mp3/0,1285,42839,00.html> (Apr. 4, 2001).

<sup>55</sup> See Frank Saxe, *MusicNet Proposal Raises Questions of Fairness*, BILLBOARD, Apr. 14, 2001; Richard Henderson & Juliana Koranteng, *The State of Play*, BILLBOARD, Apr. 14,

Sony Music Entertainment and Universal Music Group, had already announced “Duet,” since re-named “Pressplay” – an equally held joint venture.<sup>56</sup> The music industry demonstrated some of the technology at a House Committee Hearing on May 17, 2001,<sup>57</sup> and the two services were launched in December 2001.<sup>58</sup> The two entities differ in form: MusicNet is apparently set up to license the labels’ music to distributors (so far including RealNetworks’ RealOne Music and AOL),<sup>59</sup> whereas Pressplay appears to be more “centralized” – though there are links from various affiliate websites, a prospective user is always apparently directed to a site at Pressplay.<sup>60</sup> Rights granted by the two services also differ. Pressplay at this stage allows users to “burn” some files on to CDs. The breakdown of the subscription plans currently available on Pressplay is as follows:<sup>61</sup>

	<b>Basic Plan</b>	<b>Silver Plan</b>	<b>Gold Plan</b>	<b>Platinum Plan</b>
<b>Number of streams/month</b>	300	500	750	1000
<b>Downloads/month</b>	30	50	75	100
<b>CD burns allowed</b>	0	10	15	20
<b>Price per month</b>	\$9.95	\$14.95	\$19.95	\$24.95

2001; MUSICNET.COM, at <http://www.musicnet.com> (last visited May 31, 2002).

<sup>56</sup> See *About Us*, PRESSPLAY.COM, at <http://www.pressplay.com/aboutus.html> (last visited May 31, 2002). EMI announced that it would license music to Pressplay. See Penelope Patsuris, *Other Labels Must Follow EMI’s Lead*, FORBES.COM, Oct. 2, 2001, at <http://www.forbes.com/2001/10/02/1002emi.html> (last visited May 31, 2002).

<sup>57</sup> See *Music Majors Forced to Play a Different Tune*, NEW MEDIA AGE, Apr. 12, 2001.

<sup>58</sup> Pressplay was launched on December 19, 2001. See *Technology Briefing Internet: Pressplay To Start Today*, N.Y. TIMES, Dec. 19, 2001. MusicNet was launched with RealOne Music on December 4, 2001; Jon Healey, *Digital Living Room; Music Subscription Services Singing Different Tunes*, L.A. TIMES, Dec. 13, 2001.

<sup>59</sup> See *id.*

<sup>60</sup> This has been the experience of the writers. The Uniform Resource Locator (“URL”, or World Wide Web address) to which one is directed from the affiliate sites is a Pressplay URL, rather than an MSN or other URL (depending on the affiliates). Affiliates are listed on pressplay’s homepage. See Pressplay, at [www.pressplay.com](http://www.pressplay.com) (last visited Sept. 2, 2002).

<sup>61</sup> See Steve McCannell, *A Pressplay Test Drive*, O’REILLY OPENP2P.COM, at <http://www.openp2p.com/pub/a/p2p/2002/03/07/pressplay.html> (Mar. 5, 2002) (offering an analysis of the features and constraints of the Pressplay subscription service). Note that the charges and capabilities on Pressplay have changed over time as the record labels *Seek* to make the service more attractive. Current information is available from the Pressplay Web site. See Pressplay, *The Service*, at <http://www.pressplay.com/theservice.html> (last visited Sept. 2, 2002).



Some notable constraints of the Pressplay system are that: 1) once a user ends his or her subscription, access to all of the tracks that the user has downloaded from Pressplay is lost; if one resubscribes to Pressplay within six months, one can regain access to one's downloaded collection, but only if the same user name and password is used; 2) if one doesn't use up his or her downloads/streams/burns in one month, they do not carry over to the next month; and 3) a user has to be connected to the Internet to burn a CD.<sup>62</sup>

Because each service initially reflected the converged effort and investment of only half the industry, MusicNet and Pressplay were as competitors able to offer consumers only a limited catalog of content. The inconvenience of having to subscribe to both services to attain a full universe of mainstream content led analysts to remark that before the services could compete with free services they would have to offer music from all five big distributors.<sup>63</sup> Apparently, the labels have taken this message to heart:<sup>64</sup> Pressplay recently announced developments that it is close to securing licensing rights from its competitors Bertelsmann and AOL Time Warner.<sup>65</sup> Having already secured the licensing rights from Sony, Universal, EMI Group Plc, and ten independent labels, if the developments proceed as predicted, Pressplay would then have access to the recorded music of all five major distributors.<sup>66</sup>

<sup>62</sup> See *id.*

<sup>63</sup> See, e.g., Rosenberg, *supra* note 32. The problems are still being experienced. See Jon Healey, *Online Music Catalogs Lacking*, L.A. Times, Aug. 1, 2002. Rosenberg notes:

[T]he major record labels still can't give music fans something they've been getting from pirate services for more than three years: a comprehensive catalog of songs. . . . Pressplay's lineup, like that of every other authorized service, has gaping holes. . . . Some of those holes could be filled by signing more deals with major record labels-- Pressplay has Universal, Sony and EMI in its fold, but not Warner Music Group or BMG . . .

*Id.*

<sup>64</sup> According to a late-January, 2002 study by the media analysts at investment bank ABN-AMRO in London, the five major labels have spent a collective \$1.976 billion on developing digital-music services, including investments in such services as MusicNet and rival Pressplay and acquisitions of such existing companies as Myplay and MP3.com. See Matthew Benz, *Solutions Prove Elusive As Investment Disappointments And Retail Setbacks Rise*, BILLBOARD, Apr. 6, 2002, at 1. Yet, recent studies suggest that consumers have not and will not be warming up to these services in sufficient numbers to ensure profitability anytime soon. See *id.* Also in mid-January, digital-media consultancy Jupiter Media Metrix lowered its projection for digital-music revenue by 2006 – whether from subscriptions or downloads – from \$1.9 billion to \$1.6 billion. See *id.*

<sup>65</sup> See Josh Fineman, *Pressplay Close to Agreements with 2 Music Companies*, CEO says, BLOOMBERG NEWS, Apr. 26, 2002; *In re Napster, Inc. Copyright Litigation*, 191 F. Supp. 2d 1087, 1105-06 (N.D. Cal. 2002) (noting evidence that the MusicNet “joint venture anticipate[d] obtaining licenses from the other two major labels (Sony and Universal) to distribute their catalogs of copyrighted music”).

<sup>66</sup> See Fineman, *supra* note 65.

3. Is there something wrong with this picture? Non-copyright legal developments

To summarize thus far, the record companies, who own copyright in a vast majority of sound recordings, have actively litigated against developers of P2P and related technology in an effort to prevent unauthorized music distribution. They have succeeded in shutting down Napster for the present and in making technological innovation in this area contingent on their permission. Further, these same companies have formed two joint ventures for the purpose of exploiting their libraries of content within the online music distribution market.

As the discussion of Pressplay and MusicNet indicates, the recording companies may need to coordinate licensing in order to create an online distribution system attractive to consumers. Mergers and coordination certainly increase efficiency, especially in areas where transaction costs are high. However, they also may create market power—defined as “the ability of a firm (or a group of firms acting jointly) to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded.”<sup>67</sup> Between them, the “big five” recording companies control some 85% of the recorded music market in the United States.<sup>68</sup> Even prior to the current developments, the record companies were not strangers to antitrust allegations. In May, 2000, the FTC found that the companies had overcharged consumers approximately five hundred million dollars over the previous four years.<sup>69</sup>

The new music ventures (Pressplay and Musicnet) have essentially “merged” the “big five” into two for purposes of online distribution. These

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<sup>67</sup> William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981); *see also* DOJ & FTC, 1992 HORIZONTAL MERGER GUIDELINES, available at <http://www.ftc.gov/bc/docs/horizmer.htm> (last visited May 31, 2002).

<sup>68</sup> This figure is taken from the material of the Federal Trade Commission. *See, e.g.*, Complaint, *In re Sony Music Entertainment, Inc.*, No. C-3971, Aug. 30, 2000, available at <http://www.ftc.gov/os/2000/09/sonycomp.htm> (last visited Sept. 2, 2002). This complaint led to a consent agreement. *See* Decision and Order, *In re Sony Music Entertainment, Inc.*, No. C-3971, Aug. 30, 2000, available at <http://www.ftc.gov/os/2000/09/sony.do.htm> (last visited Sept. 2, 2002). The figure was also used in the Napster litigation. *See In re Napster, Inc. Copyright Litigation*, 191 F. Supp. 2d 1087, 1095 (N.D. Cal. 2002) (recording the same figure, based on the declaration of Roger Noll, Morris N. Doyle Professor of Public Policy, Stanford University).

<sup>69</sup> Peter Jan Honigsberg, *The Evolution and Revolution of Napster*, 36 U.S.F. L. REV. 473, 477-78 (2002); *see also* Statement of Chairman Robert Pitofsky, and Commissioners Sheila F. Anthony, Mozelle W. Thompson, Orson Swindle, and Thomas B. Leary, *In re Time Warner, Inc.*, File No. 971-0070, May 10, 2000, available at <http://www.ftc.gov/os/2000/05/cdstatement.htm> (last visited May 31, 2002). The companies settled with the United States, and a consent agreement was entered. *See* Press Release, Federal Trade Commission, Record Companies Settle FTC Charges of Restraining Competition in CD Music Market (May 10, 2000), available at <http://www.ftc.gov/opa/2000/05/cdpres.htm> (last visited May 31, 2000).

developments have sparked inquiries from antitrust authorities. In October, 2001, news leaked out that the DOJ had issued civil investigative demands (CIDs) to the record companies and their trade group.<sup>70</sup> This followed a June announcement by the European Commission of a competition (*i.e.*, antitrust) investigation into Pressplay and MusicNet.<sup>71</sup>

Adding to the controversy, Napster has argued that the record companies engaged in copyright misuse by imposing restrictive licensing terms in order to thwart competition and leverage copyright ownership into control of related markets. In February 2002, Judge Patel ordered the record companies to give discovery on the issue of copyright misuse, thus permitting Napster to gather evidence from some 600,000 to 800,000 pages of documents from the record companies to substantiate its claims.<sup>72</sup> In the context of the limited information before her, the Judge commented:

The current record on the licensing practices of these joint ventures is negligible. However, even a naif must realize that in forming and operating a joint venture, plaintiffs' representatives must necessarily meet and discuss pricing and licensing, raising the specter of possible antitrust violations. These joint ventures bear the indicia of entities designed to allow the plaintiffs to use their copyrights and extensive market-power to dominate the market for digital music distribution. . . . Even on the undeveloped record before the court, these joint ventures look bad, sound bad and smell bad.<sup>73</sup>

### B. Copyright Law And Digital Music Distribution: The Institutions

The section above outlined presents disputes over online music distribution. We turn now to the parties and institutions capable of solving them.

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<sup>70</sup> Kelly Donohue, *MusicNet & Pressplay: To Trust or Antitrust?*, 2001 DUKE L. & TECH. REV. 0039; Gerry May, *Specter of Copyright Abuse Haunts Music Industry's Move into Online Music*, 2001 B.C. INTELL. PROP. & TECH. F. 111201; Jane Black, *Online Music: Cranking Up the Antitrust Volume*, BUSINESSWEEK ONLINE, at [http://www.businessweek.com/bwdaily/dnflash/oct2001/nf20011026\\_0654.htm](http://www.businessweek.com/bwdaily/dnflash/oct2001/nf20011026_0654.htm) (Oct. 26, 2001).

<sup>71</sup> BBC News, *EU Threat Over Download Sites*, BBC NEWS ONLINE, at [http://news.bbc.co.uk/hi/english/entertainment/new\\_media/newsid\\_1600000/1600064.stm](http://news.bbc.co.uk/hi/english/entertainment/new_media/newsid_1600000/1600064.stm) (Oct. 15, 2001).

<sup>72</sup> *In re Napster, Inc. Copyright Litigation*, 191 F. Supp. 2d 1087, 1105-06 (N.D. Cal. 2002). The 600,000 to 800,000 pages are identical to the documents submitted by the record labels to the DOJ for antitrust investigation. The discovery request will cover any additional documents requested by the DOJ. See Brenda Sandburg, *Napster and Record Labels Still Slugging It Out*, THE RECORDER, Mar. 27, 2002, at 2 (describing the disagreement between Napster and the record labels over the material available to Napster and the timing of discovery) Napster also requested documents involving settlement negotiations between any of the plaintiffs and Napster, as well as documents submitted to the DOJ regarding the labels' negotiations with third parties. See *id.*

<sup>73</sup> *In re Napster, Inc. Copyright Litigation*, 191 F. Supp. 2d at 1109.

Cooperation among many different stakeholders and institutions will be vital.<sup>74</sup> No one institution or solution is going to provide a sufficient response. Instead, as we explore further in Parts III and IV, a *constellation* of institutions must achieve ongoing balance and adjustment.

### 1. Who are the stakeholders?

A range of different stakeholders have participated in the various Senate Judiciary Committee Hearings that have been held during 2000-2002 regarding the distribution of music and other forms of copyrighted content online:<sup>75</sup>

- Owners of copyright in sound recordings (content owners), including the major labels (EMI, Time Warner etc), represented by the Recording Industry Association of America (RIAA), as well as Independent labels;
- Owners of copyright in musical works represented by the National Music Publishers Association;
- Performing Artists;
- Traditional Music retailers and new Digital Music Companies (such as MP3.com);
- “Present day” Napster, which also needs licenses and at one Senate Committee hearing proposed a compulsory license scheme;<sup>76</sup>
- Consumer Electronics Companies and Computer Hardware Manufacturers;
- Technology developers involved in Digital Rights Management (DRM) (e.g., InterTrust Technologies); and
- Consumers.

These stakeholders have conflicting interests: Copyright owners have an interest in strong copyright law and control; independent labels need unbiased distribution mechanisms; performing artists have an interest in the protection provided by copyright law but not necessarily the total market dominance of

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<sup>74</sup> See JESSICA LITMAN, *DIGITAL COPYRIGHT* ch. 3 (Copyright and Compromise) (Prometheus Books 2001); Jane Ginsburg, *Copyright Legislation for the “Digital Millennium,”* 23 COLUM.-VLA J. L. & ARTS 137, 178-79 (1999) [hereinafter Ginsburg, *Copyright Legislation*].

<sup>75</sup> In the Senate Committee on the Judiciary alone, since November 2000, the following hearings have been held: *Music on the Internet: Is there an Upside to Downloading?*: Hearing Before the Senate Judiciary Committee, 106th Cong. (2000); *Online Entertainment: Coming Soon to a Digital Device Near You*: Hearing Before the Senate Judiciary Committee, 107th Cong. (2001); *Competition, Innovation, and Public Policy in the Digital Age: Is the Marketplace Working to Protect Digital Creative Works?*: Hearing Before the Senate Judiciary Committee, 108th Cong. (2002). See United States Senate Committee on the Judiciary, at [http://judiciary.senate.gov/schedule\\_all.cfm](http://judiciary.senate.gov/schedule_all.cfm) (last visited May 31, 2002).

<sup>76</sup> See *Online Entertainment: Coming Soon to a Digital Device Near You*: Hearings Before the Senate Judiciary Comm. 107th Cong. (2001) (statement of Hank Barry, Interim Napster CEO), available at <http://judiciary.senate.gov/hearing.cfm?id=198> (last visited May 31, 2002).

the large labels;<sup>77</sup> music retailers rely on copyright but also may be harmed by the market power of the major labels; and some digital music companies would be better served by more open or even compulsory licensing schemes. Consumers, of course, have various interests which are further explored in Part II. Other interested parties include academics and librarians, who present a vision of the public interest rooted in the importance of an informational “commons,”<sup>78</sup> and proponents of the free software movement, who are deeply affected by the “locking up” of technology.

## 2. Who are the institutions involved in making copyright law and policy?

### a. *International Institutions*

This article focuses predominantly on domestic US institutions. The reader may however protest – given the borderless nature of the Internet, why not look to existing international institutions instead – such as the World Intellectual Property Organization (“WIPO”), and/or the World Trade Organization (“WTO”) which administer the Agreement on Trade-Related Aspects of Intellectual Property (“TRIPS”)? The WTO’s international importance and its existing dispute settlement mechanisms make it an obvious international forum for dealing with the issues arising from online music distribution. This route, however, has its limitations: The institutional structure is still relatively rudimentary<sup>79</sup> and does not deal with individual disputes. More fundamentally, however, intellectual property law has historically been structured around multinational *harmonization* rather than international *governance*.<sup>80</sup> In practice, harmonization is difficult to achieve, even at a broad level of principle,<sup>81</sup> and copyright law varies significantly between

<sup>77</sup> See Jane Ginsburg, *Copyright and Control over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1642-45 (2001).

<sup>78</sup> Not all are of this view of course. Several law professors provided an amicus brief for the motion picture industry in *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 322-24 (S.D.N.Y. 2000) (referred to as the DeCSS case). See Amicus Brief from Law Professors for the Plaintiffs, Mar. 12, 2001, available at [http://www.eff.org/pub/Intellectual\\_property/Video/MPAA\\_DVD\\_cases/20010312\\_ny\\_law\\_profs\\_amicus\\_for\\_op.h\\_tml](http://www.eff.org/pub/Intellectual_property/Video/MPAA_DVD_cases/20010312_ny_law_profs_amicus_for_op.h_tml) (last visited March 29, 2002).

<sup>79</sup> See J.H. Reichman & David Lange, *Bargaining Around The Trips Agreement: The Case For Ongoing Public-Private Initiatives To Facilitate Worldwide Intellectual Property Transactions*, 9 DUKE J. COMP. & INT’L L. 11, 20-21 (1998); J.H. Reichman, *Charting the Collapse of the Patent-Copyright Dichotomy: Premises for a Restructured International Intellectual Property System*, 13 CARDOZO ARTS & ENT. L.J. 475, 479 (1993) (suggesting that the TRIPS Agreement may be bogged down by an “obsolete and increasingly dysfunctional institutional framework”).

<sup>80</sup> See Lee Ann Askew, *The ECJ, the ICJ and Intellectual Property: Is Harmonization the Key?*, 7 TULSA J. COMP. & INT’L L. 375 (2000) (considering how EU harmonization techniques could be applied more generally).

<sup>81</sup> This is exemplified by the difficulties faced by the Members of the European Union in

countries in both approach and detail.<sup>82</sup> Copyright, and particularly its exceptions, over which countries have historically had broad discretion,<sup>83</sup> is seen in many countries as an important instrument of public policy.<sup>84</sup> With respect, therefore, to those who have proposed international institutions to address these issues,<sup>85</sup> we would argue that, realistically, for the present, such issues can and should be dealt with at a national level.

*b. Executive and Legislature*

Since copyright is statutory law, Congress has played a significant role in shaping the contours of the rights associated with copyright, particularly in recent times. In the 1990s alone four major copyright reforms were enacted: the Digital Millennium Copyright Act (“DMCA”)<sup>86</sup> and the Sonny Bono Copyright Term Extension Act in 1998,<sup>87</sup> the Digital Performance Rights in Sound Recordings Act (“DPRA”) of 1995,<sup>88</sup> and the Audio Home Recording Act (“AHRA”) of 1992. Congress affects copyright law not only by amending legislation, but also through other forms of monitoring, such as the recent Senate and House Committee hearings.<sup>89</sup> Although Congress is the main

their efforts to harmonize their copyright laws in relation to digital copyright – a process that has taken some 5 years.

<sup>82</sup> See COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS AND THE EMERGING INFORMATION INFRASTRUCTURE, NATIONAL RESEARCH COUNCIL, COMPUTER SCIENCE AND TECHNOLOGY BOARD, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE* 54 (1999), available at [http://bob.nap.edu/html/digital\\_dilemma/index.html](http://bob.nap.edu/html/digital_dilemma/index.html) (last visited May 31, 2002) [hereinafter DIGITAL DILEMMA REPORT].

<sup>83</sup> TRIPS does not fully regulate scope of protection issues or the extent of permissible exceptions. See Reichman & Lange, *supra*, note 79, at 21; Sam Ricketson, *The Boundaries of Copyright: Its Proper Limitations and Exceptions: International Conventions and Treaties*, I.P.Q. 1999, 1, 56-94. The extent of allowable exceptions was explored by a WTO Dispute Settlement Panel in its Report, United States – Section 110(5) of the US Copyright Act (WT/DS160/R) (adopting a quite strict interpretation of the freedom to individual Member States).

<sup>84</sup> See Reichman & Lange, *supra*, note 79, at 21-22 (noting that “the decision-makers in developing countries will logically favor those practices that seem most favorable to their own, often shifting interests” and that similar arguments can be made about the approach of the developed countries.)

<sup>85</sup> See, e.g., Note, Howard P. Goldberg, *A Proposal for an International Licensing Body to Combat File Sharing and Digital Copyright Infringement*, 8 B.U. J. SCI. & TECH. L. 272 (2002) (advocating the creation of an international licensing body that would hold a registry of the world’s copyrighted works, license those works to Internet sites that permit secure downloading, distribute royalties to artists, and monitor the Internet for the unlicensed use of copyrighted works).

<sup>86</sup> Pub. L. No. 105-304, 112 Stat. 2860 (1998) (adding §§ 512 and 1201-05 to the Copyright Act of 1976).

<sup>87</sup> Pub. L. No. 105-298, 112 Stat. 2827 (1998).

<sup>88</sup> Pub. L. No. 104-39, Sec. 1, 109 Stat. 336 (1995).

<sup>89</sup> See *supra* note 75 and accompanying text.

source of copyright policy, impacting the legislative agenda is an extremely arduous and complex task.<sup>90</sup> Part III will show that the legislative process is unlikely to promote online music distribution in a fair and balanced way.

### c. *Administrative Agencies*

The Copyright Office, a division of the Library of Congress, has played an important role in developing copyright law.<sup>91</sup> In addition to dealing with compulsory and statutory licensing,<sup>92</sup> the Office also recommends exceptions to the anti-circumvention provisions of the Digital Millennium Copyright Act ("DMCA").<sup>93</sup> The Antitrust Division of the DOJ has also been involved in copyright policy through its enforcement of consent decrees against collecting societies such as the American Society of Composers and Publishers ("ASCAP")<sup>94</sup> and Broadcast Music, Inc. ("BMI").<sup>95</sup> Most recently, the DOJ has investigated the online digital music ventures of leading record companies. The FTC has also maintained an interest in this area, reaching a settlement on CD over-charging in May 2000.<sup>96</sup>

### d. *Courts*

Copyright owners have fought an increasing number of actions in the courts, relying on both existing law (particularly in the *Napster* case), and on new statutory provisions.<sup>97</sup> The scope of copyright owners' rights depends in large

<sup>90</sup> Professor Jessica Litman, in particular, has traced the process of amending copyright law. See Jessica Litman, *Copyright Legislation and the Technological Age*, 68 OR. L. REV. 275 (1989); LITMAN, *supra* note 74.

<sup>91</sup> For an overview of the role of the Register of Copyrights, See U.S. Copyright Office: Hearing Before the House Comm. on the Judiciary, 107th Cong. 1 (2001) (statement of Marybeth Peters, Register of Copyrights).

<sup>92</sup> This is achieved through the Licensing Division of the Copyright Office, and, in case of dispute, by the Copyright Arbitration Royalty Panels. See 17 U.S.C. § 802 (2000); See generally COPYRIGHT OFFICE, CIRCULAR 75: THE LICENSING DIVISION OF THE COPYRIGHT OFFICE, Mar. 2000, available at <http://www.copyright.gov/circs/circ75.pdf> (last visited September 2, 2002).

<sup>93</sup> See 17 U.S.C. §1201(a)(1)(C) (2000). Exceptions so made last for 3 year periods. After a required rule-making process, the Librarian made its first such recommendation in October 2000. See Recommendation of the Register of Copyrights and Determination of the Librarian of Congress, 65 Fed. Reg. 64556 (October 27, 2000) (codified at 37 C.F.R. § 201 (2001)) (giving the ruling and describing the process of rule-making in detail).

<sup>94</sup> The decree was most recently amended in June 2001. See *United States v. American Society of Composers, Authors, Publishers*, 2001-2 Trade Cases P 73,474, 2001 Copr. L. Dec. P 28,341 (S.D.N.Y. 2001).

<sup>95</sup> See *United States v. Broadcast Music, Inc.*, 1966 Trade Cas. (CCH) ¶ 71, 941, 83, 323 (S.D.N.Y. 1966), amended, No. 64-CV- 3787, 1994 WL 901652, at \*1 (S.D.N.Y. Nov. 18, 1994) (1996-1 Trade Cas. (CCH) ¶ 71, 378).

<sup>96</sup> See *supra* note 69 and accompanying text.

<sup>97</sup> See *A&M Records, Inc. v. Napster, Inc.* 239 F.3d 1004 (9th Cir. 2001); *Universal City*

part on courts' interpretation of the copyright statute and common law doctrines of contract and tort. First Amendment concerns may also bound copyright; the Supreme Court recently granted *certiorari* in a copyright case, *Eldred v. Ashcroft*, brought to challenge the constitutionality of copyright term extension.<sup>98</sup> The case will likely indicate the attitude of the Supreme Court towards other constitutional challenges to copyright law.

*e. Private Institutions*

The private entities deeply involved in copyright policy are the collecting rights organizations such as ASCAP, BMI, SESAC, and the recent addition, SoundExchange, formed to deal with digital performance rights.<sup>99</sup> An increasing number of private institutions, not all of them traditionally seen as arenas relevant to copyright policy, have the potential to affect the digital distribution of copyright content. A notable recent example is T13, a standards committee organized under the rules of the American National Standards Institute, which is responsible for "all interface standards relating to the popular AT Attachment ("ATA") storage interface utilized as the disk drive interface on most personal and mobile computers."<sup>100</sup> This technical body recently became embroiled in the copyright controversy when DRM technology was proposed as a standard.<sup>101</sup> T13 is only one of many such standards bodies whose work is gaining increasing profile given the current importance of standards in consumer electronics to copyright owners' long term goals.<sup>102</sup>

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*Studios, Inc. v. Corley* 273 F.3d 429 (2d Cir. 2001); *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072 (9th Cir. 1999); *Eldred v. Reno*, 74 F. Supp. 2d 1 (D.D.C. 2001); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

<sup>98</sup> *Eldred v. Ashcroft*, 122 S. Ct. 1062 (mem.) (February 19, 2002). The case is a challenge to the constitutionality of the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998). The challenge is brought under the Copyright Clause, U.S. Const. art. I, § 8, cl. 8, and the First Amendment, U.S. Const. amend I.

<sup>99</sup> Note that industry bodies are not included here; they have been classified as 'stakeholders' and are dealt with elsewhere, although the line is, inevitably, highly artificial.

<sup>100</sup> T13 Technical Committee, 2000 Annual Report, available at [http://www.incits.org/tc\\_home/t13.htm](http://www.incits.org/tc_home/t13.htm) (last visited September 2, 2002).

<sup>101</sup> See Electronic Frontier Foundation, *Standards Committee Rejects Hard Drive Copy Prevention Scheme: Electronic Frontier Foundation Applauds Victory for Fair Use*, April 4, 2001, available at [http://www.eff.org/IP/DRM/CPRM/20010404\\_eff\\_t13\\_pr.html](http://www.eff.org/IP/DRM/CPRM/20010404_eff_t13_pr.html) (last visited May 31, 2002).

<sup>102</sup> See generally Mark Lemley, *Standardizing Government Standard-Setting Policy for Electronic Commerce*, 14 BERKELEY TECH. L. J. 745, 746-47 (1999) (setting out the reasons why standards are so important in the network economy).



C. *The Existing Framework: Law, Reinforced By Code,<sup>103</sup> Reinforced By Law*

In the final part of this introduction, we turn to the legal and technological framework – the means presently relied on by copyright holders to control copyrighted works. Control in this context relies on a mixture of law and “code” – that is, software and/or hardware-based restrictions on what individuals can do online. Legal rules in the form of copyright law impose restrictions on individuals’ use of content, and code-based self-help methods of control give effect to (and extend) legal rights. These code-based restrictions are then backed up by laws to bolster the inevitable imperfections of those self-help measures.<sup>104</sup> In short, code backs up law, which, in turn, backs up code. Recent developments both in the legislative and judicial fields have led to a general consolidation of exclusionary rights in copyrighted works. On the other hand, there has been little effective “institutionalization” of fair use or access rights.<sup>105</sup> Further, there have been important recent developments in relation to the use of “Code,” explored in the remainder of this section, that threaten to secure an even stronger foothold for content owners as they transition to the online world. Exploring the desirable balance is a focus of Part II, and redressing this imbalance will be a key concern in Parts III and IV.

1. Law

Current factors surrounding the digital distribution of music online raise issues across the gamut of copyright law, the details of which are beyond the scope of this article. It is worth summarizing, however, several respects in which the legal framework, and the property rights of copyright owners, have been strengthened in recent years. We can divide the key relevant developments as follows: (A) the expansion of exclusive rights held by copyright owners and their increasing complexity in the particular case of music; (B) the development of “paracopyright” – protection for technological measures, (C) the further development of concepts of secondary – *i.e.*, contributory and vicarious – liability, and (D) the shrinking scope of the fair use defense. These developments have granted copyright owners a high degree of control over technologies of music distribution online.

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<sup>103</sup> “Code” here is used in the sense outlined by Professor Lawrence Lessig in his seminal work, *CODE AND OTHER LAWS OF CYBERSPACE* (1999). Code, as outlined by Professor Lessig, refers to the “software and hardware that makes cyberspace what it is”, and which imposes real and effective constraints on behavior in cyberspace, *Id* at 6.

<sup>104</sup> See generally LITMAN, *supra*, note 74, at ch. 2 (Music: Intellectual Property’s Canary in the Digital Coal Mine).

<sup>105</sup> As a concerned librarian has observed, “Legally binding license agreements that readers sign to get access to a database already require them to behave in ways far more restricted than copyright law would have ever demanded . . . threaten[ing] our public and research libraries as nothing has in decades.” JAMES J. O’DONNELL, *AVATARS OF THE WORD: FROM PAPYRUS TO CYBERSPACE* 95 (Harvard University Press 1998).

a. *The Legislative Expansion of the Scope of Copyright*

Copyright owners have increased their clout in recent years owing to expansions in the scope of exclusive rights, particularly in relation to sound recordings. Copyright in recorded musical works was already particularly complicated, by the fact that there are several copyright owners: music publishers, who own the copyright in the underlying musical work (such as the composition or lyrics) and copyright owners in the recording industry, who own the sound recording copyright.<sup>106</sup> Further, while there are collective licensing organizations (ASCAP and BMI) dealing with performance rights in musical compositions, these bodies do not deal with reproduction rights, and both rights are implicated by online delivery of works. The multiple licenses required for use of these works online has been,<sup>107</sup> and continues to be,<sup>108</sup> a serious obstacle to music distribution online.

Historically, owners of sound recordings, unlike other copyright owners, have not enjoyed an exclusive performance right.<sup>109</sup> This meant that when a sound recording was played, the composer of the musical works received royalties, while the owner of copyright in the recording did not. This changed in 1995 when Congress enacted a new exclusive right to perform the work publicly by means of a digital transmission.<sup>110</sup> Congress however did not do

<sup>106</sup> See generally David Nimmer, *Ignoring the Public, Part I: On the Absurd Complexity of the Digital Audio Transmission Right*, 7 UCLA ENT. L. REV. 189 (2000) [hereinafter Nimmer, *Ignoring the Public*].

<sup>107</sup> See generally *id.* But see Ginsburg, *supra* note 77, at 1629-30 (making sense of the digital performing rights regime).

<sup>108</sup> See *Online Music: Record Labels, Publishers Spar over Royalties*, INVESTORS' BUSINESS DAILY, May 16, 2001 (describing recent disputes between the various copyright owners over digital music distribution); *Music Execs Find New Target*, WIRED NEWS, at <http://www.wired.com/news/mp3/0,1285,43898,00.html> (May 17, 2001) (quoting RealNetworks, Inc. and MusicNet CEO Rob Glaser: "Music publishing issues stand out as the most significant potential impediment to launching great subscription services.").

<sup>109</sup> Copyright in sound recordings was not recognized until 1973. See *Goldstein v. California*, 412 U.S. 546, 576 (1973) (recognizing the federal government's constitutional authority to decide whether a particular category of "writings" is worthy of national protection). In the music industry, the right to reproduce a musical composition (sheet music or a sound recording) is separate from the right to publicly perform the musical composition, and licensing one right does not necessarily imply a license to the other. See *Foreign & Domestic Music Corp. v. Licht*, 196 F.2d 627, 629 (2d Cir 1952); *Interstate Hotel Co v. Remick Music Corp.*, 157 F.2d 744, 745 (8th Cir. 1946); *Irving Berlin, Inc. v. Daigle*, 31 F.2d 832, 834-35 (5th Cir. 1929); *Schwartz v. Broadcast Music, Inc.*, 180 F. Supp. 322, 329-33 (S.D.N.Y. 1959).

<sup>110</sup> The rights of owners of copyright in sound recordings were expanded by the enactment of the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995). The Act added to the Copyright Act to provide holders of copyright in sound recordings a digital performance right in sound recordings. See 17 U.S.C. 106(6) (2000); see also 17 U.S.C. § 115 (making the digital delivery of a sound recording an infringement unless it is authorized or licensed). The right is subject to

this by means of a general right of public performance in sound recordings. Instead, a complicated three-tier structure was introduced that requires full permission from copyright owners for certain transmissions (e.g., interactive transmissions), allows other non-interactive transmissions to occur without permission, and imposes a statutory license in other cases that fulfil a strict set of requirements.<sup>111</sup> This schema was further amended in 1998.<sup>112</sup> Generally speaking, this does not increase the number of copyright owners from whom licenses must be obtained since digital transmissions frequently involve both reproduction and distribution rights. However, the new laws do complicate the copyright regime, raising legal costs for all involved.

b. *“Paracopyright”: The Anti-Circumvention Provisions of the Digital Millennium Copyright Act of 1998*

The DMCA<sup>113</sup> represents both a further strengthening in the legal fortress surrounding copyrighted works, and a source of additional complexity.<sup>114</sup> The DMCA strengthens copyright law with “paracopyright” – legal protection for technological self-help measures used by copyright owners to protect their copyrighted works.<sup>115</sup> The “access provision” of the DMCA<sup>116</sup> prohibits unauthorized access, by outlawing the act of circumventing “a technological measure that effectively controls access to a work.”<sup>117</sup> The “anti-device provisions”<sup>118</sup> prohibit the manufacture, import, provision, trafficking or sale of technologies that either (a) circumvent measures a copyright owner has used

exceptions in 17 U.S.C. § 114. A statutory licensing scheme is established for non-interactive services, but this is only a very small set of users, not relevant here. The detailed provisions of the statutory license scheme are set out in 17 U.S.C. §114(d)(2); *see also* Digital Performance Right in Sound Recordings and Ephemeral Recordings, 65 Fed. Reg. 55,302 (September 13, 2000) (explaining the system of statutory licensing in the copyright office).

<sup>111</sup> *See generally* Nimmer, *Ignoring the Public*, *supra* note 106 (outlining the full complex digital transmission scheme); Ginsburg, *Copyright Legislation*, *supra* note 74, at 166-70 (describing the digital performance right in the context of the 1998 amendments).

<sup>112</sup> The DMCA amended 17 U.S.C. §§ 114, 115. *See generally* Ginsburg, *Copyright Legislation*, *supra* note 74, at 166-70 (describing how the amendments work).

<sup>113</sup> *See* Pub. L. No. 105-304, 112 Stat. 2860 (2000) (codified as amended at 17 U.S.C. §§ 512, 1201 et seq. (2000)).

<sup>114</sup> *See* James Boyle, *Britney Spears and Online Music Fears*, FINANCIAL TIMES, May 2000 [hereinafter Boyle, *Britney Spears and Online Music Fears*] (referring to the DMCA as the “Copyright Lawyers Guaranteed Employment Act”).

<sup>115</sup> *See* Brief of Amici Curiae in Support of Appellant, Universal City Studios, Inc. v. Reimerdes, Jan. 26, 2001, available at [http://www.eff.org/IP/Video/MPAA\\_DVD\\_cases/20010126\\_ny\\_2profs\\_amicus.html](http://www.eff.org/IP/Video/MPAA_DVD_cases/20010126_ny_2profs_amicus.html) (last visited May 31, 2002).

<sup>116</sup> *See* 17 U.S.C. § 1201(a)(1)(A).

<sup>117</sup> This was described by the Congress as “the electronic equivalent of breaking into a locked room in order to obtain a copy of a book.” H.R. REP. No. 105-551(1), at 17 (1998).

<sup>118</sup> 17 U.S.C. §§ 1201(a)(2), 1201(b)(1).

effectively to control access to a work (§1201(a)(2)), or which “effectively protect[ ] a right of a copyright owner under” Title 17 (§1201(b)).<sup>119</sup> The act of actually circumventing an anti-copying measure, as opposed to an anti-access measure, is not proscribed. This distinction represented a deliberate choice by Congress, which has since been eviscerated by judicial rulings that every act of access, including one for copying,<sup>120</sup> is covered by the anti-access provision.<sup>121</sup> Thus, copyright owners may now control every act of access to works.<sup>122</sup> The anti-circumvention provisions have been widely criticized for unduly (even unconstitutionally) extending copyright protection.<sup>123</sup> First, it is illegal to circumvent protection measures even if not everything “wrapped up” is copyrighted.<sup>124</sup> One cannot circumvent protection measures in order to get access to public domain material. Second, there are no time limits: Protection can conceivably extend beyond the limited term of copyright. Third, protection can be extended to include *all* uses by means of the access provisions, not just those protected by Copyright Law.<sup>125</sup> Finally, users’ rights

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<sup>119</sup> See Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L.J. 519 (1999); see also David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673 (2000); Jonathan Band, *The Digital Millennium Copyright Act*, available at [www.ala.org/washoff/band.html](http://www.ala.org/washoff/band.html) (November 25, 1998).

<sup>120</sup> See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 331-32 (S.D.N.Y. 2000), *aff’d*, *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2001).

<sup>121</sup> See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64,556, at 64,568 (October 27, 2000). In the context of the recent rule-making, the Register of Copyrights noted her concern at this result and recommended reconsideration by Congress. See *id.*

<sup>122</sup> See Ginsburg, *Copyright and Control*, *supra* note 77, at 1634-36.

<sup>123</sup> The relevant articles are too numerous to cite in full. However, two representative and well-known critiques are those of Yochai Benkler and Pamela Samuelson. See Yochai Benkler, *Free As the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 414-29 (1999) (considering in detail problems with the DMCA and possible constitutional challenges); Samuelson, *supra* note 119, at 534-43, 562 (arguing that the DMCA anti-circumvention provisions are “unpredictable, overbroad, inconsistent, and complex”). Most strident, of course, have been organizations like the Electronic Frontier Foundation, which in May 2002 issued a “report card” on the DMCA. See Fred Von Lohmann, Electronic Frontier Foundation, *Unintended Consequences: Three Years under the DMCA*, May 3, 2002, available at [http://www.eff.org/IP/DMCA/20020503\\_dmca\\_consequences.pdf](http://www.eff.org/IP/DMCA/20020503_dmca_consequences.pdf) (last visited September 2, 2002).

<sup>124</sup> See Nimmer, *supra* note 119, at 712. An argument along these lines was tangentially raised, but not determined, by the Second Circuit Court of Appeals in *Universal City Studios, Inc. v. Corley* 273 F.3d 429, 444-45 (2d Cir. 2001) (noting that the argument was “speculative and premature” at this stage, as well as barred by a technicality).

<sup>125</sup> See Ginsburg, *Copyright Legislation*, *supra* note 74, at 140-43 (describing the effect of the anti-access provisions: “[I]n granting copyright owners a right to prevent circumvention of technological controls on ‘access,’ Congress may in effect have extended

of fair use are not protected.<sup>126</sup> fair use is not in general a defense to a violation of the access provision.<sup>127</sup> The constitutionality of the DMCA anti-circumvention provisions was unsuccessfully challenged in *Universal City Studios v. Corley*.<sup>128</sup>

A further element of the legal armor surrounding copyright is the enforceability of electronic licenses, especially those known as “clickwrap licenses.” If enforced,<sup>129</sup> as they have been in some cases,<sup>130</sup> such contracts will be increasingly important because Internet users will often be asked to click “yes” to an electronic contract before obtaining access to a copyright work.<sup>131</sup>

### c. *The Common Law Framework: Vicarious and Contributory Infringement*

The third manner in which the legal rights of copyright holders have been strengthened is through recent tightening of the rules for secondary liability.<sup>132</sup> In the context of P2P services, ironically, it is these oldest of common law doctrines – principles of contributory<sup>133</sup> and vicarious<sup>134</sup> copyright

to cover ‘use’ of works of authorship.”).

<sup>126</sup> See generally Yochai Benkler, *supra* note 123, at 420-27; Samuelson, *supra*, note 119, at 537-58; LITMAN, *supra* note 74, at 151-63; Nimmer, *supra* note 119, at 722-742.

<sup>127</sup> *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 322-24 (S.D.N.Y. 2000) (noting that fair use is not a defense to the anti-circumvention provisions), *aff’d*, *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 443-44 (2d Cir. 2001).

<sup>128</sup> *Universal City Studios, Inc. v. Corley* 273 F.3d 429, 458-59 (2d Cir. 2001) (noting that there was no need to decide whether restriction of fair use by DMCA unconstitutional).

<sup>129</sup> A model law, the Uniform Computer Information Transactions Act (UCITA), has been proposed to validate such contracts but is not yet in force other than in Maryland and Virginia. See National Conference of Commissioners on Uniform State Laws, *available at* [http://www.nccusl.org/uniformact\\_factsheets/uniformacts-fs-ucita.htm](http://www.nccusl.org/uniformact_factsheets/uniformacts-fs-ucita.htm). Five states are expected to introduce the law in 2001; several State Attorneys-General have registered their opposition to the law. See American Library Association, *Basic Facts About UCITA*, Jan 2002, *available at* <http://www.ala.org/washoff/ucita/factsheet.pdf> (last visited Aug. 31, 2002) (stating that 32 State Attorneys-General oppose UCITA). UCITA has the support of parts of the software industry but many opponents. See UCITA Fact Sheet, *available at* <http://www.cpsr.org/program/UCITA/ucita-fact.html> (last visited May 31, 2002).

<sup>130</sup> See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

<sup>131</sup> The importance of contract here is further illustrated by the case of Professor Felten, who, it is alleged, is prevented from publishing his research cracking a security measure at the invitation of the SDMI by not only the DMCA itself but also a click through license. See Declan McCullagh, *Watermark Crackers Back Away*, WIRED NEWS, at [www.wired.com/news/mp3/0,1285,43353,00.html](http://www.wired.com/news/mp3/0,1285,43353,00.html) (Apr. 26, 2001).

<sup>132</sup> See generally 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 (2001) (considering the desirable limits of secondary liability, prior to the appeal decision in the Napster case).

<sup>133</sup> A party is liable for “contributory” infringement if, with knowledge of the infringing

infringement – and not the latest legislative amendments, which have assumed the greatest importance. Under these doctrines, providers of technology that can be used to infringe copyright may, in some circumstances, be liable for the infringements of users. The scope of application of these doctrines is likely to have a significant impact on further technological development since any technology that may lead to secondary liability for copyright infringement is unlikely to be funded except under the aegis of the relevant copyright owning industry.<sup>135</sup> Prior to the *Napster* case,<sup>136</sup> the *Sony* defense<sup>137</sup> seemed to indemnify developers of new technologies for using and distributing copyrighted works, provided the technology had a substantial non-infringing use, or, at a minimum, the capacity for such use.<sup>138</sup> This was based on the strong public interest in the development of, and access to, new technologies and in preventing copyright owner veto over such technologies.<sup>139</sup> There is, of course, a distinction between the *Napster* technology and the video recorders at issue in *Sony*: Video recorders are free-standing technology; once sold they are not in any sense under the control of the developer. The *Napster* software was an integrated part of an ongoing service, under at least the nominal control of *Napster* (which retained rights, for example, to exclude users). The *Napster* decision clarifies the importance of this distinction.<sup>140</sup> The Ninth Circuit decision in *Napster* did not go so far in terms of imposing liability as did the trial court. Nevertheless, the Ninth Circuit arguably tightened the secondary liability standard in two ways. First, the court held that the *Sony* defense did not apply *at all* to vicarious infringement suits.<sup>141</sup> Second, the court held that

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activity, they induce, cause or materially contribute to the infringing conduct of another. See *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

<sup>134</sup> A party is liable for vicarious copyright infringement if they have the right and ability to supervise the infringing activity, and also a direct financial interest in the activity. See *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.2d 259, 262 (9th Cir. 1996).

<sup>135</sup> See Ginsburg, *supra* note 77.

<sup>136</sup> See *A&M Records, Inc. v. Napster, Inc.* 239 F.3d 1004, 1021 (9th Cir. 2001).

<sup>137</sup> See *Sony Corporation of America v. Universal City Studios*, 464 U.S. 417, 442 (1984).

<sup>138</sup> See *id.*

<sup>139</sup> See *id.* at 440-441 & n.21.

<sup>140</sup> See *Napster, Inc.*, 239 F.3d at 1020-21 (considering the applicability of the *Sony* defense, and finding that “if a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to direct infringement”); Jane Ginsburg, *Copyright Use and Excuse on the Internet*, 24 COLUM.-VLA J. L. & ARTS 1, 37 (2000) (describing the importance of this distinction on the basis that courts in *Sony* had to make an “all-or-nothing” decision on whether the video technology would be distributed, while noting that in *Napster* they could “split the difference”) [hereinafter Ginsburg, *Copyright Use and Excuse*].

<sup>141</sup> See *Napster Inc.*, 239 F.3d at 1022-23.

in a case alleging contributory infringement, the defense will not avail an intermediary or provider of technology who has actual knowledge of specific infringement available on the system and fails to purge such material.<sup>142</sup> This is an important distinction in the context of an ongoing service. It sets the bar quite low: Copyright owners can easily “create” actual knowledge by simply sending a letter. The strictness of this test was underlined when the Ninth Circuit recently upheld the preliminary injunction and shut-down order entered by District Judge Patel, prohibiting Napster from recommencing its service until it does “*everything* feasible to block files from its system which contain noticed copyrighted works.”<sup>143</sup>

Further, the *Napster* decision suggests that the more free-standing the technology, the more likely it may be to escape liability under *Sony*; however, in a networked world in which software is frequently updated by providers, and even devices (such as video-recorders) may be part of a network, one is inclined to speculate about how “free standing” any technology will be – in particular, P2P technology.<sup>144</sup> Notably, the developers of FastTrack are relying on the *Sony* defense;<sup>145</sup> should a ruling be made on this defense the judgment would undoubtedly be very important for other future, decentralized, distributed P2P technologies.

#### d. *Shrinking Limits to Copyright Rights: Fair Use*

Fair use has historically provided the counterweight to property rights in copyrighted works, by providing immunity from prosecution for infringement.<sup>146</sup> Courts determine fair use on a case-by-case basis, taking into account the purpose and character of the use (including whether it is commercial), the nature of the work, the amount of the work used, and the

<sup>142</sup> See *Napster, Inc.*, 239 F.3d at 1021 (relying on *Religious Technology Center v. Netcom On-Line Communication Service, Inc.*, 907 F. Supp. 1361, 1374 (N.D. Cal. 1995)).

<sup>143</sup> *A&M Records, Inc. v. Napster, Inc.* 284 F.3d 1091, 1098 (9th Cir. 2002) (referring to the “zero tolerance” standard) (emphasis added).

<sup>144</sup> For example, FastTrack software has been updated several times. It appears that users with earlier versions have difficulty connecting to the updated network. This suggests that the network is not entirely “free-standing”, as alleged, and copyright protection could be introduced at a later stage. However, of course these facts could change.

<sup>145</sup> Defendants in the MGM case filed a Notice of Motion for Partial Summary judgment, relying on the *Sony* defense, in February 2002. See Notice of Motion and Motion for Partial Summary Judgment by Defendants Streamcast Networks, Inc. and MusicCity Networks, Inc., *Metero-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, Case No. CV 01-08541 SWB (RNBx) (C.D. Cal. Oct. 2, 2001), available at [http://www.eff.org/IP/P2P/MGM\\_v\\_Grokster/20020122\\_streamcast\\_sum\\_judg\\_motion.pdf](http://www.eff.org/IP/P2P/MGM_v_Grokster/20020122_streamcast_sum_judg_motion.pdf) (last visited May 31, 2002). The trial judge declined to rule on the validity of the defense. See Brad King, Jury to Hear File-Trading Case, *WIRED*, available at <http://www.wired.com/news/business/0,1367,50836,00.html> (March 4, 2002).

<sup>146</sup> See 17 U.S.C. § 107 (2000).

effect on the potential market for or value of the work.<sup>147</sup> The fair use doctrine serves important constitutional purposes, serving to balance, among other things, First Amendment concerns against copyright owners' legitimate interests in controlling distribution of their work.<sup>148</sup> It enables use for purposes important to the public interest, such as criticism, comment, parody, and news reporting. In general, however, courts have not been very receptive to fair use arguments raised in the context of the new music distribution technologies.<sup>149</sup> The "effect on the market" analysis has been particularly important to many of these cases involving redistribution of works online: Courts have often reasoned that because copyright owners are already licensing, or expect to license their copyrighted works for use online, there is less justification for fair use.<sup>150</sup> Not only is fair use "under attack" via an economically-focused analysis, it has also been limited by the DMCA, which, as noted above, provides no general fair use exception from the anticircumvention provisions.<sup>151</sup>

Napster and its ilk and other forms of P2P file-sharing pose a challenge to the fair use doctrine. Whether or not one believes "non-transformative" uses should fall within fair use generally, consumers are used to thinking of making copies for themselves and even friends as *de minimis* behavior or fair use.<sup>152</sup>

<sup>147</sup> See *id.*

<sup>148</sup> See *Campbell v. Acuff-Rose*, 510 U.S. 569 (1994); Melville Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970).

<sup>149</sup> With the possible exception of the recent decision in *Kelly v. Arriba Soft Corp.* 280 F.3d 934 (9th Cir. 2002) (allowing "thumbnail" pictures produced by search engines as "fair use").

<sup>150</sup> See *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000) (analyzing the fair use doctrine). In that case, MP3.com copied thousands of CDs and allowed users, upon "proving" purchase by inserting a music CD into their computer, to "store" that music and then hear it streamed by MP3.com on demand. See *id.* at 350. MP3.com attempted to rely on users' fair use rights for space-shifting and making personal copies, an argument rejected by the court. See *id.* at 350-53; see also *A&M Records v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2000) (rejecting a number of fair use arguments, including use of the Napster system for sampling, and space shifting); *Princeton University Press v. Michigan Document Services*, 99 F.3d 1381 (6th Cir. 1996) (en banc) (anticipating that a market would exist for the Copyright Clearance Center but for the uses proscribed in the case); *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1994) (holding that certain reproductions of scientific publications were not a fair use of the materials and bolstering the market climate for the Copyright Clearance Center). But see *Recording Indus. Ass'n of Amer. v. Diamond Multimedia Systems, Inc.*, 180 F.3d 1072 (9th Cir. 1999) (turning primarily on statutory interpretation).

<sup>151</sup> See *supra* notes 126-127 and accompanying text.

<sup>152</sup> This view is reflected in *Sony*, with its protection of copying for time shifting, and the Audio Home Recording Act of 1992, with its protection of "all noncommercial copying by consumers." See *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 455 (1984) (holding that using VCR's for "time-shifting" of copyrighted television programs



and thus as essentially as acceptable acts. But fair use is a notoriously slippery concept in the case of “private uses.” Courts have never stated that all private uses are inherently fair. *Particular* private uses may be fair (for example, the time-shifting in the *Sony* case<sup>153</sup>), and Congress in the Audio Home Recording Act of 1992 sought to protect private, “noncommercial” use.<sup>154</sup> But clearly neither Congress nor the Courts anticipated a situation in which one individual could share his or her personal copy, without a profit motive, with millions of other people. Drawing a line between what is acceptable sharing and unacceptable has become infinitely more controversial.

#### *e. Remaining Legal Questions*

The legal wars continue: The Supreme Court will soon be considering the temporal bounds of copyright<sup>155</sup> (though not in an online context), and the FastTrack software is the subject of current litigation.<sup>156</sup> As these developments take their course, many of the open questions discussed below will likely be addressed.

One question is the status of distributed systems such as FastTrack in relation to secondary liability for copyright infringement, *i.e.*, contributory and/or vicarious liability. As noted above, a decision rendered in this case could be of considerable significance for P2P technologies.

Another set of questions arises from the suggestion that the architecture of the Napster system must be taken as a “given,” possibly indicating that the Court does not see a role for itself in altering code.<sup>157</sup> To what extent can and should courts take on the role of mandating certain changes in software architecture? The Ninth Circuit decision in *Napster* seemed to indicate a circumspect attitude by the court. On the other hand, these possibly liberal aspects of the appellate decision in *Napster* are in tension with the form of the injunction issued by the district court, and its ongoing review, which evidences

constitutes non-infringing fair use under the Copyright Act); H.R. REP. 102-873(I), at 59; 17 U.S.C. §1008 (home taping exemption).

<sup>153</sup> See *Sony Corp.*, 464 U.S. at 455.

<sup>154</sup> 17 U.S.C. § 1008 (2000); see also *Diamond Multimedia Sys., Inc.*, 180 F.3d at 1079 (quoting House and Senate Reports to this effect).

<sup>155</sup> See *Eldred v. Ashcroft*, 122 S. Ct. 1062 (2002) (mem.).

<sup>156</sup> See Complaint, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, Case No. CV 01-08541 SWB (RNBx) (C.D. Cal. Oct. 2, 2001), available at [http://www.eff.org/IP/P2P/MGM\\_v\\_Grokster/](http://www.eff.org/IP/P2P/MGM_v_Grokster/) (last visited May 31, 2002).

<sup>157</sup> These suggestions are more implicit than explicit, but may be found in *Napster*, 239 F.3d at 1020, 1024, 1027 (stating that “We are compelled to make a clear distinction between the architecture of the Napster system and Napster’s conduct in relation to the operational capacity of the system,” that “Napster’s reserved ‘right and ability’ to police is cabined by the system’s architecture,” and that “Napster . . . bears the burden of policing the system *within the limits of the system* . . . In crafting the injunction on remand, the district court should recognize that Napster’s system *does not currently appear to allow* Napster access to users’ MP3 files.”) (emphasis added).

a willingness to require architectural change – that is, to *exercise judicial control over the form of the network architecture* – if change is shown to be possible. The district court’s modified injunction was upheld by the Ninth Circuit.<sup>158</sup> The court of appeals held that it was a proper exercise of the court’s supervisory authority to modify the injunction in consideration of new facts (*i.e.*, new technological possibilities) and to require Napster to police its system “to its fullest extent” and use new filtering systems as suggested by an expert advisor.<sup>159</sup> The court, it seems, may impose some control over code.

## 2. Code

The strong legal armor outlined above, on its own, is unlikely to be fully effective in preventing infringing uses of copyright. No one wants to sue individual users,<sup>160</sup> especially since to do so looks like an exceedingly bad public relations exercise, and no one *could* sue them all.<sup>161</sup> Moreover, as indicated above, there will not always be a convenient intermediary to sue. This, in addition to the problems of international enforcement, has led to increasing emphasis on technological controls.<sup>162</sup> The aim is to develop systems, known under the collective term DRM, that allow copyright owners to control, prevent, monitor or even meter every use of a copyrighted work, or to automatically detect violations. Such controls could potentially be imposed at different levels, such as:

- On or in copyrighted works themselves, in the form of “watermarking” and encryption that embeds in the content both identifying information and usage rules (to be enforced by compliant devices);
- Through software such as sound players that prevent the capture of streamed media;<sup>163</sup>
- In recordable media, by the use of rip-proof CDs that have the potential to severely restrict even legitimate copying activity;<sup>164</sup>
- Embedded in operating systems, *e.g.*, by embedding technology hampering the playing and recording of unprotected formats like MP3

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<sup>158</sup> A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002).

<sup>159</sup> See *id.* at 1098-99.

<sup>160</sup> See *GigaMedia, EMI to Form Online Music Venture*, *supra* note 48. But see Graeme Wearden, *Police Raid Napster Users*, ZD.NET UK, available at <http://news.zdnet.co.uk/story/0,,t269-s2084479,00.html> (Feb. 16, 2001) (indicating that there have been “raids” on individuals in Belgium already).

<sup>161</sup> The recording industry could sue a few well-chosen targets in order to achieve a deterrent effect, but this does not detract from potential public relations problems and perhaps a danger of ‘laying down the gauntlet.’

<sup>162</sup> For a discussion of the possibilities, See *infra* Part II.B.1.a.

<sup>163</sup> RealNetworks, for example, developed such streaming technology and even sued a company that developed a way to capture and store the streams. See *RealNetworks, Inc. v. Streambox, Inc.*, 2000 U.S. Dist. LEXIS 1889 (W.D. Wash. Jan. 18, 2000).

<sup>164</sup> See Charles Mann, *Napster-proof CDs*, SALON.COM, at [http://www.salon.com/tech/inside/2001/03/27/cd\\_protection/](http://www.salon.com/tech/inside/2001/03/27/cd_protection/) (March 27, 2001).

as a default in Operating Systems<sup>165</sup> with an aim of replacing MP3 with alternative, proprietary (and *secure*) compression technology;

- Hardware, e.g., consumer electronics devices that only play secured formats – the CPRM model envisages deployment on PC hard drives – that could eventually lead to a system in which consumers would only be able to download files to their computer if their computer hard drive incorporated CPRM;<sup>166</sup>
- Roaming the networks: Another security measure which is being discussed is the use of roving agents that may search users' hard drives (on P2P networks, for example, or even otherwise) to find unauthorized files.<sup>167</sup>

Models that are built on the “closed loop” principle use a combination of these techniques, requiring authorization on each “component” of the loop: hardware, software, and the copyright file itself. DRM is a developing field; various forms are presently being explored.<sup>168</sup> It is beyond the scope of this article to consider the details; suffice it to say that there are many different *kinds* of control, which may be used independently or in combination. The strongest forms of control are those that actually seek to block unauthorized uses. For example, the technology is being developed to control numbers of copies, to ensure that copies time out, or to control or prevent printing or downloading.<sup>169</sup> Encryption techniques may be also be used to ensure that only authorized persons will obtain access to works. Finally, marking and monitoring techniques that may not actually prevent misuse but which can be used to detect unauthorized copies by automatic agents like “web spiders” may be implemented. For example, digital “fingerprinting” and “DNA” are being developed which can identify sound files regardless of how the file is named.<sup>170</sup>

Such technologies could enable copyright owners to exert a level of control

<sup>165</sup> It was suggested this might occur with the next Microsoft Operating System. See Ted Bridis, *Tech Industry Aims to Render MP3 Obsolete*, WALL ST. J., Apr. 12, 2001 at A3.

<sup>166</sup> The Electronic Frontier Foundation, *Defending the Public Interest: The Unfair Use of Standards*, at <http://www.t13.org/technical/e01110r0.pdf> (Feb. 18, 2001).

<sup>167</sup> Lawrence Lessig, *CODE AND OTHER LAWS OF CYBERSPACE* (Basic Books 1999).

<sup>168</sup> For a general description of the principles behind encryption, watermarking and other secure technologies, See DIGITAL DILEMMA REPORT, *supra*, note 82, at app. E (“Technologies for Intellectual Property Protection”).

<sup>169</sup> See generally Honigsberg, *supra* note 69, at 505-07 (outlining actions taken by the Record Industries to protect copyright works). For an older but excellent work on the technological possibilities, See Mark Stefik, *Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge Us to Rethink Digital Publishing*, 12 BERKELEY TECH. L.J. 137 (1997).

<sup>170</sup> See Jon Healey, *Fee Services Prepare to Pick Up where Napster Left Off*, L.A. TIMES, Mar. 5, 2001, at C1. Such technology was introduced by Napster in an attempt to comply with the preliminary injunction. See *A&M Records, Inc. v. Napster, Inc.* 284 F.3d 1091, 1097 (9th Cir. 2002).

over musical works that is unprecedented, and indeed unachievable, in an analogue world. Jonathon Zittrain predicts that copyright owners may create a market in which music is not “sold,” but rather is licensed for streaming via “small generic jukeboxes.” Zittrain comments:

An individual authenticates herself to a jukebox - perhaps with a fingerprint . . . and then may access specific songs that fall under her monthly payment plan. . . . The songs she asks for are “streamed” to her player as she listens, and do not remain there any more than a song stays inside a radio after it ends. An inaudible signal is embedded in the music; if she holds a microphone to her headphones and thereby makes an imperfect, analog copy to an old-fashioned cassette, her name and a unique identifier will be “in” it, permitting prosecution for copyright infringement if the copy is found . . .<sup>171</sup>

Although such speculation may seem fanciful, it reflects the current trends in technological development.<sup>172</sup>

Can technology succeed in ensuring such control? Some argue no since absolute control would require a “leak-proof pipe” all the way to, and *into*, users’ machines and ears.<sup>173</sup> It seems unlikely that any such system would be perfect;<sup>174</sup> as it would present an inevitable temptation to hackers. It also remains unclear whether individuals will put up with the burdensome technology and “friction” needed to make it work – in the case of software, these burdens led to an abandonment of some copy protection.<sup>175</sup> On the other hand, as Professor Julie Cohen points out, in some areas copy protection is already routinely used.<sup>176</sup> No matter which assessment of the *technology* is correct, however, in all likelihood, from the copyright owners’ point of view, the technology does not *need* to be perfect as long as it makes it difficult for

<sup>171</sup> See Jonathan Zittrain, *What the Publisher Can Teach the Patient: Intellectual Property and Privacy in an Era of Trusted Privication*, 52 STAN. L. REV. 1201, 1214-15 (2000); see also Mark Stefik, *Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge Us to Rethink Digital Publishing*, 12 BERKELEY TECH. L.J. 137 (1997) (explaining the “terrain” well at an early stage with the advantage of a computer scientist’s perspective); See generally DIGITAL DILEMMA REPORT, *supra* note 82, at app. E (outlining basic technical details of a range of technologies such as encryption, watermarking, digital signatures, web monitoring and cryptographic envelopes).

<sup>172</sup> See Saxe, *supra* note 55, at 23.

<sup>173</sup> See Eben Moglen, *Liberation Musicology*, THE NATION, March 12, 2001, at 5.

<sup>174</sup> DIGITAL DILEMMA REPORT, *supra* note 82, at 87.

<sup>175</sup> See Julie Cohen, *Lochner In Cyberspace: The New Economic Orthodoxy Of “Rights Management,”* 97 MICH. L. REV. 462, 523 (1998); see also *The Future of Digital Music: Is There an Upside to Downloading? Hearing regarding the future of Intellectual Property in the Digital Age Using Music as an Analog for All Types of Intellectual Property Before the Senate Judiciary Comm.*, 106th Cong. (2000) (statement of Gene Kan), available at [http://www.senate.gov/~judiciary/oldsite/7112000\\_gk.htm](http://www.senate.gov/~judiciary/oldsite/7112000_gk.htm) (last visited May 31, 2002).

<sup>176</sup> Such as video cassettes for rental, and material in some commercial databases. See Cohen, *supra* note 175, at 525-27.

the majority of users to do any unauthorized copying.

Some “underground” copying and copyright infringement is inevitable and can be tolerated. The real question is one of scale. The DMCA is predicated on imperfect DRM, and backs it up with legal sanctions for its breach, and, more importantly, legal sanctions for distributing any *means* for its breach.<sup>177</sup> We might expect that hardware manufacturers would not adopt standards that restrict user freedom.<sup>178</sup> However, if content owners adopt a given standard so that the content will not be available to machines or devices that do not comply with their rules, then makers of hardware or devices may not have much choice whether to adopt the technology, regardless of whether it is a standard according to industry bodies.

Notably, the development of DRM has been a largely *private* effort, not coordinated by the kinds of consensual standards bodies, such as IETF<sup>179</sup> or W3C.<sup>180</sup> The best-known effort to develop “code controls” is the Secure Digital Music Initiative (“SDMI”) – a private body made up of 200 copyright owners, technology and hardware developers, consumer electronics and internet service providers.<sup>181</sup> Another private body, “4C” ( comprised of Intel, IBM, Matsushita, and Toshiba) proposed “Copyright Protection for Recordable Media” (“CPRM”), purporting to be a standard for storage media (including in computer hardware) and consumer electronic devices.<sup>182</sup> Numerous technology security companies (*e.g.*, InterTrust and Liquid Audio) are also developing their own formats.<sup>183</sup> These private groups are not democratic, nor do they participate in the IETF model – SDMI, for example, refused to allow the Electronic Frontier Foundation to join its deliberations, saying it had “no

<sup>177</sup> See 17 U.S.C. § 1201 (2000).

<sup>178</sup> Indeed, this is the reason why legislation has been suggested to *mandate* the adoption of copy protection standards in electronic devices; Senator Hollings introduced the Consumer Broadband and Digital Television Promotion Act, S.2048 (2002), in March 2002. The Act, if passed, would give the Federal Communications Commission to validate agreed security systems, or impose security systems standards. See *id* § 3.

<sup>179</sup> See *The Internet Engineering Task Force, Overview of the IETF*, at <http://www.ietf.org> (last visited May 31, 2002).

<sup>180</sup> See *The World Wide Web Consortium*, at <http://www.w3c.org> (last visited May 31, 2002).

<sup>181</sup> See SDMI, at [www.sdmi.org](http://www.sdmi.org) (last visited Sept. 2, 2002). For a different perspective on SDMI, See *SDMI Challenge FAQ*, at <http://www.cs.princeton.edu/sip/sdmi/faq.html> (last visited Sept. 2, 2002).

<sup>182</sup> See Andrew Orlowski, *Stealth Plan Puts Copy Protection Into Every Hard Drive*, THE REGISTER, Dec. 20, 2000, available at <http://www.theregister.co.uk/content/2/15620.html> (last visited Sept. 2, 2002).

<sup>183</sup> See Testimony of Gerry Kearby, President and Chief Executive Officer, Liquid Audio, and Testimony of Edmund Fish, Founder and CEO, InterTrust, in *Online Entertainment and Copyright Law: Coming Soon to a Digital Device Near You: Hearings Before the Senate Judiciary Committee, 107th Cong.* (2001).

legitimate interest.”<sup>184</sup>

Recently, however, we have seen an important development in the legislative field, aimed at further backing up DRM efforts and, in particular, at creating the genuine “leak-proof pipe.” We refer here to the introduction into Congress by Senator Hollings of the Consumer Broadband and Digital Television Promotion Act (“CBDTPA”).<sup>185</sup> In essence, this bill would require producers of digital devices, and even developers of computer programs, to embed copy protection standards: those standards to be either agreed upon by copyright owners and the consumer electronics industry or imposed by mandate of the Federal Communications Commission.<sup>186</sup> The purpose of the CBDTPA is clear: Since at present circumvention occurs despite DRM, the bill aims to ensure that digital devices cannot be used to make or play unauthorized copies of works. The CBDTPA is supported by copyright owners in both the recording industry and movie industry; there are, however, strong voices speaking against the enactment of such legislation, both from public interest advocates and from consumer electronics industries.<sup>187</sup> Even in the absence of such legislation, however, it seems likely that private efforts will continue. Defeating this public initiative is unlikely to lead to an absence of privately developed copy protection technology in consumer devices.

#### D. Summary

In this Part we have given a brief history of the recent disputes surrounding music distribution on the internet, and the complex group of stakeholders and institutions involved. We have highlighted the consequences of new layers of protection now devised for copyrighted works. Strong legal rights are backed up by both *private contract* and *code* as means of enforcement. Where these measures fail, both common law and the DMCA are utilized to stop unauthorized uses of works. In the next Part, we examine the negative consequences of increasing copyright owner control over content, and suggest principles to guide regulation of this development.

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<sup>184</sup> John Gilmore, *What's Wrong with Copy Protection*, at <http://www.toad.com/gnu/whatswrong.html> (Feb. 16, 2001).

<sup>185</sup> S. 2048, 107th Cong. (2002). The bill is very similar to a draft predecessor, the Security Systems Standards and Certification Act (or “SSSCA”). See Electronic Frontier Foundation, *EFF “Intellectual Property – Security System Standards and Clarification Act” Archive*, at [http://www.eff.org/IP/SSSCA\\_CBDTPA](http://www.eff.org/IP/SSSCA_CBDTPA) (last updated Mar. 26, 2002).

<sup>186</sup> See S. 2048, 107th Cong. § 3.

<sup>187</sup> The Senate Judiciary Committee held a hearing on this legislation on March 5, 2002. See *Competition, Innovation, and Public Policy in the Digital Age: Is the Marketplace Working to Protect Digital Creative Works? Hearings before the Senate Judiciary Committee*, 107th Cong. (2002), available at <http://judiciary.senate.gov/hearing.cfm?id=197> (last visited May 31, 2002). At that hearing, Intel President and CEO, Dr Craig R. Barrett criticized the move to impose copy protection on consumer electronics and computers. See *id.*

## II. PRINCIPLES TO GUIDE REGULATION OF ONLINE MUSIC DISTRIBUTION

Given the present state of law and code, online music distribution is not simply a business problem. Important policy questions must be addressed. In this Part, we focus on two areas: (1) the scope of consumer use and (2) the market conditions that will best balance the rights of creators, owners, and consumers of musical works. We discuss the principles that ought to guide the development of policy in these two areas.

The current debates regarding online music distribution have demonstrated that the boundaries of copyright protection are a vital public policy concern.<sup>188</sup> Historically, policymakers have sought a balance between public and private interests. That balance has become more difficult to achieve. The rise of P2P technology and digitization has shattered the *status quo ante*, itself a “contingent accommodation” reliant upon the characteristics of analogue media.<sup>189</sup> As Professor Yochai Benkler argues, we are unlikely to see a settlement of values that looks like the prior settlement, “because the relative costs of communication, reproduction, and use around which that settlement crystallized are so fundamentally altered by the new environment.”<sup>190</sup> The technical legal difficulties of applying “old law” to the new situation are heightened by the polarization of interests on both sides. With the stakes so high, the content industry’s efforts to secure the rights to control their works, exemplified by the DMCA, have pitted them against their own consumers, whose embrace of new advances in technology threatens to undermine that control. A new balance, and a new way of *achieving* that balance, are required.

Thus far, as Part I illustrated, strong property rights have won out;<sup>191</sup> there has been a shift within the law toward the rigid terms and limitations of a

<sup>188</sup> See Jessica Litman, *Digital Copyright and Information Policy*, in KRAIG M. HILL ET AL., *GLOBALIZATION OF INTELLECTUAL PROPERTY IN THE 21ST CENTURY: EUROPE, ASIA AND THE INTERNET* 299 (CASRIP Publication Series Number 5 1999), available at <http://www.law.wayne.edu/litman/papers/casrip.html> (last visited May 31, 2002) [hereinafter Litman, *Digital Copyright and Information Policy*] (“Time was, copyright was a niche field . . . the community of folks who needed to worry about copyright laws was really pretty small. But copyright has grown . . . it reaches into most communicative transactions . . . What that means, is that . . . more and more people who never needed to worry about copyright discover that it affects all manner of things that are important to them. And more and more of them, understandably, want to get a say in what the copyright law looks like.”).

<sup>189</sup> See Yochai Benkler, *Net Regulation: Taking Stock and Looking Forward*, 71 U. COLO. L. REV. 1203, 1247 (2000).

<sup>190</sup> *Id.* at 1248.

<sup>191</sup> This commodification of intellectual property at the expense of the intellectual commons has been acutely characterized as the “second enclosure movement” by James Boyle. See James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain* (working draft), available at <http://www.james-boyle.com> (“[T]he process of expansion of intellectual property rights has been remarkable in every field of endeavour

property rules (as opposed to a liability rules) regime. Most importantly, these shifts, particularly the anti-circumvention provisions of the DMCA, are placing exclusive control of the code that will accompany content in the hands of the content-owners, thus “privatizing a large chunk of the public law of copyright.”<sup>192</sup> Where previously the legal balancing of public and private interests was subject to political scrutiny and accountability, private commercial entities are increasingly capable of setting their own terms of use. The new digital rights management may make copyright owners’ rights absolute.<sup>193</sup> Historically, copyright has granted “conditional” rights, subject to such doctrines as fair use and the first sale doctrine. Although anti-copying protections need not lead to rigid limitations on use of and access to copyrighted works, content owners have many incentives to define the contours of use to their advantage. In this context, we should consider a more active role for law and government and ask “if copyright is limited in the protections that it gives, why shouldn’t code be limited as well – limited, that is, by law?”<sup>194</sup>

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– from business method patents, to the Digital Millennium Copyright Act, to trademark antidilution rulings, to the European Database Protection Directive. The old limits to intellectual property rights – the anti-erosion walls around the public domain – are also under attack.”).

<sup>192</sup> Yochai Benkler, *The Commons as a Neglected Factor of Information Policy*, Sept. 1998, available at <http://www.law.nyu.edu/benkler/> (last visited May 31, 2002). Yochai Benkler’s definition of privatization in the context of information policy, cuts directly to the issue of control: “Privatization consists of governmental strategies for setting and enforcing rules (e.g. property and contract rights) that make it possible for market-oriented organizations to control the production and use of information.” *Id.*

<sup>193</sup> This quest for absolute control on the part of the content holders may know no bounds. In one infamous example, a license distributed with one software publisher’s e-books specified that viewers of the public domain work, *Alice in Wonderland*, could not read the text aloud or lend a copy to a friend. See *eVIL*, HARPER’S MAGAZINE, Mar. 2001, at 18 (outlining the license specifications for an e-book of *Alice in Wonderland* published by VolumeOne for the Adobe Acrobat eBook Reader). After public backlash, the company quickly released a new version, which permitted reading aloud, but still could not be “lent” or “given.” See Lawrence Lessig, *Adventures in Adobeland*, INDUSTRY STANDARD, May 19, 2001 (discussing the debate over use restrictions in the context of e-books). The new version also graciously permitted users “to copy 10 text selections every 10 days” and “to print 10 pages every 10 days.” See *id.* The example is more deeply contextualized by Yochai Benkler, in *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain* (working draft), available at <http://www.law.duke.edu/pd/papers/benkler.pdf> (last visited May 31, 2002).

<sup>194</sup> Lawrence Lessig, *Life, Liberty, . . . and the Pursuit of Copyright*, ATLANTIC UNBOUND, at <http://www.theatlantic.com/unbound/forum/copyright/lessig1.htm> (Sept. 10, 1998); see also Joel Reidenberg, Remarks at The Politics of Open Source and Free Software session of A Free Information Ecology in the Digital Environment Conference at NYU Law School (Mar. 31, 2000), available at <http://www.law.nyu.edu/ili/conferences/freeinfo2000/webcast/transcripts/105119OpnSrcFreeSoftware.pdf> (discussing the need for social accountability of commercial actors in the cyberspace).



Parts III and IV present our suggested means of regulating online music distribution. Since ongoing scrutiny will be important in a shifting technological environment, we need to set out substantive principles capable of providing guidance for regulators. Thus, the discussion in this Part proceeds at an ideal level, identifying broad objectives and exploring how those objectives relate to music distribution online. Online music distribution should be structured so as:

- A) **To enable diverse business practices and wide availability of content;**
- B) **To maximize the development of new technologies for distribution and use;**
- C) **To maximize consumer welfare in the broadest possible terms;**
- D) **To protect the interests of all stakeholders, including artists; and**
- E) **To limit technologies of control in the public interest**

We discuss each of these principles in more detail below. In Part III, we address more practical questions, identifying *plausible*, not ideal reforms. Some of these principles may conflict; copyright law and policy is always a compromise of competing interests. Nevertheless, it is important to clarify our normative ideals before committing to any particular set of reforms.

#### A. *To Enable Diverse Business Practices and Wide Availability of Content*

##### 1. The Majors' Reluctance to Make the Digital Transition

The major labels' historical dependence on high margins in the sale of physical music "products"<sup>195</sup> is basically incompatible with the economics of digital distribution.<sup>196</sup> The "big five" have been reluctant to shift toward

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<sup>195</sup> "The primary way in which revenue has been raised from music recording . . . has been . . . to sell that content at above the marginal cost of delivery, a revenue model enabled by copyright law . . . . The points at which revenue is raised are at the points of friction along the path of delivery." Christian Baum, *The War on Unrestricted Access*, at <http://www.internetcontent.net/PrintVersion.asp?ReportID=267> (Apr. 11, 2001) (arguing that the "Internet is a distribution environment in which the protection of content is both impossible and undesirable").

<sup>196</sup> See Brett Fuller and Marc Singer, *Unchained Melody: The Digitization of Music Has Industry Execs in a Twist*, *McKinsey Quarterly* 1 (2001) ("What will happen to the major record labels when all of the music ever recorded becomes available on the Internet? Will music listeners—that is, pirates—continue to pay \$15 for a compact disc at the store?"); see also Moglen, *supra*, note 173, at 6. Under Moglen's analysis, "[Artists'] wholesale defection from the existing distribution system is about to begin, leaving the music industry-like manuscript illuminators, piano-roll manufacturers and letterpress printers—a quaint and

channels of digital distribution until they have “secured” their work.<sup>197</sup> Critics argue that they really want to secure the indefinite continuation of their current business model. If they succeed, all distributors will be required to handle content on their terms.

In our view, an institutional solution should seek to avoid the entrenchment of existing business models by encouraging competition through the wide distribution of content. In short, the existing industry structure should not dictate technological development. Copyright owners have never had such complete control over distribution that they could dictate all the terms of use. To preserve the free flow of culture, online music (and other digital works) should be subject to multiple *terms* of distribution. If content were distributed widely (with guarantees of compensation, if not absolute control, to content owners), competing online retailers and broadcasters would likely offer diverse terms of use. New business models would likely result in diverse terms of use, increasing interoperability of consumer electronics devices and innovative payment arrangements (including subscription and pay-per-use). Licensed providers could meet consumers’ diverse demands. In a truly competitive market for online music, legitimate businesses that incorporate reliability, security, affordability, and balanced content protections would become viable,<sup>198</sup> while others would fail.<sup>199</sup>

## 2. The Stance of the RIAA

The Recording Industry Association of America publicly supports this shift in business practices. The major labels’ industry association has argued that no additional legislation or governmental action is necessary because it is in the

diminutive relic of a passé economy.” *Id.* Yet, even he suggests that “[t]he industry’s giants won’t disappear overnight, or perhaps at all. But because their role as owner-distributors makes no economic sense, they will have to become suppliers of services in the production and promotion of music; [instead becoming] [a]dvertising agencies, production services consultants, packagers.” *Id.*

<sup>197</sup> James Boyle has noted that for the record labels the true value of new distribution technologies may be as a scare tactic to tame the net and the legislators. See Boyle, *Britney Spears and Online Music Fears*, *supra* note 114 (arguing that digital piracy is less of a concern than record industry efforts to eradicate it).

<sup>198</sup> Analysts have estimated that it would cost a company \$300 million a year to deliver songs from central distribution points at the same pace that songs were traded on Napster’s service before the injunction. See Bob Tedeschi, *Record Labels Struggle with Napster Alternatives that will Make Money and Please Consumers*, N.Y. TIMES, Apr. 23, 2001, at C7 (citing Matt Bailey, analyst at Webnoize). Such costs would fall up to 90% in the next three years, as the cost of network capacity, or bandwidth decreases. See *id.*

<sup>199</sup> Accompanying Napster’s staggering rise in popularity was increasing evidence of its lack of a proper business model. While dictated by legal necessity, its transition to a subscription-based model may also be seen to provide proof that its viability as a business was reliant on speculative venture capital and free content. See Rob Walker, *Napster: Show Me the Money*, SLATE, at <http://slate.msn.com/?id=1005231> (May 2, 2000).

labels' interest to respond to consumer demand. In the words of RIAA President Hilary Rosen:

[Our] goal is to have several different kinds of systems and business models for music fans to choose from, available in as many locations online as possible, on a non-exclusive basis to encourage competition – and to make these services and products compatible with the new hand held devices and other technologies that are emerging around the corner. To achieve this goal, America's record labels are licensing innovatively, constantly, and aggressively and they are in some cases putting finishing touches on systems that they have built themselves.<sup>200</sup>

However, this public accession to consumer demand before Congressional pressure should not lead us to conclude that the major labels will consistently serve the public interest. In particular, we want to ensure that as the labels license their content they do not do so exclusively, “misusing” their exclusive right of distribution to artificially constrain the market on “monopoly-like” terms.<sup>201</sup> Industry developments since the fall of Napster make clear the need for sustained vigilance in this regard.

### 3. Proprietary Online Services: MusicNet and Pressplay

As outlined in Part I, the development of label-authorized online music services, including MusicNet and PressPlay, indicates that the recording industry has begun to deal with web-based digital music intermediaries. While a step in the right direction, these services, at least as implemented thus far, demonstrate foremost the aspiration for the majors to retain the market power they leveraged in the real-space marketplace. The disconcerting potential of these licensing arrangements is reflected in the technological protections and formats such distribution presently entails.<sup>202</sup> Tellingly, for example, the design of the Pressplay system permits users who have paid for the right to stream, download, and burn music to burn no more than two tracks by an artist for any month-long billing cycle. The apparent rationale for this constraint: “to protect album sales.”<sup>203</sup>

As presently arranged, these entities evince a “disturbing correlation between the content providers (the record labels) and their distribution networks.”<sup>204</sup> In effect, the major labels are acting in a coordinated way that

<sup>200</sup> *Online Entertainment and Copyright Law: Coming Soon to a Digital Device Near You: Hearings Before the Senate Judiciary Committee*, 107th Cong. 57-61 (2001) (testimony of Hilary Rosen, President and CEO, Recording Industry Association of America).

<sup>201</sup> For a discussion of copyright misuse, *See In re Napster Copyright Litigation*, 191 F. Supp. 2d 1087, 1102-06 (N.D. Cal. 2002).

<sup>202</sup> *See infra* Part III.E.1.

<sup>203</sup> Tom Di Nome, *You Listen, You Pay: Post-Napster Music Services*, N.Y. TIMES, Mar. 7, 2002, at G9 (surveying the features and content of the legal online music services).

<sup>204</sup> Frank Saxe, *supra* note 55, at 23.

raises the risk that they will, in the long-term, collude. Upon the announcement of the labels' licensed services, consumers and artist advocacy groups, disturbed by the major labels' convergence and continuing evidence of the industry's leverage, raised antitrust concerns. Their uneasiness has since been validated by the ongoing DOJ investigation. As Future of Music Coalition's Jenny Toomey has argued, the labels are effectively arranging to artificially constrain the market to meet their own needs: "They're trying to make sure they transfer the terrestrial business models to the Web intact so they maintain the same bottleneck. The idea is that it may be an only \$12 billion business, when it could be a \$30 billion business, but at least the labels know they're dividing the \$12 billion."<sup>205</sup> Such consolidation could squeeze out independent artists and labels. In the future, the major labels claim that MusicNet will license content to other distribution platforms, including Napster, "provided such outlets satisfy legal, copyright and security concerns."<sup>206</sup> Of course, the industry's subjective take on what efforts will adequately meet such considerations may differ markedly from that of consumers, artists, or technology developers.

#### 4. Shifts in the Nature of Use and Consumer Expectations

In our view, the digitization of content requires our society to rethink the terms of copyright, just as the record labels need to modify how they do business.<sup>207</sup> In the old order, what the individual could do with media was dictated by technological limitations: the ability to record for friends (onto an inferior cassette), to lend or borrow, and to resell. The limitations of use were clear because they were tied to the physical instantiation of musical content. In such a regime, the threat of permitting personal copying as use and the latitude represented by a first sale doctrine did not stir concern like created by today's state of the art.

P2P technology and Napster have increased public awareness of new ways of using and distributing copyrighted works. Widespread shifts in consumer practices have altered the social norms and meaning associated with the use and enjoyment of musical content.<sup>208</sup> As they reflect the improved

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<sup>205</sup> *Id.*

<sup>206</sup> *Id.*; see also MusicNet, FAQ, at [http://www.musicnet.com/Frame\\_about.html](http://www.musicnet.com/Frame_about.html) (last visited May 31, 2002) ("When will Napster offer the MusicNet platform? Napster is a very important distribution partner for MusicNet and they are on track for a fall launch. As we announced sometime ago, we will deliver our platform and content once they are up and running. Nothing has changed since we announced the partnership some time ago.")

<sup>207</sup> Of course, the need to rework copyright law to fit digital media has been (and may remain to some) controversial. See Jessica Litman, *Revising Copyright Law in the Information Age*, 75 OR. L. REV. 19 (1996) (discussing the debate over whether digital technologies actually necessitate a revision of traditional copyright law).

<sup>208</sup> Generally speaking, "law and social norms" scholarship builds from the understanding that norms, in the absence of law, play a powerful role in regulating individual behavior, and assesses the potential for law to extend its grasp through shaping norms and attitudinal

efficiency and breadth of the new information infrastructure, these norms are apt to conflict with marked changes in the status of law and/or the architecture of content distribution, even, or especially, if law imposes those changes.<sup>209</sup> In effect, the facility of digital communications platforms generates an unconscious awareness for consumers of the tension underlying the application of real-space intellectual property doctrine to cyberspace. As Yochai Benkler puts it, “in a near-zero marginal cost communications environment, [a] ‘goods’-based concept of information production – [when information is] itself a zero marginal cost ‘good’ – [may] no longer [be] the appropriate way to think of how information is produced.”<sup>210</sup> The practical efficiency of P2P distribution concretizes the zero marginal cost of information distribution in economic terms, highlighting the underlying nature of musical content as a public good and generating distaste for steeply priced “products” and constraints on user privileges. While the new norms should by no means dictate a lack of compensation for creators, any public policy that does not respect the culturally accepted sentiments of the majority of users is apt to create a backlash.

Although copyright owners may seek to make the flexibility afforded MP3 format obsolete through the development of DRM systems at both the software and hardware level, it will be an uphill battle.<sup>211</sup> To the extent that hardware-

preferences. The literature also highlights, however, the constraints of using law for the purposes of “norm management.” In many contexts, there may be a potential backlash in using legal regulation to express judgments about appropriate values. See, e.g., Cass S. Sunstein, *Law, Economics, & Norms: On the Expressive Functions of Law* 144 U. PA. L. REV. 2021, 2048 (1996) (discussing the risk that attempts at norm management through law will be “futile or counterproductive,” as in the government’s “Just Say No” anti-drug campaign). The same qualities that make norms an attractive tool for legal reform – their ability to trigger group-based sanctions rooted in deeply-held and commonly-shared sentiments – ensures that once they are developed they are often hard to dislodge. See Jeffrey J. Rachlinski, *The Limits of Social Norms*, 74 CHI.-KENT. L. REV. 1537, 1537 (2000). In the presence of “hard” norms, law may lose its expressive power and persuasive edge. See *id.*

<sup>209</sup> See Paul Boutin, *Don’t Steal Music, Pretty Please*, SALON.COM, at [http://www.salon.com/tech/feature/2001/12/18/dont\\_steal\\_music](http://www.salon.com/tech/feature/2001/12/18/dont_steal_music) (Dec. 18, 2001) (quoting former BMG head Strauss Zelnick: “We need to give consumers a service they want, at a price they’re willing to pay . . . People don’t like to think of themselves as criminals.”).

<sup>210</sup> Yochai Benkler, *Net Regulation: Taking Stock and Looking Forward*, 71 U. COLO. L. REV. 1203, 1248 (2000).

<sup>211</sup> Senator Hollings’s Consumer Broadband and Digital Television Promotion Act would, by requiring copy-protection in any device that “retrieves or accesses copyrighted works in digital form,” prohibit the sale of MP3 players, such as the Apple IPOD or Diamond RIO. S. 2048, 107th Cong. (2002). In effect, this would statutorily overrule the decision of the Ninth Circuit in *Recording Indus. Ass’n of Am. v Diamond Multimedia Sys., Inc.*, which held that the Diamond Rio’s capacity to “space-shift” musical content worked in harmony with the Audio Home Recording Act’s commitment to “the facilitation of personal use.” *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1079

mandated solutions conflict with the norms and practices of technological and consumer community, Senator Hollings's recently proposed legislation demonstrates an imperfect solution. Furthermore, the deluge of MP3 files and players already in existence will likely stifle the ability of labels to stamp out that format, prospective measures notwithstanding.<sup>212</sup> Should the industry succeed in convincing – or forcing – users to adapt a more secure format, consumers and their advocates are not likely to willingly let go of the versatility afforded by compressed audio files or the hardware that permits flexible use.<sup>213</sup> Consumers have developed expectations regarding broad and flexible use of the MP3 and P2P protocols. Notably, attempts to restrict use and the means of acquiring content differ in the present case from prior instances to regulate use *ex ante* (e.g., VHS technology) because the preferable format and mechanisms of distribution have already flooded the “market.”

Content owners and copyright policymakers throughout the 1990s were primarily concerned with enhancing control over works. It is now time to balance these protections—to ask what the limits of control should be. In light of our guiding principles, Part III and IV will outline what we consider to be the minimum proper restrictions on DRM.

### 5. Music and Information Services

It is difficult to predict what the recording industry business model of the future will look like.<sup>214</sup> However, given that the architecture of cyberspace enables wider distribution of content at a reduced cost, some features should be inevitable. The business models of the future will necessarily utilize this wealth of circulation and consumption by delivering works to consumers in a manner parallel to their availability in “real space,” but with increased scope and efficiency. Yet, the new means of delivery should also include innovative new methods of promoting, sampling, sharing and learning about works. As the popularity of Napster has demonstrated, users desire, among other things, ease of access and variety of content. By offering music at a reasonable rate,

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(1999).

<sup>212</sup> See Ted Bridis, *Tech Industry Aims to Render MP3 Obsolete*, WALL ST. J., Apr. 12, 2001, at A3 (pointing out that the sheer volume of files already available will make it very difficult to eradicate them or popularize other rival formats).

<sup>213</sup> As noted earlier, resistance to rigid control has been evidenced in criticism of the labels' stumbling attempts to control content through SDMI. Prior to the introduction of the Consumer Broadband and Digital Television Promotion Act, public interest advocates began to vocalize their opposition to the technological copy control at hardware levels. See, e.g., James Borland, *Advocates Campaign Against Copy-Protection Plans*, CNET NEWS.COM, at <http://news.cnet.com/news/0-1005-200-4980230.html> (Feb. 28, 2001) (describing the Electronic Frontier Foundation's call for public scrutiny and participation in the potential adaptation of copy-protection technology).

<sup>214</sup> See, e.g., James Boyle, *Cruel, Mean or Lavish: Economic Analysis, Price Discrimination And Digital Intellectual Property*, 53 VAND. L. REV. 2007 (2000) (discussing the rhetoric of economic analysis as applied to digital intellectual property).

through their own distributors and by licensing to others, the record companies could develop new markets and greatly increase demand for their product.

These new markets may well entail reduction in sales in the old media. Once capable of downloading or streaming individual songs from the comfort of home, online consumers may buy CDs far less frequently. However, there is no reason to assume that physical distribution will be eliminated altogether. The pleasure of shopping lies at the center of our consumer culture. People enjoy the purchase of well-designed concrete artifacts. Furthermore, there will always be an adult portion of the consuming public for whom it will be more cost-efficient to purchase prepackaged commercial products. Exposure on P2P networks may serve the same purpose as radio broadcasting—whose promotional effect makes it lucrative for copyright owners even though any consumer with a tape recorder can copy broadcasted works. Like the movie industry executives who rapidly moved to promote VCR rental tapes after they lost their battle to stamp out the new technology, recording industry executives may eventually welcome the new channels of digital distribution.<sup>215</sup> Those capable of moving from a high margin/low volume business model to a low margin/high volume model are most likely to be able to take advantage of the new channels of distribution.

Digital musical content is integral to cyberspace's greatest promise—the expansion of access to information, art, and entertainment.<sup>216</sup> The labels might soften the transition by developing innovative ways to market their content. A fee-based service may become more successful than the Napster and the FastTrack networks if it delivers on features lacking in P2P networks – such as consistent speed, sound quality, and security from viruses. Moreover, the

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<sup>215</sup> These suggestions may be speculative. However, the same may be said of the economic analysis underpinning most defenses of extensions of intellectual property rights. As George Priest has argued, economists are largely unable to “resolve the question of whether activity stimulated by . . . protection of intellectual property enhances or diminishes social welfare.” George L. Priest, *What Economists Can Tell Lawyers About Intellectual Property*, in 8 RESEARCH IN LAW AND ECONOMICS: THE ECONOMICS OF PATENTS AND COPYRIGHTS 21 (James Palmer ed., 1986). In the face of uncertain economic analysis, fair use, interoperability, and innovation ought to be particularly valued.

<sup>216</sup> To expand on what the distinction between information and products might entail for the major labels, consider the concept of ‘paperback music.’ See Rob Walker, *Paperback Music*, N.Y. TIMES MAGAZINE, Apr. 1, 2001, at 17. Walker proposes a two-tiered approach in which the CD would exist along with downloads. See *id.* Record companies could offer a CD version, followed by a downloadable version. See *id.* The “hardcover” version could capitalize on the cultural capital of immediately acquiring an artist’s latest hit and need not be threatened by the “paperback” download available for less committed users. See *id.* He argues the physical object of the CD will remain viable, because the physical object is more valuable as a “cultural artifact.” *Id.* Walker notes that “[a] new CD release is . . . an official, completed object. It’s satisfying.” If online music distribution becomes the primary method of distribution, such a model may not be viable. See *id.* However, paperback, remaindered, and used books happily co-exist with more expensive hardcover versions, like first-class and coach seats on airlines. See *id.*

major labels could build on the network's interactivity to specialize as information suppliers, for example, by building upon their unique relationship to artists.<sup>217</sup> To differentiate themselves, they might have to bundle works with enhancements (*e.g.*, web exclusives, concert tickets, or artist contact) so as to make either the physical distribution more attractive or make their own online distribution models preferable to licensed competitors.

Official distribution networks should place a premium on security. The greatest strength (and weakness) of a P2P network is its decentralized framework. As a non-discriminatory communications platform, P2P systems are by their nature untrustworthy. Simply put, anonymous users have no guarantee of the quality and content of files they exchange with other users. Corrupt files and viruses are a constant threat.<sup>218</sup> Decentralized networks rely generally on a framework of reciprocity, yet user anonymity and the broad and amorphous nature of online P2P communities deter mechanisms of accountability and enforcement. Without introducing centralized distribution and filtering mechanisms, P2P software providers will be unable to cure this defect within their sub-networks. As network intelligence brings with it the enhanced prospect of legal liability, the major labels have the capacity to capitalize from the distrust inherent in decentralized networks by providing a stable alternative.

Not only are P2P users unreliable, but P2P developers and distributors appear to tarnishing their own reputation by raising the hidden "cost" of their free services. As P2P developers try to translate popularity with users into profitability, file-sharing programs frequently come bundled with adware or spyware-programs, that execute pop up advertisements as users surf the Web

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<sup>217</sup> SDMI technologist Talol Shammon has discussed the possibility of super-distribution, a method rewarding users for become distributors. See Damien Cave, *Watermarks in Music?*, SALON.COM, at [http://www.salon.com/tech/feature/2001/03/19/divx\\_part2/print.html](http://www.salon.com/tech/feature/2001/03/19/divx_part2/print.html) (July 31, 2000). Cave notes:

You can do things like super-distribution, for example, where you can e-mail the song and say, "If you get 10 of your best friends to buy it, I'll give you free tickets to the Britney Spears concert next month." So you get on AOL and you e-mail the thing to 50 of your best friends and so on . . . you can go down as many levels as you want, so they can e-mail it to 50 of their best friends, turning the consumer into a distributor of sorts.

*Id.*

<sup>218</sup> For example, in January of 2001, it was reported that a Trojan horse program masquerading as an advertising application was included with versions of file-sharing programs like BearShare, LimeWire, KaZaA, and Grokster – the Trojan tracked URLs that users visited and posted them to a website and also opened a security hole on infected systems by downloading and activating executable files. See Michelle Delio *What They Know Could Hurt You*, WIREDNEWS, at <http://www.wired.com/news/privacy/0,1848,49430,00.html> (Jan. 3, 2002); see also Brad King, *Security Fears for Peers*, WIREDNEWS, at <http://www.wired.com/news/business/0,1367,42438,00.html> (Mar. 21, 2001) (discussing the trade-off between security and privacy, as P2P developers transition toward profitable business models).



or track user surfing habits, collecting information that can in turn be sold to marketing entities.<sup>219</sup> Consider, for example, the widely publicized case of KAZAA's covert bundling of a spyware-program, which could connect users to a secondary, private network for the distribution of paid music and advertising. While users were made aware of the possibility that their hard drive could be co-opted in the small-print of their "terms-of-service" agreements and the company stated that they would ask users before harnessing their processing power, users and privacy advocates were rightfully alarmed by such misleading practices.<sup>220</sup>

*B. To Maximize the Development of New Technologies for Distribution and Use.*

In conjunction with our first policy goal, which emphasized wide availability of content, it is also important to permit the development of new technologies that will improve the ways in which digital music is accessed, produced, and distributed over the Internet. Institutions involved in copyright policy should promote technological innovation. Looking past Napster's transitional technology, policymakers need to guard this "innovation market," since it is likely to generate economic growth down the line. It is important that the concerns of one particular sector of the information economy – those of copyright owners – do not dictate technological development. By reducing barriers to entry for commercial entities offering innovative business alternatives, advances in network technologies may spark commercial development beneficial to all.

1. How Copyright Law Threatens Innovation

The current state of copyright law threatens technological development by (i) giving content owners de facto control over new technologies of

<sup>219</sup> See John Borland, *Stealth P2P Network Hides Inside Kazaa*, CNET.COM, at <http://news.com.com/2100-1023-873181.html> (Apr. 1, 2002); see also Jeffrey Benner, *Spyware, In a Galaxy Near You*, WIREDNEWS, at <http://www.wired.com/news/technology/0,1282,49960,00.html> (Jan. 24, 2002) (describing the scandal over spyware included in Audiogalaxy's software, that tracks surfing habits, delivers pop-up ads and could collect information filled into online forms, such as credit card information); Matt Richtel, *In Free-Music Software, A Hidden Fee-Based Service*, N.Y. TIMES, Apr. 3, 2002, at C2.

<sup>220</sup> See Borland, *supra* note 219 (quoting Larry Poneman, CEO of Privacy Council: "A lot of the people most likely to use this software are teenagers or college students. There's a lack of sensitivity about privacy in that age group. Do they really want to be commandeered and have their machines do things that aren't necessarily in their best interest?"). The terms-of-service agreement stated:

You hereby grant the right to access and use the unused computing power and storage space on your computer/s and/or Internet access or bandwidth for the aggregation of content and use in distributed computing . . . . The user acknowledges and authorizes this use without the right of compensation.

*Id.* Users who did not agree to these terms were unable to download the software. See *id.*

distribution, (ii) failing to encourage the development of (fair) use technologies, and (iii) giving content owners control over every step in the chain of distribution.

*a. The Technological Veto*

The courts and Congress have often given copyright owners control over new markets for their work, allotting them veto power over new uses of works.<sup>221</sup> Their current veto power over digital distribution systems stems from two conditions outlined in Part I above: (a) the ability to protect content through technological controls coupled with (b) the strong legal protections of copyright. The technological veto was at work, for example, in the Napster case, as the labels were able to leverage their licensing capacity to knock Napster out of business and off the internet.<sup>222</sup> Judge Patel's order, upon Napster's request, that the labels demonstrate their ownership of the copyrights they claimed to hold represented a small but significant qualification of this capacity.<sup>223</sup>

The inherent danger in a technological veto is that, in many instances, industry's immediate reaction to a content-based format shift will lack foresight. There is ample precedent for this dangerous character. The movie industry, for example, feared and fought VHS technology, although the technology eventually revitalized the movie business by opening a secondary

<sup>221</sup> See Ginsburg, *Copyright and Control*, *supra* note 77, at 1613 (discussing legal responses to "mass market video and audio recording equipment").

<sup>222</sup> For an argument that copyright law should not be extended to "disable new technologies," especially when those technologies are "capable of substantial non-infringing use," See Brief Amicus Curiae of Copyright Law Professors in Support of Reversal, *Napster Inc. v. A&M Records*, available at [http://web.umn.edu/~canistr/cs317/napster/amicus\\_1aw.pdf](http://web.umn.edu/~canistr/cs317/napster/amicus_1aw.pdf) (last visited May 31, 2002). Ginsburg offers an analysis of the responses by the courts and Congress to the tensions arising from the arrival of new means of disseminating content and the control of works by copyright owners. See Ginsburg, *Copyright and Control*, *supra* note 77. She argues that in the confrontation between copyright and new technologies, courts do not always refuse to protect the right to disseminate works and Congress does not always grant a compulsory license. Rather, "when copyright owners seek to participate in and be paid for the new modes of exploitation, the courts, and Congress, appear more favorable, not only to the proposition that copyright owners should get something for the new exploitation, but more importantly, to the proposition that when the new market not merely supplements but also rivals prior markets, copyright owners should control that new market. The control permits copyright owners to refuse to license, and therefore to charge market prices." *Id.* at 1617. In the context of digital technologies, she therefore concludes that Internet represents a new market which copyright owners should be permitted to exploit. At the same time, she argues that "greater author control," may permit authors to bypass "the traditional intermediary-controlled distribution system," and to offer the public "an increased quantity and variety of works of authorship." *Id.* at 1619.

<sup>223</sup> See *In re Napster, Inc. Copyright Litig.*, 191 F. Supp. 2d 1087 (N.D. Cal. 2002).

‘home-viewing’ market.<sup>224</sup> Innovation in the technologies of distribution will decline markedly if potential new innovators are chilled by a threat of legal action or believe they will not be able to attain access to works for their networks. A preferable copyright regime would create incentives for technological advancement rather than punish it.

*b. Technologies of (Fair) Use*

Policy-makers should also be concerned that the present legal environment creates disincentives for innovation that could enable flexibility at the user’s end. As recognized by the court in *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc.*, consumers have established fair use rights in keeping with the copyright statute to utilize and “space-shift” content they have obtained legitimately.<sup>225</sup> DRM systems that are designed to limit consumer options to attain security may threaten legitimate personal uses and undermine sales. Consumers are likely to think twice about buying music if they cannot “move” it from their computer to a portable player and back again. Napster itself represents the efficient overlap of the computer terminal with the stereo system.<sup>226</sup> Similarly, we may imagine a not-so-distant-future in which entertainment/information services will become both increasingly converged and versatile—cable, phone, and internet access may all come through the same device. Developing easy-to-use and affordable applications for content use requires that creative works be compatible across platforms, ensuring that consumers will be able to utilize legitimate content in a variety of ways.<sup>227</sup>

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<sup>224</sup> Due to bandwidth constraints, the movie industry was initially spared an identity crisis akin to that of the record industry upon the popularization of online communications media. Yet, broadband delivery – rather than speeding up the delivery of on-demand movie services as promised – has made piracy a primary issue for Hollywood. As a result, like the record industry before them, the movie studios have held back on digital delivery absent a closed delivery platform, facing criticism that their desire to hold back on the delivery of content has forestalled the deployment of broadband services. See Lawrence Lessig, *Who’s Holding Back Broadband*, WASH. POST, Jan. 8, 2002, at A17 (analogizing the movie and music industry’s behavior, both evincing not only a fear of piracy, but a desire to retain established and comfortable ways of doing business in a concentrated industry). Meanwhile, the search for a secure network has brought the movie industry alongside the record labels in the fight to impede innovation and constrain use through hardware-controls. See Declan McCullagh, *Anti-Copy Bill Hits D.C.*, WIRED NEWS, at <http://www.wired.com/news/politics/0,1283,51245,00.html> (Mar. 22, 2002) (noting that the “Motion Picture Association of America and the Recording Industry Association of America hailed the CBDTPA as the only way to prevent the continuing Napsterization of their businesses”) (last visited May 31, 2002).

<sup>225</sup> See *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1079 (1999).

<sup>226</sup> See Brad King, *Students Rave about PC Music*, WIRED NEWS, at <http://www.wired.com/news/business/0,1367,43029,00.html> (Apr. 13, 2001) (discussing that over one-third of students are eschewing their stereos in favor of their personal computers to listen to music).

<sup>227</sup> See generally Brad King, *Subscribing to Convergence Theory*, WIRED NEWS, at

### c. Role Conflation

The coordination and consolidation of hardware, software, and content providers also threatens technological development. In the past, content owners and providers of technologies of distribution had distinct management structures. For example, music content owners did not own radio stations or control radio manufacturers. This division acted as a crucial constraint on the record industry's behavior. Over time, the record industry paid for an imperfect influence over radio airplay, as well as retail display.<sup>228</sup> The separation, however, is significantly less distinct in the Internet context, in which music owners are now becoming distributors, giving them less incentive to cooperate with other potential distributors (now potential *competitors* rather than facilitators of distribution). If these developments remain unchecked, we risk putting the future of Internet distribution into the hands of the record labels, when "what works for the RIAA [will] not necessarily work for innovation."<sup>229</sup> If the content owners have the power to determine the future of the online musical environment through code and architecture, we have no assurance that they will permit the development of formats and protocols – such as P2P – that they perceive as a threat.

## 2. The Value of P2P

Should we care if content owners have the last say over future technological development in this field? Is P2P technology so very valuable? It is our position that policymakers should encourage development in this arena. File-sharing technology has the potential to do far more than channel

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<http://www.wired.com/news/business/0,1367,42903,00.html> (Apr. 10, 2001).

<sup>228</sup> Almost all airplay on FM commercial radio is paid for by the five major record labels. See Eric Boehlert, *Record Companies: Save Us From Ourselves*, SALON.COM, at [http://www.salon.com/ent/feature/2002/03/13/indie\\_promotion/index.html](http://www.salon.com/ent/feature/2002/03/13/indie_promotion/index.html) (Mar. 13, 2002). While FCC rules prevent direct pay-for-play, the "labels pay millions of dollars each year to independent radio promoters, universally referred to as 'indies,' who in turn pass along money to radio stations whenever they add new songs to their playlists." *Id.* The "indies'" contributions are written up as "promotional expenses" and the labels stay lawfully one-step-removed from the process. See *id.* This corrupt and costly system, however, has taken its toll on the labels. Faced with declining profits and the increasing consolidation of the radio and "indie" marketplace, the labels have ironically been arguing for intervention by the FCC on public-policy grounds to help reign in the system they fought to create. See *id.* For more on the economics of payola, See Eric Boehlert, *Fighting Pay-for-Play: Sources in the Music Industry Call for a Federal Clampdown on the New Payola*, SALON.COM, at <http://www.salon.com/ent/music/feature/2001/04/03/payola2/index.html> (Apr. 4, 2001) (noting that it costs \$100,000 to \$250,000 to launch a single on rock radio).

<sup>229</sup> Lawrence Lessig, *Just Compensation*, INDUSTRY STANDARD, Apr. 6, 2001, available at <http://cyberlaw.stanford.edu/lessig/content/standard/0,1902,23401,00.html> (last visited Aug. 31, 2002) (arguing for a balance in copyright between the right to compensation and the right to control innovation).

illicit content.<sup>230</sup> As Professor Yochai Benkler has persuasively illustrated, as an integral and emergent property of a “pervasively networked environment,” “peer production” exists as a generalized means of information production and exchange.<sup>231</sup> As evidenced most notably in the success of the open source software movement (discussed in more detail below), “peer production” is a “phenomenon [that] has broad implications throughout the information, knowledge, and culture economy.”<sup>232</sup> As an alternative to traditional market-based proprietary distribution and control, P2P’s promise stems from its ability to reduce the cost of drawing information out of and inputting information back into the network. Given these efficiencies, as Benkler has highlighted, peer production has the capacity to enhance core political values, namely the principles of autonomy and democracy that underlie liberal society.<sup>233</sup>

Against this potential, code restrictions focused on securing content by altering the network architecture may stifle all uses of the network, including but not exclusive to P2P, by altering the information processing capacity for distributed creation and exchange. For example, the proposed Consumer Broadband and Digital Television Promotion Act would severely impact the freedom and flexibility of programmers and software companies – “both those distributing code for free and those selling it” – by requiring the inclusion of federally approved copy-protection schemes.<sup>234</sup> Within a networked

<sup>230</sup> See Brief Amicus Curiae of Copyright Law Professors in Support of Reversal, *Napster Inc. v. A&M Records et al.*, available at [http://web.umn.edu/~canistr/cs317/napster/amicus\\_law.pdf](http://web.umn.edu/~canistr/cs317/napster/amicus_law.pdf) (last visited May 31, 2002).

<sup>231</sup> Yochai Benkler, *Coase’s Penguin, or, Linux and the Nature of the Firm* (working draft) (forthcoming YALE L.J.), available at [http://www.law.duke.edu/pd/papers/Coase's\\_Penguin.pdf](http://www.law.duke.edu/pd/papers/Coase's_Penguin.pdf) (pointing to evidence of “peer production” in open source software, the Open Directory Project, Distributed Proofreading, Project Gutenberg’s collection of public domain books, collectively authored encyclopedias, NASA Clickworkers, multi-player and online games, Amazon’s accreditation system, and many other projects of distributed information production).

<sup>232</sup> *Id.* at 1.

<sup>233</sup> See, e.g., Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, *supra* note 193, at 207. Benkler states:

There are . . . aspects of autonomy that are directly tied to the emergence of peer-production . . . The emergence of peer-production as an economic—and ultimately social—transformation represents, most importantly, a change in the menu of options for being productive in the information economy. . . . What is emerging in the information economy is a model of peer-production—where individuals communicate with each other about what projects are worthwhile pursuing, who might want to take them up, and share their products in an economy of gifts, reputation, and relationally-based rewards. Consumption and production are integrated, not separated, so that each individual is a “user,” rather than either purely a “producer” or a “consumer.”

*Id.*

<sup>234</sup> Declan McCullagh, *Anti-Copy Bill Slams Coders*, WIRED NEWS, at <http://www.wired.com/news/politics/0,1283,51274,00.html> (Mar. 22, 2002). Many telecommunications firms offered similar arguments against the Clipper Chip and early versions of the Communications Assistance for Law Enforcement Act. See LAWRENCE

environment, such constraints could not be isolated and may have unintended negative consequences. If policymakers permit the enclosure of the informational commons, endeavors like open software development may be endangered and new collaborative models may not have the opportunity to thrive.<sup>235</sup>

In its initial incarnation, the Napster network promoted the abuse of technology, as it supported illegal copying. But the same technology has the potential to allow and encourage distribution, use, and access to content in ways that fundamentally advance the underlying goals of copyright law by maximizing access to content, providing new incentives for creators, and serving as an “engine of free expression.”<sup>236</sup> In particular, in contrast to the top-down structure of centralized distribution services that permit a limited distribution supplied to consumers, the structure of P2P networks permits the even-handed and democratic distribution of musical content by all artists. Though the removal of intermediaries, consumers need no longer be situated at the receiving-end of content, but as users may be positioned to both accept and contribute content to the network.<sup>237</sup> An ideal copyright policy will, therefore, allow for continuing development of new P2P practices.

#### a. P2P and Community

P2P has special relevance in the context of online music since peer-based exchange systems generate an interactive listening community. P2P technology effectively generates a vast library of works, enabling individuals to share files among their computers, a practice that reflects the communal innovation that led to the development of the Internet itself.<sup>238</sup> In keeping with

LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 44-46 (1999). The Clipper Chip was ultimately abandoned, while court battles have hampered the Federal Communications Commission’s efforts to implement the latter. *See id.*

<sup>235</sup> McCullagh notes that the legislation would in effect create a “national firewall,” isolating the American open-source programming community from international collaborators. *Id.*

<sup>236</sup> Harper & Row v. Nation Enterprises, 471 U.S. 539, 558 (1985).

<sup>237</sup> For a further discussion of the shift in socio-political dynamics facilitated by distributed technologies in a ubiquitously networked environment and its impact on the future of information policy, *See* Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Towards Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561 (2000).

<sup>238</sup> *See* Eben Moglen, *Anarchism Triumphant: Free Software and the Death of Copyright*, FIRST MONDAY, at <http://emoglen.law.columbia.edu/publications/anarchism.html> (last visited May 31, 2002). Moglen asserts:

[E]veryone living in the networked portions of the world can now communicate with anyone else directly, without intermediaries, reaching very large numbers of people at almost no cost. [Such a] society in which everyone is connected to everyone else behaves differently from any society that has ever existed before; past “principles” of social and economic law, things that *Seemed* always true everywhere, aren’t anymore.

*Id.*

the nature of the Internet, Napster and P2P services generate taste through interactivity. Other users act as filters and bellwethers, potentially catalyzing mutual tastes.<sup>239</sup> With the exponential increase in the production of information,<sup>240</sup> services of customization, personalization, mediation, filtering, and screening are going to become increasingly important.<sup>241</sup> At the same time, the underlying interaction between users is an integral part of the network and the P2P protocol's efficiency – individuals sharing with one another in a networked environment benefit from the positive externalities of “network effects.”<sup>242</sup> It is also the element likely to be absent from industry-sanctioned protocols, as the labels are more likely to think of information-sharing mechanisms as avenues for illicit channeling undermining their preferred one-to-many distribution framework. Moreover, the diversification of user tastes through exposure to new and less-publicized artists stands to diminish the ability of the majors to shape the listening practices of consumers.

### 3. Innovation in Communications Technologies furthers First Amendment Principles

First Amendment principles require both the legislature and judiciary to allow technologies vital to free speech to develop freely, within reasonable grounds, and ensure that copyright content is not locked up and subject to complete control by copyright owners.<sup>243</sup> As has been the focus of academic debate and recent challenges within the courts, the development of digital technology has increased the potential for conflict between free speech principles and copyright law. In our view, policymakers should remain cognizant of this dynamic and seek to incorporate First Amendment concerns into copyright policy.

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<sup>239</sup> See Janelle Brown, *Personalize Me, Baby*, SALON.COM, at <http://www.salon.com/tech/feature/2001/04/06/personalization/print.html> (Apr. 6, 2001).

<sup>240</sup> See Peter Lyman & Hal R. Varian, *How Much Information?*, School of Information Management and Systems, University of Berkeley, Project Report, available at <http://www.sims.berkeley.edu/research/projects/how-much-info/summary.html> (last visited May 31, 2002) (attempting to measure the amount of information produced in the world each year and the repercussions of information overload).

<sup>241</sup> See JOSHUA SHENK, *DATA SMOG 7* (Harper 1995) (arguing that information overload threatens to breed apathy, disaffection, and alienation from the online environment).

<sup>242</sup> The economic theory of “network effects” instructs us that, the Internet, like the telephone system before it, increases in economic and social value as more people are connected to it. As many of the positive benefits of the Internet are linked to this dynamic, in assessing the impact of regulatory efforts that seek to alter the underlying architecture, “interconnectivity is an important goal that should not be sacrificed lightly.” Neal Kumar Katyal, *Criminal Law in Cyberspace*, 149 U. PA. L. REV. 1003, 1007 (2001).

<sup>243</sup> This position of technological deference was arguably advocated by the Justice O'Connor in her concurrence in *Reno v. ACLU*. See *Reno v. ACLU*, 544 U.S. 844, 891 (1997) (O'Connor, J., concurring) (looking towards a future in which online zoning may be possibility, yet noting that the “transformation of cyberspace is not complete”).

*a. Free Speech: The Blindness of the Courts*

Although music has not traditionally occupied the core of First Amendment concerns, its expressive dimensions are undeniable. Music is not simply property.<sup>244</sup> If we ignore its important role in the public sphere, we risk permitting the commodification of informational content vital to cultural development. Would we acquiesce so readily if access to literature or news was absolutely contingent upon the supplier's express permission?<sup>245</sup> First Amendment principles require us to consider the limitations of a regime in which content-holders dictate all terms of use.

Copyright law imposes select prohibitions on communication in order to encourage the creation of new works.<sup>246</sup> A robust commitment to the First Amendment will ensure that the law is no more restrictive than necessary, rewarding creation while fostering the capacity of individuals to communicate with one another in the broadest possible terms. In the words of the Supreme Court, "[The First] Amendment rests on the assumption that the widest dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."<sup>247</sup> Unfortunately, U.S. courts have been

<sup>244</sup> See, e.g., *Cardtoons, L.C. v. Major League Baseball Players Ass'n.*, 95 F.3d 959, 971 (10th Cir. 1996) ("Intellectual property, unlike real estate, includes the words, images and sounds that we use to communicate. . . . Restrictions on the words or images that may be used by a speaker, therefore, are quite different than restrictions on the time, place, or manner of speech.") (citations omitted).

<sup>245</sup> See Lawrence Lessig, *Reclaiming a Commons*, Keynote Address at The Berkman Center's "Building a Digital Commons," May 20, 1999, available at <http://cyber.law.harvard.edu/events/lessigkeynote.pdf> (last visited May 31, 2002) (discussing the closed society, in which open access to intellectual property is defeated by technological controls).

<sup>246</sup> See Brief Amicus Curiae of Copyright Law Professors in Support of Reversal, *Napster Inc. v. A&M Records et al.*, available at [http://web.umn.edu/~canisr/cs317/napster/amicus\\_law.pdf](http://web.umn.edu/~canisr/cs317/napster/amicus_law.pdf) (last visited May 31, 2002) (supporting Eric Eldred's Petition for certiorari). The Copyright Professors note:

The Copyright Act is a statute that regulates speech. It tells some people that they cannot print or publicly present certain words or images. It is not a law aimed at general conduct that has incidental effects on expression—like a trespass statute or an anti-littering ordinance. It is a law aimed solely at expression. . . . Its entire purpose and effect is to regulate the production of information, culture, and knowledge—all aspects of society central to the ambit of the First Amendment.

*Id.*

<sup>247</sup> The Court's use of the phrase "diverse and antagonistic sources" was introduced in *Associated Press v. United States*, 326 U.S. 1, 20 (1945) ("[The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society"). The phrase has been repeatedly cited since. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 192 (1997) (Turner II) (holding that state regulation does not violate First Amendment); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663-64 (1994) (Turner I); *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976); *Citizen Publ'g Co. v. United*



unwilling to temper copyright law with First Amendment values.<sup>248</sup> As Jessica Litman has argued:

American copyright law has never had to worry too much about a collision with the First Amendment. . . . Chiefly because the limitations that restrict copyright – the idea expression distinction, the fair use doctrine, and, I would even argue, the first sale rule – kept collisions to a minimum. Copyright has ended up not significantly restricting either the ability to speak or the ability to gain access to information; and when it's threatened to, the courts have called the use fair. Once we enact the new access control[s] . . . we have what in effect is a copyright law without those limitations. And one that promises or threatens (depending on your viewpoint) to have important effects on who has access to what information on what terms.<sup>249</sup>

Recent developments in law and code prefigure the creation of a privately-controlled information environment that impose significant costs on speech.<sup>250</sup>

Information policymakers should recognize that the Internet and P2P subnetworks are fundamentally speech-enabling technologies. Running against this potential, strong “intellectual property regimes, particularly online . . . have subtle effects in shaping the architecture, political economy, and structure of preferences in our speech universe.”<sup>251</sup> When copyright law rigidly defines what may be done online, it has an obvious and predictable chill on the development of new expressive technologies and expression itself.<sup>252</sup>

States, 394 U.S. 131, 139-40 (1969); *N.Y. Times v. Sullivan*, 376 U.S. 254, 266 (1964); *see also* *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (noting the First Amendment purpose of promoting “an uninhibited marketplace of ideas”).

<sup>248</sup> James Boyle notes that part of the difficulty is the fact that “there is no case – no single pronouncement – that speaks to the First Amendment constraints on intellectual property law with the simple authority of *New York Times v. Sullivan* [in the area of defamation].” James Boyle, *The First Amendment and Cyberspace: The Clinton Years*, 63 *LAW & CONTEMP. PROBS.* 337, 345 (2000) [hereinafter Boyle, *The First Amendment and Cyberspace*]. The Reno Court was especially attentive to the nature of the Internet as a communications medium, as well as the connection between the growth and development of the Internet as a network and linkage between the growth of the network and the democratic value of a free exchange of ideas. *See Reno v. ACLU*, 544 U.S. 844 (1997).

<sup>249</sup> Jessica Litman, *Digital Copyright and Information Policy*, *supra* note 188, at 299.

<sup>250</sup> The companies have been able to threaten free speech in such a manner due to the bold “proportization” of ideas and works. James Boyle lays part of the blame on the Clinton Administration: “The Administration's proposals -- successful, unsuccessful, and currently pending – [present] a remarkable picture . . . in which concern for First Amendment values *Seems* entirely over-shadowed by a commitment to intellectual property maximalism.” Boyle, *The First Amendment and Cyberspace*, *supra* note 248, at 341.

<sup>251</sup> *Id.*

<sup>252</sup> In 2000, Lawrence Lessig proposed that the Supreme Court would get this connection right when it heard a case dealing with the intersection of the First Amendment and copyright. *See* Lawrence Lessig, *Copyright's Rule*, *THE INDUSTRY STANDARD*, Oct. 2, 2000.

To miss the connection then between the First Amendment and copyright is to jeopardize the potential of the Internet as a communications medium. Although the decisions against Napster and MP3.com may have properly stopped as violations of copyright law, they improperly ignored the costs of that law enforcement—namely, the diminution of such services' capacity to enhance speech. It is likely that, in both cases, copyright concerns would have outweighed speech concerns. But the courts' unwillingness to recognize, even in principle, potential collisions between intellectual property rights and free speech immunities is disturbing, given its potential to undermine a broad communications infrastructure.

*b. The Information Commons and the Public Domain*

Another important value, closely linked to the intersection of copyright and free speech, is the concept of the information commons and the public domain. The commons is a space in which works are available for the taking, and a space in which the right to speak does not require the permission of anyone else. In the context of online music, the notion of the commons seeks to ensure that two goals are met: first, that there is a public domain to ensure free use, and second, that the distribution of content is not accompanied by perfect control over use. An information commons is valuable as a workspace for the exchange and development of ideas and a common culture.

The increased commodification and commercial control of intellectual property threatens to undermine the online commons by concentrating information production and control into the hands of a few. Only positive action can check this trend. As in the First Amendment context, law must actively work to limit the controls granted to copyright owners so as to ensure that works remain free for personal use. Unfortunately, the government so far has evaded this responsibility, by declaring that the Internet should take of itself while at the same time bolstering the intellectual property rights of copyright holders.<sup>253</sup>

Alternative models of intellectual property production would promote open and ongoing progress of technology. Chief among these is the open source software movement. Open source software has thrived because its source material lies squarely within the commons and is open to all. An open source project begins when a programmer writes the basic software to perform a

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Lessig argued that these issues "require a patient and well-informed inquiry about the effects of different legislation. They require an opportunity for innovators to try out different models of content distribution. They require, in short, all the hesitancy – and humility – that the courts have demonstrated in the face of the regulation of porn." *Id.* The Supreme Court's decision to hear the case of *Eldred v. Ashcroft* ensures that the Court will be compelled to confront the issue head on. See *Eldred v. Reno*, 239 F.3d 372 (2001), cert. granted, *Eldred v. Ashcroft*, 122 S. Ct. 1062 (2002) (mem.).

<sup>253</sup> See William J. Clinton, *A Framework for Global Electronic Commerce*, July 1997, available at <http://www-06.nist.gov/eleccomm/ecommm.htm>.

function, and then distributes it openly with its source code as an invitation for others to contribute their ideas and skills to the development that kernel.<sup>254</sup>

Culture, like the open source enterprise, is centered on dialogue and exchange.<sup>255</sup> Recent scholarship has urged us to take the lessons learned from the networked world and feed them back into the shaping of law and policy.<sup>256</sup> Rather than impose ‘real world’ values onto the Internet, we should instead let Internet values shape real world policy.<sup>257</sup> To that end, Lawrence Lessig has identified two values manifested by the free software movement: open evolution (no rules that say “what is right”) and universal standing (anyone can contribute without asking permission).<sup>258</sup> Open evolution mirrors a classic nostrum of free market economics—no central authority should be permitted to “pick winners” and elevate them above the fray of market competition.<sup>259</sup>

Are these values in any way relevant to online music? Undoubtedly, the analogy has serious limits. Popular musicians, even if they may make some income from performances, rely on conventional compensation in a way that contributors to code may not. While musicians undoubtedly build on the work of others, individual musical works are not usually created by a series of artists contributing to the same project. Nevertheless, the success of open code underscores the values of “open-evolution” and “universal standing” and cautions against the creation of an overly-strong property regime. In the digital music context, these qualities should be translated into policies that promote broad technological development, opening wide distributional opportunities for all artists and equally wide listening opportunities for all consumers. Thus, when it comes to setting the limits of distribution and use, the law should

<sup>254</sup> For a breakdown of the open source/free software production process and its historical development, See Moglen, *supra* note 173.

<sup>255</sup> Yochai Benkler, *Intellectual Property and the Organization of Information Production*, Oct. 1999, available at <http://www.law.nyu.edu/benkler/Ipec.PDF> (last visited May 31, 2002) (forthcoming 2002 in INT'L REV. OF L. & EC.). Professor Benkler notes:

Open source development relies heavily on contributions among volunteer users/developers . . . users are invited to use the software, and when they develop needs unfulfilled by the program, they post questions to mailing lists dealing with the particular type of software, and either they, or (usually) someone else in the network of users/developers will provide the fix.

*Id.* For a general description of open source strategies, See ERIC RAYMOND, *THE CATHEDRAL AND THE BAZAAR: MUSINGS ON LINUX AND OPEN SOURCE BY AN ACCIDENTAL REVOLUTIONARY* (O'Reilly & Associates 2001).

<sup>256</sup> See, e.g., JACK BALKIN, *CULTURAL SOFTWARE* 14 (1998) (conceptualizing all culture as software that “provides us with the tools and pre-understandings that enable us to make judgments about the social world”).

<sup>257</sup> See Lawrence Lessig, *The Charles Green Lecture: Open Code and Open Society: Values of Internet Governance*, 74 CHI.-KENT. L. REV. 1405, 1409-1410 (1999).

<sup>258</sup> *Id.* at 1414-1419.

<sup>259</sup> *Id.* at 1418-1419.

respect cyberspace's access and openness, qualities made possible by nurturing the intellectual commons.<sup>260</sup>

Linus Torvalds, the founder of the Open Source Movement, and Richard Stallman, the founder of Free Software Foundation, both believe in the continuing vitality of intellectual property and copyright.<sup>261</sup> The non-proprietary peer production of the open source community complements its commercial embodiment in the form of "for profit" companies, such as Red Hat, which rely on copyright.<sup>262</sup> As we forge copyright policy, we should learn from this balance. It reminds us that intellectual property rights, properly conceived, will function more as an incentive for innovation than as an obstacle to access. To preserve innovation, law and policy should preserve certain parameters of online use; establishing the pre-conditions of openness and accessibility is necessary for the realization of the expressive/creative potentials of the medium.<sup>263</sup> The freewheeling openness of the open source movement may be neither appropriate nor necessary in the context of digital music. However, its success should be borne in mind before content owners advocate for greater control over copyrighted works.

### C. To Preserve Space for Individual Use and Maximize Consumer Welfare

#### 1. Putting Consumers at the Bargaining Table

So far, our focus has been on the need to protect individual consumer interests as well as the public interest. The need to safeguard user interests is particularly acute because consumers have historically had little influence over copyright policy.<sup>264</sup> The legislative process is designed to assure that the

<sup>260</sup> See Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501 (1999).

<sup>261</sup> See Lessig, *The Charles Green Lecture*, *supra* note 257, at 1420. Torvalds has said: "My opinion on licenses is that 'he who writes the code gets to choose his license, and nobody else gets to complain.' Anybody complaining about a copyright license is a whiner." *Id.*

<sup>262</sup> See About Red Hat, at <http://www.redhat.com/about> (last visited May 31, 2002).

<sup>263</sup> See Moglen, *supra* note 173 ("[T]he use of intellectual property rules to create a commons in cyberspace is the central institutional structure enabling the anarchist triumph. Ensuring free access and enabling modification at each stage . . . [ensured] the speed, with which the Linux kernel, for example, outgrew all of its proprietary predecessors.")

<sup>264</sup> See Litman, *Revising Copyright Law*, *supra* note 207, at 23. Professor Litman notes:

The current federal copyright statute (and its predecessors) were composed by representatives of copyright-related industries to govern interactions among them. We have built into the process a mechanism for the cable television industry, or the software publishers' association, or the manufacturers of digital audio tape to insist that the law include a provision privileging this or that use that that party deems essential . . . The design of the drafting process (in which players with major economic stakes in the copyright sphere are typically invited to sit down and work out their differences before involving members of Congress in any new legislation) excludes ordinary citizens from the negotiating table.

parties with the biggest financial stake can set the legislative agenda. This leaves little opportunity “for the members of the general public to exert influence on the drafting process to ensure that [a] statute does not unduly burden private, non-commercial, consumptive use of copyrighted works.”<sup>265</sup> The Napster phenomenon demonstrated that *en masse* the weight of public/consumer practices can bring user interests to the attention of politicians and the media.<sup>266</sup> However, the dispersal of users across a variety of services does not bode well for continued ‘mass popular involvement.’ Furthermore, even free services suspiciously coopt modes of political protest, revealing an underlying motivation undoubtedly commercial in nature: Napster’s interest is not the public interest.<sup>267</sup>

## 2. The Vagaries of Musical Taste

What *is* consumer welfare in this new digital environment? The value and enjoyment of intellectual property is notoriously difficult to quantify.<sup>268</sup> Some consumers invest a large percentage of their income in music; others would never spend a dime on a CD. While musical taste represents an important manner in which individuals define themselves through cultural consumption, it is a fluid and protean preference. Nevertheless, precisely because demand for music is so difficult to quantify and so volatile, we believe that two values—diverse choice and flexible use—should figure heavily in the calculation of consumer welfare.

Historically, the record industry via its marketing tactics - in conjunction with popular radio and MTV - defined taste through the limitations of *genre*. This system failed to recognize the breadth across genres of certain users’ musical appreciation, and through hit songs and albums made content within each genre needlessly shallow. As a result, music has fallen within

*Id.*

<sup>265</sup> *Id.*

<sup>266</sup> As it became increasingly clear that it would not win favor with the judiciary, Napster sought to sway policymakers by galvanizing its user-base in the hopes of inspiring political action. The company invited users to D.C. to participate in a ‘teach-in’ style rally and established a toll-free number that fans could use to convey their support for file swapping directly to Congress. See John Borland, *Napster Asks Friends to Join D.C. Caravan*, CNET NEWS.COM, Mar. 26, 2001, at <http://news.com.com/2100-1023-254776.html?tag=rn> (last visited Aug. 31, 2002). The company adapted the guise of grassroots activism with the company-sanctioned Napster Action Network, soliciting users on its website to “e-mail friends or even ‘form or manage a local Napster advocacy chapter.’” *Id.*; see also Ryan Sager, *Napster ‘Teach In’: All Hail Shawn*, WIRED NEWS, at <http://www.wired.com/news/politics/0,1283,42797,00.html> (Apr. 3, 2001).

<sup>267</sup> See Andrew Leonard, *Don’t March for Napster*, SALON.COM, at [http://www.salon.com/tech/col/leon/2001/04/02/napster\\_march/index.html](http://www.salon.com/tech/col/leon/2001/04/02/napster_march/index.html) (May 31, 2002).

<sup>268</sup> See RICHARD CAVES, *Bufs, Buzz, and Educated Tastes*, in CREATIVE INDUSTRIES: CONTRACTS BETWEEN ART AND COMMERCE 175 (Harvard University Press 2000) (observing that “sociologists have given these questions more attention than economists”).

increasingly rigid categories. An ideal online music delivery service of the future would not just permit the downloading of music that users currently want, but would also provide accessibility to music of which they might not be aware. As an online analogue to radio and “sampling stations” in CD stores, this development would promote the complementary values of serendipity and experimentation. As James Boyle notes:

[M]uch of learning is serendipitous and unplanned, and the pursuit of apparently non-productive knowledge is both inherently pleasurable and practically useful. One's current preferences are formed by one's past experiences and those, in turn, are shaped by the costs of experimentation, on which legal rules may have a considerable influence.<sup>269</sup>

From the consumer's perspective, one of the strongest arguments against locking up content is that often we do not know what we like until we hear/read/see it, either by finding it ourselves or by being referred to it by others.<sup>270</sup> To increase niche listening and expand user access to new artists in that regard, copyright policy should aim to provide users with diverse sources of music and critical opinion.

### 3. Fair Use Doctrine: Free of Use, Not Free of Payment

While the public does not shape copyright policy directly, the law of copyright seeks to take the public interest into account via the doctrine of fair use.<sup>271</sup> The copyright fair use privilege excuses a variety of otherwise infringing uses, including personal copying, research and educational copying, copying for purposes of reverse engineering, copying for use in parody,

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<sup>269</sup> Boyle, *The First Amendment and Cyberspace*, *supra* note 250, at 349. The vision of a combining a broad catalog of musical content alongside the network's infomediary capacity is but one example of the ways in which the networked environment lends itself to a blend of fun and filtration. The fashionable practice of maintaining a Weblog – defined broadly as “a frequently updated Web site that is arranged in reverse chronological order” – has been described as an art of “targeted serendipity,” at best “pointing readers to things that they didn't know they wanted to *See*.” See Anni Layne Rodgers, *Targeted Serendipity*, FAST COMPANY, at <http://www.fastcompany.com/feature/02/blood.html> (Mar. 2002). The act of compiling selected links and sharing personal interests and observations is rooted upon an experimental ethic that, as one prominent Weblogger puts it, “is all about fostering real connections based on trust, respect, and creativity.” *Id.* User communities take shape around the perspective and judgment of individual users; unsurprisingly, the most popular sites are authored by those who are both avid surfers and discriminating readers.

<sup>270</sup> See CAVES, *supra* note 268, at 175 (discussing fads, fashion, herd behavior, and the market for critical opinion).

<sup>271</sup> As discussed in Part I, fair use originated as a judge-made doctrine, and is now codified in section 107 of the Copyright Act of 1976. See 17 U.S.C. § 107 (2000). As an affirmative defense to a copyright infringement suit, the fair use doctrine allows some use of copyrighted works without the permission of the copyright holder. See *id.* Fair use is a case-by-case, fact-dependent issue, determined by a four-part balancing test established in § 107. See *id.*

copying short quotations, etc.<sup>272</sup> In this way fair use (1) secures creators' ability to build on the work of others, and (2) enables the critique, parody, and discussion of works.

To uphold the welfare of users, fair use should remain a robust exception to copyright law and code-based copyright protections. While we acknowledge that it is difficult to define fair use in cyberspace, it is not impossible. Fair use as applied in cyberspace must reflect "a deliberate choice about how to regulate the technology and how to regulate activity that stimulates valuable interaction and discourse among users."<sup>273</sup> Of course, such immunity must have limits given the countervailing interest of artists and their backers to receive proper compensation—a reasonable rate of return for their investment of time, energy, and money. We discuss the appropriate reconceptualization of this exemption in section III by distinguishing between private *use* and public/commercial *distribution*. In short, we believe the former deserves far more "fair use" protection than the latter.

Online musical content should be free of use, but not free of payment.<sup>274</sup> While we recognize the genius of the Napster network, we believe that Napster, as a public commercial entity that completely denied compensation to artists, should not be absolved of liability. Yet to stamp out uses that may be legal would be to take the compensation principle too far. In particular, as we discuss in Part III, virtual private networks arguably represent the technological equivalent of sharing with friends or establishing an informal record club. We believe in a regime in which copyright owners are compensated for new public/commercial uses of their works but do not get to dictate all the terms on which that occurs. Bearing in mind these concerns of compensation, we turn to the interests of artists themselves.

#### D. To Ensure the Welfare of Other Stakeholders, In Particular Artists

##### 1. Watching from the Sidelines

In the digital content wars, the interests of musicians and writers been marginalized. This may be blamed in large part on the "information wants to be free" libertarian bias of the online world popularized by John Perry Barlow<sup>275</sup> and Esther Dyson.<sup>276</sup> By slighting the "actual creators of

<sup>272</sup> LITMAN, *supra* note 74.

<sup>273</sup> Ruth Okediji, *Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine for Cyberspace*, 53 FLA. L. REV. 107, 181-82 (2001) (arguing that a fair use doctrine for cyberspace must consider the nature of the technological medium and account for the value of the alleged infringer's use of the work). As copyright is strengthened to accommodate new technologies so should the model of public welfare be adjusted to account for how new technology promotes or hinders access and use of copyrighted works. *See id.*

<sup>274</sup> We note, however, that while use should entail an obligation to pay it, it should not mean that users must pay without limit what content owners demand.

<sup>275</sup> *See* John Perry Barlow, *Selling Wine Without the Bottles: The Economy of Mind on the*

intellectual property," this position betrays "a mindset that artists should not be compensated for their works."<sup>277</sup> We are likely to have less creation (and very poor artists) in such a system.

## 2. Artists and Advocacy

In considering the welfare of artists, we should recognize that their interests may diverge from those of the RIAA and the labels.<sup>278</sup> Since the onslaught of online file-sharing, record company executives and representatives have wielded one compelling "moral argument that has [seemingly] placed their position beyond self-interest: the fans take the music without proper permission and don't pay the artists a dime."<sup>279</sup> However, just as the labels may spend hundreds of thousands of dollars to launch an act, an artist herself may rationally decide to give away some of her work in order to build an audience that will eventually pay for it. The labels are far more threatened by online file sharing than artists, many of whom enjoy the wider distribution they experience online.<sup>280</sup>

*Global Net*, WIRED, Mar. 1993, at 86.

<sup>276</sup> See Virginia I. Postel, *On the Frontier*, REASONONLINE, at <http://www.reason.com/9610/fe.dyson.shtml> (last visited May 31, 2002).

<sup>277</sup> Paulina Borsook, *Art's Cold Welcome on the Web*, N.Y. TIMES, Feb. 23, 2001, at A19.

<sup>278</sup> At an April 2, 2001 hearing, Don Henley noted:

While we support the copyright infringement lawsuits filed by the record industry, the lawsuits should not be used to destroy a viable and useful independent Internet distribution system. It is in the best interests of recording artists, as well as consumers, that Congress promotes an atmosphere of independent digital distribution of music. The solution resides in the marketplace and not in the courtroom. If, however, a resolution cannot be reached quickly, compulsory licenses should be considered - but only as a last resort.

Coming Soon to a Digital Device Near You, Hearings Before the Senate Judiciary Hearing on Online Entertainment and Copyright Law, 106th Cong. (2001) (statement of Don Henley).

<sup>279</sup> Neil Straus, *Record Labels' Answer to Napster Still Has Artists Feeling Bypassed*, N.Y. TIMES, Feb. 18, 2002, at A1.

<sup>280</sup> Consider, for example, the story of neglected 60s recording artist Joseph Byrd. Byrd sought to obtain unpaid royalties from Sony music unsuccessfully for many years, even though Sony released his music in recent years. With his music populating the Napster network, Byrd sent of a letter of complaint to Judge Patel stating:

I am not alone. Literally thousands of musicians like me, who are purportedly represented by record companies and distributors in the current Napster case, are in my situation. The record companies' representation that they are legitimate agents for their artists is false. The only payments they make are to those who have the means to force them to be accountable; to the rest, a vast majority, they pay nothing . . . I personally would prefer to allow my music to be freely shared, to the present situation, in which only the corporations stand to gain.

See Damien Cave, *Musician to Napster Judge: Let My Music Go*, SALON.COM, at <http://www.salon.com/tech/feature/2002/04/23/copyright/print.html> (Apr. 23, 2002).



The asymmetric relationship between the artists and labels correlates with a potential divergence of interest. Profits are unevenly distributed between artists and labels—artists generally receive royalties between “7 to 12 percent of the suggested retail price for United States sales and a lesser percentage . . . for sales outside the country.”<sup>281</sup> Once the artist has signed a contract, the labels’ ability to maximize their wealth with an artist’s “product” need not coincide with an artist’s interest in economic or other terms, (e.g., developing a listening community). Demonstrating this point, as the labels transitioned to online distribution, they were immediately criticized by artists, lawyers, and managers for failing to share revenue with artists and for not obtaining or acting upon the proper licenses for digital distribution.<sup>282</sup> When the subscription-based online services launched, artists such as Offspring, Beck, and No Doubt, were surprised to find their material licensed with neither their permission and in breach of their contracts.<sup>283</sup> Artists found that they stood to profit mere pennies from the “authorized” digital distribution of their works.<sup>284</sup>

Although historically the interests of artists have been marginalized, organizations such as Future of Music Coalition represent an approach sensitive to artists’ interests as a collective.<sup>285</sup> They argue that “for too long musicians have had too little voice in the manufacture, distribution and promotion of their music on a national and international level and too little means to extract fair support and compensation for their work.”<sup>286</sup> It must be

<sup>281</sup> KRASILOVSKY & SHEMEL, *supra* note 51, at 4; *see also* Courtney Love, *Courtney Love Does the Math*, SALON.COM, at <http://www.salon.com/tech/feature/2000/06/14/love> (June 14, 2000) (detailing in numbers the disparity between record label and artist profits).

<sup>282</sup> At the center of the debate lay the question of whether artists should receive a licensing payment or a royalty fee for such services. When their works are licensed, e.g., for use in movies, artist split 50% of the profits with the label, after deductions for the producer and publisher. Straus, *supra* note 279, at A1. While the services licensed the artists’ music, the arrangements called for a royalty fee. On a royalty measure, the artists receive 15% instead, with deductions for CD production and promotional copies, which are clearly not applicable to the online distribution of their works. *See id.*

<sup>283</sup> *See id.*

<sup>284</sup> As Straus notes, “To try to avoid future protests, most major labels have added a clause to their standard recording contracts allowing the label to sell an act’s songs on the Internet, including all subscription and pay-per-use services. It is very difficult . . . for a new band to have enough leverage to remove this clause from its contract.” *Id.*

<sup>285</sup> For information about the organization’s activities and personnel, *See* Future of Music Coalition, at [www.futureofmusic.org](http://www.futureofmusic.org) (last visited May 31, 2002). The FMC has developed an ambitious and aggressive agenda to raise public consciousness and educate legislators on Capitol Hill about the stranglehold that the major labels have on many artists. *See id.*

<sup>286</sup> Future of Music Coalition, *Future of Music Manifesto*, at <http://www.futureofmusic.org/manifesto/index.html> (Feb. 12, 2002). Artists such as Courtney Love have taken a role in increased advocacy for artists’ interests, urging artists to resist unfair contract provisions and *Seek* proper royalty payments. *See* Johnny Temple & Courtney Love, *Toward a Union Label*, THE NATION, Apr. 23, 2001, available at <http://www.thenation.com/doc.mhtml?i=20010423&s=love> (last visited May 31, 2002); *see*

noted that in the era of physical music distribution, “roughly 80 percent of albums . . . fail[ed] to cover” the costs invested in them by recording companies.<sup>287</sup> Given that ratio, if labels were forced to give up more profits and control to the artists they backed, investors may have chosen not to promote music at all. Yet, given the capacity for new communications technologies to alter the calculus of the old regime, artists should at least get a chance to voice their concerns in policymaking circles, so as to be permitted to shape their own creative future.

### 3. Benefits and Losses

In general, artists, like users, will increasingly be affected by what has been referred to as the digital dilemma: namely, that the new information infrastructure promises more “quantity, quality, and access [to intellectual property] while imperiling one means of rewarding those who create and publish [it].”<sup>288</sup> While consumers clearly benefit from the growth of online musical content, the creators of music also stand to benefit by reaching a greater number of listeners. Specifically, technology promises to open new modes of distribution, empowering artists by unsettling the status quo of the concentrated five-label market.<sup>289</sup> As outlined in the Future of Music Coalition Manifesto, the development of digital music technologies may grant artists greater decision-making power and ability to manage their own careers.<sup>290</sup> In particular, it may open options beyond the polarized decision of signing on to (and thus indebting oneself to) a major label<sup>291</sup> and languishing in obscurity at an independent label.<sup>292</sup> Consolidation between content owners

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also Chuck Philips, *Recording Stars Challenge Music Labels' Business Practices*, L.A. TIMES, Mar. 29, 2001, at A1 (describing artists the increasing efforts to galvanize artists collectively in support of royalties and contract rights).

<sup>287</sup> CAVES, *supra* note 270, at 61.

<sup>288</sup> DIGITAL DILEMMA REPORT, *supra* note 82, at 2 (describing how the shift in information distribution technologies, while a boon for users and creators alike, is a double-edged sword).

<sup>289</sup> Future of Music Coalition, *Future of Music Manifesto*, at <http://www.futureofmusic.org/manifesto/index.html> (Feb. 12, 2002). The Manifesto states that:

In a marketplace where manufacturing and distribution monopolies concentrate the power of over 90% of music sold into the hands of five labels, with huge media mergers continuing to consolidate the decisions of what to play and promote, it becomes more and more difficult for artists to gain exposure through the few remaining coveted radio spots.

*Id.*

<sup>290</sup> *See id.*

<sup>291</sup> It is common knowledge that the labels' industry-standard contract requires artists to underwrite their own recordings, videos, advertising, marketing, promotion and tour support before they are paid royalties. *See* Philips, *supra* note 286, at A1.

<sup>292</sup> *See* Julene Snyder, *Musicians Find Net Success Without Record Labels*, CNN.COM, at <http://www.cnn.com/2001/TECH/internet/05/10/music.net.success.idg/index.html> (May 10,

and distributors should not stifle fresh intermediaries that give artists and their fans more options. By encouraging a wide range of distribution networks, artists and labels can promote works in innovative ways while displacing technologies that utilize their content without paying royalties.

#### 4. Just Compensation for Artists

In the early discussion of digital intellectual property, many commentators argued that artists should not bemoan their loss of royalty payments, as they would benefit online exposure and would derive profit via performances and through as-yet uncovered ways.<sup>293</sup> Meanwhile, techno-anarchists look past the “problem” of providing economic incentives for creative endeavors, and would be content to have users compensate whomever with however much they desired.<sup>294</sup> These impulses are yet alive. A recent proposal for an Open Audience License by the Electronic Frontier Foundation (“EFF”) builds on these notions of reciprocity and good will, by allowing artists to use the “open copyright symbol” – “(O)” – to grant the public permission to copy, distribute, adapt, and publicly perform their works royalty-free as long as credit is given to the creator as the original author.<sup>295</sup> The proposal represents a promising means for lesser-known artists to retain the capacity to use new technologies to encourage wide dispersion of their work, so as to gain exposure and develop an audience base.

While it is worth retaining such options of open use for artists, such approaches will be viable only if they coexist with opportunities for genuine compensation. Inherent in new technologies is the capacity for all artists to benefit directly from the enjoyment of their works. Once the bounds of fair use are set, it should be possible to trace usage and directly provide compensation to artists, perhaps in the form of micropayments. Closed networks of content, such as trusted systems,<sup>296</sup> offer the possibility for tracked usage and specified compensation. A likely scenario is a three-tiered

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2001) (discussing the success of former major label artists Jonatha Brooke and Aimee Mann in signing to independent labels and promoting and selling albums on their own websites – among other advantages, as Mann notes, “On a major, you might make 50 cents a record – and you have to pay back the costs to make that record. As an indie, you make \$8 a record.”).

<sup>293</sup> See Barlow, *supra* note 275.

<sup>294</sup> See Moglen, *supra* note 173 (“[M]usic doesn't sound worse when distributed for free, pay what you want directly to the artist, and don't pay anything if you don't want to. Give it to your friends; they might like it.”).

<sup>295</sup> See Electronic Frontier Foundation, EFF Open Audio License, at [http://www.eff.org/IP/Open\\_licenses](http://www.eff.org/IP/Open_licenses) (last visited May 31, 2002).

<sup>296</sup> See LAWRENCE LESSIG, CODE: AND OTHER LAWS OF CYBERSPACE 129 (1999) (discussing trusted systems as a controlled method of distributing and guarding digital intellectual property); See generally Mark Stefik, Trusted Systems, SCI. AM., Mar. 1997, at 78-81, as cited by Joel R. Reidenberg, *Lex Informatica: The Formulation Of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553, 568 (1998).

regime of content: a closed system of tracked usage, a public domain of untracked usage, and an underground of illicit content. The more perfect control and compensation made possible within closed networks may compensate for those losses that arise from illicit usage. In competitive marketplace, new agencies and intermediaries will arise to fill the role of tracking and rewarding for such top-tiered use.

### *E. To Limit Technologies of Control in the Public Interest*

The foregoing discussion argues that copyright owners in the digital era should be guaranteed neither as secure a distribution right as was vindicated in *Napster*, nor the technological latitude permitted by the DMCA. That is, new substantive policies are necessitated by shifts in the nature and possibilities of use, before the currents of an ever-widening copyright swallow even fair use. The delicate ecology of the Internet does not mesh well with perfect control. At the same time, copyright law has never secured absolute and exclusive rights for content-owners.<sup>297</sup>

Copyright law should protect a distribution right only insofar as it provides incentives for the creation of works. When the distribution right is defended at the cost of competing purposes, threatening legitimate access and circulation of works, careful balances must be struck. As demonstrated above, technological limits on the scope of distribution online could be truly absolute and thus allow for a substantial risk of copyright misuse. The next section introduces our vision, through institutional analysis, for countering the hazards of perfect control.

## III. CREATING POLICY TO PROMOTE FAIR COMPETITION AND FAIR USE

### *A. Introduction*

Part I of this Paper set out the history and context of disputes over the digital distribution of music. Part II described the principles that should govern the resolution of these disputes. We have raised two broad areas of concern:

**The scope of personal and private use:** Content owners may eviscerate traditional rights of fair use through increasingly sophisticated digital rights management techniques. The law should aim to preserve the type of *personal and fair uses* that have historically been protected by law.

**The nature of commercial and public distribution:** Consumers and artists worry that the key players in an already concentrated industry will leverage their ownership of content into control of new channels of distribution. The law should promote *fair competition* via robust and diverse distribution

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<sup>297</sup> See Brad King, *Copyright: Your Right or Theirs?*, WIRED NEWS, at <http://www.wired.com/news/print/0,1294,41199,00.html> (Jan. 19, 2001).

channels. This would require access to content for distributors of digital content other than the copyright owners themselves.

Collective action will be required to achieve these goals. Present antitrust inquiries are a good first step toward their realization, but proposing appropriate regulation is no easy task.<sup>298</sup> As we noted in Part I, the technology, the relevant markets, and copyright law are all in flux. Given this uncertainty, it is not useful to set out a fixed set of recommendations purporting to settle copyright controversies in the digital arena.

Policymakers can respond to this situation in many ways. Government-commissioned studies, such as the *Digital Dilemma Report*, have endorsed incrementalism – marginal reform and continued study. Superficially prudent, their approach would fail to preserve fair use and promote fair competition. Our approach is more ambitious. In the last Part of this article we set forth broad substantive principles; we now seek to narrow and formalize these in the form of a proposed consent decree. We conclude the article by identifying those institutions best able to apply the recommended policies.

Part II set out the broad substantive principles that should guide governmental monitoring of online music distribution. In Part III, we detail a range of policies and reforms available to preserve fair use and promote fair competition. Our aim is to assess these policies along two equally important axes: *comprehensiveness* and *plausibility*. This is a useful way to order potential responses to the issues we address. The most comprehensive proposals – those that most adequately address the concerns raised in Parts I and II – are also the least plausible from an institutional point of view. The most plausible proposals only marginally advance fair competition and fair use. Unfortunately, popular proposals in this area have tended to gravitate toward one of these two extremes. Liberal activists and scholars, pointing out the dangers in the current regime, have proposed comprehensive legislative re-ordering. Despite the compelling logic behind many such approaches, they are not plausible given the current state of the law and institutions. On the other hand, industry leaders (and some conservative scholars) rearrange deckchairs on the sinking ship of conventional copyright law, suggesting reforms ultimately unlikely to guarantee fair use, fair competition, and robust markets in intellectual property.

This article aims to move the debate beyond discussions of impossible revolution and trivial reform. The impossibility of achieving comprehensive change in the law, along with the irrelevance of continued judicial tinkering, have led us to try to *balance* plausibility and comprehensiveness. We have settled on four *minimum advances* of copyright policy based on the five fundamental principles discussed in Part II. In order (A) to enable diverse business practices and wide availability of content, we endorse the present antitrust investigation into the business practices of the record labels. In order (B) to maximize the development of new technologies for distribution and use,

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<sup>298</sup> See Richtel, *supra* note 1, at C2.

we call for a temporary moratorium on infringement lawsuits against virtual private networks of less than ten members (essentially permitting groups of this size to form on-line record clubs designed to pool resources to purchase a common library of works). In order (C) to preserve space for individual use and (D) to ensure the welfare and interests of all stakeholders, we call for disclosure of and limits on DRM techniques and, in particular, a strict limits on DRM techniques that infringe on personal privacy. Finally, in order (E) to tailor distribution rights in the public interest and to limit technologies of control, we call for public interest representation on industry-dominated DRM standard-setting bodies.<sup>299</sup>

After describing these proposals in some detail, we consider how they might be implemented. There is more than one way that these proposals could be put into practice: They could be enacted via legislation or made a matter of administrative regulation. We propose their concrete legal instantiation in a consent order between the relevant companies and U.S. antitrust authorities. We propose relying on institutions, such as the FTC and DOJ, that presently do not have a large role in copyright policy. We believe that an exclusive focus on traditional copyright *law* occludes broader debate on copyright *policy*, blinding commentators to creative institutional options. Not copyright law, but traditional hedges on the market power it confers – such as antitrust and consumer protection regulation – offer possibilities for assuring fair competition and fair use in the digital age. Since the recording industry needs antitrust clearance to assure rapid deal-making for online distribution, antitrust authorities have a unique opportunity to leverage industry concessions designed to domesticate perfect control.<sup>300</sup>

We recognize that others may disagree with one or more of the specific proposals we advance or may criticize the means we suggest. The analysis in this part should, nevertheless, provide some framework for thinking about the state of the debate and, we hope, provoke others to think in terms of both plausibility and comprehensiveness, as well as in terms of the relevant *institutions* through which proposed reforms can be achieved. We also hope to encourage copyright scholars to recognize the importance of doctrines (like antitrust) that limit the power of copyright owners. In short, rejection of part of the following analysis does not necessarily mean rejection of the whole.

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<sup>299</sup> Of course, this matching of goals to rules is somewhat artificial; anything that promotes fair competition usually promotes fair use, and vice versa. But the matching helps us understand the most important problem to which any particular proposed rule responds.

<sup>300</sup> This is not to deny the continued role of institutions already involved in copyright law; we do, however, suggest that we also need to look further afield. In particular, for example, we would expect the Register of Copyrights to continue to fulfill a minor role in making adjustments to the DMCA for exceptions to anti-circumvention provisions in particularly egregious cases. See *supra* notes 91-93 and accompanying text.

B. *Fair Competition and Fair Use: The Two Central Challenges for Copyright Policy in the Digital Age*

The rise of digital media in a networked environment creates two problems for copyright policy: (1) encouraging diversity and competition in commercial, public distribution of copyrighted content online and (2) maintaining fair use and a robust public domain.<sup>301</sup> We need new rules and new rule-generating mechanisms (institutions)<sup>302</sup> in order to solve problems that arise in (1) the commercial and public sphere, and (2) the noncommercial and private sphere.

Commercial distribution occurs when copyrighted content (such as music) is sold for profit. Such distribution now typically occurs on a large scale from one source, such as a record company, to many consumers, usually by way of some intermediary, such as a retail distributor of music. On the other hand, noncommercial distribution typically occurs when the owner of an instantiation of copyrighted content, such as a CD, shares the product, permitting one or more persons to copy it for free. For example, she might lend the CD to a friend, or make it available on her hard drive to members of a network. These cases display core examples of the commercial/noncommercial distinction. While fair use exceptions to copyright presently cover a patchwork of rights accorded to consumers, librarians, and educators, some commentators would simplify this regime by focusing copyright restrictions on commercial uses.<sup>303</sup>

Before digital distribution, such a focus would likely have guaranteed copyright owners nearly all the protection they could reasonably expect. However, P2P networks give nearly every individual with a large hard drive (not just profit-seeking pirates) the opportunity to distribute a great amount of material to a great number of persons. Therefore, copyright owners are not only legitimately concerned by unauthorized *commercial* distribution, but also by unauthorized *public* distribution—i.e., distribution to many people.<sup>304</sup> Users of Napster did not pay for the music that they procured from other participants. Their use could be seen as public, however, in that it was a mass distribution of content. In contrast, private distribution occurs only in smaller networks among more intimate associates.<sup>305</sup>

<sup>301</sup> See discussion *supra* Part II.A.

<sup>302</sup> See JON ELSTER, NUTS AND BOLTS OF THE SOCIAL SCIENCES 4 (1992) (defining institutions as rule-generating mechanisms).

<sup>303</sup> See, e.g., LITMAN, *supra* note 74, at 180-86 (arguing for a simple commercial/noncommercial distinction to replace present complex exceptions).

<sup>304</sup> Thanks to Ernie Miller for pointing out this distinction. As the No Electronic Theft Act indicates, copyright stakeholders are as interested in stopping non-commercial online distributions of content as they are in stopping distributions that are commercial. See The No Electronic Theft Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997).

<sup>305</sup> The public/private distinction is notoriously amorphous; however, the distinction between intimate associates and people “brought together” via some “public” or commercial link has long been used in copyright law. Section 101 of the Copyright statute, for example, in defining “public performance,” refers to “unrelated” people. See 17 U.S.C. § 101; see also *Columbia Pictures Industries, Inc. v. Aveco, Inc.*, 800 F.2d 59 (3d Cir. 1986).

We therefore believe that public and commercial *distribution* of music has quite distinct implications for the copyright policy than its private and noncommercial *use*. Within the realm of public/commercial distribution, it is necessary to ensure that diverse sources of music in cyberspace mirror the array of wholesalers, retailers, broadcasters, and record clubs presently enjoyed by consumers in real space. Extensive DRM may be a necessary prerequisite for content owners to feel comfortable in licensing music to such a diversity of sources. However, DRM should not so dominate the sphere of noncommercial/private use that it eliminates traditional fair use, eviscerates the public domain, or needlessly compromises interoperability.<sup>306</sup>

*C. The Remedy Continuum: Balancing Comprehensiveness and Plausibility*

Potential remedies not only arise in these two areas (public/commercial and private/non-commercial), but also scale an axis between the most comprehensive and least comprehensive solutions. Moreover, the more comprehensive the solution, the less institutionally plausible it is at present. Less comprehensive remedies are more readily applicable, but may end up failing to address our most important concerns. The following chart maps out the main policy options in descending order of comprehensiveness and ascending order of plausibility. The particular options referred to in the table are discussed in further detail below.

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<sup>306</sup> See Yochai Benkler, *Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment*, 11 HARV. J.L. & TECH. 287, 365 (1998).



**The Continuum of Remedies:  
Balancing Plausibility and Comprehensiveness**

	<b>Commercial/ Public Distribution</b>	<b>Noncommercial/ Private Sphere</b>
<div style="border: 1px solid black; padding: 5px; margin-bottom: 10px;"> <i>Most Comprehensive, Least plausible</i> </div> <div style="text-align: center; margin-bottom: 10px;"> </div> <div style="border: 1px solid black; padding: 5px;"> <i>Least Comprehensive, Most plausible</i> </div>	<b>1) Comprehensive shift in property rights via <i>legislation</i></b> Compulsory licensing scheme	Legal mandate of fair use standards into code
	<b>2) Promotion of fair competition and fair use via <i>regulation</i> authorized under existing legal framework</b> Antitrust and fair competition enforcement actions	Consumer protection via fair competition regulation
	<b>3) Reactive and incremental development via <i>court-based doctrine</i> and <i>market models</i></b> Market development of music industry online distribution models and licensing agreements	Development of anti-circumvention doctrine: in particular, development of further exceptions via judicial interpretation, legislation or administrative intervention

It is our goal to strike a proper balance between comprehensiveness and plausibility. We will now consider the most and least comprehensive solutions on this chart. Although we ultimately reject these options, it is important to understand why they will not work in order to demonstrate the promise of our own proposal.

*D. Comprehensive Reordering of Property Rights: The Most Comprehensive and Least Plausible Solution*

Radical reordering of property rights via legislation would result in the most comprehensive approach to ensuring both fair use and fair competition in digital music distribution. Just as it did in 1976 to advance cable

retransmission of broadcasts,<sup>307</sup> Congress could impose a compulsory licensing scheme designed to advance commercial distribution. To preserve fair use and promote interoperability, Congress also could, through statute, limit the types of protective measures used as DRM. As the following sections demonstrate, a number of respected academics and business interests have advocated both compulsory licensing and code-based restrictions,<sup>308</sup> but the current matrix of copyright policy-making institutions almost certainly dooms such comprehensive public ordering.<sup>309</sup>

### 1. Comprehensive Reordering in the Public/Commercial Realm: The Compulsory Licensing Alternative

Compulsory licensing represents a highly regulatory, comprehensive approach to promoting fair competition and access to content in the public/commercial realm. Governments have previously resorted to compulsory licensing where (a) new distribution media or technologies are introduced, (b) transaction costs are very high owing to the large number of licensors, and (c) where potential licensees need to obtain licenses from most or all of them to be effective.<sup>310</sup> Compulsory licensing is also a preferred option when dominant players threaten to exercise market power anti-competitively.<sup>311</sup> Digital music distribution, including P2P networks, clearly falls within these parameters: There are complicated copyright rights involved, owned by a large number of different entities, and access to a vast array of

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<sup>307</sup> 17 U.S.C. § 111(c) (2000).

<sup>308</sup> See *infra* Parts III.D.1, 2.

<sup>309</sup> See *infra* Part III.D.3.

<sup>310</sup> Examples include the compulsory licensing of “mechanical reproductions” of musical works (allowing anyone to record a cover of a song once it has been recorded once), 17 U.S.C. § 115; licenses for the retransmission of broadcast works over cable and satellite, 17 U.S.C. § 111(c); compulsory licensing of music for use in jukeboxes, 17 U.S.C. § 116; and compulsory licensing for non-interactive services of the digital performance right in sound recordings, 17 U.S.C. § 114(d)(2).

<sup>311</sup> The compulsory license for mechanical reproductions, originally introduced to cover piano rolls, was introduced in part to reduce the power of the Aeolian Company. For the history behind the introduction of the compulsory license as a Congressional response to *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1 (1908) (holding that piano rolls were not infringing), see PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY 67* (Hill & Wang 1995); see also Ginsburg, *Copyright and Control*, *supra* note 77, at 1623-24, 1627 (discussing the court decisions considering cable transmission was not a “performance”, and introduction by Congress of a compulsory license in 17 U.S.C. § 111(c)). For a comparison of the English situation and policy discussion, see generally THOMAS GALLAGHER, *COPYRIGHT COMPULSORY LICENSING AND INCENTIVES* (OXFORD INTELLECTUAL PROPERTY WORKING PAPER SERIES No. 2, May 2001), available at <http://www.oiprc.ox.ac.uk/EJWP0201.html> (last visited May 31, 2002); see also Jane Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1926 (1990) (“[T]he real purpose of a compulsory license is to reduce the extent to which copyright ownership of the covered work conveys monopoly power.”).

music is required, as no one wants a system in which they can only get a very limited selection of music.<sup>312</sup> Napster (at least before it tried to be acquired by Bertelsmann) argued for such a scheme, as have other stakeholders such as MP3.com.<sup>313</sup> Under a compulsory licensing scheme, all copyright owners<sup>314</sup> would be required by law to license their content on a non-discriminatory basis, at a regulated rate, to any potential digital distributor who met certain baseline requirements.<sup>315</sup> This would effectively replace property rules, historically the baseline for copyright law, with liability rules.<sup>316</sup>

Compulsory licensing schemes are heavily regulated. In the context of online distribution, prospective licensees would submit applications to a government agency designed to assess their technical competency and security. Compensation to the copyright owner could be determined according to (a) a pre-determined, general schedule (as they are presently for broadcast performances of musical works) or (b) *ex post facto* in some adjudicatory process via a “safe harbor” approach permitting distributors to “distribute now, pay later.” By breaking the nexus between the copyright owners’ rights to payment and their control over the terms on which distribution occurs, compulsory licensing would ensure compensation to copyright owners without ceding them absolute control over works.

A compulsory licensing scheme could advance online music distribution in many ways. It could reduce the transaction costs of licensing,<sup>317</sup> and include

<sup>312</sup> The real value of a Napster system was, in part, access to any and every work under the sun; such a system loses a significant part of its value if confined to a finite list of works. *See generally* Coming Soon to a Digital Device Near You: Hearings Before the Senate Judiciary Hearing on Online Entertainment and Copyright Law, 106 Cong. (2001) (statement of Hank Barry, Interim CEO, Napster, and Consumers Union); Yen, *supra* note 132.

<sup>313</sup> *See generally* Online Entertainment: Coming Soon to a Digital Device Near You: Hearings Before the Senate Judiciary Comm. 107th Cong. (2001) (statement of Hank Barry, Interim Napster CEO), available at <http://judiciary.senate.gov/hearing.cfm?id=198> (last visited May 31, 2002); Lawrence Lessig, *Just Compensation*, THE INDUSTRY STANDARD, Apr. 21, 2001, available at <http://www.thestandard.com/article/0,1902,23401,00.html> (last visited May 31, 2002) (implicitly advocating some form of compulsory licensing scheme).

<sup>314</sup> Including both owners of the copyright in the musical work and owners of copyright in the sound recording.

<sup>315</sup> Prior conditions might include, for example, the level of digital rights management to be applied to the content, and/or perhaps basic quality requirements. This would need to be set by regulation.

<sup>316</sup> We refer to the schema introduced by Calabresi and Melamed distinguishing between different rules for the enforcement of entitlements. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV L. REV. 1089, 1092 (1972) (distinguishing between property rules that protect entitlements (where the entitlement can only be interfered with or taken with the consent of the owner or after paying the owner’s price) and liability rules (where anyone can take or interfere with the entitlement provided they pay some price determined by a third party)).

<sup>317</sup> *See generally* Michael A. Heller, *The Tragedy of the Anticommons: Property in the*

direct payments to artists.<sup>318</sup> A wide variety of different distributors and models might take advantage of compulsory licensing—particularly if the licensing authority promotes varying models of distribution.<sup>319</sup> Compulsory licensing would promote further innovations in business models and distribution technologies by assuring that they do not fall under the control of the owners of copyright through the effective power of veto that property rules currently provide.<sup>320</sup> Provided that licensees could provide music files in different formats, compulsory licensing may also promote fair use. Finally, as Ayres and Talley have pointed out, forcing copyright owners to bargain under the shadow of a liability rule could promote more efficient bargaining.<sup>321</sup>

Of course, these are all hypothetical gains and must be balanced against potential drawbacks. Critics<sup>322</sup> offer a litany of concerns about compulsory licensing: It interferes with the market; takes away property rights; reduces incentives for production and innovation; reduces incentives for copyright owners to form their own collective licensing bodies to license works; encourages inefficient rent-seeking behavior by parties seeking to ensure favorable terms; imposes excessive levels of bureaucracy and can increase costs through lengthy fee determination proceedings.<sup>323</sup> A compulsory licensing regime may also conflict with the obligations of the United States under the TRIPS agreement.<sup>324</sup> It is beyond the scope of this article to

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*Transition from Marx to Markets*, 111 HARV. L. REV. 621, 622 (1998) (discussing these costs by arguing that too many rights of exclusion can lead to under exploitation of a scarce resource).

<sup>318</sup> See The Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 36 (1995) (requiring a direct share to artists to be collected by the Collective Rights Organization of the recording industry, SoundExchange, controlled by RIAA).

<sup>319</sup> See Saxe, *supra* note 55.

<sup>320</sup> See Lessig, *supra* note 313, at ¶ 8 (“Dinosaurs should die. A truly free market would let them die, and Congress could help this evolution along by passing laws to make sure artists get paid without delivering the Internet into the hands of the labels. Compensation, in other words, without control.”). But See Ginsburg, *Copyright and Control*, *supra* note 77, at 1645 (observing (with approval) that Congress has accorded copyright owners control over new technologies of dissemination when such control appeared to advance wide dissemination of content). As Bertelsmann negotiates to buy Napster, it appears that the dynamic identified by Ginsburg is already occurring in the online environment.

<sup>321</sup> See Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement To Facilitate Coasean Trade*, 104 YALE L.J. 1027, 1092-94 (1995) (arguing that liability rules endow each party with a partial claim, reducing incentives to behave strategically during bargaining, and thus promoting more efficient bargaining).

<sup>322</sup> See generally Robert Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293 (1996) [hereinafter Merges, *Contracting into Liability Rules*].

<sup>323</sup> See, e.g., Copyrighted Webcast Programming on the Internet: H.R. Subcomm. on Courts. & Intell. Prop., 106th Cong. 50-55 (2000).

<sup>324</sup> See generally Laurence R. Helfer, *World Music on a U.S. Stage: A Berne/TRIPS and*

consider these arguments in detail. Insofar as they assume that the market will do *better*, or that there will be *less* rent-seeking in compulsory licensing than there already is in regard to the delineation of property rights, these assumptions are debatable given the arguments in Part I above, and the history of copyright revision in the United States.<sup>325</sup>

There are, however, more novel objections to compulsory licensing in this particular context. First, the parties to whom licenses would be granted would vary in nature far more than is the case with present schemes – which tend to regulate more homogenous industries.<sup>326</sup> If we envisage the distribution of music on a spectrum ranging from a pure broadcast model (which does not enable retention of high quality copies) to a pure copy distribution model (for example, the sale of CDs where individuals buy not only the CD, but its packaging and status as a “fetish object”) a system allowing the downloading of files (that can be copied) or the streaming of files (that cannot be copied) falls somewhere in between.<sup>327</sup> Further, in the case of broadcasting or retransmission, the copyrighted work is being used by the licensee in a single, predictable way. In the case of digital downloads of files, particularly as DRM technology becomes more sophisticated, it will be possible to provide copyright works in many different forms: for example, for single playback; or playback but no copying; or in a form that “expires” after a given date. Moreover, there are a number of different secure formats for music files. Thus, unlike broadcast models, the terms on which copies are to be provided to individuals could vary enormously, and would need to be fixed *ex ante*.

These factors considerably complicate any proposal for compulsory licensing.<sup>328</sup> The difficulties of collective valuation<sup>329</sup> would be increased by

*Economic Analysis of the Fairness in Music Licensing Act*, 80 B.U. L. REV. 93, 151-156 (2000); Neil W. Netanel, *The Next Round: The Impact of the WIPO Copyright Treaty on TRIPS Dispute Settlement*, 37 VA. J. INTL. L. 441, 456-463 (1997) (arguing that TRIPS more narrowly circumscribes the kind of public policy limits that may be imposed on intellectual property rights, including protection of copyright); World Trade Organization, United States – Section 110(5) of the US Copyright Act: Report of the Panel, WT/DS160/R, June 15, 2000 (concluding that subparagraph (B) of section 110(5) of the Copyright Act of 1995 does not meet the requirements of the TRIPS Agreement, indicating a strict view of copyright exceptions.).

<sup>325</sup> See LITMAN, *supra* note 74, at ch. 3 (discussing the 1909, 1976, 1998, and other revisions to the copyright law).

<sup>326</sup> This is perhaps not true of the mechanical reproduction compulsory license, but that is a special case, involving “one-off” recordings of existing songs, rather than ongoing licensing relationships like that involved in, say, cable re-transmission or webcasting.

<sup>327</sup> See Rob Walker, *Paperback Music*, N.Y. TIMES MAGAZINE, Apr. 1, 2001, at 17 (arguing for a two-tier market for music like that prevailing in books, with a much larger role for used music sellers); but See Ken Lovern, *Evaluating Resale Royalties for Used CD's*, 4 KAN. J.L. & PUB. POL'Y 113, 113 (stating that the market for used CDs is growing) (1994). See generally THORSTEIN VEBLEN, *THEORY OF THE LEISURE CLASS* 52-76, 112 (1934) (discussing fetish-objects, conspicuous consumption and valuation).

<sup>328</sup> See Ginsburg, *Copyright and Control*, *supra* note 77, at 1643 n.131 (pointing out the

the need to determine not only the price, but also the “product”—i.e., what rights individuals would be granted to use, copy, and transfer the file and what form of DRM would be permitted or required. This is obviously a far more sizeable interference with copyright owners’ rights than previous compulsory licensing regimes, and a significantly more difficult determination. The chief advantage of compulsory licensing – enabling the rapid development of new business models and technologies and reducing transaction costs – would very likely evaporate in the midst of interminable controversy.

## 2. Comprehensive Reordering in the Private/Non-commercial Realm: Mandated Code-Based Fair Use

In the area of private/non-commercial use of digital music, one legislative proposal raised by Pamela Samuelson and by the *Digital Dilemma Report*<sup>330</sup> is that § 1201 of the Copyright Act should permit “fair breach” of anti-circumvention technology.<sup>331</sup> Such permission would depend on a “legitimate purposes” exemption to the anti-circumvention rules, which courts would flexibly interpret in order to reach just results.<sup>332</sup> To be effective, such an exception would need to extend not only to the “access” provisions but also the “device” provisions of the DMCA, so that technologically unsophisticated would-be fair users could employ others to circumvent protection measures for them.<sup>333</sup> Such a provision would not be a radical departure from established copyright law; so far Congress has delegated to courts the power to determine the contours of fair use via case-by-case balancing that takes into account the interests of both the copyright owner and the user of copyright works. Congressional intervention here is unlikely, however, since the DMCA itself was so solicitous of content owners’ interests, and the main players responsible for its adoption are still at the helm of the relevant committees.

A more radical proposal in the area of private/non-commercial use comes from Professors Dan Burk and Julie Cohen, who propose a two-tier system for

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intractability of the pricing problem).

<sup>329</sup> See Mark A. Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 U. DAYTON L. REV. 547, 584 (1997) (proposing network transmissions subject to a negotiated or compulsory license); Merges, *Contracting into Liability Rules*, *supra* note, at 1307-1308 (discussing collective valuation).

<sup>330</sup> DIGITAL DILEMMA REPORT, *supra* note 82, at 221-24 (discussing DMCA and noting views of some members that circumvention should be allowed for “other legitimate purposes”).

<sup>331</sup> See Samuelson, *supra* note 119; 17 U.S.C. § 1201 (2000).

<sup>332</sup> See Samuelson, *supra* note 119.

<sup>333</sup> At present, the exceptions do not extend to the device provisions, and even exceptions allowed by the Library of Congress are similarly limited to the access provisions. See 17 U.S.C. §1201(a)(1)(C). For the effect of this limitation, See generally, David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 727-37 (2000) (analyzing the exceptions to the anti-circumvention provisions in 17 U.S.C. § 1201).

protecting fair use in a DRM environment.<sup>334</sup> They propose, as a first tier, a mandated level of flexibility built into all DRM, reflecting an agreed minimum of fair use, to be implemented by making copyright protection or anti-circumvention provisions unenforceable for works in which no such flexibility was provided.<sup>335</sup> Since this would not cover all possible fair uses, they also propose a second tier whereby a “trusted third party,” probably a public body like the Library of Congress, would hold decryption keys, to be given out on application by prospective “fair users” – *without* the Library of Congress making any determination as to the legitimacy of the application.<sup>336</sup>

There are a number of minor problems with the Burk and Cohen proposal. It seems less suited to music distribution perhaps than other areas of content because it is difficult to imagine any “agreed minimum” of fair use that could be mandated and consistently applied.<sup>337</sup> What would be the size of the extract that should be allowed as a minimum, where even quotation of a very small amount of music may not be fair use if it happens to be a composition’s most distinctive phrase?<sup>338</sup> Can copyright owners be expected to agree to a minimum number of copies to be allowed as fair use when it is quite possible

<sup>334</sup> See Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Copyright Management Systems*, 15 HARV. J.L. & TECH. 41, 65-66 (2001).

<sup>335</sup> See *id.* While Burk and Cohen do not specify what such a minimum might be, one way to fill it in would be to use Professors Lessig’s and Benkler’s suggestion of a system that allowed first generation, but not second generation, copying – suggested in the context of “less restrictive means” analysis and reflecting the system that does apply under the Audio Home Recording Act of 1992 for digital audio tapes. See Brief of Amici Curiae in Support of Appellant, *Universal City Studios, Inc. v. Reimerdes*, Jan. 26, 2001, available at [http://www.eff.org/IP/Video/MPAA\\_DVD\\_cases/20010126\\_ny\\_2profs\\_amicus.html](http://www.eff.org/IP/Video/MPAA_DVD_cases/20010126_ny_2profs_amicus.html) (last visited May 31, 2002).

<sup>336</sup> See Burk & Cohen, *supra* note 334, at 63, 65-66 (suggesting that the trusted third party would not make a determination about the bona fides of the access application and discussing the “mixed” infrastructure proposed).

<sup>337</sup> For example, many of the most valuable fair uses of music do not require access to or copying of perfect copies. The parodist does not require a perfect copy in order to create a parody. Of course, this assumes access to copying technology which is not digital. We have already noted that fair use is an evolving concept. Should analogue be phased out and no public access to works be available, then these issues would need to be thought through again. This simply points to the very real need for a body other than Congress with ongoing supervisory power.

<sup>338</sup> See, e.g., *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.* 780 F. Supp. 182 (S.D.N.Y. 1991) (admonishing at the digital sampling case’s outset that “thou shall not steal”); *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (1976) (holding that George Harrison had plagiarized the Chiffons’ song “He’s So Fine” with his composition “My Sweet Lord”), *aff’d sub nom.* *ABKCO Music, Inc. v. Harrisongs, Ltd.*, 722 F.2d 988 (2d Cir. 1983); see also *Hawkes & Son (London) Ltd. v. Paramount Film Serv. Ltd.* [1934] Ch. 593 (English authority, holding that 20 seconds of a song was sufficiently “substantial” to be copyright since anyone would recognize the excerpt).

that some business models will be built on subscriptions or micropayments<sup>339</sup> with which this kind of copying might interfere? If music is supplied initially in digital form, even allowing all first generation copies but not second generation copies, as with a serial copy management system similar to that required under AHRA, free riders would be able to evade the payments that incentivize collective licensing.<sup>340</sup> There are more fundamental problems, however, with the proposed reliance on statute.

### 3. The *Implausibility* of Radical Public Reordering of Copyright Policy: Copyright Capture of the Legislature

In theory, both compulsory licensing and statutory limits to DRM might advance online music distribution. However, it is difficult to imagine them put into practice. Such comprehensive reordering of property rights would depend on legislative action—and we doubt such action could occur in the United States. Although some analysts have praised legislatures as a forum for open debate among a broad range of interests,<sup>341</sup> past revisions to copyright law have not been models of transparency.<sup>342</sup>

This should not be surprising: Copyright legislation presents a classic public choice conundrum. The considerable benefits to be reaped from expanding copyright rights accrue, in general, to a concentrated group of large, well-financed and well-organized entities. The costs of any rent-seeking by such interests are diffuse but mainly affect three groups: existing intermediaries, developers of as-yet-undeveloped technologies, and the content-consuming public.<sup>343</sup> These three groups are substantially more diverse and dispersed

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<sup>339</sup> See Teresa N. Kerr, *Bowie Bonding in the Music Biz: Will Music Royalty Securitization be the Key to the Gold for Music Industry Participants?*, 7 UCLA ENT. L. REV. 367 (2000) (explaining how uncertainty over the bundle of rights protected under copyright laws may undermine complex, Pareto-optimal transactions in the music industry).

<sup>340</sup> Of course, arguably a broader criticism of the Burk and Cohen proposal is that these same issues arise not just in the case of musical works, but others such as films and literary works. The focus of the present analysis, however, is musical works.

<sup>341</sup> See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 53-58 (University of Chicago Press 1994).

<sup>342</sup> See, e.g., LITMAN, *DIGITAL COPYRIGHT*, *supra* note 74, at 23; Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 277 (1989) [hereinafter Litman, *Copyright Legislation*].

<sup>343</sup> James Q. Wilson's famous typology classifies four types of legislation: (1) legislation with concentrated benefits and diffuse costs, (2) legislation with concentrated benefits and concentrated costs, (3) legislation with diffuse benefits and concentrated costs, and (4) legislation with diffuse benefits and diffuse costs. See JAMES Q. WILSON, *THE POLITICS OF REGULATION* 366-67 (Basic Books 1980). The first category often includes economically inefficient legislation because rent-seeking lobbyists can get benefits without drawing scrutiny from those from whom they are ultimately taking the benefit. See *id.* Copyright legislation usually falls into this region of concentrated benefits and diffuse costs since content owners gain a great deal from it and consumers are largely unorganized. See *infra*



than the concentrated recording industry and are thus unlikely to be effectively represented in any bargaining over legislative amendments; inventors of as-yet-undeveloped technologies by definition are not at the bargaining table. On the other hand, copyright law has become a highly technical subject, so legislators tend to look with favor on delegating the drafting of legislation to interested parties, rendering the law even more technical and specialized.<sup>344</sup> Jessica Litman has revealed the drawbacks of this lawmaking process in her studies of copyright revisions of the twentieth century:

About one hundred years ago, Congress got into the habit of revising copyright law by encouraging representatives of the industries affected by copyright to hash out among themselves what changes needed to be made and then present Congress with the text of appropriate legislation. By the 1920s, the process was sufficiently entrenched that whenever a member of Congress came up with a legislative proposal without going through the cumbersome prelegislative process of multiparty negotiation, the affected industries united to block the bill. Copyright bills passed only after private stakeholders agreed with one another on their substantive provisions. The pattern has continued to this day.<sup>345</sup>

Though other groups, such as the home-recording industry, librarians, and educators, have attempted to exert their own influence, revisions to the copyright laws have by and large favored the content industries. As Litman further explains, even with the involvement of some opposing public interests:

There is no overarching vision of the public interest animating the Digital Millennium Copyright Act. None. Instead, what we have is what a variety of different parties were able to extract from each other in the course of an incredibly complicated four-year multiparty negotiation. Unsurprisingly, they paid for that with a lot of rent-seeking at the expense of new upstart industries and the public at large.<sup>346</sup>

In this context, a fundamental problem with *both* the Burk and Cohen proposal, *and* the idea of compulsory licensing, is that it is unrealistic to imagine that the required legislative amendments could be passed by Congress. Because copyright law traditionally has been, and presently still is, essentially a legislative schema, and given the centrality of the legislature in the formulation of American public policy, Congress would be extensively

notes 342-346 and accompanying text.

<sup>344</sup> See Litman, DIGITAL COPYRIGHT, *supra* note 74, at 277 (discussing how this delegation to interested parties renders the law more technical and specialized given the number of narrow exemptions that are exchanged as part of negotiated deals).

<sup>345</sup> LITMAN, DIGITAL COPYRIGHT, *supra* note 74, at 23; see also Litman, *Copyright Legislation*, *supra* note 342, at 277 (noting that “copyright legislation in this century has evolved from meetings among industry representatives”); William F. Patry, *Copyright and the Legislative Process: A Personal Perspective*, 14 CARDOZO ARTS & ENT. L.J. 139, 140-142 (1996).

<sup>346</sup> LITMAN, DIGITAL COPYRIGHT, *supra* note 74, at 144-45.

involved in any comprehensive policy shift. While reformers call for limiting property rights, Congress has expanded them throughout the 1990s. Its record should give one pause about enhancing the Congressional role in copyright policymaking.

Additionally, while compulsory licensing requires a continuing body to resolve issues of valuation and the kind of rights to be attached to the work, Congress has neither the time nor the attention to continually monitor these issues.<sup>347</sup> Fair use, as Burk and Cohen acknowledge, is an evolving notion.<sup>348</sup> The doctrine is likely to fare poorly if set in legislative stone—particularly in this area, in which it largely consists of code flexibility. Of course, legislative hearings (backed by threat of legislation) can be effective—the April 3, 2001 Congressional hearings appeared to spur the recording industry toward putting music online.<sup>349</sup> However, this kind of supervision on an ad hoc basis would be inadequate for the task at hand. Determining which uses or distributions should be allowed and protected will require particularized fact-intensive inquiry and strong institutional memory. In summary, Congress is ill-suited to monitor the recording industry, and its role in any rule-making capacity should be limited, if necessary, to a broad delegation of authority to another institution accompanied by whatever ad hoc supervision is appropriate in light of changing circumstances.

*E. Promotion of Fair Competition and Fair Use Within Existing Legal Frameworks: Is The Least Comprehensive and Most Plausible Solution Enough?*

At the other end of the “plausibility/comprehensiveness” axis are incremental approaches endorsing only minimal intervention from government authorities. Despite the ominous trends described in Parts I and II of this article, many respected commentators argue that market forces should be allowed to play out within a framework of reactive incremental development.<sup>350</sup> If comprehensive solutions are not realistic, is it better to rely solely on incremental development? Our answer is: yes and no. With respect to ensuring the growth of public/commercial distribution, and competition in such distribution, we endorse incrementalism. Investigation, not active intervention through enforcement, is warranted at this stage. However, government initiatives are required to preserve fair use.

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<sup>347</sup> *But see* Digital Millennium Copyright Act § 1201(a), 17 U.S.C.S. § 1201 et seq. (2000) (mandating rulemaking by the Copyright Office).

<sup>348</sup> *See* Burk & Cohen, *supra* note 334, at 45–46.

<sup>349</sup> *See* Ted Bridis, *Online Music: Is It Time to Rewind or Fast Forward?*, WALL ST. J., Apr. 4, 2001, at B3 (explaining that “The hearing came just days after AOL and another big music company, EMI Group, announced a deal to sell their music online.”).

<sup>350</sup> *See, e.g.,* Merges, *Contracting Into Liability Rules*, *supra* note 322, at 1376–1378; Ginsburg, *Copyright and Control*, *supra* note 77.

### 1. Incremental Development in the Public/Commercial Realm: Allowing and Monitoring Market Developments

The most plausible, but least comprehensive approach to policy problems within the commercial/public sphere would consist of permitting the development of online distribution models, with the Big Five of the recording industry taking the lead in first putting content online and then negotiating licensing agreements with distributors. Robert Merges suggests that, left to market forces, industry actors will contract into liability rules through the development of collective rights organizations.<sup>351</sup> Merges argues that “property rules entitlements drive [intellectual property rights] holders in high transaction cost industries into repeat-play bargaining which leads to the formation of [collective rights organizations].”<sup>352</sup> These repeat players develop norms that reduce transaction costs. If Merges is correct, this market approach might allow rights-holders to negotiate a web of agreements more efficient than a compulsory licensing scheme. Such cross-licensing may reduce transaction costs in the long term for digital distributors and permit extensive online distribution of music.

Here we must acknowledge a direct conflict between two of our policy goals: efficient distribution may require reducing the diversity of sources of music online. Clearly a balance must be struck between these two principles. The most obvious way to reduce transaction costs would involve combinations—precisely what we are seeing now with the creation of MusicNet and Pressplay. Such combinations give rise to the possibility of obtaining licenses from copyright owners in sound recordings through these joint ventures thus lowering transaction costs. Indeed, current developments, including in particular the anticipation of cross-licensing between the companies participating in PressPlay and MusicNet<sup>353</sup> so that distributors online can obtain access to a wide range of works, point tentatively in this direction.<sup>354</sup>

Because the markets for online music are so volatile, caution is in order for would-be regulators of commercial/public distribution of music online. We therefore do not at this stage recommend legislation or regulation to force copyright owners to license to all distributors who meet some baseline – as might be required by compulsory license, or by an antitrust agency seeking an enforcement order to deal with the question of commercial/public distribution. This would involve antitrust policymakers dictating business models, and even

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<sup>351</sup> Merges, *Contracting Into Liability Rules*, *supra* note 322, at 1293.

<sup>352</sup> *Id.* at 1296.

<sup>353</sup> See *In re Napster, Inc. Copyright Litigation*, 191 F. Supp. 2d 1087, 1106-07 (N.D. Cal. 2002) (referring to evidence from the plaintiffs in the action that MusicNet anticipated obtaining cross-licenses from other copyright owners).

<sup>354</sup> See, e.g., Nick Wingfield & Jennifer Ordenez, *Sony, Universal License Music to Yahoo!*, WALL ST. J., Apr. 6, 2001, at B5.

imposing *de facto* compulsory licensing, on the industry. That is not a desirable development, and not warranted at this stage.

We do believe, however, that these commercial developments – indeed, these combinations – need to be scrutinized. If such licensing organizations develop a control over the market for recordings analogous to the control enjoyed by musical composition licensors like ASCAP and BMI, they merit close monitoring. This monitoring should occur under the auspices of antitrust law, and be undertaken by the antitrust regulatory authorities: either the FTC or the DOJ.<sup>355</sup>

Why is antitrust supervision justified in the present context? Those familiar with the literature in this area will at once recognize the controversy. The intersection, and sometimes conflict, between intellectual property law and antitrust law is “notoriously contentious.”<sup>356</sup> Writers have rightly emphasized the need for great care in attempting to reconcile the two.<sup>357</sup> Moreover, if we are suggesting that the matter of concern is the licensing practices of MusicNet and/or Pressplay, this touches on the question of refusals to license intellectual property. This is one of the most controversial issues in reconciling intellectual property and antitrust given that one of an intellectual property owner’s key legal rights is the right to exclude – to refuse to license their intellectual property.<sup>358</sup>

<sup>355</sup> See *infra* discussion Part III.G.

<sup>356</sup> David McGowan, *Innovation, Uncertainty and Stability in Antitrust Law*, 16 BERKELEY TECH L. J. 729, 781 (2001).

<sup>357</sup> See generally *id.*; Maureen O’Rourke, *Striking a Delicate Balance: Intellectual Property, Antitrust, Contract, and Standardization in the Computer Industry*, 12 HARV. J. L. & TECH. 1 (1998) [hereinafter O’Rourke, *Striking a Delicate Balance*]. Still others have argued that intellectual property owners should be immune from antitrust scrutiny in most cases. See Daniel B. Ravicher and Shani C. Dilloff, *Antitrust Scrutiny of Intellectual Property Exploitation: It Just Don’t Make No Kind of Sense*, 8 SW.J.L. & TRADE AM. 83 (2001-02). The latter is an extreme position not generally followed, and inconsistent with the approach of both the DOJ and the FTC. See U.S. DEPARTMENT OF JUSTICE AND THE FEDERAL TRADE COMMISSION, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY, April 6, 1995, § 2.1 [hereinafter DOJ/FTC IP GUIDELINES].

<sup>358</sup> In this area, U.S. decisions are inconsistent. Compare *Image Technical Services v. Eastman Kodak*, 125 F.2d 1195 (Fed. Cir. 1997) (holding Kodak incurred antitrust liability for refusing to supply spare parts to independent service organizations) with *Independent Serv. Org. Antitrust Litigation*, 203 F.3d 1322 (Fed. Cir. 2000) (reaching the opposite conclusion on very similar facts in which Xerox’s refusal to sell or license its patented and copyrighted materials was deemed to be squarely within the statutory intellectual property rights and hence gave rise to no antitrust liability). The matter is also the subject of controversy in the European Union, where a “refusal to license intellectual property” decision is currently on appeal. See *IMS Health Inc v. Commission of the European Communities* (T184/01 R) (No.1) [2002] 4 C.M.L.R. 1, and (No.2) [2002] 4 C.M.L.R. 2. The issue has also been left uncertain in Australia by a decision of the High Court decided on narrow legal grounds. See *Melway Publishing Pty Ltd. v. Robert Hicks Pty Ltd. t/as Auto Fashions Australia* (2001) 178 ALR 253.

The determination of whether *in fact* there is a breach of antitrust principles is a highly fact-specific inquiry that cannot be undertaken on the presently available information. Nevertheless, it is worth pointing out why there may be grounds for ongoing supervision. First, it is axiomatic that while intellectual property rights do not give rise to a presumption of market power,<sup>359</sup> they do not confer immunity from antitrust scrutiny.<sup>360</sup> Second, evidence already on the record indicates that scrutiny is justified. Although the “Big Five” have contracted with Web portals and MTV, some smaller distributors complain that they are being cut out of key deals.<sup>361</sup> Not only has the DOJ already become involved, as noted in Part I, but in addition, findings of the trial judge in the *Napster* litigation indicated that licensing practices of the major labels may constitute copyright misuse, a doctrine which, while not co-extensive with antitrust law is nevertheless closely related.<sup>362</sup> Judge Patel found that there was some indication that the licensing terms offered to Napster were “overreaching.”<sup>363</sup> Such contractual terms are commonly addressed through antitrust law.<sup>364</sup> In terms of market power, the FTC has already indicated its view that “The five distributors together account for over 85 percent of the market . . . and each has market power in that no music retailer can realistically choose not to carry the music of any of the five major distributors.”<sup>365</sup> This would also be true of online distributors/retailers. Gallagher has referred to this feature of the music industry, in which distributors need access to *all* labels, as a “natural monopoly of demand.”<sup>366</sup> The known structure of the joint ventures, MusicNet and PressPlay, facilitates collusion on matters of price.<sup>367</sup> Moreover, while there has been some

<sup>359</sup> DOJ/FTC IP GUIDELINES, § 2.2.

<sup>360</sup> DOJ/FTC IP GUIDELINES, §2.1; *U.S. v. Microsoft Corp.*, 253 F.3d 34, 63 (D.C. Cir. 2001) (endorsing a statement of the Federal Circuit that “Intellectual property rights do not confer a privilege to violate the antitrust laws.”); *Data General Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1183 (1st Cir. 1994).

<sup>361</sup> See Saxe, *supra* note 55, at 23.

<sup>362</sup> See *supra* notes 72-73 and accompanying text. On the doctrine of copyright misuse, See *In re Napster Copyright Litigation*, 191 F. Supp. 2d 1087, 1102-06 (N.D. Cal. 2002).

<sup>363</sup> *Id.* at 1102.

<sup>364</sup> See O’Rourke, *Striking a Delicate Balance*, *supra* note 357, at 3 (noting that “Antitrust’s relationship with contract law has traditionally been an important part of antitrust litigation.”).

<sup>365</sup> Statement of Chairman Robert Pitofsky and Commissioners Sheila F. Anthony, Mozelle W. Thompson, Orson Swindle, and Thomas B. Leary, *In re Sony Music Entertainment, Inc.*, File No. 971-0070, Sept. 6, 2000, available at <http://www.ftc.gov/os/2000/09/index.htm> (last visited May 31, 2002). Similar findings were made of the industry in a recent Australian case. See *Australian Competition and Consumer Commission v. Universal Music Australia* [2001] FCA 1800 (Federal Court of Australia, December 2001) (the case is on appeal).

<sup>366</sup> GALLAGHER, *supra* note 366.

<sup>367</sup> *In re Napster Copyright Litigation*, 191 F. Supp. at 1108-09. The court noted:

criticism of using antitrust analysis in “high technology” markets,<sup>368</sup> the market for the distribution of recorded music, even online, is not an innovation market with low barriers to entry. Rather, the copyrights in existing music act as barriers to entry given the natural monopoly of demand referred to above, and the enormous cost of setting up rival music production.

Recording industry consolidation has effectively reduced the number of players in the market for online music distribution from five to two.<sup>369</sup> The online market for sound recordings may turn into an effective duopoly, analogous to the market for public performance licenses presently dominated by BMI and ASCAP – organizations which have long been subject to antitrust scrutiny as a result. As the Herfindahl-Hirschman Index (HHI) indicates, that level of market concentration has provoked antitrust investigation in the past (in the context of horizontal mergers) and should do so now.<sup>370</sup>

Although we cannot be certain that unfair practices will hamper the growth of online distribution, authorities will not be able to make that determination without more information. We therefore endorse scrutiny at this stage. Such monitoring has the twin benefits of a) public scrutiny of licensing practices and business practices<sup>371</sup> and b) the possibility of ensuring certain protections for

[E]ven a naif must realize that in forming and operating a joint venture, plaintiffs’ representatives must necessarily meet and discuss pricing and licensing, raising the specter of possible antitrust violations . . . . These joint ventures bear the indicia of entities designed to allow plaintiffs to use their copyrights and extensive market-power to dominate the market for digital music distribution.

*Id.*

<sup>368</sup> See, e.g., Judge Frank Easterbrook, *Information and Antitrust*, 2000 U. CHI. LEGAL. F. 1 (2000).

<sup>369</sup> See MusicNet, at <http://www.musicnet.com> (last visited May 31, 2002); Duet, at <http://www.duet.com> (last visited May 31, 2002).

<sup>370</sup> See, e.g., Horizontal Merger Guidelines for the Department of Justice and Federal Trade Commission § 1.4: Calculating Market Shares, reprinted in MORGAN, MODERN ANTITRUST LAW AND ITS ORIGINS 894 (1995). The HHI is “calculated by summing the squares of the individual market shares of all the participants.” *Id.* Markets are “moderately concentrated” when the HHI is between 1000 and 1800 and highly concentrated when the HHI is above 1800. See *id.* Since the Big Five market share is 26%, 15%, 16%, 9%, and 16%, the HHI is well over the threshold. See Music CD Industry: Competition, *The Rise of the Big Six. . . or Five?*, at <http://www.soc.duke.edu/~s142tm01/compete3.html> (last accessed May 31, 2002) (listing the current figures); Music CD Industry: Big Six Profile, *The “Big Six” Profile*, at <http://www.soc.duke.edu/~s142tm01/profile.html> (last accessed May 31, 2002).

<sup>371</sup> Such scrutiny has been provided in Australia recently through a court case which has examined industry practices in the area of importing non-infringing copies of CDs from overseas. While the result has been highly controversial owing to the definition of “market power” adopted by Justice Hill in the Federal Court, the extensive facts found by the judge in the case have provided a basis for some discussion of the practices of the recording industry. See *Australian Competition & Consumer Commission v. Universal Music Australia* [2001] FCA 1800, 2001 AUST FEDCT LEXIS 2082 (Federal Court of Australia, Hill J, 14 December 2001), available at [www.austlii.edu.au](http://www.austlii.edu.au) (last accessed May 31, 2002);

fair use that we propose below. We return to the plausibility of antitrust involvement in Section G below.

Thus, within the sphere of commercial/public use of copyrighted material, we endorse the present antitrust *investigation*, but do not recommend immediate enforcement *action*. At this point in time, the industry is developing so rapidly that it would be premature to propose any concrete restrictions on licensing practices.<sup>372</sup> Enforcement actions could dampen enthusiasm for precisely the kinds of deals all sides on the public distribution debate claim to want. However, the *threat* of antitrust enforcement may be a powerful tool that policymakers in either the FTC or DOJ could use in order to leverage fair use concessions.<sup>373</sup>

## 2. Incremental Development in the Private/Non-commercial Realm: Allowing Market Development and Anti-Circumvention Rulemaking in Accordance with the DMCA

Within the private/non-commercial sphere, reformers of an incrementalist cast argue that courts could protect the commons with existing copyright doctrines. One argument that has been raised, most notably in the context of the *DeCSS* case, is that the courts *either* should interpret the DMCA to allow for (a) circumvention of DRM for purposes of fair use, *or* (b) should simply declare the DMCA unconstitutional on its face.<sup>374</sup> Alternatively, some have recommended that the DMCA be amended to make clear that “fair breach” or circumvention for fair use purposes is allowed.<sup>375</sup> The difficulty with these arguments is that they risk an “all-or-nothing” logic that leads either to infanarchy or perfect control. If unfettered circulation of anti-circumvention devices is allowed on the reasoning that they can sometimes, or even often, be used for the purposes of fair use,<sup>376</sup> then we may as well abandon all pretence of enforcing anti-circumvention measures. We would thus resign ourselves to

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*see also* Lawrence A. Sullivan, *Is Competition Policy Possible in High Tech Markets? An Inquiry into Antitrust, Intellectual Property, and Broadband Regulation as Applied to the “New Economy,”* 52 CASE W. RES. L. REV. 41, 45 (2001) (referring to the value of antitrust enforcement as a visible, public way of educating commercial culture).

<sup>372</sup> Except, perhaps, for the kind of covenants-not-to-compete mentioned in *Lasercomb* and cognate copyright misuse cases. *See* PETER JASZI ET AL., *COPYRIGHT LAW* 810 (4th ed. 1998).

<sup>373</sup> *See supra* Part II.

<sup>374</sup> *See* Brief of Amici Curiae in Support of Appellant, Universal City Studios, Inc. v. Reimerdes, Jan. 26, 2001, *available at* [http://www.eff.org/IP/Video/MPAA\\_DVD\\_cases/20010126\\_ny\\_2profs\\_amicus.html](http://www.eff.org/IP/Video/MPAA_DVD_cases/20010126_ny_2profs_amicus.html) (last visited May 31, 2002). These arguments have been rejected at every stage thus far.

<sup>375</sup> *See, e.g.*, Samuelson, *supra* note 119, at 545-46.

<sup>376</sup> This approach would probably be required if the “right to circumvent” is not to be limited only to the tech-savvy. Non-tech-savvy users wishing to circumvent for legitimate purposes require some means of access to circumvention technology. *But see* Burk & Cohen, *supra* note 334 (proposing a means to avoid this end).

the fact that copyright owners will have to choose among engaging in a technology war with hackers, suing users, or using drastic means like seeking to cut off users' Internet access via the DMCA's "notice and take down" provisions.<sup>377</sup> None of these options would advance a fair copyright regime.

This is not to argue that the lockup of content in DRM technology beyond the scope of publicly granted copyright rights and beyond the term of copyright protection should be allowed. Rather, given the current state of the law and legislation, leaving the matter of fair use to the courts is not a viable option because rigid doctrine effectively forecloses a nuanced and balanced approach. Courts must choose between a) upholding the DMCA and ensuring perfect control, or b) not enforcing the DMCA and beginning a socially wasteful technology arms race. The rule-making procedures under the DMCA offer some possibility for adjustment, but are strictly limited by the terms of the legislation and the Copyright Office's reluctance to intervene.<sup>378</sup> It is clear the situation is unlikely to improve without new initiatives.

*F. Balancing Plausibility and Comprehensiveness in the Non-commercial, Private Realm: Minimum Policy Advances*

Although we cannot be certain whether present industry developments threaten or advance the development of a "Celestial Jukebox,"<sup>379</sup> they clearly do threaten fair use and an extant "commons" of copyrighted material.<sup>380</sup> We

<sup>377</sup> See 17 U.S.C. §§ 512(b)(2)(E), (c)(1)(C), (d)(3) (2000).

<sup>378</sup> See *supra* notes 91-93 and accompanying text (describing the rule-making procedures). In particular, the Register of Copyrights's recommendations to the Librarian of Congress, since accepted by the Librarian and Congress, have narrowly interpreted "class" of works in §1201(a). See *Oversight Hearing on the United States Copyright Office: Hearing Before the Subcommittee on Courts, the Internet, and Intellectual Property* 107th Cong. (2001) (statement of Marybeth Peters). This interpretation, if it holds, is likely to limit the usefulness of the rule-making procedures.

<sup>379</sup> This is the slang term for a commercial database that permits users to purchase all available works online. See Charles Mann, *The Heavenly Jukebox*, ATLANTIC MONTHLY, Sept. 2000, available at <http://www.theatlantic.com/issues/2000/09/mann.htm> (last visited May 31, 2002).

<sup>380</sup> We recognize the potential tensions between celestial jukebox development and preservation of fair use. Nevertheless, we believe that the value of the commons may justify delaying the development of a universal commercial catalog of works on line. See, e.g., Dennis S. Karjala, *Federal Preemption of Shrinkwrap and On-line Licenses*, 22 U. DAYTON L. REV. 511, 518-521 (1997) (arguing that, even if all consumers were willing to sign away all of their rights, they should not be allowed to because the public has a strong interest in ensuring that a widely available work's unprotected elements become potential source material for other authors to create new and different works). Karjala further argues that copyright owners and consumers should not be allowed to directly contract because the public interest protected by the federal law is not represented in the contracting process. See *id.* at 518-20. Therefore, "any state contract rule that purported to validate any shrinkwrap license terms that most licensees would be willing to accept would inhibit – indeed, would reduce to naught – the benefits to the public that flow from the federal limitations on



can point to no recent developments to assure us that, left alone, the market would preserve these spheres. To the contrary, the growth of “clickwrapping,” the SDMI, and the CPRM demonstrates just the opposite.<sup>381</sup> Much of what Hannibal Travis writes of the publishing industry could apply to music as well. The “Celestial Jukebox” may have transaction cost benefits – but it has dangers as well:

As the public's easements in the public domain are transformed into piracy, into trespass, independent Web publishing will be steadily displaced by intensive exploitation of established works. The Oversoul that is cyberspace will give way to the Celestial Jukebox, to the corporate synergies of the diminishing number of publishers, networks, and studios. The agenda hinted at by the *Harper & Row* opinion, and aggressively advocated by the White Paper and other documents, namely the capture by copyright holders of the full social value of their works and the expansion of copyright infringement to encompass interference with any new licensing scheme, leaves no room for the independent Internet publisher's necessary easement upon the intellectual commons.<sup>382</sup>

The DMCA allows for content owners to back up the most stringent technological protections with legal action against those who would circumvent them, even for legitimate purposes.<sup>383</sup>

The music industry stands at a critical threshold. While rapid development of new digital distribution networks could provide massive profits to recording companies and artists alike, further delay, and over-extensive use of DRM technology, threaten to frustrate and alienate consumers. It is time to leverage the market forces that are presently threatening fair use into positive developments that can assure its future. While antitrust policymakers cannot prescribe business models to the industry, they can delay the worst business models by initiating lawsuits or failing to approve mergers. Antitrust authorities can preserve fair use from perfect control if they skillfully leverage industry concessions in return for permitting coordinated market initiatives.

As noted above, we cannot expect full implementation of all of the substantive policy goals that we have outlined.<sup>384</sup> Some of those goals conflict, and the dynamic field of intellectual property admits no permanent solutions. Effective copyright policy largely consists of choosing the right principles to guide institutions engaged in ongoing monitoring and enforcement.<sup>385</sup> We have, therefore, identified *four minimal standards* designed to protect fair use:

copyright rights.” *Id.* at 519-20.

<sup>381</sup> See *id.* at 520 (giving empirical evidence of these phenomena).

<sup>382</sup> Hannibal Travis, *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment*, 15 BERKELEY TECH. L.J. 777, 861 (2000).

<sup>383</sup> See *supra* Part I.

<sup>384</sup> See *supra* Part III.A.

<sup>385</sup> See *supra* Part III.D.3.

### 1. Minimum Standard 1: Immunizing Virtual Private Networks

Virtual private networks are a relatively recent development in online music distribution. A virtual private network is a small group of friends or associates who agree to share some or all of the resources on their hard drives with one another, yet are not acting in an “underground fashion.”<sup>386</sup> Rather, VPNs may constitute an attempt to build a commercial model for file sharing within the bounds of current copyright law.

VPNs deserve special solicitude because they only represent a slightly more convenient form of file sharing than have long been tolerated, even if not strictly allowed by law. As the *Sony* decision makes clear, the first sale doctrine and fair use combine to protect individuals who wish to share copyrighted content with their friends by passing on copies or by inviting friends over to watch with them.<sup>387</sup> Except for a few half-hearted public relations campaigns to the contrary, recording industry leaders have tacitly conceded that “sharing” by friends often involves duplicate copies of material. The VPN only makes this tolerated sharing of content easier.<sup>388</sup> Given the controversy that efforts to prosecute such small networks would raise, we do not believe that the record industry gives up much by allowing VPNs. Such networks might even be good for their business—they might allow users to sample different types of music, or to create informal record clubs, distributing costs among themselves for a common library of recordings.<sup>389</sup> However, to fully understand their legal status and potentially benign economic effects, it is important to define them more carefully.

Until it changed into the fee service Madster, the leading VPN was Aimster, a system that piggy-backed on AOL’s AIM instant messaging service.<sup>390</sup>

<sup>386</sup> See Cisco Systems, *The ABCs of VPNs: A Virtual Private Networking Primer for Enterprises*, at [http://www.cisco.com/offer/tdm\\_home/pdfs/vpn/VPN\\_ABCs.pdf](http://www.cisco.com/offer/tdm_home/pdfs/vpn/VPN_ABCs.pdf) (last visited May 31, 2002).

<sup>387</sup> See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984).

<sup>388</sup> We note the comment of Professor Jane Ginsburg that file-sharing in whatever form is not “sharing” because the user who “shares” does not thus make their copy unavailable to themselves – *i.e.*, he or she does not delete or give up their own copy. See Ginsburg, *Copyright Use and Excuse*, *supra* note 140, at 30. However it would be an exaggeration to argue that file sharing is “totally unlike” sharing that went before because users need not give up copies. The reality has been some duplication but on a limited scale between limited numbers of people – something our proposal seeks to recognize.

<sup>389</sup> The record club offers a humble example of a low margin, high volume business model. Members of record clubs agree to spend a certain amount of money within a set amount of time. In return, they either get free CD’s (the classic “12 CD’s for a penny” offer) or significantly reduced rates on CD’s purchased beyond those necessary to fulfill a membership obligation. See, *e.g.*, Columbia House, Columbia House Music Club, available at <http://www.columbiahouse.com/sa/ch/homepage.jsp> (offering “12 CDs for free (plus shipping and processing)”); see also KRASILOVSKY & SHEMEL, *Record Clubs*, in *THIS BUSINESS OF MUSIC*, *supra* note 51, at 345.

<sup>390</sup> See Gwendolyn Mariano, *Aimster Loses Domain Name Battle with AOL*, CNET

Aimster allowed users of AIM to see and swap files on selected areas of the computer's hard drive with their buddies on the messenger system.<sup>391</sup> Instead of just being able to send text messages to their buddies, they could transfer and receive files.<sup>392</sup> In effect, Aimster added a middle zone of "privication" between private ownership, like something that is on one's own PC that no one else can see, and publication, like the Napster approach of exposing my files to the world.<sup>393</sup> The technology meant that Aimster could create smaller, more hidden swap meets that are virtually untraceable because the indices of all these files were stored only on each AIM user's personal machine.<sup>394</sup>

Although VPN users cannot access as many songs as they could using a centralized database like Napster, they can feel more secure because the files come from a friend's machine, rather than a stranger's. Thus they are less likely to include Trojan horses or viruses.<sup>395</sup> There is also less strain on individual users' bandwidth, since only a select group can actually request files.

As avatars of privication, virtual private networks straddle the divide between public distribution (which involves large numbers of users) and private use of a single individual. If VPNs have too many members, or if persons join multiple VPNs, such networks would cease being private and would rightly be considered a tool of public distribution analogous to Napster. To address these problems, we propose limiting membership in VPNs to ten persons, and only permitting individuals to join one VPN at a time. Although the industry still might worry that serial membership in a number of VPNs could permit a "promiscuous" user to share a vast amount of music with a vast number of potential consumers, relatively simple serial copy management (analogous to that mandated by the Audio Home Recording Act) could address that problem.<sup>396</sup> Such DRM would employ robust and fragile watermarks to

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NEWS.COM, at <http://news.search.com/click?sl%2Cnews.43.232.942.0.7.Napster-like.0%2Chttp%3A%2F%2Fnews.cnet.com%2Fnews%2F0-1005-200-5993790.html> (May 21, 2001).

<sup>391</sup> See John Borland, *RIAA Sues Aimster Over File Swapping*, CNET NEWS.COM, at <http://news.search.com/click?sl%2Cnews.43.232.942.0.5.Napster-like.0%2Chttp%3A%2F%2Fnews.cnet.com%2Fnews%2F0-1005-200-6033575.html> (May 25, 2001).

<sup>392</sup> See *id.*

<sup>393</sup> See Jonathan Zittrain, *What the Publisher Can Teach the Patient: Intellectual Property and Privacy in an Era of Trusted Privication*, 52 STAN. L. REV. 1201, 1214-15 (2000). Zittrain argues that "a well-enforced technical rights architecture would enable the distribution of information to a large audience - publication - while simultaneously, and according to rules generated by the controller of the information, not releasing it freely into general circulation - privication." *Id.* at 1201.

<sup>394</sup> See Borland, *supra* note 391.

<sup>395</sup> See P. J. Huffstutter, *File-Swapping Aimster Offers Promise, Peril*, L.A. TIMES, Dec. 18, 2000, at C1.

<sup>396</sup> See Ginsburg, *Copyright and Control*, 101 COLUM. L. REV. at 1629.

prevent any piece of music from being copied more than, say, nine times (and only for members of one's own VPN) and would prevent any of the copies of that music from ever being copied.

Industry leaders might protest that they should get some compensation for those extra copies. However, it is difficult to see how small VPNs are different from the record clubs they have already endorsed. All the members of a VPN would be doing is pooling their resources to build a larger common collection of music. The industry certainly would not complain if five brothers and sisters pooled their allowances to buy a CD to which all could listen. In a given VPN, five individuals who would usually buy (and individually enjoy) ten or so CDs each year may well purchase (and enjoy) sixty or so collectively. Obviously the demand functions here are speculative. But VPNs could be as desirable a development as radio and record clubs, and should be allowed to proceed experimentally for the time being.

## 2. Minimum Standard 2: Disclosure of and Limits to DRM<sup>397</sup>

As discussed above, the confluence of code and law stands at present to reinforce the interests of content-holders over other parties by providing them with an absolute right of control.<sup>398</sup> We believe that such DRM techniques have negative externalities: They make content more difficult to use and pave the way to a pay-per-use world that stifles innovation. Thus, we advocate balancing copy-protection with usability.

DRM is problematic because it is concerned mainly with illegal use and not the lawful customer.<sup>399</sup> Copy protection enhances the difficulty and complexity of use for all consumers, who may also have to pay extra (through pay-per-use or by buying new hardware and software) for uses they had assumed they had purchased already. Moreover, aggressive DRM, such as that suggested in the form of Senator Hollings' CBDTPA mentioned in Part I above may create dire incompatibilities if applied at the level of hardware.<sup>400</sup>

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<sup>397</sup> Since the time of this writing, very similar issues have been raised in relation to copy-protected CDs, in a suit brought by a purchaser of a CD. In the case, *DeLise v. Farenheit Entertainment*, the purchaser complained that the CD was not labeled as protected, and that consumer protection laws had therefore been breached. There were also privacy concerns raised in the case. The bringing of this case (which was settled) indicates only that these issues are pertinent, and do not represent a significant concession on the part of the recording industry. See generally *Copy-Protected CD Makers Lose Battle*, ZDNET NEWS.COM, at <http://zdnet.com.com/2100-1104-843616.html> (Feb. 22, 2002).

<sup>398</sup> See *supra* Part II.

<sup>399</sup> See Andreas Pfeiffer, *Digital Rights Management's Hidden Dangers*, ZDNET NEWS.COM, at <http://www.zdnet.com.com/2102-11-528106.html> (Feb. 12, 2001).

<sup>400</sup> See Jakob Nielsen & Susan Farrell, *Nielsen on Useability: The Seven Sins of Copy Protection Tools*, INTERNET WORLD DAILY NEWS, available at <http://www.internetworld.com/news/archive/01232001d.html> (Jan. 23, 2001) ("[Copy protection] creates problems between compliant and noncompliant media and drives. On the user side, products that worked before stop working, and new products might never

Problems with copy protection in the software industry highlight the inadequacy of such an approach within the online regime: "Users hate it, and it doesn't really stop hackers from pirating programs anyway."<sup>401</sup> By stifling innovation and frustrating consumers, industry advocates of DRM threaten to throw the baby of new markets out with the bathwater of piracy.

People should be able to utilize content across the many devices that they own. Such a baseline expectation of usability will ultimately benefit artists and intermediaries by encouraging consumers to buy. If they can assume interoperability, consumers now skittish at the prospect of multiple incompatible devices will be more comfortable with investing in hardware, software, and content. DRM should only diminish the distributional capacity of online service intermediaries to the extent necessary to assure secure content.

Furthermore, DRM should respect individual users' privacy. The risks to privacy from some forms of copyright management technologies have been well noted.<sup>402</sup> Where metering systems are used, extensive personal information may be collected. Some enforcement techniques, especially on P2P networks, involve searching users' hard drives. We would recommend that anonymous payment systems be required and that disclosure of identifying information be banned.

We propose, in addition, adequate disclosure of all DRM techniques embedded in products.<sup>403</sup> Too often limitations on use are not clearly stated.<sup>404</sup> Disclosure guarantees the transparency of contracts between content producers and consumers and, it is hoped, more public discussion of the same. If users understand limitations, consumer sovereignty should eventually reward companies with limited DRM and discourage aggressive control over use.

Disclosure accords with the intuitive belief among consumers that they should be able to utilize products in customary ways. Consumers may never again be able to assume that music is "theirs" once purchased, subject to whatever use they choose for it. However, regulators should at least ensure that consumers can help shape the terms of use by requiring that limitations on a purchase are known beforehand.

Beyond privacy and disclosure limitations, we are reluctant to propose particular limits on DRM techniques at this early stage. Such techniques will change rapidly as new services are marketed. We only suggest that whatever

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work.").

<sup>401</sup> Richtel, *supra* note 2, at C2.

<sup>402</sup> See, e.g., Julie Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981, 1036-38 (1996).

<sup>403</sup> Both in response to past battles over easy reprography and present circumstances, many authors have advocated conspicuous notice of unusual copyright terms. See, e.g., Maureen A. O'Rourke, *Copyright Preemption After the ProCD Case: A Market-Based Approach*, 12 BERKELEY TECH. L.J. 53, 83-87 (1997) (offering qualified support for a rule requiring conspicuous disclosure of contract terms that diverge from copyright).

<sup>404</sup> See Gilmore, *supra* note 184.

minimum standards are imposed, they come in the form of a consent decree following an antitrust investigation.<sup>405</sup> As such, particular terms would be a matter for negotiation.

### 3. Minimum Standard 3: Inclusion of Public Interest Representation on Industry Standards-Setting Bodies

Finally, we believe it is important that members of public interest organizations have membership in all relevant digital rights management standards-setting bodies and a right to participate actively in all such bodies. In standards-setting bodies, we include all formal industry groups and discussion forums, as well as inter-industry groups and more formal standards setting organizations with responsibility for approving or recommending standards for adoption in both hardware and software. Given the variety of DRM techniques that are possible at hardware, software and operating system levels, it is important that all such bodies be included. The existence of consensus-based, loosely organized entities that coordinate the development and adoption of common standards and protocols has been one of the noted features of early Internet development.<sup>406</sup> This practice, though changing, continues in the form of the World Wide Web Consortium (“W3C”).<sup>407</sup> This institutional feature has been absent from the development of DRM in the copyright field. The more coordinated and centralized effort to develop protocols, the Secure Digital Music Initiative (“SDMI”), has been slow and unsatisfactory in its progress.<sup>408</sup>

Public interest groups should not be given veto power over the adoption of new standards, for that would be too great an interference in market forces and private ordering. Rather, the aim is to ensure representation of the public interest at least to some limited extent, and perhaps more importantly, to ensure a greater degree of transparency in any processes of development. We are concerned, in other words, about standards developed in smoke-filled backrooms and presented as a *fait accompli* to the public.

The obvious question is whether public interest representatives could effectively contribute to the debate over standards without having veto power over their development. They may not even be able to assure transparency – their inclusion would not prevent extra-organizational negotiation between major players. Moreover, “network effects” ensure that a particularly important player, like Microsoft, can effectively set standards for the rest of the industry regardless of organizations designed to assure broader input. One

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<sup>405</sup> See generally Burk & Cohen, *supra* note 334, at 55-68 (taking a similar approach in noting the difficulty of determining actual limits to facilitate fair use).

<sup>406</sup> See Paulina Borsook, *How Anarchy Works*, WIRED MAGAZINE, Oct. 1995, available at [http://www.wired.com/wired/archive/3.10/ietf\\_pr.html](http://www.wired.com/wired/archive/3.10/ietf_pr.html) (last visited May 31, 2002).

<sup>407</sup> See World Wide Web Consortium, at <http://www.w3.org> (last visited May 31, 2002).

<sup>408</sup> See Sam Costello, *Why Secure Digital Music Initiative Is Falling Apart*, IDG.NET, at [http://www.idg.net/ic\\_411846\\_1793\\_1-1681.html](http://www.idg.net/ic_411846_1793_1-1681.html) (Feb. 6, 2001).

might argue that SDMI has failed so far because a concentrated market renders it redundant.

Nevertheless, we remain convinced that requiring inclusion of public interest representatives would be of some benefit. First, to consider is a recent precedent for non-inclusion of such representatives, by SDMI itself, which refused membership to the Electronic Frontier Foundation (“EFF”) on the basis that it did not have any legitimate interest in the work of SDMI.<sup>409</sup> Our proposal would prevent such actions. Second, there is recent precedent for EFF action, and even some success, in a standards body that did allow membership and advocacy by public interest groups.<sup>410</sup> This in itself indicates some benefit to such inclusion. Finally, there are a number of large industries involved in digital music distribution online at present with varying, and at times conflicting, interests. The interests of content providers in maximal protection and control may conflict with the interests of providers of hardware and consumer equipment whose main appeal lies in ease of use. In this context, both sides need to cooperate. By including informal discussion forums, we hope to include as many opportunities for public interest participation as is reasonably possible. We would also recommend that such participation be a condition wherever negotiation occurs in the context of legislative reform. On many occasions, as Jessica Litman has chronicled in some detail, industry groups are told to go away and negotiate a deal before legislation is passed.<sup>411</sup> If such a legislative process continues, public interest representation would enhance its fairness.

Such representation would be preferable to the process proposed in the CBDTPA referred to in Part I, which envisages private negotiation of standards, under the threat of legislation in the absence of agreement. First, the legislation is quite apparently designed to increase property rights rather than exceptions for fair use, demonstrating again the problems of using the legislative process in this area. But even if that were not the case, the advantages we point to need to be instituted at the earliest stages so that public discussion of proposed standards is made possible. Public representation *during the discussions* is necessary. And the extreme sanction – the possibility of government-mandated standards – has few apparent supporters and would represent a massive intervention in the market.

#### 4. Other advances?

As was highlighted at the beginning of Part III, one cannot ensure fair competition and fair use of digital music online with a single set of proposals.

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<sup>409</sup> See Press Release, Electronic Frontier Foundation, Standards Committee Rejects Hard Drive Copy Prevention Scheme (Apr. 14, 2001) *available at* [http://www.eff.org/IP/DRM/CPRM/20010404\\_eff\\_t13\\_pr.html](http://www.eff.org/IP/DRM/CPRM/20010404_eff_t13_pr.html) (last visited May 31, 2002).

<sup>410</sup> See *id.*

<sup>411</sup> See Litman, DIGITAL COPYRIGHT, *supra* note 74, at 282-322 (detailing techniques for copyright law reform).

Rather than fixed rules, ongoing monitoring will be the key. Revision of the terms set out above may well be necessary from time to time. Furthermore, American law will need to respond to international developments, such as the new European Union Directive on Copyright in the Information Society, due to come into effect by January 2003.<sup>412</sup> This directive includes some very interesting provisions, including a requirement that, in the absence of voluntary measures by rightsholders, member states are to ensure that “fair use”-type exceptions to copyright law are given effect in the digital environment.<sup>413</sup> The agency involved would be well advised to monitor these developments in Europe and determine whether similar techniques would be useful in the United States.

### G. Institutional Mechanisms for Setting the General Terms of Fair Competition and Fair Use Policy

#### 1. Possible Institutional Mechanisms

Having outlined our policy recommendations, we are left with a key question: Which institution(s) can best promote them? This question has two main aspects. First, which institution(s) can best formulate the range of rules that will govern the use of digital music? Second, which institution(s) can best apply and implement these rules, either through enforcement with respect to entities that do not adhere to the rules or through continual monitoring? The rest of Section III will explore the first set of concerns. Section IV will cover the second.

The policies outlined could be enacted through legislation or delegated to an existing administrative body by Congress, or, potentially, undertaken by an existing authority, using *existing* powers.

As mentioned above, congressional action authorizing the kinds of regulation described above – through legislative amendment – is exceedingly unlikely.<sup>414</sup> Reformers who want results need to root their institutional strategy in the existing statutory framework. Fortunately, antitrust and consumer protection law, traditional brakes on expansive intellectual property rights, provide useful tools for promoting online music distribution.<sup>415</sup> We

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<sup>412</sup> See Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, Official Journal L 167, June 22, 2001, at 10-19.

<sup>413</sup> See *id.* at art. 6.4.

<sup>414</sup> If this is so, it rules out not only legislation, but also delegation by Congress of responsibility for such standards to the Library of Congress as was done in relation to the anti-circumvention provisions of the DMCA.

<sup>415</sup> See Stephanie Brauner, *Preparing Your Music Client For Web Distribution*, 22 HASTINGS COMM. & ENT. L.J. 1, 20-21 (1999) (listing a variety of defenses a contracting party can assert, including consumer protection); Merges, *Contracting Into Liability Rules*, *supra* note 322 (analogizing intellectual property rights to robust plants and antitrust laws to



therefore propose that antitrust authorities supplement existing copyright law with antitrust and consumer protection laws, which may provide limits to expanding copyright protections.

Two agencies, the FTC and the DOJ Antitrust Division, have already begun preliminary investigations into the recording industry, as noted above. Further, as discussed, there is evidence and analysis to suggest, at least at this preliminary stage, that some scrutiny is warranted.<sup>416</sup> Some preliminary background on the two agencies can aid in assessing their relative policymaking capabilities.<sup>417</sup>

The FTC was formed in 1914, when the Federal Trade Commission Act gave it broad powers to regulate business practices in the United States.<sup>418</sup> The FTC has many responsibilities, including enforcement of consumer protection and antitrust laws.<sup>419</sup> Although the Antitrust Division of the DOJ was established later in 1933, it has since come to predominate in antitrust matters.<sup>420</sup>

herbicide); *see also* Radio Telefis Eirann and Independent Television Publications Ltd. v. E.C. Commission (McGill T.V. Guide Limited Intervening) [1995] 4 C.M.L.R. 718, 762-63 [hereinafter “the McGill case”] (recognizing the role of European competition law (the equivalent of antitrust) in defining the scope of copyright).

<sup>416</sup> *See* Richtel, *supra* note 2, at C2. (regarding the DOJ); *see also* Press Release, Federal Trade Commission, *FTC Charges Warner Music and Universal Music*, July 31, 2001, available at <http://www.ftc.gov/opa/2001/07/tenors.htm> (last visited May 31, 2002) (explaining that “[i]n an effort to shield . . . new products from competition, Warner and PolyGram agreed not to discount and not to advertise certain of their catalog products for a limited period of time”).

<sup>417</sup> Until 2002, the FTC and the DOJ had shared authority over all antitrust concerns, dividing cases among themselves on an ad hoc basis. The leaders of the DOJ’s Antitrust Division (Charles James) and the FTC (Timothy Muris) have recently signed an agreement allocating antitrust enforcement authority over the entertainment industry and software, *inter alia*, to the DOJ. Federal Trade Commission, *FTC and DOJ Announce New Clearance Procedures for Antitrust Matters: Memorandum of Agreement Allocates Industry Sectors Between Agencies*, Mar. 5, 2002, available at <http://www.ftc.gov/opa/2002/03/clearance.htm> (last visited May 31, 2002). The status of the agreement is in doubt; Senator Ernest Hollings has threatened to withhold appropriations to the FTC if it is maintained. *See Hollings Questions Ashcroft about Merger Review Agreement*, COMMUNICATIONS DAILY, Feb. 27, 2002. If the allocation agreement holds, the following section (assessing the relative competence of the FTC and the DOJ to regulate the music industry) may be moot. *Id.* However, given that the memorandum of agreement was largely based on a personal friendship between James and Muris, it may not survive past the presidency of George W. Bush. *See Muris Pitches FTC Common Carrier Jurisdiction to House*, COMMUNICATIONS DAILY, Apr. 11, 2002.

<sup>418</sup> 15 U.S.C. § 41 (2000).

<sup>419</sup> *Id.* §§ 45-47; *see also* Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement*, 77 OR. L. REV. 1383, 1389 (1998).

<sup>420</sup> *See* Waller, *supra* note 419, at 1430 (arguing that the Antitrust Division has had greater practical independence than the FTC throughout most of its history, that its

The FTC has authority under the Sherman and Clayton Acts to investigate combinations in restraint of trade and price discrimination.<sup>421</sup> The Federal Trade Commission Act empowers the FTC, among other things, to prevent unfair methods of competition; prevent unfair or deceptive acts; seek monetary redress and other relief for conduct that injures consumers; promulgate trade regulation rules that specifically define acts or practices that are unfair or deceptive; establish requirements designed to prevent such unfair or deceptive acts or practices; conduct investigations relating to the organization, business, practices, and management of entities engaged in commerce; and make reports and legislative recommendations to Congress.<sup>422</sup> The FTC has used this broad mandate to regulate Internet privacy policies,<sup>423</sup> a useful precedent both procedurally and substantively for our purposes.

Extant doctrines surrounding monopolization and merger review, as already outlined above, render the intervention of both the DOJ and the FTC institutionally plausible.<sup>424</sup> Like Microsoft and Intel before them, the major record companies appear to be trying to leverage control over a copyrighted item (musical content) into control over retail, resale, rental and other markets. Although the "Big Five" have announced a number of transactions with Web portals and MTV,<sup>425</sup> smaller distributors complain that they are being cut out of the key deals.<sup>426</sup> Industry consolidation for the purposes of online music distribution may mean that, like the market for mechanical licenses dominated by BMI and ASCAP, the market for sound recordings will turn into an effective duopoly. That level of market concentration has provoked antitrust monitoring and investigation in the past and should do so now.<sup>427</sup>

We state again that findings of antitrust breaches, especially in the controversial area of the relationship between intellectual property and antitrust law, are highly fact-specific and require detailed analysis of complex facts, and without access to all the evidence, we cannot venture a definite opinion as to whether there has in fact been some breach. The proposed remedy below via consent order is therefore necessarily speculative. But the speculation is

procedures (albeit informal) are fairer, and its decisions worthier of court deference than those of the FTC). Hereinafter, we will assume that the Antitrust Division of the DOJ is the acting administrative agency when discussing an antitrust centered regulatory scheme.

<sup>421</sup> 15 U.S.C. §§ 1, 13.

<sup>422</sup> *Id.* §§ 41-58; see also Federal Trade Commission, *Statutes Relating to Both Missions*, available at <http://www.ftc.gov/ogc/stat1.htm> (last visited May 31, 2002) (explaining 15 U.S.C. §§ 41-58, as amended).

<sup>423</sup> See Federal Trade Commission, *Privacy Initiatives*, at <http://www.ftc.gov/privacy> (last visited May 31, 2002).

<sup>424</sup> Although it may seem disingenuous to argue for such an investigation before we are certain that unfair practices will hamper online distribution, the need for more information about industry practices is indisputable.

<sup>425</sup> See *supra* notes 19-24, 103-106 and accompanying text.

<sup>426</sup> See Saxe, *supra* note 55, at 23.

<sup>427</sup> See *supra* note 370 and accompanying text.

worthwhile. At least some evidence supports scrutiny, as outlined above. Moreover, we submit that this scrutiny will need to be ongoing given the dynamic nature of the market and the ongoing opportunities, if MusicNet and PressPlay continue, for collusion between competitors.

If there were to be some basis for the suggestion of antitrust breaches, this would provide either of the agencies the leverage to argue for consent orders. In accordance with our approach, such consent orders should not impose *de facto* compulsory licensing at this stage. Rather, we suggest they should aim to protect the consumers' interests. There is an obvious objection to this proposal: that the measures in the proposed "consent order" relate, not to the direct preservation of competition, but rather to the preservation of particular aspects of copyright policy – *i.e.*, to matters that are Congress's concern or perhaps that of the Librarian of Congress in his delegated role, not antitrust regulators. Even assuming there is some antitrust breach which can be established on the facts, the ordinary remedy would consist of measures to ensure competition, rather than measures aimed at specific aspects of consumer welfare. There is no doubt that the proposal is an extension of the traditional role of either the FTC or DOJ. However, it is an extension that could be justified in the particular circumstances here. Antitrust is not aimed at protecting particular market entrants (such as Napster or others),<sup>428</sup> but to ensure that social welfare – including consumer welfare – is maximized. Thus, some provisions in consent orders going to protection of interests other than those of distributors may be justified. We have identified problems in the present constellation of institutions that do not inspire confidence that these desirable ends could be achieved by resort to those institutions. Second, antitrust law is concerned with strong property rights. Strong property rights are of very particular concern where copyright owners are able to control all *use* of copyrighted works; as we have illustrated in Part I, they now can. They are also of particular concern where the copyright owners concerned constitute a very small, very powerful group. These concerns would not be as great, and the threat to user freedom likely less, if there were more competition in the market, but such competition is unlikely to emerge. Finally, all the other possible institutions cannot adapt copyright with sufficient nuances, on an ongoing basis, as would be possible through the antitrust regulators and through a mechanism such as a consent decree – a notably more flexible mechanism than "one size fits all" intellectual property regulation.<sup>429</sup>

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<sup>428</sup> See David McGowan, *Innovation, Uncertainty, and Stability in Antitrust Law*, 16 BERKELEY TECH. L.J. 729, 788 (2001).

<sup>429</sup> See Lawrence A. Sullivan, *Is Competition Policy Possible in High Tech Markets?: An Inquiry into Antitrust, Intellectual Property, and Broadband Regulation as Applied to 'The New Economy'*, 52 CASE W. RES. L. REV. 41, 62 (2001).

## 2. The FTC and DOJ as Antitrust Policymaking Institutions

Both the DOJ and the FTC could initiate a program of monitoring fair competition and protecting fair use.<sup>430</sup> Leaders in both organizations have focused on the special challenges raised by the intersection of intellectual property and antitrust law. For example, the DOJ has cautioned the Supreme Court to avoid addressing the questions raised by the intersection of antitrust law and intellectual property until an appropriate case arises.<sup>431</sup> Furthermore, given the commitment of both the Clinton and Bush administrations to the Microsoft case, it is likely that the DOJ will scrutinize efforts by dominant IP owners to leverage their patent or copyright monopoly into broader market power. The FTC has also taken an activist approach. Ex-FTC Chairman Robert Pitofsky has stressed the potential synergy between intellectual property and antitrust law. During his tenure, his agency was at the forefront of IP/antitrust concerns, as evidenced by its inquiries into Intel and CD price-fixing.<sup>432</sup>

Although the DOJ and FTC have overlapping jurisdictions, they have different institutional competences.<sup>433</sup> While the DOJ can prosecute antitrust violators criminally and civilly, the FTC can only sue civilly.<sup>434</sup> Only the FTC can sue under the Federal Trade Commission Act (the unfair competition law).<sup>435</sup> The FTC Act is an antitrust law similar to the Sherman and the Clayton Acts, but it grants a greater degree of discretion to the FTC, under §

<sup>430</sup> See Diane Leenheer Zimmerman, *Adrift in the Digital Millennium Copyright Act: The Sequel*, 26 U. DAYTON L. REV. 279, 281 (2001) (asserting that the Copyright Office has so far been exceptionally quiescent on these issues, despite the role envisioned for it in the DMCA).

<sup>431</sup> See, e.g., Brief for the United States as Amicus Curiae, *CSU, L.L.C. v. Xerox Corp.*, 203 F.3d 1322 (2000), *cert. denied*, 531 U.S. 1143 (2000) (arguing against Supreme Court review of a Federal Circuit case protecting the rights of intellectual property patent holders to refuse to license their inventions), available at <http://www.usdoj.gov/osg/briefs/2000/2pet/6invit/2000-0062.pet.ami.inv.pdf> (last visited May 31, 2002).

<sup>432</sup> See Robert Pitofsky, *Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy*, 16 BERKELEY TECH L.J. 535 (2001) (discussing whether the present level of intellectual property protection is adequate, and whether antitrust enforcement has protected incentives to innovate); Robert Pitofsky, *Challenges of the New Economy: Issues at the Intersection of Antitrust and Intellectual Property*, Address at Conference: An Agenda for Antitrust in the 21st Century (June 15, 2000), available at <http://www.ftc.gov/speeches/pitofsky/000615speech.html> (last visited May 31, 2002).

<sup>433</sup> See FTC, *Mission Statement*, at <http://www.ftc.gov/bc/mission.htm> (last accessed May 31, 2002) (stating that both the DOJ and the FTC are responsible for enforcing the federal antitrust laws and consult with each other before opening a case to avoid duplication).

<sup>434</sup> See E. THOMAS SULLIVAN & HERBERT HOVENKAMP, *ANTITRUST LAW: POLICY AND PROCEDURE* 69 (4th ed. 1999).

<sup>435</sup> 15 U.S.C. § 45 (2000).

5(a), and also protects consumers from unfair and deceptive acts and practices.<sup>436</sup>

Both agencies are staffed by lawyers and economists. At the DOJ, the ultimate decision whether to intervene is made by the Assistant Attorney General who heads the Antitrust Division.<sup>437</sup> At the FTC, such decisions are made by the five commissioners through a majority vote.<sup>438</sup> While the DOJ initiates most actions *sua sponte*,<sup>439</sup> the FTC is slightly more permeable to public input. According to its website, "The FTC may begin an investigation in different ways. Letters from consumers or businesses, Congressional inquiries, or articles on consumer or economic subjects may trigger FTC action."<sup>440</sup> After the FTC has initiated an investigation, if it believes a violation of the law occurred, it may either "attempt to obtain voluntary compliance by entering into a consent order with the company . . . [or] [i]f a consent agreement cannot be reached, [it] may issue an administrative complaint."<sup>441</sup> The DOJ operates through a similar process. But while the DOJ must file suit in an Article III court,<sup>442</sup> the FTC may file suit in federal court or before an administrative law judge.<sup>443</sup>

While the DOJ has gained a higher profile in this area, the FTC actually covers a somewhat broader area of market and consumer concerns. The FTC has also taken a lead role in promoting online privacy, a key component of the effort to cabin invasive DRM techniques.<sup>444</sup> While the DOJ's economists are more familiar with traditional antitrust analysis, the FTC's experts on consumer protection are likely to be slightly more capable of marshaling new legal theories to advance their cases.<sup>445</sup>

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<sup>436</sup> See 15 U.S.C. § 45(a); SULLIVAN & HOVENKAMP, *supra* note 434, at 73.

<sup>437</sup> See DOJ, *Overview: Antitrust Division*, at <http://www.usdoj.gov/atr/overview.html> (last visited May 31, 2002).

<sup>438</sup> See 16 C.F.R. § 4.14 (1985).

<sup>439</sup> See SULLIVAN & HOVENKAMP, *supra* note 434, at 69-70.

<sup>440</sup> FTC, *How the FTC Brings an Action*, at <http://www.ftc.gov/ftc/action.htm> (last visited May 31, 2002).

<sup>441</sup> *Id.*

<sup>442</sup> See DOJ, *Antitrust Division Manual*, at <http://www.usdoj.gov/atr/foia/divisionmanual/three.htm> (last accessed May 31, 2002).

<sup>443</sup> See FTC, *Mission Statement*, at <http://www.ftc.gov/bc/mission.htm> (last visited May 31, 2002).

<sup>444</sup> See FTC, *Privacy Initiatives*, at <http://www.ftc.gov/privacy/index.html> (last visited May 31, 2002).

<sup>445</sup> See generally *In re Napster Copyright Litigation*, 191 F. Supp. 2d 1087, 1102-06 (N.D. Cal. 2002) (discussing copyright misuse doctrine); *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970, 976 (4th Cir. 1990) (deviating from the doctrine that copyright misuse is bound together with antitrust principles by concluding that the misuse doctrine is not simply a branch of antitrust law, or an expansion of patent doctrine, but serves to promote the policy goals behind copyright); CRAIG JOYCE ET AL., *COPYRIGHT LAW* 810 (4th ed. 1998) (explaining the chief new legal theory of misuse). Many commentators have

Admittedly, the FTC has some key disadvantages. Although its past participation in Internet privacy policy provides some precedent for our proposal, the situation is not identical. The area of online privacy was not in any agency's jurisdiction when the FTC took it on.<sup>446</sup> This contrasts with copyright, where a number of different government entities – the Registrar of Copyrights, DOJ (through the consent orders entered into with ASCAP and BMI), the Senate Judiciary Committee, the House Commerce Committee (in the context of the DMCA), and even the Commissioner of Patents and Trademarks – have been involved for some time.<sup>447</sup> The FTC would have more difficulty intervening here because there are so many other competing interests and competencies. The FTC may need specific legislative mandate to fully regulate this area, and even if it did intervene, some skeptics doubt that the FTC has the expertise necessary to keep up with fast-paced technological change.<sup>448</sup>

Nevertheless, the FTC is an administrative agency well-suited for the role of hedging intellectual property rights with public interest privileges. Therefore, we believe that the current antitrust investigation launched by the DOJ (focused on the market structure of the music industry) should be

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agreed, however, on the vitality of the doctrine that copyright misuse is bound together with antitrust principles. See, e.g., Brett Frischmann & Dan Moylan, *The Evolving Common Law Doctrine of Copyright Misuse: A Unified Theory and Its Application to Software*, 15 BERKELEY TECH. L.J. 865, 868-69 (2000); David Scher, Note, *The Viability of the Copyright Misuse Defense*, 20 FORDHAM URB. L.J. 89, 102-3 (1992); Richard Stitt, Comment, *Copyright Self-Help Protection as Copyright Misuse: Finally the Other Shoe Drops*, 57 UMKC L. REV. 899, 899 (1989); Note, *Clarifying the Copyright Misuse Defense: The Role of Antitrust Standards and First Amendment Values*, 104 HARV. L. REV. 1289, 1290 (1991) (arguing that, in addition to instances of antitrust violations, "courts should also uphold misuse defenses when the plaintiff's conduct threatens to undermine the fundamental copyright goal, rooted in the first amendment, of promoting the dissemination of ideas and information").

<sup>446</sup> See Steven Hetcher, *The FTC as Internet Privacy Norm Entrepreneur*, 53 VAND. L. REV. 2041, 2057 (2000).

<sup>447</sup> PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY* (Hill and Wang 1994).

<sup>448</sup> See Julie E. Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089, 1137-42 (1998); Julie E. Cohen, *Some Reflections on Copyright Management Systems and Laws Designed to Protect Them*, 12 BERKELEY TECH. L.J. 161, 178 (1997); see also Boyle, *The First Amendment and Cyberspace*, *supra* note 250, at 344. Cohen argues that:

The FTC and the Justice Department's Antitrust Division proved rather more skeptical about the unvarying menu of intellectual property expansion. Both political appointees and civil servants outside the PTO saw the danger of anti-competitive effects, costs to consumers and market concentration, particularly in the context of computer networks, where concern about "lock-in" effects and path dependency were being popularized by the Microsoft case. To some extent, these countervailing forces prevented the Administration's Internet strategy from being completely dominated by an agenda of intellectual property maximalism.

*Id.*

complemented by an investigation by the FTC (focused on the consumer protection concerns raised by DRM). Although most FTC investigations are private in order to “protect both the investigation and the company,” a public investigation can provide the agency with significant leverage.<sup>449</sup>

Since both the DOJ and FTC have extracted concessions from companies that need merger review,<sup>450</sup> both can offer the suspension of the investigation as a “carrot” to induce industry compliance with standards of fair use protection.<sup>451</sup> Preliminary stages of the investigation should allow the agency to develop a better sense of whether anti-competitive licensing practices are likely. The agency would only suspend the investigation if the companies agreed to the following, or substantially similar, measures:<sup>452</sup>

*Terms of the Proposed Consent Order:*

CONSENT ORDER

The following consent order is to be entered between Universal, Warner, Sony, EMI, and BMG [hereinafter “the companies”] and the FTC [hereinafter “the agency”]. Aware of significant potential anticompetitive effects of the companies’ decision to consolidate digital licensing procedures into the MusicNet and Pressplay services, the agency initiated an antitrust investigation into the potential coordination of the companies. In exchange for the agency’s suspension of this investigation, the companies agree to the following measures. The measures are to be interpreted in light of the intent of this agreement: to preserve customary fair use privileges, as a method of advancing the

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<sup>449</sup> See FTC, *How the FTC Brings an Action . . .*, at <http://www.ftc.gov/ftc/action.htm> (last visited May 31, 2002).

<sup>450</sup> Markets may punish allegations of collusion more efficiently than judicial procedures. For example, if the FTC indicates that a merger is likely to go ahead, stock prices rise; if not, they fall. By the same token, by indicating that it may eventually “undo” deals, it substantially decreases the value of those deals to stock buyers.

<sup>451</sup> See Brad King, *Music Rights Battle Spins On*, WIRED NEWS, Oct. 17, 2001, at 1, available at <http://www.wired.com/news/politics/0,1283,47632,00.html> (last visited May 31, 2002) (noting that the government works out a settlement with digital distributors in 70 percent of cases); Hetcher, *supra* note 446, at 2047 (stating the FTC threatened to propose privacy legislation unless substantial new self-regulation occurred).

<sup>452</sup> The use of antitrust law proposed moves beyond the traditional bounds of antitrust law. The protection of free speech and encouragement of creative interaction clearly fall outside the typical sphere of antitrust. But antitrust and fair competition consent orders have long attempted to improve corporate practices in ways that go beyond mere promotion of economic efficiency. We follow this tradition by using the apparatus of antitrust to effect the broader goals of copyright policy. Such aims are consonant with the larger goals of antitrust law, since the protection of fair use may have pro-competitive consequences. Furthermore, the mechanisms established in antitrust law are peculiarly capable of forwarding these aims.

constitutional values and public policy behind statutory copyright protections.

### Immunizing Virtual Private Networks

The companies agree not to suppress peer-to-peer networks with substantial non-infringing uses. The companies agree not to initiate (or support) legal action against virtual private networks with less than ten<sup>453</sup> users. This section shall not preclude the companies' efforts to monitor such networks within the limits of existing and future laws, including the Digital Millennium Copyright Act, to ensure that they are actually private on-line communities. But such monitoring is subject to limits enumerated in Parts III and IV of this agreement.

### Opening Up Standard-Setting Bodies

The companies agree not to participate in any standard-setting bodies without public interest representation. Standard-setting bodies shall include formal industry groups and discussion forums, as well as inter-industry groups and more formal standards setting organizations with responsibility for approving or recommending standards for adoption in *both* hardware and software. If the standard-setting bodies are consensual, at least one member of a 501(c)(3) organization must be appointed for every thirty industry representatives. If the standard-setting body makes decisions on a majoritarian or staked basis (where stakes are based on the amount invested in or contributed to the organization), public interest representation must be at one-half the level needed to effectively block action.

### Publicly Disclosing Digital Rights Management Methods

The companies agree to disclose fully all DRM techniques to potential consumers before purchase. Such techniques must also be filed with the FTC at the time they are implemented. DRM techniques include but are not limited to TCPA, CPRM, watermarking, worms, and susceptibility to degrading aspects of operating systems and hardware. Any computer-user monitored by TCPA or worms used by the companies has the right to demand full disclosure of the uses to which this information is put.

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<sup>453</sup> Note that it is necessary, to some extent, to "pluck a number out of the air." The number ten seeks to reflect to some extent the basis on which we are recommending this exemption: namely, the desire to preserve personal uses, and the kinds of uses generally enabled under previous analogue technology, without allowing the network to grow to such an extent that it truly represents a public, rather than a private distribution.



### Limiting Digital Rights Management

No DRM technique shall unreasonably invade a consumer's privacy. Consumers have the right to demand any records of use compiled by the companies. Rights management agencies employed by the companies shall process disputes in a timely manner, following procedures analogous to those included in the Fair Credit Reporting Act.<sup>454</sup>

An obvious question arises: Who will be responsible for monitoring and enforcing this consent order? Having translated our policy goals into legal rules in this section, we explore institutions for monitoring and enforcing the rules in Section IV. Real reform must be situated in appropriate policy-making and policy-applying bodies. Striking a proper balance between administrative agencies and courts depends on (1) examining their relative institutional competencies, (2) reflecting on the types of balances that have been struck in the past, and (3) projecting the types of disputes likely to arise under the language proposed above. We undertake each task below, and conclude with the proposal of a fine-grained monitoring and enforcement process.<sup>455</sup>

#### IV. POLICY APPLICATION

##### *Introduction*

We conclude by comparing methods of applying the policies recommended above.<sup>456</sup> If these policies were made law, both courts and administrative agencies would need to implement them flexibly and creatively. In an era of rapid technological and economic change, in which the practices of copyright exploitation and the means for consuming copyright works are not stable, ongoing enforcement and monitoring is a crucial part of protecting both competition and user interests. After an agency has promulgated rules, whether in the form of regulation, or via a consent order, both courts and administrative agencies will need to implement it. A good deal of legal scholarship has focused on the appropriate division of power between these two policy-applying entities.<sup>457</sup> After briefly reviewing this literature, and the particular challenges inherent in applying policy in this particular environment, we consider how the general strengths and weaknesses of courts and

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<sup>454</sup> See generally Maureen A. O'Rourke, *Copyright Preemption After the ProCD Case: A Market-Based Approach*, 12 BERKELEY TECH. L.J. 53, 83-87 (1997) (offering qualified support for a rule requiring conspicuous disclosure of contract terms that diverge from copyright).

<sup>455</sup> See *infra* Part IV.

<sup>456</sup> See *supra* Part III.

<sup>457</sup> See *infra* Part IV.A.

administrative bodies relate to the particular problems they are most likely to face in the process of applying the proposed reforms to copyright law and policy.

Since we are primarily concerned with the maintenance of user privileges, these problems fall into two categories: a) monitoring the relevant companies' legal and business initiatives and b) regulating the anti-circumvention technology used to protect their intellectual property. The rest of this section systematically compares courts' and administrative agencies' capacities to apply each policy. After considering the general strengths and weaknesses of judges and bureaucrats, we focus on the particular history and current status of copyright/antitrust and copyright/consumer protection conflicts. Finally, this article recommends a larger role for administrative agencies than they have previously enjoyed in this realm.

#### A. *Reflections on the Relative Institutional Competence of Administrative Agencies and Courts*

Both courts and administrative agencies have traditionally enforced the antitrust laws, and both would have an important role in implementing the proposed policies on digital distribution of music. Existing scholarship examining the appropriate division of power between these two entities, complemented by the comparative institutional analysis pioneered by Neil Komesar, should provide some preliminary intuitions about the proper roles of judges and administrators in implementing policy in this arena.<sup>458</sup>

##### 1. Adjudication vs. Rulemaking

The difference between policy-making and policy-application is not always clear. The formal distinction between statutes and their interpretation obscures the diverse ways in which statutes can be applied. Administrative law scholars have ordered this diversity by distinguishing between rulemaking and adjudication. The bureaucratic rulemaking process is designed to serve large numbers of parties affected by an ambiguous statute, while adjudication is appropriate for a small number of parties disputing the possible violation of a law.<sup>459</sup> The rulemaking process is often slower than individual adjudication,

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<sup>458</sup> Komesar examines methods of allocating authority between bureaucracies, legislatures, courts, and markets. KOMESAR, *supra* note 341, at 3.

<sup>459</sup> See Peter Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process*, in *THE LIMITS OF THE LAW* (Westview Press 2000), 139, 153 (distinguishing the courts and administrative agencies on the basis of their institutional purpose, typical rules, and decision procedures). *But see* Owen Fiss, *Injunctions and The Forms of Justice*, 98 HARV. L. REV. 1 (1978) (challenging traditional distinctions between judicial and executive functions in the context of desegregation actions requiring complex and continuing administrative interventions by courts).

but is sometimes faster than the development of judge-made doctrine, which requires a series of cases raising pertinent issues.<sup>460</sup>

Both courts and administrative bodies have had an important role in the application of copyright policy.<sup>461</sup> Widespread media attention to the *Napster* case may give the impression that judges are the key actors in the field of music copyright. But the quiet, largely behind-the-scenes work of the Copyright Office has influenced the level of remuneration for copyright-holders<sup>462</sup> and the practical effect of new legislation, like the DMCA.<sup>463</sup> As more music moves online, politicians will need to decide to what extent statutory interpretation should be the final result of a formal rulemaking process versus the piecemeal aggregation of court decisions. To what extent should we put specific disputes in front of specialist tribunals, as has been done by conferring power on the Copyright Office's experts in the context of anti-circumvention rulemaking, or in front of generalist judges?

As the chart above suggests, each policy-applying entity has unique competencies and liabilities. To put the problem schematically, we might re-style the questions above in more general terms. How do we ensure that the rulings generated by courts continue doing justice in particular cases, yet do not interfere with the development of stable entitlements and expectations? How do we keep the principles assuring the "local maxima" of fair rulings from ossifying into barriers of "global maxima" sought by rulemakers?<sup>464</sup>

Perhaps the most important recent contribution to this venerable debate has been made by advocates of comparative institutional analysis. Neil Komesar reminds us to aim for arrangements which enable participation while tapping the unique competencies of current institutions.<sup>465</sup> These concerns roughly

<sup>460</sup> See Peter Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law*, 74 COLUM. L. REV. 1231, 1245 (1974) (stating that the rulemaking process is clogged with obstacles).

<sup>461</sup> Although agencies can both adjudicate and make rules, this article focuses on the latter.

<sup>462</sup> As in, for example, the recent Copyright Arbitration Royalty Panel determination on Webcasting royalties. See *Report of the Copyright Arbitration Royalty Panel, Rates and Terms for Statutory License For Eligible Nonsubscription Services to Perform Sound Recordings Publicly by Means of Digital Audio Transmissions ("Webcasting") and to Make Ephemeral Recordings of Sound Recordings*, Feb. 25, 2002, available at [http://www.copyright.gov/carp/webcasting\\_rates.html](http://www.copyright.gov/carp/webcasting_rates.html) (last visited May 31, 2002).

<sup>463</sup> For example, through the first rulemaking on exceptions to 17 U.S.C. § 1201. See Library of Congress, *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 37 C.F.R. § 201 (2000).

<sup>464</sup> For a discussion of local and global maxima in policymaking, see JON ELSTER, *ULYSSES AND THE SIRENS* (Cambridge University Press 2nd ed. 1984).

<sup>465</sup> As Komesar observes, "variation in the performance of an institution is tied to the participation of important institutional actors . . . . As such, I emphasize the activities of consumers, producers, voters, lobbyists, and litigants. . . . In this sense, the adjudicative and

map to classic administrative balancing between democracy and efficiency. But they may be specified still further in our context. Proper monitoring and regulation can only occur when those who are applying policy have confronted the problems of capture and opportunism, differing political values, and bounded rationality. Gerald Brock describes the solutions to these problems in more detail:<sup>466</sup>

1. **Opportunism:** Controlling power to be certain it is used only in the public interest;

2. **Differing Political Values:** Defining the public interest on issues for which any decision helps some people but hurts others, and for which there are differing political views among those who are not personally affected by the issue;

3. **Bounded Rationality:** Guarding against errors caused by the policy maker's lack of expertise or inability to fully utilize the available information to devise policies that accomplish given policy goals.

We can compare potential institutional arrangements with reference to these values. A forum enables democratic participation if it publicly resolves conflicts over political values after giving each relevant perspective some chance to be heard. An efficient and competent institution minimizes opportunism and bounded rationality. Both legitimacy and expertise are important.<sup>467</sup> Both are factors in the following analysis of the advantages and disadvantages of courts and agencies in the context of antitrust regulation of online music distribution.

## 2. General Institutional Advantages of the Courts

As Tocqueville has noted, sooner or later, nearly every great American political dispute is converted into a court case.<sup>468</sup> In an exceptionally diverse and pluralistic nation, the judiciary stands as the last bastion of rationality in a maelstrom of incommensurable rhetorical appeals. Courts force litigants to translate their dispute into the language of law. In the realm of copyright, vague claims of property, justice and "incentives and rewards" are, for example, matched up to decades of doctrine defining fair use and "effects on the market" in concrete cases. In the area of antitrust, broad statutory

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political processes are like the market, with its myriad of buyers and sellers." KOMESAR, *supra* note 331, at 7.

<sup>466</sup> See GERALD BROCK, TELECOMMUNICATIONS POLICY FOR THE INFORMATION AGE: FROM MONOPOLY TO COMPETITION 7 (Harvard University Press 1994).

<sup>467</sup> See PETER SCHUCK, THE LIMITS OF THE LAW: ESSAYS ON DEMOCRATIC GOVERNANCE 47-48 (Westview Press 2000) (arguing that democratic values like participation and transparency are important, but must be balanced by the ability of institutions to process information).

<sup>468</sup> See ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 270 (J.P. Mayer ed. & George Lawrence trans., Harper & Row 1969).

mandates of such legislation as the Sherman Act are translated to reflect economic understandings and the purposes of furthering competition.<sup>469</sup>

The impartial language of courts is, in part, a by-product of the neutrality of their personnel. Article III federal judges have life tenure (during good behavior) and are largely protected from political pressure.<sup>470</sup> The process of appointment has become increasingly partisan, but judges are uniquely capable of resisting the interest group and fund-raising pressures that afflict elected (or high-ranking appointed) members of the federal government.<sup>471</sup> The key advantage of the courts in the context of copyright law therefore is that they are far less likely than the legislature (and arguably the executive branch) to be captured by the interests of copyright owners or any particularly concentrated group of interested parties (as discussed in Part III above).

While Congress usually legislates with an eye to the future, courts must deal with the past. Before a suit can be filed, the circumstances to be considered must have crystallized into some concrete "case or controversy." New technology can be judged in terms of its actual operation. In an area of rapid and unpredictable development, this is a considerable advantage over both legislators and rulemaking bureaucrats who must try to deal in advance with possible future developments. Past legislative efforts to prognosticate in copyright law do not inspire confidence. In general, copyright legislation tends to focus on the particular interests at play on the day the law is drafted rather than the interests of future, unknown, unknowable developers of new technologies.<sup>472</sup> Despite the length of time they take to make decisions, courts nevertheless have certain advantages in uncharted areas of law relating to the Internet, because they will encourage both sides on an issue to cooperate in identifying problems and, owing to the nature of common law development through incremental addition of cases, will take on an "informative," almost investigative role, creating a body of legal principle.<sup>473</sup>

Courts are able to take a piecemeal, case-by-case approach.<sup>474</sup> Legislatures must state principles of general application, whereas courts can decide

<sup>469</sup> See generally McGowan, *supra* note 428, at 741, 752 (2001) (describing antitrust law as "an interesting mixture of statutory interpretation and common-law decision-making," starting from the "open-ended language of [the] statute" and noting that the courts have been left to articulate just what behavior is "bad" by antitrust standards).

<sup>470</sup> See U.S. CONST. art. III.

<sup>471</sup> See J. MASHAW, ET AL., *ADMINISTRATIVE LAW* 768 (West Group, 4th ed. 1998) at 35 (stating that approximately the top 3,000 appointments in the executive branch are political).

<sup>472</sup> On the process of legislating in the copyright arena, and the tendency of legislation to reflect a compromise between competing interests, See generally Jessica Litman, *Copyright Legislation and the Technological Age*, 68 OR. L. REV. 275 (1989); JESSICA LITMAN, *DIGITAL COPYRIGHT* (2001).

<sup>473</sup> See Thomas K Richards, Note, *The Internet and Decisional Institutions: The Structural Advantages of Online Common Law Regulation*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 731, 736-37 (2000).

<sup>474</sup> See SCHUCK, *supra* note 467, at 155 (explaining that "most court adjudication . . . is

individual cases based on the facts (confined, of course, by precedent). By encouraging the use of “muddy” standards rather than absolute rules, this feature causes uncertainty on both sides.<sup>475</sup> But courts do not need to engage in future-oriented speculation and may encourage parties to deal rather than go to court.<sup>476</sup> Of course, when likely plaintiffs (the copyright industry) have significant resources available to them for litigation, they are capable of “holding out” against settlement of litigation and so achieving a more favorable settlement than their upstart litigation targets.<sup>477</sup>

Lawyers may automatically turn to the courts as a favored institution. However, in summary, the above impartial analysis reveals the contributions courts can make in enforcing the consent order. First, courts are generally independent and insulated from outside lobbying pressures. Of course, it is naïve to believe that courts are immune to outside interests. However, the pressures are more pronounced within the realm of certain political issues, such as affirmative action, abortion, and federalism. The realm of intellectual property is relatively free of such political considerations. Second, courts participate in organic common law adjudication. This incrementalism allows for informed gradual developments of legal rules that are grounded in the particular factual circumstances of individual litigants.

### 3. General Institutional Disadvantages of the Courts

On the other side of the equation, courts are limited to considering the disputes that come before them. Despite the significant advantages already outlined above, adjudication may also leave many important disputes unresolved. An individual adversely affected by an unacceptable restriction on the use of digital content may not have the knowledge, time, or resources to bring forth a claim in a court of law. In addition, court rulings apply only to the parties involved in the specific litigation. *Stare decisis* provides incentives for similarly situated actors to conform to the ruling, lest they be dragged into court, but such incentives are inadequate. Furthermore, courts can only

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structured to focus attention narrowly upon the claims of individual litigants rather than upon a decision’s larger social consequences”).

<sup>475</sup> The potential developer of new technology may want to know where he or she stands before investing his or her time and effort (or the venture capitalist’s funds) in a new technology or distribution business. There are three responses to this: (1) a risk-averse party can at least try to know where he or she stands by negotiating prior to development; (2) if flexibility is introduced into the legal doctrines, potential developers can then *Seek* to maximize their opportunities within the “loopholes” left in the law; (3) courts can and should attempt to develop legal doctrine consistently, so as to develop a stable overall framework of principles. Certainty, then, is not a fatal factor rendering the courts totally unsuitable.

<sup>476</sup> Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 578-80 (1988); see also Dan L. Burk, *Muddy Rules for Cyberspace*, 21 CARDOZO L. REV. 121 (1999).

<sup>477</sup> See Rose, *supra* note 478, at 608-09; Burk, *supra* note 478, at 121.

penalize litigants who run afoul of the rules; they cannot provide incentives or rewards for those who promote fair competition and fair use.

Unfortunately, it usually takes a great deal of money to reach the federal justice system. As a result, the court system is perhaps the least “democratic” (in the sense of enabling participation) of our three possible law and policy-makers. While a large, diffuse interest may be able to vote into power lawmakers sympathetic with their aims, it rarely can overcome the coordination problems and costs of collective action involved in making a case in court. Meanwhile, bureaucratic rulemaking processes are, in principle, open to everyone. In practice, well-established groups are usually granted more access, but these usually include public interest groups.

A further problem with relying on the courts is that, as Charles Taylor and Mary Ann Glendon have observed, “rights talk” threatens to convert ordinary judicial disputes into epochal battles of principle.<sup>478</sup> In court, the recording industry speaks of absolute property rights in recordings, while file-sharers tout an equal absolute right to use technology as they wish in the service of free speech. Both overstate their case. In the U.S., copyright is not based on a notion of “natural rights” of ownership by copyright-holder; rather, it is a bundle of entitlements conditioned on the “Progress of Science and useful Arts.”<sup>479</sup> The copyright system includes both property and liability rules, and policymakers choose the proper balance between the two.<sup>480</sup> Innovations like radio, videorecording, and cable television have required an adjustment in the balance of entitlements of content producers and suppliers.<sup>481</sup> This system, however, does not grant innovators the right to set the balance themselves. File sharers have sometimes argued that, because code trumps law, they should have a right to do whatever they wish with intellectual property.<sup>482</sup> Although it is rhetorically easy to convert this kind of “info-anarchy” position into the

<sup>478</sup> See MARY ELLEN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 12-14 (Free Press 1991) (comparing “rights talk” in the U.S. and Canada and critiquing this development in the U.S.).

<sup>479</sup> U.S. CONST. art. I, § 8, cl. 8; see also *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).

‘The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings.’ H.R.Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909). Congress thus seeks to define the rights included in copyright so as to serve the public welfare and not necessarily so as to maximize an author’s control over his or her product.

*Id.* at 580.

<sup>480</sup> See ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL ERA* 350 (2000).

<sup>481</sup> See Ginsburg, *Copyright and Control*, *supra* note 77, at 1614.

<sup>482</sup> See Laurence Pulgram, *Napster’s Side of the Story*, CNN.COM, at <http://www.cnn.com/law/columns/napster.05.19/index.html> (May 19, 2000).

rhetoric of free speech, such “rights talk” in fact obscures the balancing of interests necessitated by innovation.

The flip side of the court’s capacity to do justice in particular cases is a vulnerability to setting doctrine on the basis of unusual cases. Although the common law system is premised on the incremental development of doctrine through a series of cases,<sup>483</sup> discontinuities result when particularly “hard” cases appear in the system. Sometimes for better, but often for worse, the same seems to be true in copyright law. The popular image of Napster-users has been of college students unfairly taking advantage of free broadband access to “rip-off” songs by ripping CDs. The result may have been different if the case reached the courts when P2P technologies and broadband access had roughly the same rate of penetration as VCRs did in 1984 when the *Sony* case vindicated consumers’ rights.<sup>484</sup> The result may well have been more measured.

Observing these shortcomings of courts in the realm of liability of Internet service providers (“ISP’s”) for copyright infringements committed using their networks, Timothy Skelton criticizes the courts as a forum for decision-making that is:

- Unable to articulate consistent rules in the area of contributory and vicarious liability;
- Confused about fact patterns in an unfamiliar and complex domain;
- Unwilling to grapple with the important social, economic, and constitutional policy considerations raised by such cases; and
- Constrained by both statutory language and common law principles.<sup>485</sup>

Such infirmities make it necessary for comparative institutional analysts to examine administrative agencies as alternative sources of policy application.

#### 4. The Advantages of Administrative Agencies

Administrative agencies have the distinct advantage of being able to take into account broader conceptions of the public interest. As the *Napster* case also demonstrates, doctrinal pigeonholes can impede the presentation of cases in judicial forums. Some economists have charged that the recording industry’s maintenance of a high-margin, low-volume business model depends on anti-competitive practices.<sup>486</sup> In a judicial forum, the doctrines of “copyright misuse” cannot adequately reflect this sense. Courts are also

<sup>483</sup> See MELVIN EISENBERG, *THE NATURE OF THE COMMON LAW* 1 (Harvard University Press 1988) (explaining that the common law is established by courts).

<sup>484</sup> See *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984).

<sup>485</sup> See Timothy Skelton, *Internet Copyright Infringement and Service Providers: The Case for a Negotiated Rulemaking Alternative*, 35 SAN DIEGO L. REV. 219, 223, 340 (1998).

<sup>486</sup> See CAVES, *supra* n. 268, at 286-296; MARK ELIOT, *ROCKONOMICS: THE MONEY BEHIND THE MUSIC* 70-71 (1989); REEBEE GAROFALO, *ROCK ‘N’ ROLL IS HERE TO PAY: THE HISTORY AND POLITICS OF THE MUSIC INDUSTRY* 45, 60-62 (1977); R. SERGE DENISON, *SOLID GOLD: THE POPULAR RECORD INDUSTRY* 231 (1975).



constrained in their decision-making process. Think, for instance, of the *American Geophysical* decision, in which the judges had to frame a decision that ultimately hinged on the *desirability of creating* a market like the Copyright Clearance Center, in terms that presumed an “effect on an already existing market.”<sup>487</sup> Less doctrinally bound tribunals, however, such as adjudicatory panels within the FTC or Copyright Arbitration Royalty Panels within the Copyright Office can analyze economic data more flexibly.<sup>488</sup>

Bureaucracies not only develop expertise within, but can also contract out evaluations of complicated new economic problems. Many government agencies and departments have “contracted out” for services by hiring private companies to perform them for a set number of years.<sup>489</sup> At the end of the contract, the services are again subject to a competitive bidding process.

The “contracting out” model works particularly well in the copyright regime because the services are discrete and direct, and relevant experts are accustomed to doing contractual work. The same professionals who handle valuation problems for ASCAP and other Collective Rights Organizations are likely available for consulting positions at the Copyright Office. Intellectual property experts may review the broad contours of discussion.<sup>490</sup> This institutional solution would also assure the permeability of the Copyright Office to outside expertise. While notice-and-comment rulemaking is designed to assure institutional openness to diverse perspectives, putting such “outsiders” on the inside of the agency may be a particularly effective way of refreshing and balancing an agency’s perspective.<sup>491</sup>

Administrative agencies have a marked advantage over courts in the processing of information relating to valuation. Professional economists can

<sup>487</sup> *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 926 (2d Cir. 1994).

<sup>488</sup> For a discussion of the adjudicatory panels of the FTC, *See* Jeffrey Katzmann, *Federal Trade Commission*, in *THE POLITICS OF REGULATION* 152, 177 (James Q. Wilson ed., Basic Books 1980). For a discussion of CARP’s, *See* <http://www.loc.gov/copyright/carp> (last visited May 31, 2002). Judges have been reluctant to intervene in their proceedings. *See* *National Ass’n of Broadcasters v. Librarian of Congress*, 146 F.3d 907, 918 (D.C. Cir. 1998) (describing the “exceptionally deferential” standard of review under which the court may set aside the order of the Librarian of Congress in adopting the recommendation of a CARP).

<sup>489</sup> *See, e.g.*, Christopher J. Dorobek, *GSA: Contract out IT work if it makes sense*, *GOVERNMENT NEWS*, Mar. 16, 1998, available at <http://www.gcn.com/archives/gcn/1998/march16/news1.htm> (last visited May 31, 2002) (stating that agency managers are contracting out IT services); *DoD Panel: Contract Out More*, *GOVERNMENT EXECUTIVE MAGAZINE*, Oct. 1, 1996, available at <http://www.govexec.com/reinvent/downsize/1030b1.htm> (last visited May 31, 2002) (explaining that the Department of Defense might contract out support services).

<sup>490</sup> Courts, on the other hand, may be subject to the “battle of the experts.”

<sup>491</sup> Of course, anti-circumvention rules are more complex and iterative than valuations and generate a foundation of precedent. Rulemakers develop an expertise in their projects. Therefore, if it continues to play a role in this field, the Copyright Office would probably do well to follow the example of the FTC in cognate consumer protection fields and establish a permanent committee assigned to this project.

sift through competing expert reports in order to show the concrete economic effects of regulations and infringements. Economists can give voice to the interests of dispersed individuals unable to advocate for their own interests. Using technical tools, economists can investigate hidden aggregate consequences of regulations pushed by isolated interests. Often trusted as “neutral experts,” economists can also devise clear performance standards for their employers. Some advocates of incommensurability might argue that economic calculations cannot factor in the diverse, noncommercial values implicit in the present copyright regime.<sup>492</sup> However, the participation of academic economists opens the door for other experts (like political scientists and ethicists) to contribute to the application of policy.<sup>493</sup> They also promise to bring methodological rigor to governmental decisionmaking processes clouded by vague legal mandates.

Administrative agencies are also better than courts at proactively seeking out those who violate rules and monitoring their behavior. Furthermore, where Congress is largely confined to legislative hearings, administrative agencies can take more active measures, depending on the authority they are allocated. Combining executive, legislative, and judicial powers, administrative agencies are more flexible than legislatures or courts. Furthermore, many agencies (like the FTC) have boards with a rough partisan balance, assuring some diversity of perspective in their leaders.

##### 5. The Disadvantages of Administrative Agencies

Unfortunately, because administrative agencies have expertise, they are also likely to be staffed by persons who have worked or plan to work for the very entities and individuals they are to regulate.<sup>494</sup> While Congress is subject to rent-seeking by powerful interests, agencies are subject to capture. For example, bureaucrats within the Copyright Office are liable to specialize in a very narrow area and may want to parlay that specialization into a lucrative private practice. There are few better ways to curry favor with affected interests than to set rules they endorse.

Bureaucracies also face ossification of personnel due to life tenure. Most federal bureaucrats may only be terminated after a long series of procedures.<sup>495</sup> And while whole agencies can in theory be eliminated by an act of Congress,<sup>496</sup> in practice their entrenched constituencies are almost always powerful enough to control one of the “veto points” capable of stopping this process.

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<sup>492</sup> See, e.g., Margaret Jane Radin, *Free Expression, in* CONTESTED COMMODITIES 165 (Harvard University Press 1996).

<sup>493</sup> The World Bank, for instance, has begun hiring political scientists and anthropologists to complement the work of economists who have hitherto dominated the agency.

<sup>494</sup> See RONALD A. CASS ET AL., ADMINISTRATIVE LAW 10 (3d ed. 1998).

<sup>495</sup> See *id.* at 142-45.

<sup>496</sup> See *id.* at 65.

## 6. The Indeterminacy of Abstract Institutional Analysis

As the reflections above demonstrate, comparative institutional analysis is indeterminate in the abstract. Administrative agencies may be more efficient than courts at processing information, but they are also vulnerable to tunnel vision.<sup>497</sup> Notice-and-comment rulemaking may in principle be more permeable to participation than litigation, but agencies are far more likely to be “captured” than judges. In the field of comparative institutional analysis, context is everything. The diversity of policy problems demands diverse institutional responses. Final institutional choice should rest on a considered analysis of past interventions in the relevant policy area.

Judicial interventions in the current battles over digital copyright have not been promising. Defenders of the judiciary might claim that judges are at a relative disadvantage in this field simply because they have not had the opportunity to respond to the problems raised over a long enough period of time. They may simply urge that doctrine be given more time to settle so that we can take advantage of common law regulation of the online environment.<sup>498</sup> However, history demonstrates that such a step would be unwise. Courts have had an extensive role in applying antitrust policy in the context of musical copyright in the past. Their past failure to regulate mechanical licensing in a timely and efficient fashion – a problem we discuss further below – should warn us against resorting to them now.<sup>499</sup>

### B. *A Failed Balance of the Past: Courts as Central Rulemakers and Collateral Involvement of Administrative Agencies in the case of BMI and ASCAP*

Antitrust law has been applied in many creative industries, including concert booking, movie production and distribution, book distribution, and music publishing.<sup>500</sup> The copyright collectives or performing rights organizations known as the American Society of Composers, Authors, and Publishers (“ASCAP”) and Broadcast Music, Inc. (“BMI”) license the right to publicly perform musical works and lyrics.<sup>501</sup> They have drawn sixty years of antitrust

<sup>497</sup> See STEPHEN BREYER, *BREAKING THE VICIOUS CYCLE* (Harvard University Press 1993).

<sup>498</sup> Thomas K Richards, Note, *The Internet and Decisional Institutions: The Structural Advantages of Online Common Law Regulation*, 10 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 731, 734-735 (2000) (arguing that Congress passed legislation regarding ISP liability for copyright infringement was passed too early because common law had not yet established principles that could have provided guidance in drafting the legislation).

<sup>499</sup> Mechanical rights include “the right to reproduce copyrightable musical compositions on phonograph records and tapes, as well as the additional right to distribute them to the public.” KRASILOVSKY & SHEMEL, *supra* note 51, at 232.

<sup>500</sup> See RICHARD CAVES, *CREATIVE INDUSTRIES: CONTRACTS BETWEEN ART AND COMMERCE*, 93-95, 157, 307-08 (2000).

<sup>501</sup> See *About ASCAP*, at [http://www.ascap.com/lp\\_about\\_ascap.html](http://www.ascap.com/lp_about_ascap.html) (last accessed

scrutiny from antitrust regulators.<sup>502</sup> Strangely, no commentator appears to have applied the lessons of the big two copyright collectives (ASCAP and BMI) to the big five labels in the recording industry. However, now that the Internet music licensing ventures *Pressplay* and *MusicNet* threaten to reduce an oligopoly to effective duopoly, the connection appears obvious.

ASCAP and BMI have both been praised for providing blanket licensing that allows royalty collection of what would otherwise be hopelessly fractionated micropayments.<sup>503</sup> They are now seen as an efficient use of contract to aid consumers and artists.<sup>504</sup> However, few of these collectives' contemporary admirers adequately acknowledge the role of sixty years of antitrust regulation in making these organizations fair and efficient.<sup>505</sup> Brief examination of antitrust regulation of leading performing rights organizations starkly illuminates the disadvantages of judicial domination of antitrust enforcement.

### 1. Antitrust on a Continuum Between Law Enforcement and Regulation

The prototypical antitrust enforcement scheme involves an administrative agency policing business practices according to rules promulgated by common law methods of adjudication.<sup>506</sup> If the agency's charge against a business is challenged, a court settles the dispute and in the process builds on the existing body of law.<sup>507</sup> Because of this dialectical process, "[t]he conventional

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March 29, 2002); *About BMI*, at <http://www.bmi.com/about/index.asp> (last visited May 31, 2002).

<sup>502</sup> For a brief historical discussion, See Joel I. Klein, Cross-Licensing and Antitrust Law, Address Before the American Intellectual Property Law Association (May 2, 1997), available at <http://www.usdoj.gov/atr/public/speeches/1123.htm> (last visited May 31, 2002).

<sup>503</sup> See, e.g., *BMI v. Columbia Broadcasting System*, 441 U.S. 1, 23-24 (1979); Robert Merges, *Contracting into Liability Rules*, *supra* note 322.

<sup>504</sup> See MICHELLE BURTIS & BRUCE KOBAYASHI, INTELLECTUAL PROPERTY AND ANTITRUST LIMITATIONS ON CONTRACT 17-20 (George Mason Univ. School of Law, Law and Economics Working Paper No. 00-06, 2000), available at [http://papers.ssrn.com/paper.taf?abstract\\_id=210088](http://papers.ssrn.com/paper.taf?abstract_id=210088) (last visited May 31, 2002); see also MICHELLE M. BURTIS & BRUCE H. KOBAYASHI, WHY AN ORIGINAL CAN BE BETTER THAN A COPY: INTELLECTUAL PROPERTY, THE ANTITRUST REFUSAL TO DEAL, AND ISO ANTITRUST LITIGATION 17-20, (George Mason Univ. School of Law, Law & Economics Working Paper No. 01-02 2001), available at [http://papers.ssrn.com/paper.taf?abstract\\_id=259297](http://papers.ssrn.com/paper.taf?abstract_id=259297) (last visited May 31, 2002). Although the authors find that there is no reported case in which a court has imposed antitrust liability for a unilateral refusal to sell or license a patent or copyright, they ignore the recent uptick in copyright misuse findings.

<sup>505</sup> For a rare exception, See *CAVES*, *supra* note 500, at 297-313.

<sup>506</sup> See SULLIVAN & HOVENKAMP, *supra* note 434, at 69-76.

<sup>507</sup> See *id.*

wisdom is that the antitrust laws are the antithesis of pervasive regulation of the economy.”<sup>508</sup> As Justice Stephen Breyer has explained,

[T]he antitrust laws differ from classical regulation both in their aims and in their methods . . . [T]hey act negatively, through a few highly general provisions *prohibiting* certain forms of private conduct. They do not affirmatively order firms to behave in specified ways; for the most part, they tell private firms what not to do . . . Only rarely do the antitrust enforcement agencies create the detailed web of affirmative legal obligations that characterizes classical regulation.<sup>509</sup>

In some respects this “enforcement” model is an ideal form of antitrust that runs along a continuum.<sup>510</sup> The other side of the continuum is classical regulation. Some have argued that contemporary antitrust law tends toward the regulatory end of the continuum.<sup>511</sup> Douglas Melamed, a former DOJ official and present antitrust partner at the firm of Wilmer, Cutler & Pickering, argues that an important factor in this trend is the use of consent orders.<sup>512</sup> A continuum of regulatory and enforcement approaches gives antitrust authorities some discretion, potentially increasing the effectiveness of antitrust in achieving competition policy goals.

## 2. Antitrust in the Context of Music: The ASCAP Precedent

The use of antitrust law to regulate the music industry is not unprecedented. ASCAP was formed in 1914 as a cost spreading organization for copyright litigation.<sup>513</sup> Justice White provided a succinct explanation of the society’s genesis in *Columbia Broadcasting Sys. v. ASCAP*:

Since 1897, the copyright laws have vested in the owner of a copyrighted musical composition the exclusive right to perform the work publicly for profit, but the legal right is not self-enforcing. In 1914, Victor Herbert and a handful of other composers organized ASCAP because those who performed copyrighted music for profit were so numerous and widespread, and most performances so fleeting, that as a practical matter it was impossible for many individual copyright owners to negotiate with and license the users and to detect unauthorized uses.<sup>514</sup>

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<sup>508</sup> Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement*, 77 OR. L. REV. 1383, 1383 (1998).

<sup>509</sup> STEPHEN BREYER, *REGULATION AND ITS REFORM* 156-57 (Harvard University Press 1982).

<sup>510</sup> See A. Douglas Melamed, *Antitrust: The New Regulation*, 10 ANTITRUST 13 (1995) (describing “two paradigms,” the law enforcement model and the regulatory model, and the shift of antitrust law in recent years from the former to the latter).

<sup>511</sup> See *id.*

<sup>512</sup> See *id.* at 13-15.

<sup>513</sup> See Merges, *supra* note 322, at 1340.

<sup>514</sup> *BMI v. Columbia Broadcasting Sys.*, 441 U.S. 1, 4-5 (1978).

ASCAP grew tremendously as a collective rights organization as radio gained prominence in the 1920s. This new medium represented both an immense risk of “piracy” and a great opportunity for developing royalty revenue. From its beginning, ASCAP has licensed its members’ performing rights collectively by way of a “blanket license.”<sup>515</sup> Under such a license, the licensee can use any of the songs in the ASCAP catalogue as many times as she likes.<sup>516</sup> Two aspects of ASCAP’s licensing practices brought on the scrutiny of antitrust authorities: (1) ASCAP obtained exclusive rights from its members, forbidding them to work out individual deals with its members and (2) there was “no legal restraint on ASCAP’s ability to fix any license fee it deemed appropriate.”<sup>517</sup>

The government first brought suit in 1934 and then again in 1941, at which point a consent order was first entered.<sup>518</sup> The first decree was modified in 1950,<sup>519</sup> at which point it contained eighteen sections, twelve procedural and six substantive.<sup>520</sup> Two of its most prominent provisions established the following: (1) the establishment of a U.S. district court in the Southern District of New York as an arbiter to settle disputes between ASCAP and users over what constitutes a “reasonable rate” and (2) non-exclusive licenses.<sup>521</sup> The consent order has been subsequently amended at various points in the intervening years, most recently in 2000.<sup>522</sup>

### 3. Criticism of ASCAP Antitrust Enforcement

Critics of antitrust actions against ASCAP largely object to the central role that the judiciary has played in these developments. ASCAP antitrust enforcement has fallen largely within two spheres: (1) private litigation and (2) the crafting of consent decrees.<sup>523</sup> The courts dominate the first sphere, while the latter bargaining only occurs in their shadow. Private litigation involves licensees who object to the practices of ASCAP, particularly the practice of issuing blanket fee licenses, and who respond by initiating lawsuits. Jay Fujitani has identified three limitations of these lawsuits. First, their expense

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<sup>515</sup> See Simon H. Rifkind, *Music Copyrights and Antitrust: A Turbulent Courtship*, 4 CARDOZO ARTS & ENT. L.J. 1, 7 (1985).

<sup>516</sup> See *id.*

<sup>517</sup> *Id.*

<sup>518</sup> See Noel L. Hillman, *Intractable Consent: A Legislative Solution to the Problem of the Aging Consent Decrees In United States v. ASCAP and United States v. BMI*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 733, 743 (1998).

<sup>519</sup> See *id.* at 744.

<sup>520</sup> See *id.*

<sup>521</sup> See *id.* at 745-46.

<sup>522</sup> See *U.S. v. ASCAP*, No. 64 Civ. 3787, 2000 U.S. Dist. LEXIS 2872 (S.D.N.Y. Mar. 9, 2000).

<sup>523</sup> See Jay M. Fujitani, *Controlling the Market Power of Performing Rights Societies: An Administrative Substitute for Antitrust Regulation*, 72 CAL. L. REV. 103, 103 (1984).

means there are few users who can afford them.<sup>524</sup> The litigation is dominated by motion picture exhibitors,<sup>525</sup> local television broadcasters,<sup>526</sup> radio broadcasters,<sup>527</sup> and television networks.<sup>528</sup> Second, such litigation results in inconsistent application by different courts.<sup>529</sup> As a result of the suits involving the four aforementioned litigants, radio broadcasters and television networks are subject to blanket licenses, while motion picture exhibitors and local television broadcasters are not.<sup>530</sup> Third, the judiciary is unable to frame appropriate remedies.<sup>531</sup> Two remedies are typical: Either ASCAP is prevented or allowed to issue blanket licenses to a group of licensees.<sup>532</sup> Parties who want a blanket license but simply object to the terms imposed by ASCAP have no adequate remedy in the judicial system.<sup>533</sup>

The application of consent decrees also draws criticism. Fujitani argues that the time and expense involved in adjudicating disputes in the rate court set up in the Southern District of New York to resolve individual disputes between ASCAP and licensees is just as prohibitive to potential litigants as private litigation.<sup>534</sup> This may be a reason why the rate court has seen few disputes. As Merges explains,

The imposition of a 'rate court' of appeals to be administered by a federal judge in the Southern District of New York may appear a significant change. In fact, it merely formalized long standing ASCAP procedures for resolving member licensing disputes. Until 1981, the assigned rate court was never called on to resolve a fee-setting dispute. . . . Even now resort to the judge is rare.<sup>535</sup>

Given that the consent decrees have only been renegotiated three times over the past sixty years, they are unable to respond to ongoing developments, particularly rapid technological change: "Inflexible consent decrees are inherently flawed as a tool for resolving antitrust enforcement disputes regarding intellectual property."<sup>536</sup>

<sup>524</sup> See *id.* at 121.

<sup>525</sup> See *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1966).

<sup>526</sup> See *Buffalo Broadcasting Co. v. ASCAP*, 546 F. Supp. 274 (S.D.N.Y. 1982).

<sup>527</sup> See *K-91 Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967).

<sup>528</sup> See *CBS v. ASCAP*, 400 F. Supp. 737 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977), *rev'd sub nom.* *BMI v. CBS*, 441 U.S. 1 (1979).

<sup>529</sup> See Fujitani, *supra* note 523, at 122.

<sup>530</sup> See *id.* at 116.

<sup>531</sup> See *id.* at 122.

<sup>532</sup> See *id.*

<sup>533</sup> See *id.*

<sup>534</sup> See *id.* at 122-23.

<sup>535</sup> Merges, *supra* note 322, at 1340.

<sup>536</sup> Hillman, *supra* note 518, at 734.

#### 4. How Administrative Agencies Might Have Helped

These criticisms of the ASCAP antitrust enforcement model point toward a regime that relies more heavily on the involvement of administrative agencies. First, proceedings might have been less costly in the administrative arena. Second, the remedies would have been more effective since they would have been monitored on a more regular basis and devised by administrators with greater expertise. Third, agencies like the FTC and DOJ could have coordinated regulatory actions to assure consistent application of the devised policy across different jurisdictions and among likely situated parties.

These comparative advantages of agencies not only might have improved (and might still improve) antitrust regulation of Performing Rights Organizations (“PROs”) but are also relevant to the present. Since RIAA members sued Napster, application of copyright policy in the realm of digital distribution has been synonymous with court decisions.<sup>537</sup> Just as judicial responses to PROs’ antitrust violations were unsatisfactory, current court domination of the copyright policy application field has distorted the policy landscape in several important ways.

#### C. *The Failing Balance of the Present: Courts’ Dominant Role in Present Policy Application*

Over the past few years, copyright policymakers have, by default, consigned most disputes over policy interpretation to court-based resolution. As already identified in Part I above, there are two key areas of copyright law that are crucially relevant to the extent of control which can be exerted by copyright owners over the development and use of distribution technologies: (a) anti-circumvention measures and (b) the judge-made doctrines of contributory and vicarious liability. Courts are now addressing these crucial “gray areas” of the law.<sup>538</sup> We should only leave the fate of P2P technologies to the courts if we believe that they can develop a nuanced concept of responsibility sensitive to the needs of consumers, producers, and distributors of content. Unfortunately, such confidence would be naïve. When they have been called upon to address both anti-circumvention doctrine and vicarious liability cases in the digital context, courts have been slow to recognize the crucial importance of *developing* doctrine to reflect new economic and technological realities.

##### 1. Anti-Circumvention Doctrine

We have argued above that the anti-circumvention provisions of the DMCA are, as presently drafted, insufficiently flexible: They consist of broad prohibitions and narrowly drawn, inconsistent exceptions. Fair use has not succeeded as a defense to breach of the anti-circumvention provisions (both

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<sup>537</sup> See the discussion of the various decisions *supra* Part I.

<sup>538</sup> Including forms of more private sharing and the degree of responsibility that suppliers of software different from that supplied by Napster.



access and device provisions) of §1201 of the DMCA.<sup>539</sup> The perfunctory analysis of fair use privileges in the *DeCSS* case bodes ill for future efforts to defend legitimate circumvention in court.<sup>540</sup>

## 2. Contributory and Vicarious Liability

The holdings of the *Napster* court in relation to secondary bases of liability for copyright infringement have been discussed more extensively above. As noted, the Ninth Circuit in *Napster*, in both its initial appeal judgment and in the recent judgment upholding Judge Patel's modified preliminary injunction, has taken a broad view of vicarious and contributory infringement and a narrow view of the *Sony* defense, which would be sufficient to render liable many P2P and other networks and likely preclude new technological developments. Even if one agrees with the *Napster* decision's "effect on the market analysis," the court's elliptical and antiquated economic reasoning scarcely justifies this result.

However, courts historically have differed on the scope of vicarious and contributory liability. In the analogous though not identical area of ISP liability for copyright infringement, prior to the enactment of the DMCA (Title II<sup>541</sup> of which provides safe harbors for ISPs), courts were criticized by some for giving inconsistent answers on the question of the scope of responsibility for others' copyright infringements.<sup>542</sup> Despite this, even those critics have tended to prefer the court-developed doctrines of responsibility to the sweeping immunities enacted (or liabilities suggested) by Congress. The legal doctrine in this area, though imperfect, is at least well established (given respected principles such as enterprise liability).<sup>543</sup> Nevertheless, all of the advantages courts have in this area could be matched (if not trumped) by agency interventions. Agency rulemaking could codify a body of law rarely predictable in outcome, and while court-based rules are frozen into precedent, agencies have a freer hand to adopt rules to technological change.

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<sup>539</sup> See *Universal City Studios, Inc. v Reimerdes*, 111 F. Supp. 2d 294, 331-32 (2000).

<sup>540</sup> See *Declaration of Jon Bing for defendants in DVD CAA v. McLaughlin, Bunner, et al.*, available at [http://www.eff.org/pub/Intellectual\\_property/Video/DVCCA\\_case/20000118\\_bing\\_norway\\_law\\_decl.html](http://www.eff.org/pub/Intellectual_property/Video/DVCCA_case/20000118_bing_norway_law_decl.html) (last visited May 31, 2002) (critiquing the district court decision in this case).

<sup>541</sup> Otherwise known as the Online Copyright Infringement Liability Limitation Act or "OCILLA." 17 U.S.C. § 512.

<sup>542</sup> See Skelton, *supra* note 485, at 223 (arguing for negotiated rule making in the context of ISP liability); Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833, 1854 (2000) (discussing ISP liability).

<sup>543</sup> See Yen, *supra* note 542, at 1856 (arguing that though enterprise liability too easily becomes liability without limit, courts nevertheless have shown themselves capable of engaging in line-drawing).

D. *A New Balance for the Future: Increasing the Role of Administrative Agencies*

Either courts or administrative agencies will need to take a dominant role in applying the policies we have recommended. In our view courts have proven unreliable in this area. While generalist judges and clerks may lack the expertise necessary to understand the complex economic and technological issues surrounding digital distribution of music, administrative agencies may hire staff better able to build on extant expertise in the area. For example, the Copyright Office and the Copyright Arbitration Royalty Panels it appoints have long used economic analysis to calculate compulsory license rates in the realm of television broadcast retransmission and are presently involved in regulating Webcasting.<sup>544</sup> They have also participated in rulemaking on exceptions to the anti-circumvention provisions of the DMCA.<sup>545</sup> Since these administrative offices may be captured by affected industries, judicial supervision (as provided for in the Administrative Procedure Act<sup>546</sup>) should provide a check on their authority. Courts, however, should be deferential toward these administrators' expertise.

The types of expert analyses that eluded the competence of courts attempting to administer the ASCAP consent order and to apply "fair use" doctrine to P2P technologies are only likely to proliferate given the policies we propose. An administrative agency with ongoing enforcement authority would be necessary in order to coherently regulate these situations. Administrative agencies can set policy and regulations in a forward-looking manner not tailored only to past disputes but also to future problems. They can build on principles already set by courts (and our consent decree) to mold them to particular technologies – without having to litigate each form of new technology to see how it fits within the broader principles developed by the court. That is, they can engage in more general translation of the underlying legal principles to a changing technological context. Courts are confined to broad principle and specific application; administrative agencies can tailor compromises that fall somewhere in between. When an administrative agency sets some parameters for appropriate conduct, using the fair use principles developed by the courts over time, but trying to translate them in a way that deals with particular conduct we see as dangerous, they can promote an ongoing supervisory process. Such a *coherent process* of regulation is

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<sup>544</sup> See Report of the Copyright Arbitration Royalty Panel, *Rates and Terms for Statutory License For Eligible Nonsubscription Services to Perform Sound Recordings Publicly by Means of Digital Audio Transmissions ("Webcasting") and to Make Ephemeral Recordings of Sound Recordings*, Feb. 25, 2002, available at [http://www.copyright.gov/carp/webcasting\\_rates.html](http://www.copyright.gov/carp/webcasting_rates.html) (last visited May 31, 2002).

<sup>545</sup> See Oversight Hearing on the United States Copyright Office: Hearing Before the Subcommittee on Courts, the Internet, and Intellectual Property, 107th Cong. (2001) (statement of Marybeth Peters).

<sup>546</sup> 15 U.S.C. §§ 551 et seq. (2000).

particularly important given the ways in which court-based antitrust regulation of the music industry has failed in the past.

## V. CONCLUSION

Digital music distribution has changed dramatically over the past three years, but its progress is still frustratingly slow. In this environment, the formation of policy is a serious challenge. To preserve the historic balance of copyright law between providing incentives for creators and ensuring maximum use of and access to copyright works, we need to craft flexible rules and institutions.

This article began with a question that plagues policymakers and lawmakers today: *How can we continue to enjoy the benefits of peer-to-peer technology while simultaneously ensuring a proper balance of compensation and incentives to creators of musical works?* Any concrete solutions raise a complicated set of substantive policy concerns. Provisional compromises are inevitable since no one institution or set of rules can provide a permanent resolution. Nevertheless, real reform must address two closely related problems:

- 1) How to ensure competition and diversity in commercial, public distribution of copyrighted content online; and
- 2) How to maintain fair use and a robust public domain.

We have demonstrated that the present “wait and see” approach adopted by the political branches of the United States government is not an adequate response. It is likely to lead *either* to an ongoing “technological arms race” between content owners and those seeking to defeat their technologies of control, or, more likely, to increasingly tight control by copyright owners over content at the cost of user access and fair use. Neither info-anarchy nor perfect control is acceptable. In light of the current upheavals in the music industry, we have suggested that, at this stage, a more proactive approach is necessary.

To promote fair competition and robust public distribution, we propose ongoing investigation and monitoring of commercial developments by antitrust authorities but no direct intervention. On the other hand, we believe that in light of present developments of DRM technology, fair use can only be preserved if policymaking institutions more actively protect these rights. To this end, we have proposed four *minimum advances of copyright policy* (in addition to antitrust investigation). Those minimum policy advances include:

- A temporary moratorium on infringement lawsuits against virtual private networks of less than twenty members;
- Disclosure of all DRM techniques
- Limits on DRM to ensure the protection of the privacy of individual users; and
- Public interest representation on industry-dominated DRM standard-setting bodies.

In keeping with our acknowledgment that these are issues which will require ongoing adjustment in light of changing circumstances, we have offered a

framework that should guide both institutional choice and the development of law and policy by relevant institutions. First, we set out five substantive principles that are relevant in assessing particular suggested reforms and institutional choices:

- 1) To enable diverse business practices and wide availability of content;
- 2) To maximize the development of new technologies for distribution and use;
- 3) To preserve space for individual use and maximize consumer welfare in the broadest possible terms;
- 4) To ensure the welfare of other stakeholders, in particular artists; and
- 5) To tailor distribution rights in the public interest and to limit technologies of control.

In Part III, we assessed a range of policies designed to advance these goals. We ranked them according to their plausibility and comprehensiveness. Given the existing institutional environment, the more comprehensive the solution, the less plausible it becomes. Our approach has been to strike a balance between comprehensiveness and plausibility. Part III also considered the advantages of moving beyond institutions and laws historically associated with copyright. We have discerned limits to copyright's expansionary tendencies in antitrust and consumer protection legislation and have called for more aggressive application of those laws in the digital music context.

Finally, in Part IV, we examined the relative institutional competencies of courts and administrative agencies in conducting ongoing supervision and application of our recommended policies. We recommend that administrative agencies be given a more active role in this area. Courts have generally failed to use antitrust law effectively in the music field, and they presently are doing little to promote the few extant elements of copyright law that protect consumer interests. Specialized agencies are better equipped to process information and are likely to be more flexible and more generally competent than generalist courts to address the complex policy and economic issues involved.

Peer-to-peer technologies represent a remarkable innovation and opportunity. While digital rights management could domesticate P2P by stifling its illegal uses, it now threatens to strangle innovation if left unchecked. Limits on DRM are necessary to fair competition and fair use in online music distribution. Flexible policies and innovative institutional arrangements can help achieve a continuing balance between the interests of all stakeholders involved.