

REVOLUTIONS ALL THE TIME: MUSIC, LAW, & TECHNOLOGY

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As of January 27, 2010

I. The Digital Revolution and File-Swapping

A. Background

1. The Betamax Case

In the landmark decision *Sony Corp. of America v. Universal Studios, Inc.*, 464 U.S. 417 (1984), the U.S. Supreme Court ruled that creators and distributors of copying devices could not be held liable under copyright law as long as the technology was capable of substantial non-copyright-infringing uses. The court reasoned that Sony's Betamax video recorders could be used for non-infringing purposes such as recording public domain programs or simply "time-shifting" programs that were aired on broadcast television stations. While the decision particularly addressed Sony's sale of Betamax video recorders, for almost two decades it has been, and continues to be, applied to similar technological innovations, including file-swapping programs.

2. Contributory and Vicarious Infringement

Individuals who infringe copyright are liable for direct infringement, but people who help those individuals commit the infringement may be liable for contributory or vicarious copyright infringement. For example, the owner of a flea-market may be held responsible for knowingly providing a forum for the sale of pirated recordings. Not surprisingly, this flea-market example has often been analogized to file-swapping programs.

Contributory and vicarious infringement are subject to different criteria, but the two offenses are similar enough that they often occur in tandem. In order to prove contributory infringement, the plaintiff must show that the defendant (1) had knowledge of the infringing activity and (2) materially contributed to the infringement. For vicarious liability, on the other hand, the plaintiff must show that the defendant (1) received some financial benefit from the infringement and (2) had the right and ability to control or stop the infringing activity.

B. The Recording Industry's Approach to File-Swapping

Before digital formatting was developed, the recording industry produced music in analog formats. The nature of the process for producing or reproducing analog recordings was such that

the sound quality of analog copies diminished with each subsequent generation. Further, the ability to make multiple analog copies required an investment in expensive copying equipment. There was little risk that the typical music fan would set up a bootlegging shop with commercial impact.

With the emergence of digital formatting, however, just one person equipped with a computer can easily reproduce a virtually unlimited number of perfect copies. Furthermore, when that person's computer is connected to the Internet, he or she can distribute that perfect copy worldwide at little to no cost. The popularity of such file-swapping has placed the recording industry in the awkward position of labeling the activities of its consumer base as "piracy." In efforts to contain file-swapping, the recording industry has challenged both the file-swapping services and those end users who actually swap files. The recording industry has also turned to lobbying efforts and technological measures such as digital rights management software in order to deal with the challenges.

1. The Technology

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

In December 1999, A&M Records brought suit against Napster for contributory and vicarious infringement. In July 2000, the district court granted a preliminary injunction against Napster prohibiting it "from engaging in, or facilitating others in copying, downloading, uploading, transmitting, or distributing plaintiffs' copyrighted musical compositions and sound recordings." Napster appealed to the Ninth Circuit Court of Appeals, but the court affirmed the injunction. Central to the Circuit Court's finding of contributory infringement was the fact that Napster maintained a central server with the names of all of the files that were being swapped on its system and thus had actual knowledge of the infringement. Also, because this central server was an integral part of the system and its maintenance was necessary for the file-swapping to occur, the court found that Napster could essentially control the file-swapping and thus satisfied a central requirement for vicariously liability as well.

ii. *Arista Records, Inc. v. MP3Board Inc.*, 2002 Copr. L. Dec. P. 28,483 (S.D.N.Y. 2002)

Arista Records, Inc. filed a suit against MP3Board, Inc., alleging that MP3Board's website supported copyright infringement by users. The parties filed motions for summary judgment. MP3Board's site allegedly linked users to unauthorized copies of music recordings. Arista argued that MP3Board should be held liable for both contributory and vicarious infringement. The court denied Arista's motion, ruling that issues of fact remained as to whether the users actually downloaded files and whether the files were disseminated to the public. The district court also rejected MP3Board's fair use arguments and denied its claim.

iii. *Virgin Records Am., Inc. v. Does 1-35*, 2006 Copr. L. Dec. P. 29,168 (D.D.C. 2006)

The D.C. District Court's 2006 ruling on the establishment of personal jurisdiction as it relates to online copyright infringement cases expanded the available jurisdictions in which the record labels may file their suits. In response to a motion to quash a subpoena, the court took a broad view in finding personal jurisdiction in a case involving active peer-to-peer network use. The issue was alleged unauthorized uploading, downloading, and distribution with other peer-to-peer users. These factors were cited by the court. First, merely contracting with a D.C.-based ISP was sufficient to allow the case to proceed. Second, the nationwide distribution was sufficient for jurisdiction because the defendants can anticipate that infringement may occur in D.C. Third, by installing the peer-to-peer software and logging onto a peer-to-peer network, the defendants were disseminating copyrighted works to anyone that wanted them, including residents of the jurisdiction.

iv. *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003)

In June 2003, the Seventh Circuit Court of Appeals denied Aimster's appeal of a district judge's order of preliminary injunction against the company. Aimster argued that the breadth of the injunction had the effect of shutting it down. Plaintiff owners of copyrighted popular music successfully argued that Aimster had committed contributory and vicarious copyright infringement.

Aimster was a file-swapping service that piggy-backed off of AOL's popular Instant Messenger and allowed its users to swap their computer files containing copyrighted music. Like Napster, Aimster maintained a central server that facilitated the file-sharing, though the contents of the files were encrypted.

The recording industry argued that Aimster provided a service and did not sell "articles of commerce" like Sony. The Seventh Circuit distinguished *Sony* from this case. Sony relinquished control over the use of the Betamax recorders after they were distributed. Aimster provided a "service" in maintaining the central server and as such maintained control over the service while the infringing acts were taking place.

In January 2004, the U.S. Supreme Court denied Aimster's appeal petition meaning that the injunction issued by the District Court and upheld by the 7th Circuit Court of Appeals stands.

v. *Metro-Goldwyn-Mayer v. Grokster*, 545 U.S. 913 (2005)

In June 2005, the Supreme Court ruled that companies that distribute peer-to-peer software or devices that facilitate digital file-sharing over the Internet may be held liable for the infringing activities of third-party users. MGM and other copyright holders brought an action against Grokster and StreamCast as distributors of peer-to-peer file sharing software.

The Ninth Circuit's decision acknowledged that the Grokster system's architecture differed from Napster in a significant way. When Grokster users searched for a file, the information is relayed

between users' computers. Unlike the Napster system, which relied on a central server owned and run by Napster that maintained an index of users' files available on the network, there was no central Grokster server to be used as a vehicle for information transmission. Due to the decentralized nature of the software, it was the users and not Grokster or StreamCast who searched, retrieved, and stored the infringing files.

The Supreme Court held that the Ninth Circuit had erred in applying the holding from *Sony* so broadly and remanded the case for further proceedings. The Court held that the *Sony* ruling does not apply whenever a product is capable of a substantial lawful use but, instead, should apply only where intent to infringe is being imputed from the design of a product that is capable of a substantial lawful use. The Court held that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is contributorily liable for the resulting acts of infringement by third parties.

vi. Kazaa Settlement

In July 2006, the Motion Picture Association of America ("MPAA") and the Recording Industry Association of America ("RIAA") announced that the major music and film companies they represent entered into a settlement agreement with Sharman Networks, Ltd., operators of Kazaa peer-to-peer digital file-sharing network. Kazaa was one of the world's largest peer-to-peer networks for the illegal distribution of music and films, and at the height of its popularity in 2003, it was estimated that Kazaa was responsible for over 239 million downloads.

As one of several co-defendants in the *Grokster* case, Sharman had been actively engaged in negotiations in an effort to avoid further litigation after the Supreme Court ruling. Although the exact amount of the settlement has not been confirmed, it was reported that Sharman agreed to pay approximately \$115 million to the major record companies and a smaller undisclosed amount to the movie studios. Sharman stated it would continue its operations by obtaining licenses from entertainment companies to lawfully distribute music and movies and agreed to implement new applications and technologies (e.g., a new filtering technology) to limit unauthorized sharing and unlawful distribution of the copyrighted materials.

This landmark settlement was the first of its kind, marking the hopeful beginning of new cooperative relationships between peer-to-peer technology and content industries. The Kazaa settlement indicates that the entertainment industry is making progress in its war to eliminate illegal peer-to-peer file sharing by working directly with companies in order to transform them into legitimate online distributors of music and film and may serve as a model for other file-sharing services seeking to legitimize their practices.

vii. *Arista Records L.L.C. v. Lime Group L.L.C.*, 532 F. Supp. 2d 556 (S.D.N.Y. 2007)

In August 2006, major record companies filed suit against LimeWire, a peer-to-peer file-sharing program, for copyright infringement. The lawsuit was filed in the U.S. District Court for the Southern District of New York and named Lime Group L.L.C., its subsidiaries, and the

corporation's top executives in the suit. In their complaint, the record companies alleged that LimeWire permitted and encouraged thousands of copyrighted songs to be pirated by its users and that the program was specifically designed to distribute sound recordings without paying any required royalties. The record companies further alleged "the scope of infringement is massive," the operators of LimeWire are "actively facilitating, encouraging and enticing" online users to steal copyrighted music, and that LimeWire is liable for the "inducement" of this infringement.

This case marks the first music-piracy lawsuit to be brought against a distributor of file-sharing software since the landmark *Grokster* decision. In *Grokster*, the U.S. Supreme Court ruled that tech companies may be liable for copyright infringement if they encourage customers to steal music and/or movies over the Internet. The record companies are seeking compensatory and punitive damages, including a minimum of \$150,000 for each willful infringement, and injunctive relief.

In September 2006, LimeWire responded to the record company and counterclaimed with antitrust violations under the Sherman Act and Clayton Act. LimeWire also asserted counterclaims under New York State law for conspiracy in restraint of trade, deceptive trade practices, and tortious interference with prospective business relations. LimeWire alleged that the record labels created their own electronic distribution services to destroy other music distribution services they did not control. They sought monetary damages and attorneys fees. In a December 2007 decision, the court dismissed LimeWire's counterclaims, but set aside a few counterclaims without prejudice, allowing LimeWire to re-file them. Specifically, the court found that LimeWire did have standing for an antitrust injury due to the record companies' mandatory licensing scheme for use of hash-based technology under the Sherman Act.

viii. *Universal Music Group Recordings, Inc., v. MySpace, Inc.*, 06 CV 07361 (C.D. Cal. complaint filed Nov. 17, 2006)

In November 2006, Universal Music Group filed suit against MySpace for copyright infringement. Universal is seeking \$150,000 for each unauthorized song or video posted on MySpace and an injunction to prevent MySpace from distributing infringing material. Universal alleges that much of MySpace's "user created content" is actually "user-stolen." MySpace stated that the lawsuit was "unnecessary and meritless," among other things claiming its activities fall within the safe harbor provision of the Digital Millennium Copyright Act.

In 2007, Universal reportedly required that all of its recording artists limit music posted on third-party sites to 90-second samples, unless the site had a previously existing contract with Universal which allowed it access to the full song. Alternatively, Universal artists may add an audio tag to the beginning and end of audio files rather than provide only the 90-second clip.

ix. *Arista Records LLC, et al. v. Usenet.com, Inc.*, 07 CIV 8822 (S.D.N.Y. 2009)

In October 2007, the RIAA and several major record companies filed suit in the District Court for the Southern District of New York to obtain a permanent injunction against the Usenet newsgroup service for alleged direct, contributory, and vicarious copyright infringement and

alleged inducement of copyright infringement. This is the first suit that major record companies and the RIAA have filed against a newsgroup service. The plaintiff record companies claimed that the “[d]efendant touts its service as a haven for those seeking pirating content, claiming that it provides ‘[t]oday’s hottest way of sharing MP3 files over the Internet’ without getting caught.” Unlike a P2P file-sharing network such as Grokster, a newsgroup service can actually store content on its own servers. It is alleged in the lawsuit that Usenet is storing copyrighted content on its server and that Usenet actively encourages users to share pirated content. Usenet filed briefs arguing that it is protected by the safe-harbor provisions of the DMCA which “protects services that are hosting material on behalf of users or linking to material.” Usenet also attempted to exercise provisions of the DMCA in its counterclaims, however, the court dismissed these claims in a November 2008 decision. *Arista Records LLC v. Usenet.com, Inc.*, 07 CIV 8822 (S.D.N.Y. Nov. 24, 2008). The court affirmed that the DMCA is not an affirmative cause of action, and held that Usenet’s counterclaims must be dismissed because they present no independent case or controversy that would survive the infringement claim. The court has yet to rule on the merits of the case. In January 2009, the court granted the plaintiff record companies’ motion for sanctions against Usenet. That motion claimed that Usenet had deliberately destroyed data about usage of the site and digital music files that had been posted on it even though the material had been subject to discovery requests. The judge agreed to preclude Usenet from challenging any statistical evidence about infringement on the site. The plaintiffs filed a request for more extensive sanctions in the form of a permanent injunction against Usenet, in May 2009. In the May motion, the record companies alleged “massive spoliation of evidence and other pervasive litigation misconduct.”

The group of fourteen record companies, claimed a victory in June 2009 when Judge Harold Baer granted summary judgment against Usenet.com. Judge Baer remarked, “There can be no dispute that defendants’ services were used overwhelmingly for copyright infringement.” However, the judge refused to impose terminating sanctions, which the record labels had requested in light of Usenet’s evidence spoliation. The parties then had twenty-one days in which to submit briefings as to proposed scopes of injunctive relief. A magistrate judge has been asked to determine the damages. According to Steven M. Marks, general counsel for the RIAA, “This decision is another example of courts recognizing the value of copyrighted music and taking action against companies and individuals who are engaging in wide-scale infringement.”

x. *Capitol Records, Inc., et al. v. Hi5, et al.*, 08 CV 5831 (S.D.N.Y. complaint filed June 27, 2008)

In June 2008, Capitol Records, Virgin Records, and other plaintiffs, all affiliated companies of EMI Music Group, initiated a lawsuit against the Hi5 social networking site, VideoEgg (which had provided video functionality in the past for the website), and 10 John Does to be named later alleging infringement of copyright of music videos that appear on the website. The alleged infringement involves use of an application from VideoEgg made available Hi5 users. That application allows them to upload their own video creations, including music clips playing in the background. VideoEgg, although no longer affiliated with Hi5, was included in the lawsuit because it allegedly allowed the videos to be uploaded over its servers. Plaintiffs allege that VideoEgg directly profits from the infringing clips by attaching video advertisements to them. VideoEgg’s CEO, Matt Sanchez, says that the company complies with all DMCA takedown

demands, but did not receive one from EMI. EMI sought damages of \$150,000 per infringed work. The parties stipulated to dismiss the case in March 2009.

**xi. *EMI Entertainment World v. Premium Wireless Services*, 07 CV 232
(S.D.N.Y. complaint filed January 12, 2007)**

In January 2007, EMI's publishing division filed a \$100 million lawsuit against InfoSpace, a mobile entertainment provider, and its subsidiaries. EMI alleged that InfoSpace breached two ringtone license agreements by underpaying royalties, fraudulently reporting royalties, and infringing EMI's copyrights by using unlicensed works. InfoSpace indicated that it had lost large customer, Cingular, when the company decided to deal directly with music recording companies for its ringtone services. In July 2008, the suit settled under undisclosed terms, although InfoSpace indicated the settlement would not "adversely affect the Company's business."

**xii. *Capitol Records, Inc., et al. v. MP3tunes LLC and Michael Robertson*, 07
CV 9931 (S.D.N.Y. complaint filed November 9, 2007)**

In November 2007, several affiliates of EMI Music and Publishing Groups filed suit against MP3tunes and its CEO, Michael Robertson. According to the complaint, the defendants operate a website that links to other sites that provide copyrighted music, and then streams that music to its users. It also provides users with a "locker" to store copies of those songs, and users can download those copies to their personal computer and music players, all without authorization from the copyright owners. The Plaintiffs allege direct infringement, inducement, contributory infringement, and vicarious infringement.

On September 29th, 2008, the suit against Robertson was dismissed for lack of personal jurisdiction. The suit against MP3tunes, however, is still pending.

**xiii. *F.B.T. Productions, LLC v. Aftermath Records*, No. CV 07-3314 (C.D.
Cal. 2009)**

Rapper Eminem's production company sued Universal Music Group for unpaid royalties on iTunes downloads and mobile ringtones, arguing that Eminem was entitled to half of the net profits the record company gets for the downloads rather than his standard rate of royalties from record sales. A California jury agreed with Universal's view that Eminem's agreement was a licensing agreement and not a distribution deal.

**xiv. *Capitol Records, LLC et al v. Escape Media Group, Inc.*, 09 CD 4458
(S.D.N.Y. complaint filed May 8, 2009)**

Initially launched in 2006 as a P2P file-sharing application, the Florida-based start-up Grooveshark (Grooveshark.com) has since shifted to provide a free streaming music service. The company operates with the motto, "Play any song in the world, for free!" Although, according to statements made by Grooveshark, the company had been negotiating a licensing deal with EMI Music Group for a year, on May 8, 2009, the label filed suit for copyright

violation against Grooveshark in a New York court. In October 2009, EMI dropped its suit against Grooveshark, opting instead to license its catalog of music to the service. According to Grooveshark, it plans to pursue similar licensing deals with all of the major labels in the hopes of creating a popular on-demand music Web site that is advertising and subscription supported.

xv. *PeerMusic, III, Ltd., et al. v. Motive Force, LLC and Sean Columbo*, 09 cv 01137 (W.D. Pa. consent judgment filed December 23, 2009)

In August 2009, the National Music Publishers Association (NMPA) sued Columbo and Motive Force, a company he created, for hosting a wiki website (a collaborative website whose content can be edited by anyone with access). The website, LyricWiki, had over one million pages of unlicensed copyrighted lyrics. Four months later, a judge approved an agreement between the parties that permanently enjoined the Defendants' from using unlicensed song lyrics in connection with their own websites or supplying them to other websites or software applications. The Defendant's were also ordered to pay \$100,000 to NMPA. All of the previously unlicensed music content that was available on Motive Force has now been turned over to a licensed lyrics website provider.

xvi. *UMG Recordings, Inc. v. Escape Media Group, Inc.*, 10 cv 100152 (N.Y. Sup. Ct. complaint filed January 6, 2010)

UMG Recordings filed a complaint against Escape Media Group's Grooveshark.com for infringing its copyrighted pre-1972 musical recordings. UMG alleges that the infringement occurs through the "reproduction and storing of the copyrighted sound recordings on Defendant's servers as part of its extensive catalog of infringing music and then distributing copies of those recordings to the users of that website." UMG stated that "pre-1972 recordings are subject to protection exclusively under state law and are not subject to or governed by the federal Copyright Act."

2. The Consumers

i. *Recording Indus. Ass'n of Am. v. Verizon Internet Servs.*, 351 F.3d 1229 (D.C. Cir. 2003)

Under the subpoena provision of the Digital Millennium Copyright Act (DMCA), the RIAA served Internet service provider Verizon with a subpoena, seeking the identity of a user whom it believed was infringing copyrights through the Verizon services by illegally sending files through peer-to-peer networks. When Verizon refused to provide the user name, the RIAA sought the subpoena to compel production. The United States District Court for the District of Columbia ordered Verizon to disclose the identities of alleged infringers. On appeal, the Court of Appeals for the D.C. Circuit reversed the ruling. The court held that under the DMCA, a subpoena may only be issued to an ISP engaged in storing infringing materials on its servers, and not to an ISP acting as a mere conduit for data transferred between two Internet users. The court emphasized that a subpoena could not be issued because there was no storage of infringing material on the server.

ii. *In re: Charter Communications, Inc.*, 393 F.3d 771 (8th Cir. 2005)

Notwithstanding the *Verizon* decision, the RIAA attempted to subpoena another ISP, Charter Communications, in order to gain access to the names, addresses and phone numbers of subscribers the RIAA alleged had engaged in unauthorized file swapping through Charter's service. Charter's motion to quash the subpoena and its subsequent appeals were denied by the U.S. District Court for the Eastern District of Missouri, and the ISP ultimately turned over its records before filing an appeal to the 8th Circuit.

Adopting the reasoning of the D.C. Circuit's *Grokster* decision, the Court found that the DMCA's § 512(h) is "structurally linked to the storage functions of an ISP and not to its transmission functions." The Court held that, like *Verizon*, Charter acted as a mere conduit for the transfer of allegedly copyrighted files through its network and hence the subpoena provision of DMCA did not permit the RIAA to obtain personal information about Charter's subscribers. The circuit court vacated the subpoenas, remanded the case to the district court directing it to order the RIAA to return all subscriber data obtained by the subpoenas and to maintain no record and make no further use of that information.

iii. *BMG Music, et al. v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005)

In January 2005, BMG Music; Sony Entertainment Inc.; UMG Recordings, Inc.; Fonovisa, Inc.; and Atlantic Recording Corp. brought suit against Cecilia Gonzalez claiming that Gonzalez had infringed their copyrights in sound recordings by downloading 30 songs onto her home computer.

A federal court granted summary judgment for the plaintiffs and rejected the defendant's claim that her copying constituted a fair use and that any damages awarded in the case should be nominal because the defendant qualified as an "innocent infringer." Rejecting the defendant's fair use defense, the court relied on *Napster* in finding that downloading music files to sample can not be considered a fair use and that, even if defendant's actions could not be shown to cause financial harm, the cumulative effect of direct infringers, like the defendant, harms the recording industry and raises a barrier to the industry's entry into the digital download market.

The Court also found the defense of innocent infringement under section 402(d) inapplicable in this case because notice of copyright was included on the published recordings. Although the notice appeared on the actual CDs and not on the digital downloads, the Court held that the CDs were in circulation and available and that the innocent infringer defense is not applicable where a defendant had reason to be aware of infringement. BMG was awarded \$22,500 (\$750/song) in damages and granted an injunction from further infringement against Gonzalez; both of these remedies were upheld on appeal in December 2005.

iv. *Interscope Records v. Duty*, 2006 WL 988086, 79 U.S.P.Q. 2d 1043 (D. Ariz. 2006)

Lindsey Duty allegedly used the Kazaa peer-to-peer network to download and distribute music without authorization. Duty filed a motion to dismiss arguing that Interscope failed to provide

evidence of dissemination. In response to defendant's motion, the court found that the listing of songs in the defendant's "Kazaa shared folder" was sufficient to support the record company's claim following the 9th Circuit's ruling in *Napster*.

v. RIAA, University Students and File Sharing

Students at the University of Massachusetts in Amherst are demanding that the now-defunct i2hub file-sharing service pay to settle copyright infringement claims brought against the students by the RIAA. The students claim that i2hub had placed advertisements on campus that misled students into believing that the software was sanctioned by the university.

Wayne Chang, a University of Massachusetts student, created i2hub using DC++ software and the Abilene Network which allows data transfers at higher rates than normal Internet connections. I2hub began on the Amherst campus and, over time, expanded to over 400 universities and colleges in the US and abroad. In November 2005, i2hub shut down, citing legal concerns. Chang claimed that i2hub's EULA warned students against trading and downloading copyrighted material over the network.

In early 2007, the RIAA started a new initiative targeting college students for illegal peer-to-peer file sharing. On behalf of the major record companies, the RIAA sent pre-litigation settlement letters to universities, which were then responsible for distributing the letters to respective students. These letters offered students the choice either to settle the matter by paying a settlement fee on a website or face a copyright infringement lawsuit. Although a legal market place has developed since the first lawsuits by the RIAA in 2003, the RIAA claims illegal downloading of copyrighted material still remains a significant problem with university students.

In June 2007, the U.S. District Court for the District of New Mexico denied a record company's attempt to compel the University of New Mexico to disclose the identity of students the company suspected of using the university's online systems to download and distribute the company's copyrighted works without permission. *Capitol Records Inc. v. Does 1-16*, No. 07-485 WJ/LFG (D.N.M. 2007). The court said that granting access to the students' information could violate their privacy rights, noting that "access to a subscriber's Internet information may include a wealth of information including name, address, social security numbers, credit card information, purchase histories, as well as road map of the subscribers' Internet activities, and perhaps disclosure of their private e-mail communications." In refusing the ex parte application, the Court acted to ensure that subscribers "actually receive notification and are given a reasonable opportunity to intervene in order to stop the disclosure of [such] sensitive information."

In April 2008, Judge Gertner of the District Court of Massachusetts initially refused the RIAA's request for Boston University students' names, pursuant to its suit against several BU students. Citing First Amendment considerations, the Judge issued a fifty-four page decision at least temporarily prohibiting BU from giving the RIAA students names, until she could review the Internet service agreement BU has with its students, so as to interpret what privacy rights are granted to the students. In July 2008, the president of Tufts University sent a letter to Judge Gertner requesting an opportunity to discuss its concerns with the subpoena served by the RIAA. Because of limitations of Tufts system, when attempting to provide the user names of the

requested IP addresses, Tufts could only narrow the list to forty individuals. Tufts is concerned about turning over so many names with such uncertainty as to the actual user at the requested IP address.

A Harvard Law School professor became involved in the student file-swapping lawsuits in defense of one of the Boston University students, Joel Tenenbaum, who was sued for alleged illegal uploading and downloading of copyrighted music on the P2P file-sharing network Kazaa. Charles Nesson, who is a founder of the Harvard Berkman Center for Internet and Society, is basing the legal challenge, in part, on constitutional law grounds. Among other arguments, Professor Nesson alleges that the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999 is unconstitutional as applied to the RIAA's actions, because it allows a private group (the RIAA) to effect a criminal law through civil enforcement. The RIAA has contested Professor Nesson's arguments and proceeded with the case against the student. Massachusetts Federal District Court Judge, Nancy Gertner granted Nesson's request to allow live streaming of the court hearing on a website run by the Berkman Center, however, the RIAA requested a determination from the First Circuit that the streaming would violate a Local Rule of the District Court for the District of Massachusetts and a 1996 judicial resolution banning cameras from the courtroom. The First Circuit held oral arguments on the matter on April 8 and posted an audio version online after the fact. In an April 16 decision, the Circuit Court held that Judge Gertner exceeded her discretion because the existing law and rule are directly on point and do not authorize streaming for the purposes of this case.

In a March 9, 2009, order denying the Defendant's request to compel the deposition of an RIAA attorney, Judge Gertner criticized the Defendant and his counsel for failing to comply with various procedural rules. Judge Gertner wrote that, "[w]hile the Court understands that counsel for the Defendant is a law professor, and that he believes this case serves an important educational function, counsel must also understand that he represents a client in this litigation -- a client whose case may well be undermined by the filing of frivolous motions and the failure to comply with the Rules."

As both sides of the case wrangled through the pre-trial procedural issues, the federal government took the opportunity to take a side. The United States Department of Justice, under newly-elected President Barack Obama, filed a brief in support of the RIAA's theory as to the constitutionality of statutory damages in late March 2009. In June 2009, Judge Gertner rejected BU student Joel Tenenbaum's motion to bring abuse-of-process counterclaims against record companies and the RIAA in their copyright infringement lawsuit targeting college students who upload and download music illegally. Professor Nesson made the argument on behalf of Tenenbaum that the record industry's suits to curtail downloading and distributing copyrighted works via P2P networks is an abuse of process purely because the trend has spawned a myriad of suits against young students who are not able to afford legal representation. Judge Gertner clarified that "[a]buse of process... does not turn on the identity of the defendants, their ability to hire an attorney, nor their inclination to settle claims against them."

Another of the judge's orders granted Tenenbaum's motion to amend his answer to the complaint, asserting a "fair use" defense for downloading music. However, mere hours before the trial began on July 27, 2009, Judge Gertner rejected the use of such a defense, deeming it, "so

broad it would swallow the copyright protections that Congress has created.” As of the end of the day on July 27, jury selection was completed. Opening arguments commenced the following morning in a standing room only court room.

The trial ended quickly, however. When the plaintiff’s counsel asked Tenenbaum during direct examination, “on the stand now, are you admitting liability for downloading and distributing all 30 sound recordings that are at issue and listed on Exhibits 55 and 56 of the exhibits?” Tenenbaum answered simply, “yes.” As a result, in a directed verdict, Tenenbaum was found to have infringed the copyrights of 30 songs. The damages reportedly could have been as high as \$4.5 million, but the jury decided on \$675,000 (\$22,500) per song as statutory damages.

On January 4, 2010, Tenenbaum filed a motion asking the court to either grant a new trial because the Court improperly decided the fair use issue and/or refused to admit certain evidence, reduce the statutory damages to the minimum allowed (\$750 per song) on the ground that the jury’s award is unconstitutional, or to remit the statutory damages award under the common-law doctrine of remittitur. Nesson argues that the reduction in damages is based upon a precedent set by a Supreme Court case that ruled damages are invalid if they are “oppressive and disproportionate to the offense.” Tenenbaum stated he will have to file for bankruptcy if the damages are not reduced. On January 19th, the Department of Justice filed a brief opposing Tenenbaum’s motion to set aside the verdict on constitutional grounds. The brief argues that the Copyright Act’s statutory damages provision satisfies due process. In September 2008, the U.S. District Court for the District of Oregon granted another motion to quash a subpoena seeking the identities of University of Oregon students suspected of infringement. In *Arista Records, LLC v. Does 1-17*, No. 07-CV-06197 (D. Or. 2008), the court held that the subpoena was overbroad and imposed an undue burden on the school. Specifically, the court explained that the University could identify the dorm rooms associated with the named IP addresses, as well as the occupants assigned to those rooms, but could not determine the identities of the persons who accessed the content in question without an investigation. The court held that such an investigation would be an undue burden on the University, and therefore granted the motion to quash, but authorized the plaintiff record companies to submit a second subpoena seeking only the names of those associated, by dorm room occupancy or username, with the IP addresses in question.

In contrast, in October 2008, the U.S. District Court for the District of Maine found in favor of Arista Records and several other joined RIAA-member record companies in their suit against students from the University of Maine on questions of contested dispositive, discovery, and sanctions issues. In *Arista Records LLC v. Does 1-27*, Nos 07-CV-00162, 08-CV-00028 (D. Me. 2008), the court found that it was not an improper exercise of judicial discretion for the magistrate judge to allow discovery of the University’s system to obtain the identity of the students. The court held that this exercise was fair because, “[o]nce unmasked, Defendants will have at their disposal all applicable legal defenses, both substantive and procedural.”

As the record companies continued filing suits against groups of students, differing holdings emerged from within single federal circuits. In *Arista Records LLC v Does 1-11*, No. 07-CV-02828 (N.D. Ohio 2008), in November 2008, the U.S. District Court for the Northern District of Ohio held that joinder of the defendants was improper in two respects. First, the court refuted the record companies’ assertion that one defendant’s motion for severance was premature since

the defendants were not yet identified. This holding diverges from a similar case decided in the Southern District of Ohio in July 2008, in which the court held that although joinder was improper, enforcement of the severance should be stayed until after the students were individually identified by the university. *Arista Records, LLC v. Does 1-9*, No. 2:07-CV-961 (S.D. Ohio 2008). The Northern District of Ohio, however, agreed with its sister jurisdiction that insofar as joinder of the defendants generally was improper, because it did not satisfy the transactional requirement of Rule 20, that defendants cause the same harm, and not merely the same type of harm, to plaintiffs.

In *Arista Records LLC v. Does 1-14*, 7:08-cv-00205 (W.D. Va. 2009), a case brought by the recording industry against alleged infringing students at Virginia Tech, the university claimed that as a state school, it was protected under sovereign immunity from replying to subpoena requests. Although the court viewed Virginia Tech as an arm of the state, 4th Circuit precedent allowed sovereign immunity under the 11th Amendment to be extended only to federal, not state, agencies. The court found, however, that Virginia Tech had complied as much as it could with the subpoena requests because it was not able to match individual infringers up with the IP addresses in question.

Some schools instituted policies requiring proof of infringement before forwarding an RIAA notice of infringement to students. According to a November 14, 2008 article in the Duke Chronicle newspaper, “P2P Policy to Require RIAA Proof,” Duke will not send “pre-litigation” notices based solely on IP addresses and not individual identities.

Tennessee is the first state to pass a law requiring that schools implement policies and procedures to prohibit copyright infringement. In November 2008, the Governor of Tennessee signed into law Senate Bill 3974. According to this law, each institution of higher education that receives funding from the state must “develop and enforce a policy defining computer and network usage and ethics...that details the penalties for infringement provided under both federal law and the school code...” Also, a school is required to “thoroughly analyze its computer network, including its local area and internal networks, to determine whether it is being used to transmit copyrighted works.” Under this policy, a school also needs to either certify that its networks are free of copyright infringement, or take affirmative steps to prevent infringement.

A plan developed by Choruss LLC to address illegal file sharing between and among students began to surface in 2008. Choruss’s idea is to provide students with compulsory flat-fee music. Choruss would act as a central distributor of music and collector of royalties. This model was envisioned by Warner Music’s Jim Griffin, in an attempt to avoid litigation against students, DRM issues, and to protect copyrights. By December 2008, several major record labels signed on backing the Choruss plan. But with the RIAA’s plan to cease suing individual infringers in favor of the “three strikes” system and the music industry’s general trend to drop DRM protection, it remains to be seen whether this idea will be practicable.

Instead of suing individual infringers, the RIAA adopted a “graduated response” to copyright infringement through agreements with a group of major internet service providers (ISP). The agreements provided that a warning notice would be sent to customers accused of illegal file sharing. If the warning was ignored, the ISP would suspend or terminate the service. In January

2010, Verizon became the first ISP to acknowledge that (since April 2009), it has been issuing warning letters to suspected copyright infringers. A Verizon spokesperson stated that the company does not monitor what its customers download on the internet. Copyright owners search the internet for infringements, capture the IP addresses, and then request that Verizon send out an e-mail warning to the customer. If Verizon receives multiple notices for a single address, the company reserves the right to suspend or terminate the customers service. Since Verizon does not release any customer information to the copyright owner without a court order, the company handles contacting the alleged infringer. To date no customer has been terminated from Verizon's network for copyright infringement.

vi. *Capitol Records Inc. v. Foster*, 2007 Copr.L.Dec. P. 29,345 (W.D. Okla. 2007)

In July 2007, the District Court for the Western District of Oklahoma upheld an award of attorneys' fees to one defendant against whom previous claims of infringement had been dropped. In 2004, several record labels filed suit for copyright infringement against Deborah Foster and her adult daughter alleging that both had illegally downloaded recordings. However, despite the labels dropping the infringement claims against her, Foster pursued a counterclaim against the labels, seeking a declaratory judgment of non-infringement. While the court ordered that Foster's counterclaims (which included a prima facie tort claim) be dismissed, it nonetheless declared her the "prevailing party" of the action. As such, the court upheld her request for attorneys' fees. Though the record labels contended that attorneys' fees and expenses should not be awarded because these fees could have been mitigated by Foster's assisting the labels' investigation of the infringement, Foster was awarded \$68,685.23, which represented "reasonable" attorneys' fees and legal expenses.

vii. Peer-to-Peer "Bill of Rights & Responsibilities"

Another way consumers have been affected by peer-to-peer file sharing is that certain ISPs allegedly limit the bandwidth allocated to peer-to-peer network users. In response to a petition filed with the FCC for allegedly limiting bandwidth allocated to customers who were peer-to-peer network users, Comcast announced in April 2008 a collaboration with "P2P" content provider Pando Networks to create and institute an industry wide "Bill of Rights and Responsibilities" for peer-to-peer users and Internet service providers. The purpose of this collaboration is to "clarify what choices and controls consumers should have when using 'P2P' applications as well as what processes and practices [Internet service providers] should use to manage 'P2P' applications running on their networks." The companies hope to help "'P2P' companies, [Internet service providers], and content owners find common ground to support consumers who want to use 'P2P' applications to deliver legal content." At the Distributed Computing Industry Association (DCIA)'s P2P Media Summit in May 2008, with more than one-hundred member companies representing peer-to-peer (P2P) and social networking software providers, content rights holders, ISPs, and service-and-support companies, the DCIA announced that it would now spearhead this "P2P Best Practices Initiative." Comcast responded to this development by stating that the DCIA is an "ideal forum for the entire industry to collaborate and develop some best practices."

viii. Infringement and Restitution

In a decision from the United States District Court for the Western District of Virginia, the court held that criminal allegations of copyright infringement must be substantiated by proof of actual loss sustained. *United States v. Dove*, No. 07-CR-00015 (W.D. Va. 2008) involved an individual who was found guilty of criminal copyright infringement. Although the government alleged that restitution should be paid to the RIAA members whose works had been infringed, the court applied the Mandatory Victims Restitution Act of 1996 (MVRA) and ruled that restitution would not be feasible. The court noted that although there was a definite offense against property and identifiable victims, it would not be possible to determine the amount of actual loss sustained.

ix. *Motown Record Co., L.P. v. Kovalcik*, No. 07-4702, 2009 WL 455137 (E.D. Pa. 2009)

In March 2009, the U.S. District Court for the Eastern District of Pennsylvania held that a peer-to-peer user who was sued for copyright infringement could not claim that investigators' access to files that he placed in a public network online was unauthorized. The user's failed counterclaim was based on the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(4). Because the files the user made available were accessible by anyone using the program, Limewire, no authorization was needed. The court also invalidated the user's claim of trespass, holding that it was preempted by the Copyright Act.

x. *Loud Records LLC v. Minervini*, No. 08-551 (W.D. Wis. 2009)

One aspect of the CFAA, is a prohibition on unauthorized access to "protected computers" being used in foreign or interstate commerce when such access causes loss, damage, or obtaining anything of value. In this case, the university student defendant in a copyright infringement case sought to strike back at the record company plaintiffs by using the CFAA against them. He claimed his computer was accessed "without authorization", using the "protected computer element under the CFAA. In June 2009, however, the US District Court for the Western District of Wisconsin held that a defendant could not successfully assert that plaintiffs violated the CFAA because in this case the "protected computer" element needed for the CFAA claim was not satisfied. By definition, because they were on a P2P network, his files were "publicly available" and therefore could not have been accessed "without authorization" by the plaintiffs during their investigation. As a result, the defendant was not entitled to relief on the infringement claims. The P2P user's computer was not "protected."

Plaintiffs had obtained the identity of the defendant through information which followed from a subpoena served on the University of Wisconsin seeking the identity of parties using an Internet Protocol address they associated with a device when had been allegedly used to disseminate the audio works in question illegally. The defendant's claim that these actions by the plaintiffs violated the Family Educational Rights and Privacy Act, 20 U.S.C. 1232(g) was also turned down by the court (which had rejected a similar FERPA argument in *Arista Records LLC v. Doe 9* in March of 2008). In the *Arista Records* case, the court made note that, according to Section 1232(g), universities are permitted to release such "directory information" provided that they notify the student and/or parents.

xi. *Fink v. Time Warner Cable*, No. 08-9628 (S.D.N.Y. 2009)

Jessica Fink filed suit in the Southern District of New York against Internet service provider Time Warner Cable, claiming that the company violated the Computer Fraud and Abuse Act in preventing its users from sharing content via peer-to-peer applications by interfering with the Transmission Communication Protocol (TCP) on users computers. As a result, it was claimed that when users try to share files via P2P, the transmission is blocked and a TCP message appears saying, “‘reset’ packets”. Following this action, all Internet connections coming in stop and the P2P action is cancelled. Fink claims that the “throttling” violated the Computer Fraud and Abuse Act but did not identify which portion.

Fink’s claim, however, was dismissed without prejudice in July 2009 when Judge Laura Taylor held that Fink’s allegations seemed to fall only under Section 1030(a)(5) of the CFAA, therefore the plaintiff was required to allege both sufficiently factual damages *and* loss. Fink’s complaint, according to the judge, had only claimed damage and no loss. Fink was granted leave to amend her complaint and may re-file. Critics of the decision have pointed out that the opening clause of Section 1030(g), authorizing civil actions under the CFAA, refers only to those actions in terms of involving “damage or loss.”

xii. *Atlantic Recording Corp. v. Raleigh*, No. 06-1708 (E.D. Mo. 2009)

In June 2009, the US District Court for Eastern District of Missouri held that in this P2P network copyright infringement case, the site-user defendant’s CFAA counterclaim simply recited back the statute, failing to assert specific facts which would rise to a viable claim. “[D]efendant’s unsupported conclusory allegations contain nothing more than a formulaic recitation of the elements of a claim[,]” the court said. The case was concluded in a private settlement agreement in August 2009.

xiii. *Virgin Records America Inc. v. Bagan*, No. 08-4674 (D.N.J. 2009)

In July 2009, the District Court of New Jersey ruled that a P2P service user would be required to pay statutory damages because he shared eight recordings. Further, he failed to answer the complaint and did not appear for the ensuing copyright infringement lawsuit. The court held that, “By downloading the Copyrighted Recordings and distributing them to other users on the P2P network, Defendant... infringed Plaintiffs’ copyrights on those recordings. Accepting these allegations as true, as the Court must, Plaintiffs have established grounds to impose liability... for copyright infringement.” In addition to granting a permanent injunction to bar the defendant from infringing the copyrights of the plaintiffs any further, at the request of the plaintiffs the court fined Bagan \$750 per instance of infringement (the minimum statutory damages award) for a total of \$6000.

xiv. Indictments Against Alleged Rabid Neurosis (“RNS”) Members

On September 9, 2009, four individuals alleged to be members of Rabid Neurosis (“RNS”), an alleged Internet music piracy group based in the U.S., were indicted on charges of conspiracy to commit copyright infringement by a federal grand jury in the U.S. District Court for the Eastern District of Virginia following a multi-year federal investigation. From 1999 until 2007, Adil R. Cassim, Bennie Glover, Matthew D. Chow, and Edward L. Mohan allegedly distributed thousands of music albums, movies, software programs, and video games through P2P networks.

As a “first provider” for pirated content online, RNS acquired content, often before its release date, and then made it available on file-sharing networks where others would continue sharing it. Initially, Glover allegedly had access to pre-release albums via a CD manufacturing plant in North Carolina. As the group’s reputation grew, it gained exclusive access to music and other copyrighted content that was often leaked to them from industry insiders at music labels, radio stations, or other CD manufacturing plants. In the weeks leading up to these indictments, two other members of RNS had been indicted on similar conspiracy charges, with one individual pleading guilty. If convicted, the RNS members face a maximum of five years in prison, three years of parole, and a \$250,000 fine.

3. Surveillance

In June 2003, the RIAA began large-scale surveillance of peer-to-peer networks, gathering evidence and preparing lawsuits against users who “share” a “substantial amount” of copyrighted songs over the Internet. Thousands of lawsuits were eventually filed against alleged copyright infringers. RIAA President Cary Sherman, said “the law is clear... this activity is illegal, you are not anonymous when you do it, and engaging in it can have real consequences.” The RIAA maintains that peer-to-peer piracy is negatively affecting artists and their livelihood.

In a lawsuit filed by BMG Music and other record labels against 203 peer-to-peer users in Philadelphia, a judge for the District Court for the Eastern District of Pennsylvania ruled that BMG had improperly joined 202 of the defendant file-swappers pursuant to Fed. R. Civ. Pro. 20-21. The court ordered the record labels to file separate complaints against each of the defendants. In a similar case in Atlanta, the court declined to rule on the joinder issue, but required that the ISP be allowed 25 days before compliance with the subpoena, so that the subscribers could have extra time to object to identification if they so desired—as had subscribers in the *Verizon* case filed in the District of Columbia.

In a sweeping change to its strategy of massive litigation efforts against individual infringers, the RIAA announced in late 2008 that it would discontinue these suits in favor of a “three strikes” policy echoing the proposed French system. According to the new system, the RIAA will stop sending out new lawsuits, and will instead attempt to work with ISPs to notify alleged illegal file-sharers, eventually cutting off service if the infringement continues. It remains unclear if ISPs will voluntarily comply. More likely, this program will be less than satisfactory in the eyes of record labels and a push for legislation in which ISPs will bear more responsibility will be the next step. In January 2009, buzz began to circulate indicating that the RIAA had successfully recruited major ISPs AT&T and Comcast to participate in the three strikes plan. As of March

2009, however, AT&T and Comcast have denied they would participate in such a three-strikes plan and no official reports have been issued indicating that these ISPs have formalized any such agreements.

i. *Tanya Andersen v. Atlantic Recording Company*, No. CV 07-934 BR (D. Or. 2007)

In 2005, Tanya Andersen was sued by Atlantic Recording Company and other record labels (“Atlantic”) for allegedly downloading gangster rap over Kazaa. Andersen denied engaging in piracy, and in October 2005, she filed a countersuit accusing the record industry of racketeering, fraud, and deceptive business practices. Then in June 2007, Andersen and Atlantic agreed to dismiss the case against her with prejudice, making her the prevailing party and eligible for attorneys’ fees.

Meanwhile, in August 2007, Andersen filed court documents in an Oregon federal court to elevate her suit against the record companies to class action status. Andersen hopes to make a class out of those “who were sued or were threatened with suit by Defendants for file-sharing, downloading or other similar activities, who have not actually engaged in actual copyright infringement.” In the complaint, Andersen alleges that Atlantic “has engaged in a coordinated enterprise to pursue a scheme of threatening and intimidating litigation in an attempt to maintain its music distribution monopoly.” Some of Andersen’s claims against Atlantic have been tried by other defendants, but this is apparently the first time that a judge has been asked to consolidate such lawsuits into a class action. This suit is still pending, awaiting class action certification.

ii. *Atlantic Recording Corporation, et al v. Andersen*, No. CV-05-933-AC (D. Or. 2008)

As noted above, in light of Atlantic’s stipulation to dismiss its case against her with prejudice, the judge in the original case recommended that Andersen’s motion seeking costs and attorney’s fees be granted. Andersen then requested \$298,995.00 in attorney’s fees and \$5,387.05 in court costs. In May 2008, the magistrate judge to whom this motion was assigned recommended that the District Court award Andersen \$103,175 in attorney’s fees and \$4,659 in costs, and in June 2008, the District Court judge granted the Magistrate’s suggested award. The District Court judge stated that attorney’s fees to the prevailing party are “‘the rule rather than the exception’ under the Copyright Act, and ‘should be awarded routinely.’” The record companies paid the awarded fees and costs to Anderson (totaling nearly \$108,000) in August of 2008.

iii. EFF Publishes RIAA File-Sharing Lawsuit White Paper

In August 2007, the Electronic Frontier Foundation (EFF) released a “white paper” chronicling the RIAA’s four-year legal campaign against illegal file-sharing. The paper (titled “RIAA v. The People: Four Years Later”) concludes that the RIAA has failed to diminish the volume of worldwide illegal file-sharing, despite having filed over 20,000 lawsuits against individuals suspected of committing copyright infringement on file-sharing networks. Instead of suing consumers, the EFF proposes that the music industry form one or more “collecting societies,”

wherein file swappers would be able to continue to share music in exchange for a “reasonable regular payment.” This fee would then be divided among artists and copyright holders based on the relative popularity of their music.

In January 2008, the RIAA, in its twelfth wave of the campaign, sent over 400 pre-litigation letters to 18 universities.

iv. *Maverick Recording Company, et al. v. Harper*, 07-CV-026-XR (W.D. Tex. complaint filed January 9, 2007)

Plaintiffs, Maverick Recording, UMG Recordings, Arista Records, Warner Brothers, and Sony BMG, filed suit against 16-year old Whitney Harper for copyright infringement in connection with her use of Kazaa, seeking \$750 per infringement. Harper admitted to copying, but she asserted an innocent infringer defense which could limit the damages to \$200 per infringement. The RIAA filed a summary judgment motion arguing that the defense could not apply since copyright notices are part of CDs sold in stores. In August 2008, the court disagreed and denied the motion regarding damages unless the RIAA agreed to accept \$200 per infringement. The court held that the RIAA did not present evidence to counter Harper’s assertion that she innocently infringed the copyrights. The court allowed the RIAA to decide whether to accept the \$200 per infringement in damages or to continue pursuing the case.

Later in August, both parties moved for reconsideration, which the court rejected. Claiming an interest in “judicial economy,” the plaintiffs moved for an entry of judgment against the defendant for \$7,400 (\$200 per song for 37 songs) in late September. On October 22, 2008, over defendant’s objection, the court granted the motion and entered the judgment.

v. *UMG Recordings v. Roy*, 08 cv 90-JL (D.N.H. 2009)

Universal Music Group settled a piracy suit in June 2009 when it became clear that the defendant, Mavis Roy, a resident of New Hampshire did not even own a computer at the time UMG first filed against her. Roy assumed letters she received initially from UMG’s attorneys were a scam or joke, because the RIAA directed her to a site where she could pay off her “debt”.

4. “Making Available”

Many of the RIAA members’ file infringement claims relate to consumer use of “peer-to-peer” networks, such as Kazaa. However, district courts differ as to the liability of a user who merely makes copyrighted songs available to other users. A District of Minnesota jury found a defendant user who had made over twenty songs available on her Kazaa account liable for infringement and damages over \$200,000.

Other district courts—in New York, Massachusetts, and Arizona—have found that the “making available” of songs is not infringement, unless the plaintiff also shows actual downloading of the song. A Massachusetts judge went so far as to attribute a certain amount of creativity to the act of downloading music. By associating downloading with “the self-expressive act of

identification with a particular recording,” the judge allocated some measure of First Amendment protection to certain aspects of music downloading.

These past three decisions occurred subsequent to the Minnesota case, which may indicate a trend toward placing the additional burden on a plaintiff to show more than a mere “making available” of copyrighted works by the consumer.

i. *Capitol Records, Inc., et al. (formerly Virgin Records America, Inc., et al.) v. Thomas, No. 06 CV1497 MJD/RLE (D. Minn. 2007)*

Jammie Thomas, a single mother from Minnesota, was sued by several major record labels for allegedly infringing the copyrights in twenty-four songs. The labels contended that Thomas illegally made available files on the Kazaa file-sharing network. Thomas denied that she shared the files, and the case went to trial after Thomas decided that she would not accept a RIAA settlement offer. The District Court judge instructed the jury that the record labels had to show only that Thomas made the copyrighted sound recordings available for electronic distribution and not whether the recordings were actually transmitted to other Kazaa users.

In October 2007, a jury found that Thomas was liable for copyright infringement and awarded \$222,000 in damages to the record labels (\$9,250 for each of the 24 songs). In an interview with the Wired.com “Threat Level” site, Michael Hegg, one of the jurors on the case, stated that the jury “wanted to send a message” that people should not illegally download copyrighted content and that the jury had considered larger financial penalties. Thomas stated that she would appeal the decision and has solicited donations for her legal defense on YouTube.

The verdict emboldened the recording industry to continue to sue individuals for alleged copyright infringement. Additionally, according to the *New York Times*, “the verdict is likely to reinforce the notion that computer users who do become targets of lawsuits—a small fraction of the population using file-swapping networks—are better off settling.”

In light of three subsequent decisions, Thomas challenged the “making available” claim in her appeal. In May 2008, the trial judge announced that he was contemplating granting a new trial on the grounds that the court committed a manifest error of law when it instructed the jury that making a copyrighted song available was a violation of the copyright owner’s rights “regardless of whether actual distribution has been shown.” The court cited *National Car Rental System, Inc. v. Computer Associates Int’l, Inc.*, 991 F.2d. 426 (8th Cir. 2001), in which the Eighth Circuit held that, “infringement of [the distribution right] requires an actual dissemination of either copies or phonorecords.” The court also noted that one case which the plaintiff originally relied on to support the questioned jury instruction had since been vacated. In June 2008, EFF and other industry groups filed amicus curiae briefs, arguing that the original “making available” jury instruction constituted an incorrect statement of the law.

In September 2008, the court held that liability for violation of the Copyright Act’s exclusive distribution right requires actual dissemination, and that the jury instruction given was thus erroneous. On those grounds, the court granted Thomas a new trial. Notably, Judge Davis concluded the opinion by imploring Congress to amend the Copyright Act to address liability

and damages in peer-to-peer file-sharing cases, particularly given the special case of private individuals who seek no profit from their acts, as contrasted with illegal commercial conduct by corporate or business defendants.

However, the evidence collected by MediaSentry, mentioned above, which led to the new trial, was used in the June 2009 retrial. This evidence of Thomas' "making available" music files in an allegedly infringing manner on the P2P network was controversial because there was never a direct download of any of the files by any user apart from MediaSentry, as part of its investigation on behalf of the plaintiffs. Some have called tantamount to entrapment. In the retrial, a federal jury ruled quickly against Thomas, finding her guilty of willingly infringing copyrights on 24 songs she posted on the Kazaa P2P file-sharing network. She was fined \$80,000 per song, for a total of \$1.92 million in statutory damages.

Calling the verdict "shocking" and grossly excessive, Thomas-Rasset quickly filed a motion on July 6, 2009, asking a federal judge to reduce the fine or grant a new trial. On January 22, 2010, Judge Michael Davis agreed that the \$1.92 million fine was "monstrous and shocking." However, finding that Thomas-Rasset acted willfully, Judge Davis determined there should still be a penalty and lowered the fine to \$54,000 (\$2,250 per song).

ii. *Elektra Entertainment Group, Inc. v. Barker*, 551 F. Supp. 2d 234 (S.D.N.Y. 2008)

In contrast to the *Thomas* case, the District Court for the Southern District of New York held in a March 2008 decision that, while the exclusive right of "publication" conferred to copyright holders is equivalent to the right to distribute, merely "making available" copyrighted works does not in itself constitute infringement. Denise Barker had, like Jammie Thomas, made several music recordings available to the public through a Kazaa profile. The Court held that Elektra will have to show that Barker not only "made an offer to distribute" but also that "the offer to distribute was for the purpose of further distribution, public performance or public display." The Court did give Elektra time to modify its complaint so as to "track the language of the Copyright Act that prohibits an 'illegal offer to distribute.'" Elektra filed an amended complaint in April 2008. Of particular concern to the RIAA is the effect this decision will have on the *Thomas* decision, which is the RIAA's greatest resource in its campaign against would-be copyright infringers. In July 2008, Barker filed her answer to the amended complaint and admitted to using Kazaa but argued innocent infringement.

She also alleged that the statutory damages were an unconstitutional construction because they would be several hundred times greater than the actual damages sustained. The RIAA valued each download at between \$750 and \$150,000 based on statutory damage guidance. Barker's attorney constructed a maximum fine of \$3.50 per stolen song. These issues were never adjudicated, as the parties reached a settlement on August 15, 2008. Under the terms of the settlement, Barker agreed to pay \$6050 to Elektra and refrain from further infringement.

iii. *London-Sire Records, Inc. v. Doe 1 et al.*, 542 F.Supp.2d 153 (D. Mass. 2008)

On the same day as the *Elektra* decision, the U.S. District Court for Massachusetts granted two motions to quash subpoenas filed by plaintiff record companies seeking the identities of several defendants for copyright violations. In granting the motions, the Court rejected the record companies' "making available" argument, which alleged that the defendants had distributed the record companies' music and thereby violated their copyrights by uploading recordings on a peer-to-peer sharing network. The court stated that "[b]y the plain meaning of [the Copyright Act] all 'distributions...to the public' are publications. But not all publications are distributions to the public." Therefore, the court reasoned that just because these defendants took all the necessary steps to make the copyrighted recordings available to the public does not necessarily mean that "distribution"—one of the exclusive copyrights—had occurred. According to the court, however, for the purposes of filing a complaint, that a reasonable fact finder *could* infer that a distribution had occurred is sufficient. As such, the Court held that while the record labels have a valid complaint against the defendants, they cannot proceed with legal action until they identify the defendants.

iv. *Atlantic Recording Corporation, et al. v. Howell*, 554 F.Supp. 2d 976 (D. Ariz. 2007)

In August 2007, a judge held that the "making available" of copyrighted content on a file-sharing network can constitute copyright infringement. Pursuant to 17 U.S.C. § 106(3), the distribution of copyrighted material need not involve a physical transfer. Thus according to the judge hearing the case, screenshots of the contents of Jeffrey Howell's Kazaa shared folder, taken by the P2P monitoring firm MediaSentry, provided enough evidence to establish infringement and grant the label's motion for summary judgment. "It is no defense that a Kazaa user did not directly oversee the unauthorized distribution of copyrighted material," the ruling stated. Though the court originally granted Atlantic's motion for summary judgment, it vacated that order.

In April 2008, the court denied Atlantic's motion for summary judgment, holding that the "making available" of music files does not constitute distribution. The court held that it was necessary to prove that someone actually downloaded forty-two files which were included in Atlantic's claim of infringement. Although Atlantic's investigators did download twelve files, they did not download the other forty-two recordings that Atlantic included in the infringement claim. As such, only the twelve downloaded songs may be considered as part of the suit. Additionally, the court held "that the labels must prove at trial that Howell was responsible for sharing the files."

In August 2008, in response to a motion filed by Atlantic, a judge entered a default judgment against Howell because he had destroyed evidence of file sharing in bad faith. Howell had reformatted his hard drive, deleted Kazaa and files from his shared Kazaa folder, ran a file wiping program, and destroyed logs of his file wiping activities. The court granted statutory damages in the amount request by the recording companies, \$750 per download for a total of

\$40,500, plus \$350 in costs. The court also entered an injunction to prevent further infringement by Howell.

v. *Warner Bros. Records, Inc., et al. v. Cassin*, 06-CIV-3089 (SCR) (S.D.N.Y. complaint filed April 21, 2006)

After monitoring Joan Cassin's distribution of music to other users of Kazaa, plaintiffs Warner Brothers, Capitol Records, UMG Recordings, Sony BMG, Maverick Recording, and Arista Records brought suit against her for copyright infringement. Plaintiffs claimed that Ms. Cassin made 349 music files available to millions of other users on this P2P network. Interestingly, after two years of litigation, the RIAA voluntarily dropped its lawsuit in June 2008. Defendant's attorney suggested that the suit may have been dropped due to a potential challenge to the RIAA's "making available" infringement theory and the decisions in the *Howell* and *Thomas* cases. Reportedly, Defendant's attorney discovered papers that showed the RIAA had actually re-filed its case against Cassin in the case *Warner v. Does 1-4*. The second case was assigned to a different judge and creates speculation of forum shopping by the RIAA. Defense counsel has asked for clarification of the dismissal as "with prejudice" in the former case and for this matter to be returned to the former judge since it is a "related matter."

vi. *Sony BMG Music Entertainment v. Cloud*, No. 08-CV-01200, 2009 BL 124553 (E.D. Pa. 2009)

Allegedly, Denise Cloud distributed 372 copyrighted audio files using the program Limewire on P2P network Gnutella. Cloud, charged by Sony BMG Music Entertainment, among other record companies under a "making available" theory, first had asserted that the plaintiffs failed to properly allege that Cloud "made available" copyrighted materials, based on the original 2008 Jammie Thomas ruling (which has since been overturned). The court replied that because the record companies had "raise[d] a right to relief above the speculative level, on the assumption that all allegations in the complaint are true," the claim under Section 106 of the Copyright Act of infringement of an exclusive right was sufficiently pleaded.

Second, the court dismissed Cloud's claim that the plaintiffs failed to plead that her alleged infringement was "willful." She claimed that the recording companies' arguments that copyright notices appeared on published copies of the music, putting consumers on notice was insufficient to support a finding of "willfulness". The court found that the allegation of knowledge sufficient to cover willfulness.

Third, Cloud alleged that the record companies' complaint should be dismissed because the digital files she uploaded were not adequately fixed so as to amount to "copies" as "material objects", as defined in Section 101 of the Copyright Act. To this end, Cloud attempted to show that the allegations of the plaintiffs did not fulfill the "embodiment" and "duration" requirements of the Act, particularly since the applicable terminology refers to such digital files as being "stored", implying more than a "transitory duration." The court did not accept this line of reasoning. In May 2009, the U.S. District Court for the Eastern District of Pennsylvania denied Denise Cloud's motion to dismiss for failure to state a claim of copyright infringement.

The court also declined to give a ruling at this stage of the case on whether the requested statutory damages were unconstitutional.

5. Digital Rights Management (“DRM”)

i. Apple’s view on DRM

In February 2007, Steve Jobs, CEO of Apple, took on the controversial subject of ceasing DRM systems to protect digital music downloaded from Apple’s iTunes service. Apple was the first online retailer to secure music licenses conditioned on implementing DRM systems by the four major record labels. In his statement, Jobs highlighted three future alternatives to the current situations: 1) to maintain the status quo, 2) sharing its FairPlay DRM with corporations, or 3) abandoning DRM altogether. He believes that DRM-free licensing would open up the market and facilitate a larger growth of digital music sales by 15% to 20%. AmazonMP3, the No. 2 online music retailer, is currently the most successful retailer to sell unrestricted songs in the MP3 format.

In a major breakthrough for Apple, EMI Group decided to abandon DRM on its digital music downloads provided to Apple’s iTunes store, beginning in April 2007. Apple announced a more significant change to the existing copy protections in January 2009, by stating that it will discontinue DRM from all of the eight million songs available in its digital store. Along with this change, Apple also unveiled a new pricing plan; instead of the standard 99-cents-per-song, the cost per song will range from 69 cents to \$1.29, depending on popularity and release date.

ii. Sony DRM Software

In October 2005, a security researcher discovered that Sony had included on its music CDs DRM software that would load on customers’ computers when the CDs were played without their consent. The DRM restricted consumers in the number of times the audio files could be copied and the use on portable digital devices such as iPods. It also exposed the computer to security risks by allowing unauthorized access to consumers’ computers and making it difficult to uninstall.

In November 2005, Texas was the first state to bring action against Sony alleging violation of the state’s Consumer Protection Against Computer Spyware Act and deceptive trade practices laws. Lawyers in California and New York filed class-action suits against Sony alleging that Sony’s software violated statutes including Unfair Competition Law, laws governing deceptive trade practices, and the Consumer Protection against Computer Spyware Act, prohibiting software controlling a user’s computer or misrepresenting a user’s ability to uninstall the program.

Sony first settled with New York in January 2006. The settlement was to provide consumers with replacement CDs and two incentive packages: 1) a cash payment of \$7.50 and a promotional code that allowed the consumer to download an additional album from the list of more than 200 titles or 2) an opportunity to download three additional albums. New York consumers had until December 2006 to file a claim.

In December 2006, both Texas and California entered into a settlement agreement with Sony. Under the agreement each state was to receive up to \$750,000 in civil penalties and costs. The consumers in these states are to receive \$175 if they filed their claim within 180 days of the agreement stating that their computers had been damaged while trying to uninstall the DRM.

The latest settlement by Sony was with the Federal Trade Commission (“FTC”) in January 2007. The FTC charged Sony with violating federal law when it sold CDs with the hidden DRM without the consent and knowledge of the customers. The settlement requires Sony to: 1) disclose the presence of DRM on the packaging of any CDs, 2) obtain authorization via a click-through license prior to installing the DRM software, 3) discontinue any use of the information previously gathered through the DRM, and 4) provide an effective method of uninstalling the DRM. The settlement also provides relief for the effected consumers by allowing them to exchange any CD with the DRM purchased prior to December 31, 2006 and to reimburse them up to \$150 for damages that were a direct result of consumers attempting to uninstall the DRM. Under the settlement agreement, Sony also has a responsibility to the retailers to provide a financial incentive to return problematic CDs and to clearly label any CDs in stock sold to retailers. The FTC retained the rights to monitor the compliance with the order.

Subsequently, Sony settled lawsuits with a consortium of thirty-nine states and the District of Columbia for \$4.25 million.

6. Enacted Legislation

i. Artists’ Rights and Theft Prevention Act

In the first major change to criminal copyright law since the No Electronic Theft Act of 1997, Congress has enacted the “Artists’ Rights and Theft Prevention Act of 2005” as part of the Family Entertainment and Copyright Act. This legislation adds two new criminal standards to current criminal penalties for copyright infringement. The Act criminalizes using a video recorder to record a film in the movie theater. The Act also criminalizes the willful distribution of pre-release software, movies, and music by making it available on computer networks accessible to the public. The Act provides additional provisions for copyright owners to register their pre-release works with the Copyright Office.

ii. California’s File-Swapping Law

In September 2004, Gov. Schwarzenegger signed into law legislation that seeks to terminate file-swapping by requiring file-swappers who share files to ten users or more to attach their legitimate email addresses to each swapped file. Those who violate the law can be charged with a misdemeanor resulting in up to \$2,500 in fines and possibly jail time. Minors, however, would only be charged up to \$250 for their first two offenses.

A second, related piece of legislation was introduced to the California legislature in January 2005 by Senator Kevin Murray. SB-96 would subject those who sell, advertise, or distribute peer-to-peer software to a fine of \$2,500 per charge or a year in jail for failure to incorporate filtering technology into the software to prevent the unauthorized swapping of copyrighted works

via their software. Currently, the bill is listed as inactive and Murray resigned from the Senate due to term limits.

iii. Prioritizing Resources and Organization for Intellectual Property Act of 2008

In an attempt to curb the piracy of intellectual property, Congress has enacted the “PRO-IP Act of 2008,” which is meant to “enhance remedies for violations of intellectual property laws, and for other purposes.” The Act aims to increase both the level of protection associated with intellectual property and the financial penalties for infringement. It amends copyright law to: 1) provide a safe harbor for copyright registrations that contain inaccurate information; 2) provide that copyright registration requirements apply to civil (not criminal) infringement actions; 3) require courts to issue protective orders to prevent disclosure of seized records relating to copyright infringement; 4) revise standards for civil damages in counterfeiting cases; and 5) prohibit importing and exporting of infringing copies of copyrighted works.

The Act increases the statutory damages for counterfeiting. It also establishes an Intellectual Property Enforcement Coordinator (IPEC) to serve within the executive branch, as well as an advisory committee that the IPEC will chair. Duties of the IPEC and advisory committee include development of a plan to reduce counterfeiting and infringement, and reporting to Congress and the president on domestic and international IP enforcement programs.

iv. Copyright Act Challenges

In April 2009 decision, the United States District Court for the District of Colorado upheld a challenge to the Copyright Act of 1976 on a First Amendment basis. In *Golan v. Holder*, No. 01-cv-01854-LTB (D.Col. 2009), the court considered a challenge to Section 104A of the Copyright Act by Stanford Law School’s Center for Internet and Society. The lawsuit was filed on behalf of music industry professionals who had been using works in the public domain prior to the passing of 104A, which, in an effort to comply with the Berne Convention, restored copyrights to foreign authors and removed the works from the public domain. This law required the plaintiffs to pay for the works or to cease using them. The arguments for the plaintiffs were initially rejected in the District Court, but the Court of Appeals for the 10th Circuit held that it is a “bedrock principle of copyright law that works in the public domain remain there” and that removing works from the public domain implicates free expression concerns. On remand, the District Court held that 104A does violate the First Amendment, because the statute is substantially broader than necessary to comply with the Berne Convention.

7. Pending and Withdrawn Legislation

i. The College Opportunity and Affordability Act of 2008

Introduced in November 2007, the College Opportunity and Affordability Act of 2008 was designed to amend the Higher Education Act of 1965 and address the rampant illegal downloading, distribution, and sharing of copyrighted files on college and university campuses. Under the amendment, colleges and universities would be required to “make publicly available”

their rules, policies, and sanctions pursuant to the downloading, distribution and sharing of copyrighted materials. They would also be required to “develop...plan[s] for offering alternatives to illegal downloading or peer-to-peer distribution of intellectual property as well as...plan[s] to explore technology-based deterrents to prevent such illegal activity.” The bill was signed into law by President Bush on August 14, 2008.

ii. Copyright Modernization Act of 2006

The Copyright Modernization Act of 2006 was sponsored by Rep. Lamar Smith, the chairperson of the House Subcommittee on Courts, the Internet, and Intellectual Property. It was withdrawn on September 27, 2006. The bill would have created a blanket mechanical license for all digital music with licensing rates and terms set by the Copyright Royalty Board. Additionally, it would have reduced the remedies available against infringing parties who performed a reasonably diligent good faith search for the copyright owner, but were unable to find the owner.

iii. Platform Equality and Remedies for Rights Holders in Music Act of 2007

In April 2006, Senators Feinstein and Graham introduced a bill that would establish “the fair market value” of licensing rights for digital music distribution in a variety of medias – including the Internet. The bill (S. 256) was revived in 2007 after the 2006 version did not become law, but did not go through, either. The “PERFORM Act” would have equalized royalties for Internet, cable television, and satellite services. At the same time, the Act would require such services to use readily available and feasible technology to prevent the making of unauthorized copies of music.

iv. House Resolution to Urge China to Prevent Piracy

In July 2004, in an ongoing effort to encourage the Chinese government to more strictly enforce intellectual property rights, H.R. 576, a bill sponsored by Rep. Diane Watson which recommended that the Chinese government implement more effective customs and border measures to help curb exportation of pirated goods into the U.S. passed the House. The Resolution also encouraged the Chinese government to implement a legal framework for the protection of intellectual property rights and to allow foreign producers greater market access to reduce the number of counterfeit goods sold in China.

8. Online Music Alternatives

i. AllofMP3.com / mp3sparks.com

Russian online music store AllofMP3.com offered downloads of popular music to as many as 5.5 million subscribers for \$.10 to \$.20 per song causing great concern among recording industry groups in the United States and Europe who contend the service was not licensed to distribute their artists’ works. In March 2005, after an investigation prompted by the International Federation of Phonographic Industries (“IFPI”), Russian prosecutors reportedly determined that Russian copyright law addresses only physical media and not digital copies. During the fall of

2006, Visa International and MasterCard Inc. stopped accepting credit card transactions from AllofMP3.com. AllofMP3.com remains an operational site, but offers only a blog.

In July 2008, MediaServices launched an alternative site, mp3sparks.com which is still operational as a music downloading alternative. MediaServices claims that the site is legal under Russian law, arguing the same principles that made AllofMP3.com legal. Russian copyright law made unauthorized downloads of music illegal as of September 1, 2006, after the creation of AllofMP3.com, but before the launch of mp3sparks.com.

In December 2006, major record labels filed suit against MediaServices, which owns both sites, in federal court in New York. The suit is seeking an injunction and compensatory and punitive damages amounting to \$1.65 trillion (\$150,000 per download) for the alleged eleven million unauthorized downloads which occurred from June through October of 2006. In May 2008, the record companies dismissed their suit. A representative for the RIAA stated that since the site has ceased operation, its anti-piracy goal prevailed. Bloggers on the site are already asking for its reincarnation given the dismissal. Meanwhile, Denis Kvasov, former head of MediaServices, was acquitted of copyright infringement, a criminal charge under Russian law, on August 15, 2007. However, this may be due to the fact that Kvasov was no longer MediaServices head by September 1, 2006, when unauthorized downloads became illegal.

ii. Muxtape

In March 2008, Justin Ouellete launched Muxtape, a website that allowed users to upload digital music compilations to share with others. Ouellette's stated motivation was to provide a digital version of a "mixtape" that one would share with others to help them discover new music. The site had a very simple design, and was initially quite popular, even among some copyright owners.

Ouellete was soon met with both legal challenges and business proposals from major record labels. According to Ouellete, he had the opportunity to create a fully licensed version of the site, but passed it up over concerns about maintaining the integrity and experience of the site. As legal issues surrounding the site escalated, the site was shut down in August 2008. Currently on the website (muxtape.com), Ouellete speaks of plans to re-launch the site, in a modified form, as a service exclusively for bands to establish themselves online.

iii. Project Playlist

In April 2008, Atlantic Recording Corporation and eight other record labels sued Project Playlist, a music-streaming service with more than 600,000 daily users in the U.S. District Court for the Southern District of New York. Project Playlist's website allows users to stream music, free of charge, from URLs placed on the Project's servers by other users. Users can access these URLs, and the music-streams to which they link, through the Project's web-based music player. Citing this feature, Plaintiffs allege that Project Playlist "performs, and purposely facilitates the performance of, Plaintiffs' copyrighted works without authorization." As of March 2009, Project Playlist had reportedly entered into agreements with Sony and EMI to allow their respective catalogs of music to be played through Project Playlist. On March 25, 2009, the

Southern District of New York issued a ruling in the case. *Atlantic Recording Corp. v. Project Playlist*, 603 F.Supp.2d 690 (S.D.N.Y. 2009). The court denied Project Playlist's motion to dismiss the state copyright infringement and unfair competition claims. Project Playlist had argued that it was an "interactive computer service" and thus immune from liability under the Communications Decency Act, however, the court found that the Communications Decency Act does not apply to state or common law copyright claims (such as those that protect sound recordings fixed prior to 1972).

iv. SeeqPod

In January 2008, Warner Music Group filed a lawsuit in the U.S. District Court for the Central District of California alleging copyright infringement against the search engine program SeeqPod. Warner challenged SeeqPod's program, which allows users to search for, stream, and recommend online playable media, especially music. SeeqPod has attempted to assert that it is protected by the Title II DMCA safe harbor, the Online Copyright Infringement Liability Limitation Act. This case is of particular importance because SeeqPod has been sued for searching and offering links to media available on others' sites. It has not hosted or facilitated the transmission of copyrighted material otherwise. In February 2009, EMI Music joined the suit against SeeqPod, and included as an additional defendant the application FavTape, which is based partly on the SeeqPod application programming interface. EMI's move to sue FavTape, which some consider to be a user of SeeqPod, reflects an attempt by EMI to broaden the scope of liability among defendants. The case is still pending, and will likely be pivotal in defining the relationship of copyright law to music and media-focused search engines. Under pressure from the ongoing lawsuits, SeeqPod filed for Chapter 11 Bankruptcy in March, 2009. Meanwhile, SeeqPod has made its source code widely available, to permit the technology behind its venture to survive the legal challenges. SeeqPod has recently indicated that it is in the process of being acquired by a media company.

v. Apple's iTunes

Apple's iTunes entered the market for digital distribution of songs in May 2003. It has since overwhelmed its competition but has not ended free downloading. Apple expanded its digital selection to include purchasing and viewing digital distribution of video content in 2005. In January 2007, at Apple's Macworld event, CEO Steve Jobs announced that Apple had over 350 TV shows and would shortly offer over 250 movies through their iTunes service. The company's website indicated that iTunes had sold over 8.5 billion songs as of September 2009. In 2008, iTunes launched Movie Rentals and currently offers over 2,000 titles to rent.

While the music labels have supported the iTunes Store's platform for the sale of digital music downloads, songwriters, composers, and music publishers are lobbying Congress to try to obtain additional royalties from iTunes and similar online music stores. Performance rights organizations such as ASCAP and BMI believe that composers and songwriters should be receiving performance royalties each time a song is downloaded as a single track, as part of a film or TV show, or as a streamed 30-second song sample. ASCAP and BMI believe that performance royalties should be paid for all downloads or streams, similar to the royalties that are paid when a song is played on the radio or broadcast during a TV program. David Israelite,

president and CEO of the National Music Publishers Association, explains, “We’re arguing that the law needs to be clarified that regardless of the method by which a consumer watches the show there is a performance right.”

vi. eMusic.com

eMusic is a subscription based, online music store. The service differs from other online music stores in that the mp3 files available for download are free from DRM software. As of September 2009, the service made 6 million tracks available for download.

vii. Zune Marketplace/MSN Music Store

In 2004, Microsoft introduced MSN Music, an online music store intended to compete with Apple’s iTunes Music Store. The MSN Music Store could be accessed through Windows Media Player or through an Internet browser. The store utilizes Microsoft’s Windows Media Player application and proprietary Windows Media Format files (protected .wma files). MSN Music has been replaced by the Zune Marketplace. In April 2008, MSN Entertainment sent out emails to customers advising them that they must assign all purchased songs to their authorized computers before August 31, 2008 because the company will no longer support retrieval of license keys, which previously would allow songs to play on any computer whether authorized or not. After that date, users’ music would play only on up to five machines previously authorized by the system.

viii. Napster

In February 2005, the reborn Napster introduced its Napster To Go service. Under this unique model, the user pays a monthly fee to “rent” as much of Napster’s entire music catalog as the user can download and fit onto a portable device. The songs are available in samples, permanent downloads, mp3 permanent downloads, and DRM permanent downloads with varying degrees of availability for downloading and transferring depending on the category. Starting in May 2008, all permanent downloads were sold in the mp3 DRM-free format. In January 2007, AOL announced that it would partner with Napster and migrate all of its customers on its Music Now service to Napster.

II. The Digital Revolution and Sampling

A. Sampling of Unoriginal Jazz Loop Not Actionable

In *Newton v. Diamond*, 349 F.3d 591 (9th Cir. 2003), the Ninth Circuit rejected jazz musician James Newton’s claim of copyright infringement brought against the rap/rock outfit the Beastie Boys. Newton claimed that the Beastie Boys sampled his six-second, three-note sequence without permission. The Beastie Boys, who had cleared the sound recording with ECM Records, but not the musical composition, which Newton owned, looped (repeated continuously) the sequence throughout their popular song “Pass the Mic.”

The Ninth Circuit held that the sequence was not sufficiently original to be afforded copyright protection. The court found that even if the sequence were original, the Beastie Boys' use of the sequence was *de minimis*. In June 2005, the Supreme Court declined to consider the case and let the Ninth Circuit ruling stand without comment.

B. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005)

In September 2004, the Sixth Circuit Court of Appeals held that any unlicensed sampling of sound recordings constitutes direct copyright infringement. The case involved the song "100 Miles and Runnin'" from the soundtrack to the movie *I Got the Hook Up*. The song used a three-note, four second sample of a guitar riff from the song, "Get Off Your Ass and Jam." The court based its decision primarily on the text of Section 114(b) of the U.S. Code, which grants sound recording copyright holders the exclusive right to "rearrange" or "remix" the recording. Given that "sampling is never accidental" and that the defendants in this case admitted to sampling the song, the court saw no reason to conduct the usual "substantial similarity" test for direct copyright infringement. In an amended opinion in June 2005, the court further clarified its original opinion by reasoning that only a new recording consisting entirely of an independent fixation of other sounds will not constitute infringement, even where these sounds imitate those in the copyrighted recording. The court believed that the music industry, as well as the courts, are best served by such a bright-line rule.

III. The Digital Revolution and Video-Sharing Services

A. *Tur v. YouTube Inc.*, 06 CV 4436 (C.D. Cal. complaint filed Nov. 13, 2006)

In July 2006, Robert Tur, a journalist and owner of the Los Angeles News Service, filed suit against YouTube Inc. in the U.S. District Court for the Central District of California alleging that the video-sharing site encourages copyright infringement by hosting footage from users who do not have the necessary permissions from copyright holders to upload and download the footage. This was the first copyright lawsuit filed against YouTube. Tur alleged YouTube posted unauthorized copyrighted footage owned by him and was viewed more than 1000 times before it was removed. This case was dismissed.

B. *The Football Association Premier League Ltd., et al. v. YouTube, Inc.* 07 CV 03582 (S.D.N.Y. complaint filed May 4, 2007)

In May 2007, several groups joined in a proposed class action suit against YouTube, including former Plaintiff Robert Tur. According to press reports during the *Tur* case, YouTube considered including within its defenses the safe-harbor provision of the Digital Millennium Copyright Act ("DMCA"), which is designed to allow content owners to request the removal of infringing material and to limit the liability of complying Internet service providers. Presumably, it may consider similar defenses in this class action suit.

C. *Viacom Int'l, Inc. v. YouTube, Inc.*, 07 CV 2103 (S.D.N.Y. complaint filed March 13, 2007)

In March 2007, Viacom Inc., owner of MTV and Comedy Central, sued YouTube, owned by Google, in U.S. District Court for the Southern District of New York. Viacom seeks \$1 billion in damages for international copyright infringement as well as an injunction prohibiting further infringement. According to the press, Google states among its defenses that it is within the protection of the “safe harbor” provision of the DMCA. This is the first major lawsuit by a media conglomerate against YouTube. While there was some speculation that Viacom’s suit would precede other media suits against Google, no other media companies have filed since Viacom. On the contrary, NBC-Universal and Universal Music Group have tendered deals with Google to provide content on the YouTube site. In July 2008, the District Court denied Viacom and the Football Association’s [see above referenced case] joint Motion to Compel YouTube or Google to produce: (1) the source code for the YouTube.com search function; (2) the source code for the YouTube.com Video ID program; (3) data fields for all videos posted to YouTube.com which defendants agreed to produce only for the works-in-suit; (4) the schema for Google’s advertising database; (5) the private videos and any data related to those. The judge granted Viacom and the Football Association’s Motion to Compel YouTube and Google to produce: (1) all removed videos; (2) all data from the logging database concerning each time a YouTube video has been viewed on YouTube.com or through embedding on a third-party website; and (3) the schema for the Google video content database.

D. *MoveOn.org Civic Action v. Viacom Int'l, Inc.*, 07 CV 01657 (C.D. Cal. complaint filed March 21, 2007)

The Viacom lawsuit spawned a new suit against Viacom by the Electronic Frontier Foundation (“EFF”), representing MoveOn.org and Brave New Films, which alleged that Viacom had improperly directed YouTube to take down a parody based on the “The Colbert Report.” The EFF claimed that the snippets of “The Colbert Report” used fall under the parody exception of the “fair use” doctrine, and therefore, Viacom’s action was infringing the free-speech rights of the videomakers. Viacom claimed that it had no objections to the posting of the parody and stated that it did not target it in its 160,000 takedown notices sent to YouTube. This case was voluntarily dismissed in April 2007. The video snippet is again viewable on YouTube.

E. *Universal Music Group Recordings, Inc., v. Grouper Networks, Inc.*, (C.D. Cal. complaint filed Oct. 16, 2006); and *Universal Music Group Recordings, Inc., v. Bolt, Inc.*, (C.D. Cal. complaint filed Oct. 16, 2006)

In two separate lawsuits, Universal filed suit against Grouper Networks (“Grouper.com”) and Bolt Inc. (“Bolt.com”) for copyright infringement of its music videos. Each website provides to users music videos to which Universal owns the copyright. According to comScore, an online audience measurement firm, Bolt.com had 8.1 million unique visitors and Grouper had 1.8 million unique visitors, in comparison to YouTube which had 72.1 million unique visitors in the month of August 2006. In October 2006, prior to YouTube’s sale to Google, it entered into a content deal with Universal in which it agreed to use new technology to filter out unauthorized content.

In March 2007, Universal and Bolt.com entered into a settlement agreement in which Bolt.com was required to pay Universal a multi-million dollar sum for past infringement against a percentage of the value of the company. Bolt.com also agreed to implement filtering technologies within sixty days. After the settlement, Bolt.com suffered financially, and after a failed acquisition by GoFish in August 2007, Bolt.com entered into an assignment of benefit of creditors with Net Revolution, Inc. and is no longer in operation. In August 2006, Sony bought Grouper. After the purchase, Sony removed the offending videos relevant to the *Universal* suit and relaunched Grouper as Crackle.com.

F. *Universal Music Group Recordings, Inc., v. Veoh Networks, Inc.*, 2008 WL 5423841 (C.D. Cal. 2008)

In December 2008, Internet-based video sharing service Veoh prevailed in a lawsuit brought by Universal for copyright infringement. Although Veoh did allow uploading and sharing of Universal's video content through streaming and downloading, the court held that Veoh's actions fell within the DMCA § 512(c) safe harbor defense. Because Veoh followed the procedures necessary to be eligible for safe harbor protections, it was not found to be liable. Despite Universal's contentions to the contrary, the court found that the software functions enabled by Veoh were undertaken "by reason of the storage at the direction of a user," as required for the safe harbor defense.

G. *Capitol Records, LLC, et al. v. Vimeo, LLC d/b/a Vimeo.com*, (S.D. N.Y. complaint filed Dec. 10, 2009); *EMI Blackwood Music, Inc., et al. v. Vimeo, LLC d/b/a Vimeo.com*, (S.D. N.Y. complaint filed Dec. 10, 2009)

In December 2009, Capitol Records filed a copyright infringement action against video-sharing site Vimeo, alleging that the company "induces and encourages its user to upload ... audiovisual works." It also claims that the company's staff actively participates in "making, selecting, commenting on, and at times choosing to delete" the lip-syncing videos posted on its site. Therefore, Capitol Records argues that Vimeo should not be eligible for protection under the DMCA's "safe harbor" provision which shields service providers from copyright infringements committed by users of their services.

IV. The Digital Revolution and Radio

A. Satellite Radio

1. *Atlantic Recording Corp. v. XM Satellite Radio Inc.*, 2007 U.S. Dist. LEXIS 4290, 81 U.S.P.Q.2d (BNA) 1407 (S.D.N.Y. 2007)

In May 2006, several record labels filed suit against XM Satellite Radio ("XM") accusing it of copyright infringement of sound recordings. The lawsuit focuses on the ability of XM subscribers to record songs and programs on its "XM +MP3" player, a digital audio recording device, enabling subscribers to: listen to broadcasts, record songs from playlists, and replay them as mp3 files. Specifically, the labels assert that XM, by enabling subscribers to record mp3 files

off of its transmissions, is acting similarly to legal online music retailers, and markets the player as an iPod-alternative.

In January 2007, a U.S. District judge denied XM's motion to dismiss for failure to state a claim. XM alleged that under the Audio Home Recording Act of 1992 ("AHRA") it was immune to the labels' lawsuit because its XM+MP3 player complied with the AHRA barring copyright infringement actions based on distribution of a digital audio recording device. The District Court sided with the labels, finding that they were not suing XM for its practices as an XM+MP3 player distributor but rather for distributing digital copies of the sound recordings without authorization to these players. The Court found that XM had entered into license agreements with the record labels only to transmit music, and the delivery of music onto the XM+MP3 was outside the scope of the license. Therefore, for the purpose of the motion, by acting as both a radio transmitter as well as a music distributor, XM was not protected by the AHRA.

This lawsuit generated other copyright infringement lawsuits against XM in March 2007 by music publishers, such as the National Music Publisher's Association ("NMPA") and EMI Music Publishing, who are making allegations similar to those of the record labels.

Meanwhile by early 2008, three of the major record labels party to the suit—Universal Music Group, Warner Music Group, and most recently Sony BMG—settled with XM and withdrew as plaintiffs. In June 2008, XM also settled with EMI Music Group, the last major record label to withdraw from the complaint. Also in June 2008, XM settled the first of the publishers' lawsuits by reaching an agreement with EMI Music Publishing. Details of the settlements have not been available.

B. Terrestrial Radio

1. Anti-Payola Settlement

The Federal Communications Commission ("FCC") and four major radio broadcasters (Clear Channel Communications, CBS Radio, Entercom Communications, and Citadel Broadcasting) finalized a \$12.5 million Anti-Payola settlement agreement in 2007. Payola is an illegal payment of incentives by record companies in exchange for the broadcast of songs on the radio. Under terms of the agreement, the broadcasters will provide to independent labels and their artists 8,400 half-hour segments of free airtime, which will not apply to the four major records labels. The broadcasters will also be required to create "rules of engagement," which will be negotiated with the independent labels to prevent further payola practices.

2. Performance Rights Act

In February 2009, a bill was introduced into Congress entitled the Performance Rights Act (PRA), H.R. 4789, which aims to cease allowing traditional radio broadcasters to play sound music without paying performers. The Performance Rights Act bill includes a clause calling for a flat annual fee instead of royalty payments for individual broadcast stations with gross revenues of less than \$1.25 million and for non-commercial, public broadcast stations. It also contains an exemption for royalty payments for religious broadcasts and incidental musical

sound recordings. While sponsors and advocates of the legislation have labeled this bill as an attempt to achieve parity in radio performance rights, foes assert that the law will stifle musical growth and that royalties will end up largely in the hands of record companies and not performers. In May 2009, the House Judiciary Committee voted to send the Act to the full House for a vote. After a contentious three-hour hearing in which three amendments to the bill were offered, only one of the amendments, reducing the fees to small broadcasters, was voted into the current version.

In June 2009, the MusicFIRST Coalition, an artists advocacy group supporting passage of the PRA, filed a request for a declaratory ruling from the Federal Communications Commission (FCC) as to whether some radio broadcasters' actions in opposition to the bill are contrary to the public interest, asking for the FCC's intervention in forcing broadcasters to cease such actions. MusicFIRST claims that members of the National Association of Broadcasters, who oppose the bill, are "using their licenses over public airwaves to promote their own pecuniary interests and to distort an important matter of public debate." In August 2009, the FCC began soliciting public comment on additional claims that broadcasters are airing misleading advertisements against passage of the PRA under the guise of public service announcements, refusing to air MusicFIRST advertisements, and refusing to play the music of some artists who vocally support the PRA while also threatening those artists. MusicFIRST also asked the FCC to consider "strengthening the license renewal process and shortening license terms" in light of these broadcasters' actions.

C. Internet Radio

1. RealNetworks' Rhapsody

Instead of buying songs and albums on the Internet, consumers may also subscribe to a digital-jukebox service, such as RealNetworks' Rhapsody. Rhapsody allows a user to pay a monthly fee in exchange for on-demand access to Rhapsody's music library.

Streaming audio does not allow users to own or keep the songs to which they have access; however, the relatively affordable monthly price makes streaming audio an attractive alternative to many customers.

In late June 2009, however, a consortium of music rights holders filed suit with a 104 page complaint against Yahoo, RealNetworks and Microsoft in district court in Tennessee, claiming that the companies were streaming music to consumers through YahooMusic.com, Rhapsody.com and Zune.com, respectively, without first obtaining copyright licenses for the sound recordings nor for the underlying musical compositions.

2. Pandora

Pandora is a unique Internet radio service created by the Music Genome Project as an outgrowth of the group's extensive technical analysis of songs' "musical attributes" and "focus traits." Pandora makes automated recommendations based on pieces with musical similarities to the user's own choices of songs and artists. The user then has the option to either approve or

disapprove of the service's choice, which will be taken into consideration for future selections. The service allows the user to create an unlimited amount of "stations" that reflect the different musical styles the user enjoys. Users are offered the ability to buy songs or albums at Amazon.com or iTunes Store. Pandora has both a free subscription service supported by advertisements or a fee-based subscription without advertisements. Due to the Copyright Royalty Board's 2007 ruling that increased fees and required licensing guarantees, Pandora is now only available in the United States.

3. *Arista Records, LLC v. Launch Media, Inc.*, No. 07-2576-cv (2d Cir. 2009)

In 2001, Arista Records and other music labels brought suit against Launch Media claiming that Launch had violated the Digital Millennium Copyright Act ("DMCA") by providing an "interactive service" through which users could create custom radio stations based on their favorite songs, artists, or music genres without paying individual licensing fees for each song. LAUNCHcast, Launch's service, took into consideration a user's preferences in creating a custom 50-song playlist for each station, but also included 5,000 randomly generated songs among the 10,000 that were narrowed down by an algorithm to create the playlist. While the songs consistent with a user's preferences were somewhat more likely to be picked for the playlist, the user was not able to choose a specific song or artist to play at any given time. At trial, a jury returned a verdict for Launch.

In August 2009, the 2nd Circuit held on appeal that the question was a matter of law and should not have gone to a jury. Nonetheless, it held LAUNCHcast was not an "interactive service" as a matter of law because it "does not provide copyrighted sound recordings on request, nor does it transmit a program specially created for the user within the meaning" given in the definition section of the DMCA. As a result, Launch and other Internet radio stations that do not provide songs on request continue to pay a substantially smaller statutory licensing fee for the use of digital sound recordings.

4. Internet Radio Royalties - Webcaster Settlement Acts

Under initial royalty rates imposed by the Copyright Royalty Board ("CRB") in 2007 online music streaming websites, like Pandora, were required to pay specified fees every time they streamed a song which raised with each year. This fee was scheduled to increase to \$0.0019 by 2010. However, webcasters were complaining that such high fees would leave them unable to compete against satellite and broadcast radio and eventually put them out of business. Originally, all webcasters, commercial and non-commercial were required to pay a \$500 minimum in addition to the per-song fee.

After two years under the old CRB agreement, the U.S. Court of Appeals for the District of Columbia handed down a verdict in July 2009, vacating the \$500 annual minimum, deeming the old "regime" "arbitrary" and stating that it "[did] not appear to represent what 'would have been negotiated in the marketplace between a willing buyer and a willing seller,'" but the Court kept in place the per-play rates imposed by the CRB.

Meanwhile, in September 2008, legislation was introduced that would grant the collecting society SoundExchange the authority to negotiate new royalty agreements with Internet radio providers on behalf of copyright owners and performers. H.R. 7084, the Webcaster Settlement Act of 2008, passed both houses in late September, and was then signed by the president in October.

The agreements are permitted to last up to 11 years, and will be binding on all copyright owners. However, any settlements must have been reached by February 15, 2009, when the legislation was set to terminate. There are several reports that many webcasters view this legislation favorably.

By March 2009, SoundExchange negotiated an agreement with the National Association of Broadcasters (NAB), which lowers the rates that Internet radio stations pay by approximately sixteen percent in 2009 and 2010. Stations that are not part of NAB may join the agreement, and SoundExchange is still negotiating agreements with special groups, such as college radio stations.

Record labels and some of the major webcasters, including Pandora, have come up with a new royalty rate agreement on their own to cover online music streaming as of July 2009. This new agreement (to cover the period from 2006 through 2015 for larger sites and through 2014 for smaller sites) will impose different rates based on site size and business model. Webcasters like Pandora, with considerable advertising revenue, will either pay 25% of their revenue or a lower fee than under the previous agreement for each time a song is played – whichever is greater. The new per-play fee for these larger sites will range from \$0.0008 for streaming in 2006 to 0.0014 for songs streamed in 2015. Smaller webcasters (those with revenues under \$1.25 million) will simply pay 12-14% of their revenues in royalties. However, there will be a minimum fee of \$25,000 annually for all stations, big and small, which can be applied to their royalty payments.

Other types of streaming sites will pay different fees. For example, the Corporation for Public Broadcasting made one royalty payment of \$1.85 million to cover all of the nation's public radio online streams through 2010. Another aspect of this new deal is that webcasters have also agreed to report more thorough information regarding playlists and user numbers to SoundExchange.

On June 30, 2009, the President signed into law the Webcaster Settlement Act of 2009 which extended the negotiation period during which SoundExchange can bargain with webcasters until 30 days after enactment of the law.

In July 2009, concerns about the constitutionality of the CRB appointment process were discussed in two decisions by the U.S. Court of Appeals for the D.C. Circuit but were not resolved since they had not been raised by the parties or had been raised too late. In August 2009, Internet radio broadcaster Live365 filed suit against the CRB in the U.S. District Court for the District of Columbia claiming that due to a legislative change that took effect in 2005, the appointment process for the three-judge board is unconstitutional. In 2005, the CRB members began being appointed by the Librarian of Congress instead of the President. Live365 argues that since the CRB judges wield extensive authority without supervision by any Executive

Branch official and can only be removed for cause, they are principal officers of the United States and must be nominated by the President and confirmed by the Senate in accordance with the Appointments Clause of the Constitution. It is not clear what impact a decision that the current appointment process is unconstitutional will have on the validity of the CRB's decisions and royalty rate determinations since 2005.

V. The Digital Revolution and Other Developments

A. *Capitol Records, Inc. v. Naxos of Am., Inc.*, 4 N.Y.3d 540 (2005)

In April 2005, the New York Court of Appeals held that in New York, common law copyright in sound recordings exists in perpetuity or until preempted by federal statute. Capitol Records owns the rights to a number of classical music recordings produced in the United Kingdom in the 1930s, which it re-mastered and distributed in the United States under an exclusive license. The original recordings entered the public domain in the United Kingdom in 1990. In 1999, Naxos re-mastered the recordings from the original shellac records and offered them for sale in the United States. Capitol Records' subsequent copyright infringement claim against Naxos reached the Second Circuit Court of Appeals.

The Second Circuit asked the New York Court of Appeals to certify whether Capitol Records could sustain its copyright infringement claim in New York where the sound recordings were created before 1972 and had entered the public domain in the United Kingdom. The New York Court of Appeals held that the expiration of the United Kingdom copyright did not terminate Capitol Records' New York common law copyright in the works and allowed the suit to continue.

B. *United States v. Am. Society of Composers, Authors & Publishers*, 485 F.Supp.2d 438 (S.D.N.Y. 2007)

In April 2007, the U.S. District Court for the Southern District of New York held that a musical work downloaded via the Internet involves the right of reproduction and not the performance right under Section 106 of the Copyright Act. AOL LLC, Yahoo! Inc., and RealNetworks, Inc., applied to ASCAP for a public performance license for their respective online music services. When the parties were unable to agree on an appropriate royalty, ASCAP applied to the court for a determination of a reasonable fee. In examining the definition of public performance, the court concluded that "in order for a song to be performed, it must be transmitted in a manner designed for contemporaneous perception," which the court concluded was not the case with respect to pure downloads. The court held that downloading is more accurately characterized as a method of reproducing a file, not publicly performing it: "the mere fact that ... each segment ... is capable of playback as soon as the transmission is completed, does not change the fact that the transmission is a data transmission rather than a musical broadcast."

On April 30, 2008 the court rejected both ASCAP's and the defendant's proposed formulas for determining royalties owed to ASCAP. See *United States v. Am. Society of Composers, Authors & Publishers*, 562 F. Supp. 2d 413 (S.D.N.Y. 2008); *United States v. Am. Society of*

Composers, Authors & Publishers, 559 F. Supp. 2d 332 (S.D.N.Y. 2008) (redacted version). The court determined its own formula for a blanket license which was similar to ASCAP's proposal, but with the royalty reduced from ASCAP's proposed 3% to a "more reasonable" 2.5% of each company's "music-use-adjusted revenues." This new rate is retro-active to 2002, and runs through December 31, 2009. According to the court, the music-use-adjusted revenue is to be computed by dividing each company's total hours of streaming music by the total number of hours users were logged into each site, as estimated by comScore, a disinterested party. The parties may still provide further documentation to the extent that they disagree with the comScore estimates.

In January 2009, the court issued companion judgment orders affirming the earlier fee determination formula and calculating performance royalty fees due from Yahoo! and RealNetworks. See ***United States v. Am. Society of Composers, Authors & Publishers***, No. 41-CV-01395 (S.D.N.Y. Jan. 20 and Jan. 21, 2008). The court's order also included a provision requiring audits, and a requirement of 1.5% per month late payment charge for any payment not made within 30 days of its due date.

In 2006, YouTube applied to ASCAP for a blanket license to offer video clips that contain songs from the ASCAP repertory. After the parties were not able to cooperate successfully in computing the royalties due to ASCAP, ASCAP applied to the U.S. District Court for the Southern District of New York for a fee determination. In May 2009, the court issued a ruling directing YouTube to pay over \$1.6 million in interim royalties, until a final rate is set. ***United States v. American Society of Composers, Authors and Publishers***, No. 41-CV-01395, 2009 BL 104603 (S.D.N.Y. May 13, 2009). The court considered ASCAP's arrangements with other streaming and video services, as well as YouTube's agreements with other publishers and societies. Based on a fee rate of 2.5 percent, the court set interim fees of \$1.4 million for the period from 2005 to 2008 and \$70,000 per month for the period January 1, 2009 through the determination of final fees.

C. UMG Recordings, Inc. v. Troy Augusto, No. 07-cv-3106 SJO (AJWx) (C.D. Cal. 2007)

Universal Music Group Recordings, Inc. (UMG) sued Troy Augusto, an eBay "re-seller" of "promotional" CDs. The defendant, whose legal team includes the Electronic Frontier Foundation (EFF), claimed that his sales of the CDs were lawful under the "first sale" doctrine (as codified under 17 USC 109 of the Copyright Act), and filed a counterclaim against UMG under 17 U.S.C. §512(f) for having allegedly "knowingly materially misrepresented" that the CDs sold by the defendant were infringing.

While the first sale doctrine provides that the owner of a CD is entitled to resell it without the permission of the copyright holder, UMG claimed that CDs marked as "promotional use only" remain the property of Universal and thus can never be resold. Augusto denied any contractual obligation and maintains that he was the true owner of the copies at issue, having acquired them from previous owners other than UMG. In June 2008, a federal judge allowed Augusto's summary judgment motion and ruled that his actions are protected under the first sale doctrine as the promo CDs from UMG are gifts. UMG has appealed the decision to the Ninth Circuit Court.

D. *United States of America v. Kevin Cogill*, No. CR 08-01222 (C.D. Cal. 2008)

In August 2008, Kevin Cogill was arrested and charged under the Family Entertainment and Copyright Act of 2005 for posting on his music site *antiquiet.com* nine unreleased songs from an upcoming Guns N' Roses album, "Chinese Democracy." He admitted to posting the songs online briefly, but removed them upon the band's request. Under the statute, for his first-time offense, Cogill could have faced charges of imprisonment for not more than three years, a fine of up to \$250,000, or both. However, in late October, the prosecutors in Cogill's case reduced the charges to a misdemeanor offense, for which the penalty of imprisonment is not more than one year. Although Cogill initially pleaded not guilty to the charges, he agreed to enter a guilty plea to one federal count of copyright infringement at a plea deal hearing in December.

In July 2009, Cogill, entered a guilty plea for one misdemeanor count of copyright infringement. Cogill told the court that he "never intended to hurt the artist, [but] intended to promote the artist because [he's] a fan." He was sentenced to home confinement for two months plus a year of probation.

In addition to the federal charges filed by the Government, the band could also file a civil suit against Cogill, but has not done so as of this writing.

E. *Lennon et al v. Premise Media Corp. L.P. et al*, 556 F. Supp. 2d 310 (S.D.N.Y. 2008) and *EMI Records v. Premise Media Corp. L.P.*, No. 601209/08 (N.Y. 2008)

In April 2008, the widow and children of John Lennon, along with the publisher of the song "Imagine," filed a complaint in federal court against those involved with "Expelled: No Intelligence Allowed," a feature-length film that used a 15 second portion of "Imagine" without obtaining permission. The film is a commercially released documentary dealing with what it considers to be unfair treatment by the academic community toward proponents of Intelligent Design. The complaint requested damages for copyright infringement as well as a preliminary injunction to prevent the further distribution of the film. In June 2008, the District Court for the Southern District of New York found that the plaintiffs successfully alleged a *prima facie* cause of action for common law copyright infringement, but after considering the four fair use factors of Section 107, determined that the plaintiffs did not demonstrate a probability of success. First, the court found the use of the song for the purpose of criticism to be transformative, regardless of whether the film as a whole was made for commercial purposes. Second, the court found that, as an artistic work, the nature of "Imagine" "falls close to 'the core of the copyright's protective purposes.'" Third, the court found "the amount and substantiality of the portion used in relation to the copyrighted work as a whole" to be small, as only 8% of the song was used and the defendants did not make it "the heart of 'Expelled.'" Fourth, the court found that there is no cognizable harm to the plaintiffs based on the use of the song in the film. Because the court determined that the factors of Section 107 favor a finding of fair use, it also determined that a presumption of irreparable injury was unwarranted. Thus, the court denied the plaintiffs' motion seeking a preliminary injunction. At the same time, the court also denied the defendants' motion to dismiss.

The owner of the “Imagine” recording, EMI Records Ltd., and the exclusive United States licensee of the recording, Capitol Records, also filed suit in *state court* against Premise Media Corp. in April 2008. The Supreme Court of the State of New York also found that the plaintiffs alleged a prima facie case for common law copyright infringement, as they did demonstrate valid ownership and unauthorized reproduction of the copyrighted work. The court held that fair use is available as a defense in the context of sound recordings under state law and considered the four factors of Section 107 as applied to Premise’s use of the “Imagine” recording. The state court reached the same conclusions with respect to each of the four factors as did the District Court for the Southern District of New York in *Lennon*, and thus found that the plaintiffs failed to demonstrate a likelihood of success. Because of this finding, the state court similarly found that a presumption of irreparable injury was unwarranted. The state court then denied the plaintiffs’ motion for a preliminary injunction and denied the defendants’ motion to dismiss.

Following the preliminary injunction denials in both cases, the plaintiffs voluntarily dismissed all claims against the filmmakers in September 2008. In their motion to dismiss, the plaintiffs acknowledged that they could only “at best, achieve an expensive, pyrrhic victory” without an injunction against use of the song in the film. The parties subsequently agreed to bear their own costs.

F. *.Starr v. Song BMG Music Entertainment, --- F.3d ---- (2010)*

In November 2008, the U.S. District Court for the Southern District of New York, dismissed accusations that record labels had conspired to fix prices and terms for their music on digital platforms violating Section 1 of the Sherman Antitrust Act. In January 2010, the U.S. Second Circuit Court of Appeals in New York reinstated the lawsuit stating that the complaint alleged enough facts to go forward.

Together the record labels involved control more than 80 percent of the digital music online. The appeals court cited a number of allegations that may be evidence of an illegal conspiracy:

“First, defendants agreed to launch MusicNet and Pressplay, both of which charged unreasonably high prices and contained similar digital rights-management plans. Second, none of the defendants dramatically reduced their prices for Internet Music (as compared to CDs), despite the fact that all defendants experienced dramatic cost reductions in producing Internet music. Third, when defendants began to sell Internet Music through entities they did not own or control, they maintained the same unreasonably high prices and digital rights-management plans as MusicNet itself. Fourth, defendants used Most Favored Nation clauses in their licenses that had the effect of guaranteeing that the licensor who signed the clause received terms no less favorable than terms offered to other licensors. For example, both EMI and UMG used the clauses in their licensing agreements with MusicNet. Fifth, defendants used the clauses to enforce a wholesale price floor of about 70 cents per song. Sixth, all defendants refuse to do business with eMusic, the #2 Internet Music retailer. Seventh, in or about May 2005, all defendants raised wholesale prices from about \$0.65 per song to \$0.70 per song. This price increase was enforced by the clauses.”

The case now returns to Manhattan federal court for further legal proceedings.

G. *Broadcast Music, Inc. et al. v. T-Mobile USA, Inc., 09 cv 09316 (C.D. Cal. 2009)*

On December 19, 2009, BMI filed a suit against T-Mobile for copyright infringement of resulting from ringback tones. A ringback tone is a customer selected song that is heard by a caller instead of a regular ring. The ringback tones are stored on T-Mobile's servers and then sent to the customers phone. The service is available for \$1.49 a month and songs can be purchased for \$1.99 each. BMI claims it has licensed ringback tones on all other major wireless carriers, except T-Mobile. BMI will now have to overcome the result of *In the Matter of the Application of Cellco Partnership d/b/a Verizon Wireless*, which found that ringtones were not public performances in need of a license.

H. Discovery from Investors Sought by Record Companies in Ringtone Cases

In March 2009, several record labels filed requests in the U.S. District Court for the Southern District of Florida compelling discovery from investors of an online company that allegedly distributed copyrighted recordings as unauthorized ringtones. See *Arista Records LLC v. Myxer Inc.*, S.D. Fla., No. 09-20608, complaint filed 3/11/09; *Arista Records LLC v. Myxer Inc.*, S.D. Fla., No. 09-20609, complaint filed 3/11/09. The record companies are seeking details regarding the investors' involvement in the venture, and implicated them because of their financial interest in the matter. The case against Myxer Inc, a website where users may search and download music files to send to mobile devices, is pending in California. See *Arista Records LLC v. Myxer Inc.*, No. 08-3935 (C.D. Cal. complaint filed June 16, 2008).

I. Digital Millennium Copyright Act

1. Misrepresentations

17 U.S.C. §512(f) (2007) allows service providers and alleged infringers under the act to sue individuals who "knowingly materially misrepresent" that content the service provider is presenting on the Internet is infringing. If the service provider prevails, a court may impose damages, costs and attorneys' fees.

In *Marvel Entm't Inc., v. NCSoft Corp.*, 74 U.S.P.Q. 2d 1303 (C.D. Cal. 2005), the court did not dismiss a §512(f) claim after Marvel sent a take down notice to the publisher of an online video game that allowed its users to create superhero characters, where some of the characters were created by Marvel attorneys. Marvel argued that NCSoft was not an ISP so §512(f) was not available to them, but the court stated that the passive and innocent nature of an ISP is not the basis of standing with regard to §512(f). The suit quickly settled.

In March 2006, an author of a *World of Warcraft* strategy book filed suit under §512(f) against Blizzard Entertainment Inc., the owners of *World of Warcraft*, who had repeatedly sent take down notices to eBay regarding the book, even though it did not include text from the game, only included a few screen shots, and contained a disclaimer on the first page stating it was not "official." *Kopp v. Vivendi Universal Games*, No. 06-01767 (C.D. Cal. complaint filed March 23, 2006). Months after Kopp's complaint, Blizzard dropped its claims for copyright and trademark infringement.

In *Lenz v. Universal Music Publishing Inc.*, No. 07-3783 (N.D. Cal. 2008), a mother filed a complaint in the U.S. District Court for the Northern District of California, seeking injunctive relief and damages under §512(f) in response to Universal Music Publishing Inc.'s allegation that a home video she made of her child infringed the copyright in a sound recording that was audible on the video. The video, which was posted on YouTube, featured Lenz's infant son dancing to the Prince song "Let's Go Crazy." While Lenz acknowledges that Universal owns the copyright for "Let's Go Crazy," she maintains that the video does not infringe any copyrights owned or administered by Defendants because her use of the Prince song "is a self-evident non-infringing fair use under 17 U.S.C. § 107." The Court granted Universal's motion to dismiss Lenz's §512(f) misrepresentation claim, but with leave to amend. In its analysis, the Court stressed that the misrepresentation must be *knowingly* made by the copyright owner. In *Online Policy Group v. Diebold*, the Court had previously defined "knowingly" as meaning "that a party actually knew, should have known if it acted with reasonable care or diligence, or would have had no substantial doubt had it been acting in good faith, that it was making misrepresentations." However, unlike the facts in that case, the Court determined that Lenz had not asserted any facts that Universal made a knowing misrepresentation. Additionally, the court dismissed Lenz's motion for judicial declaration of non-infringement because Universal never actually filed an infringement claim against Lenz. In fact, the video in question was reposted on YouTube, and can still be viewed (*see* <http://www.youtube.com/watch?v=N1KfJHFWhQ>). Lenz filed an amended complaint in April 2008, alleging that Universal acted in bad faith by issuing a takedown notice without proper consideration of the fair use doctrine. Because the court found this allegation sufficient to state a §512(f) misrepresentation claim, Universal's motion to dismiss the amended complaint was denied on August 20, 2008.

In November 2008, Apple reportedly wrote to the public wiki host site, Bluwiki, saying that the postings discussing how to sync music to an iPod or iPhone without the iTunes software was copyright infringement and a violation of the Digital Millennium Copyright Act's anti-circumvention provisions and demanding that the content be removed. The hobbyists discussing this topic on Bluwiki pages have yet to find a way to download music from other software companies, such as Songbird or Winamp, onto their iPod/iPhone. Fearing official legal action, Bluwiki took down the offending pages. In April 2009, the Electronic Frontier Foundation sued Apple on the behalf of OdioWorks, Bluwiki's parent company, asking the court to restore the posts Bluwiki had initially taken down. On July 8, 2009, it was reported that Apple said it would not target the Bluwiki pages again.

2. Reasonable Implementation

17 U.S.C. §512(i) (2007) establishes that a service provider has to have "reasonably implemented" a system that terminates the account of subscribers and account holders of the service provider's system in appropriate circumstances and upon informing the subscribers and account holders.

In the recent case *Perfect 10, Inc. v. CCBILL LLC*, 488 F.3d 1102 (9th Cir. 2007), the court set a low standard for online service providers to comply in reasonably implementing a system under §512(i). The court held that a service provider complied with §512(i), if it terminates "repeat infringers" when "appropriate," but does not have to affirmatively police its users for evidence of

repeat infringement. In addition, the court held that to comply with the reasonableness standard, a service provider only need to implement a notification system as well as not hinder content owners from collecting information necessary to provide such notifications.

3. Boucher Bill

In February 2007, Virginia congressman Rick Boucher proposed a bill titled, the “Freedom and Innovation Revitalizing U.S. Entrepreneurship Act of 2007,” (the FAIR USE Act) in an effort to restore the “carefully calibrated balance between the rights of copyright owners and the rights of the users of copyrighted material.” The bill, originally introduced in 2003 and again in 2005 as the “Digital Media Consumers Rights Act of 2005,” was in response to the Digital Millennium Copyright Act. Boucher believed the DMCA has “dramatically tilted the copyright balance toward complete copyright protection at the expense of the public’s right to fair use,” and had been calling for significant changes to the DMCA since 2002.

This new bill would instruct courts to refrain from imposing statutory damages on a defendant found guilty of aiding others in copyright infringement unless the copyright owner can show that “no reasonable person could have believed” the conduct constituting the infringement was lawful under the circumstances. It would also codify the “Sony-Betamax standard” by exempting hardware manufacturers from copyright infringement for the design, manufacture, or distribution of a device capable of “substantial, commercially significant non-infringing use.” Finally, the bill would make permanent the latest round of DMCA exemptions from the Copyright Office (November 2006), as well as add new exemptions for consumers wishing to circumvent copyright protection schemes for the purpose of engaging in certain enumerated activities (e.g., making a compilation of audiovisual works for classroom use, skipping commercials, transmitting files over a home network, accessing works in the public domain, and accessing works “of substantial public interest solely for purposes of criticism, comment, news, reporting, scholarship, or research”).

J. Communications Decency Act

In May 2008, the U.S. District Court for the District of New Hampshire declined to reconsider a lower court’s order in *Doe v. Friendfinder Network Inc.*, D.N.H., No. 07-cv-286 in which the court ruled that Defendant, an adult online networking service, was immune from liability under the Communications Decency Act for allegedly defamatory third-party postings located on its service. Section 230 of the Communications Decency Act provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” The District Court notes that, “this language leaves no room for liability on the theory that a service provider ‘re-posted’ – by actions of either man or machine – actionable information, so long as that information was provided by somebody else.”

Additionally, the court declined to reconsider the lower court’s ruling that the Communications Decency Act did *not* preclude Plaintiff’s common-law right of publicity claim.

K. Copyright Royalty Board Rate-setting Decision

On October 2, 2008, the Copyright Royalty Board issued a decision that maintains a 9.1 cent per track royalty rate for digital copies of music, rejecting copyright owners' proposed rate increase. The 9.1 cent rate first went into effect January 1, 2006. Among the various new fee arrangements proposed were a change from the flat per-track "penny rate" to a royalty based on percentage of revenues, as well as increase in the flat fee to as much as 15 cents per song. The Board found that, given all the evidence offered by the parties on both sides of the issue, the existing rate is "neither too high nor too low or otherwise inappropriate."

The Board concluded that a fee-per-use structure was more readily calculable than a royalty based on percentage of revenues, as the latter is susceptible to problems such as disagreements over the definition of revenue. The Board also noted that the penny rate is the established standard, and was concerned that imposing an unfamiliar percentage-based standard would lead to higher transaction costs. Additionally, the Board was convinced that a flat rate provides the best measure of actual usage. Considering all of the rate-setting factors of § 801 of the Copyright Act in detail, the Board found that each goal would be best met by maintaining the current rate.

The decision also establishes a 24 cent royalty rate for ringtones. This rate was determined using current market nominal rates for ringtone royalties.

Finally, pursuant to § 803(c)(7) of the Copyright Act, the Board adopted a late payment fee of 1.5% per month for overdue royalty payments. A number of other proposed terms, however, were rejected.

L. *In Re Application of Cellco P'ship*, 2009 U.S. Dist. LEXIS 95630 (S.D.N.Y. 2009)

In October 2009, the U.S. District Court for the Southern District of New York granted summary judgment in favor of Cellco Partnership, the retail wireless communications joint venture between Verizon Communications and Vodafone that does business as "Verizon Wireless", after determining that it did not have to pay ASCAP a public performance licensing fee for ringtones that it sold. When Cellco applied to ASCAP for a blanket public performance license for other music-related products it licenses, ASCAP attempted to require that Cellco also obtain a performance license for its ringtone sales. In response, Cellco filed this suit to resolve the issue. The court determined that Cellco did not engaged in the public performance of musical works when its sold ringtones to its customers via download, nor did its customers perform the works publicly when the ringtone sounded in a public place, rejecting ASCAP's arguments that Cellco was both directly and indirectly liable for copyright infringement each time a ringtone sounded on a customer's phone. Rather, the court held that Cellco's only involvement in the playing of a ringtone after its purchase was to send a signal to the customer's phone indicating that a phone call was incoming. It was the customer's decision whether a pre-programmed ring, a ringtone, a vibration, or nothing would occur in that instance, and Cellco had no say in the matter. As for indirect liability, the court held that even if a ringtone sounded in a public place, the customer

was not playing it for any commercial advantage and thus was not directly liable, preventing Cellco from being potentially indirectly liable.

M. *Capitol Records, LLC et al v. BlueBeat Inc. et al*, No. 09-cv-08030 (C.D. Cal. 2009)

In October 2009, BlueBeat Inc. began selling digital downloads of Beatles songs and other music on its Bluebeat.com and Basebeat.com websites for 25 cents per track. It did not, however, license the music from the copyright holders. On November 3, several record labels from the EMI Group, the distributor of the Beatles' catalogue, sued BlueBeat for copyright infringement, misappropriation of sound recordings made before 1972, and unfair competition, seeking an injunction to shut down the websites. Hank Risan, CEO of BlueBeat, claimed that the sound recordings sold on the websites were not infringing copies of the original songs, but instead were new sound recordings created through a process called "psychoacoustic simulations" that BlueBeat designed to make recorded music sound more like a live performance. Risan equated the process to a cover band performing a song, except that "psychoacoustic simulations" took the original track, processed it via computer, and produced a new track that BlueBeat then copyrighted as its own. The court found that the various EMI labels had suffered irreparable injury and granted a temporary restraining order against BlueBeat on November 5. On November 18, the court granted a preliminary injunction after determining that the labels would likely succeed on the merits of the claims at trial.

VI. The Digital Revolution and International Revolution

A. International Developments

1. Australia

In September 2005, an Australian court found the operators of Kazaa liable for copyright infringement. The suit was brought in late 2004 by the Australian record labels (EMI, Sony, BMG, Warner, and Festival Mushroom). The court ruled that Kazaa's distributors actively encouraged users to share copyrighted files. The judge found Sharman Networks' small print warning on the Kazaa website an ineffective way to deter its estimated one hundred million users from downloading copyrighted music. The judge also found evidence of focus group reports that showed the site's popularity was based on downloading free copyrighted music. The judge ruled that Sharman Networks not only failed to take steps to reduce copyright infringement, but actively encouraged users to increase their file-sharing. The judge described a Web page entitled "Join the Revolution" that criticizes record companies for opposing file-sharing. In his opinion, the judge explained that both individuals who make copyrighted files available and users who download the unauthorized material are liable for infringement.

The judge attributed liability for the copyright law violations to Sharman Networks, which has owned Kazaa since early 2002. The ruling also placed blame on the chief executive officer, Altnet (the company that distributes licensed music files on Kazaa), and Brilliant Digital Entertainment (Altnet's parent company). The court froze the equivalent of \$30 million USD in cash and real estate controlled by the company and gave Sharman Networks two months to

develop an updated version of the software that contains keyword filtering to block the exchange of copyrighted material. The court also ordered the company to pay ninety percent of the record companies' attorneys' fees. As discussed above, Kazaa settled with the record labels in excess of \$100 million USD.

The recording industry saw this case as another victory for copyright holders against peer-to-peer networks. The case is in line with *Grokster* in which the US Supreme Court ruled that a company can be sued for inducing users to download copyrighted material.

In December 2006, an Australian appellate court unanimously upheld a finding of an ISP's secondary liability for hosting a website that provided hyperlinks to infringing music. The court held that the ISP was "aware of the high level of usage . . . and of the copyright problems [implicated]."

In November 2006, the Australian Parliament debated amendments to its copyright laws. Five of the schedules became effective after Royal Assent was received in December 2006, with the remaining schedules effective January 1 and 8, 2007. Free speech advocates were particularly concerned with the criminal aspects of the new laws and the shift to favor copyright holders over consumers. Amendments to the copyright bill changed some of these issues to allow private citizens to use new technology without criminal liability.

2. Brazil

In September 2009, a Brazilian court made an unprecedented ruling against a website that distributed a popular P2P file-sharing program, deeming the software illegal and banning its distribution on the website. The iPlay.com.br website distributed K-Lite Nitro, a file-sharing program which allowed used to download music and other files from P2P networks such as Gnutella, OpenFT and Ares. Cadare Information Technology Ltd. ("Cadare"), iPlay's corporate owner, was sued in 2007 by the Protective Association of Phonographic Intellectual Property Rights (APDIF) who sought an order banning iPlay from distributing K-Lite Nitro. In February 2009, a judge decided to order that the software have a copyright filter added to its features with the expectation that it would block the sharing of copyrighted music. Although APDIF and several music labels provided a list of 4 million songs to be filtered, Cadare could not rewrite the program to included the content filter since it did not develop the software and had no control over the code. When Cadare was not able to comply with the initial court order, the judge ordered that the software be banned from the website.

In addition to the ban, the judge's ruling also concluded that any Brazilian websites that offered P2P file-sharing software could be held criminally liable if the website also contained advertising in an attempt to profit from users' desire to download such software. Cadare has removed the K-Lite Nitro software from the iPlay website, but plans to appeal the decision.

3. Canada

In June 2008, Interior Minister Jim Prentice proposed new legislation (Bill C-61) in the Canadian parliament which would overhaul current copyright laws. Under the proposed law, ISPs would

remain exempt from infringement due to their users' violations. In addition, ISPs would only be required to pass on notices of violations to their users rather than be required to take down the material as U.S. law requires. Users would be allowed to time-shift television and radio programs, but could not permanently store such recordings in a personal library. The bill would also limit individuals' liability for making illegal copies of music or movies to a maximum C\$500, in addition to C\$20,000 per infringement if digital locks were broken. Higher penalties would still also apply to posting copyrighted music on P2P technology or posting images to websites, such as YouTube. One online group, Fair Copyright for Canada, claims that the proposed legislation has fine print that would still hold individuals in violation if they "lock down" recordings.

In March 2009, one of the largest P2P networks on the Internet, isoHunt, was told by a Canadian court that a full hearing would be needed to prove its case seeking to have its services declared "non-infringing" of copyrights in the case brought against it by the Canadian Recording Industry Association. Gary Fung, who runs isoHunt from British Columbia appealed the ruling, but was turned down in July 2009. Fung said he plans to move forward and go to trial.

4. China

In July 2005, seven record companies including SonyBMG, Warner Music, and Universal Music accused one of China's largest search engines, Baidu.com, of engaging in copyright infringement. Baidu stated that it searched all music file formats indiscriminate of copyright protection or format. Beijing's First Intermediate Court denied the relief the record companies sought: a suspension of the downloading service and compensation equivalent to \$216,250 USD. Baidu is still operating as of June 2008 after the People's High Court of Beijing granted a reprieve which upheld a lower court's ruling that Baidu had not violated the copyright to songs. However, record-industry sources indicate that the decision may have little practical meaning because the copyright laws applicable to China have changed since the original suit was filed. The record companies have already filed a new lawsuit. When judged under the new laws, sources claim, Baidu could be held liable for copyright infringement as Yahoo China was. Yahoo was sued by the IFPI in 2006 for violation of copyright by engaging in a practice called "deep linking" – a process linking to file-sharing sites and, in many instances, directly linking to pirated songs hosted on servers throughout China.

In August 2009, the Chinese Ministry of Culture announced a series of reforms in order to combat the online piracy of music in China. Central among the reforms was the new requirement that all foreign music available online be reviewed and approved by an online auditing system beginning on December 31, 2009. As part of the review process, songs must be submitted with written lyrics, translated into Chinese. In order to distribute music online, Chinese companies need to be registered as "Online Cultural Businesses". The changes also require search engines to ensure that any links to music content available in their searches direct users only to content that has been approved by the Ministry's auditing department. Two weeks after this announcement, the Ministry announced that all lyrics posted on Chinese websites would also have to be vetted by its content auditing department.

5. European Union

In January 2007, the IFPI warned ISPs that it may sue them in order to properly protect the rights of its members. The chairperson and CEO of the group stated that they should not have to wage the war against piracy alone, but need the cooperation of ISPs. The IFPI reported that record labels sold \$2.9 billion USD worth of music online or through mobile phones in 2007. The report also indicated that billions of illegal files were swapped in 2007, at a 20 to 1 ratio of unlicensed tracks downloaded to legal tracks sold.

In April 2007, the European Commission charged Apple iTunes with violating European antitrust law. The Commission alleges that Apple is restricting music sales in Europe by limiting consumers to purchase music from iTunes in their country of residence rather than a single European market. These allegations arose out of a British consumer group filing a complaint with the Commission highlighting the price discrepancies of a digital download in different European countries. Digital downloads vary from \$1.32 to \$1.56 depending on the country. Apple stated that it had initially wanted to open an European store, but the music industry imposed the current business model. In January 2008, the EC settled with Apple by agreeing to drop its antitrust suit in exchange for Apple's lowering of prices in the U.K. in order to equalize "pricing across its European iTunes stores within six months," according to *Fortune Magazine*. In July 2008, Apple announced that it would not be lowering U.K. prices, as a change in exchange rates had resulted in the 79p charged in the U.K. being of relatively equal value to the €0.99 charged throughout the rest of Europe. The EC has not responded as of this writing, but there has been some criticism that there will once again be price discrepancies when exchange rates inevitably change in the future.

In December 2007, the EU put into place the Lisbon Treaty. It was scheduled to take effect in 2009, subject to ratification by all 27 member states. The treaty would eliminate many of the member countries' individual veto powers giving the EU dominion over certain intellectual property rights in the hopes of a more unified and efficient system. In June 2008, Ireland voters rejected the treaty. Although, the fate of the treaty is in question, the European Commission stated it would continue with the ratification process and address the Ireland situation later in the year.

In July 2008, the EU Parliament approved the "Telecom Reform Package" and proposed amendments. The package includes a wide range of reforms to numerous telecommunications industries. Opponents, including the Foundation for a Free Internet Infrastructure (FFII), are concerned that the language of some of the proposed amendments could lead to grave effects on consumers, such as: peer-to-peer and other software applications being deemed "unlawful" under a software licensing authority; the codification of the use of warning letters sent to copyright infringers by ISPs transforming into a "three strikes" policy; and allowance by network providers to "ensure network security" which would allow them to block DRM-circumvention software. Supporters of the reform argue that the opponents' warnings are unwarranted and that any language open to interpretation will be "adequately modified."

In March 2009, EU telecoms legislation amendments which would have included a three strikes plan were voted down by the EU Parliament. June 16, 2009's "Digital Britain" report, preferring

commercially-led solutions, offered no support for a three strikes disconnection plan, though it did recommend technical measures such as blocking of sites, capping bandwidths, bandwidth shaping and filtering, or a combination of these measures as sanctions for illegal P2P file-sharing. In response to the possible reintroduction of a “three strikes” plan for the U.K., the Featured Artists Coalition, the British Academy of Songwriters, Composers and Authors, and the Music Producers Guild united in opposition of such a measure, showing that while the music labels may support such strict measures, some music creators themselves do not.

Internationally, many continue to speculate as to whether the three-strikes initiative will find success in various countries. New Zealand decided to forego a three strikes set-up as well. As of now Ireland seems to be the only place where the recording industry has triumphed in this context. In the United States, following a major push by the RIAA, the proposal has not found a warm reception.

Additionally, in July 2008, the European Commission proposed a change in copyright to expand the term of protection for recordings from 50 to 95 years. Included in the proposal was a reversion of the copyright to the original performers after 50 years if the recording label does not actively market the content. Moreover, if the work is not being exploited in the market by the performer, record company, etc., it enters the public domain. Composers and authors receive copyright protection of life plus 70 years. The proposal went to the European Parliament for debate and although European Parliament’s Legal Affairs Committee approved the copyright extension in February 2009 the Council of Ministers of the European Union rejected the proposed extension in March 2009. While the French and German governments supported this legislation, the U.K. position was in favor of a 70-year term instead. A minority of other countries, including Sweden, Denmark, Belgium, Malta, the Netherlands, Finland, Austria, Slovakia, Slovenia and Romania, was against the proposal.

In May 2009 at a meeting of the European Parliament, two European commissioners proposed the creation of an EU copyright license that would allow for cross-border sales of digital content, including books, music, and movies. According to the proposal, consumers could shop online from any retailer in the EU regardless of their respective locations. At the present, many retailers will not sell media to foreign countries due to complex domestic copyright rules and fees, but under the new scheme, they would only pay fees to one central office. Legislation is expected to be submitted in 2009.

In October 2009, several of the top companies in the music industry signed a joint statement outlining a set of principles intended to improve online music opportunities in Europe by introducing expanded online distribution networks, new licensing platforms, and a common system for the exchange of rights ownership information. In addition to these new developments, the statement also encouraged greater use of multiterritorial licenses for digital music. The statement was a result of the fourth meeting of the Roundtable for the Online Distribution of Music which was attended by representatives from leaders in online music distribution, like Apple and Amazon.com, with the discussion led by the EU Competition Commissioner Neelie Kroes. Representatives from the major music labels and European performance rights organizations also participated in the drafting of the principles that are

expected to result in better availability of a wider offering of digital music to citizens in all of the EU member states.

i. Belgium

A Belgian court's ruling in June 2007 gave the country's smallest ISP Scarlet six months to "make it impossible" for its users to violate copyright laws. SABAM (Société d'Auteurs Belge – Belgische Auteurs Maatschappij), the Belgian collective management organization, sued Scarlet based on its users' online file sharing. The victory was a big one for the group, prompting it to threaten Belgium's largest ISPs and the Belgian Internet Service Providers Association that they might be next if they do not install software filters to prevent file-sharing. After putting a significant effort into finding a viable solution, Scarlet has argued it is impossible to comply with the order and is challenging the court-ordered €2,500 fine it was ordered to pay for each day that it did not comply with the order, and the fines continue to accrue. In related news, Belgacom's proposed acquisition of Scarlet for €185 million is expected to be ruled on by Belgium's antitrust regulator in September. The appeal of the SABAM case is scheduled to be heard shortly thereafter, in October 2009.

ii. Denmark

In February 2008, one of the smaller broadband providers in Denmark (4% of traffic)—Tele2—was ordered to block the Pirate Bay website (see "Sweden" below). Tele2 has stated it will comply with the order. A Danish enforcement court also ordered DMT2 to close the connection to Pirate Bay and its users, and the ISP complied. Pirate Bay responded to the orders by opening a new URL, jesperbay.org, named after the head of the Danish IFPI.

iii. France

In August 2006, French President Jacques Chirac signed into law copyright legislation that may have a considerable impact on software and entertainment companies selling digital music players or online music services in France.

The legislative process started in March 2006 when French lawmakers passed a draft of a bill (referred to by the French abbreviation DADVSI) through the lower house of the legislature, the Assemblée Nationale, that required sellers of digital music players and online music services in France to open up their DRM and become entirely interoperable (e.g., usable or playable on any device or software program). Although the bill had reportedly been intended to harmonize French copyright law with the European Copyright Directive, this proposed legislation went far beyond these norms in mandating interoperability among digital media, thus breaking the hold any one technology might have over a cultural or artistic work. This makes the purchase of digital music or videos more similar to the purchase capability of CDs or DVDs, which are playable on any appropriate device/machine. The pending legislation, commonly referred to as the "iPod Law," greatly concerned the digital music industry leader Apple.

Although the bill was initially approved by the French Senate and National Assembly, the pending "iPod law" was brought before the Conseil Constitutionnel for review. In July 2006,

after reviewing the proposed “iPod Law,” the Council declared a major section of the legislation unconstitutional in violation of the constitutional protections of property. The Council relied primarily on the 1789 Declaration of Human Rights in support of its decision.

The bill had previously allowed individuals to circumvent DRM protections to enable interoperability; however, changes to the legislation now make such conduct illegal and punishable by a fine. Additionally, provisions protecting open source development of related applications have been virtually eliminated.

The Council further determined that Apple and its competitors in the digital media market could not be forced to share their copy-protection technology without being paid for it. Thus, while the Council addressed the need for compensation, the Council opted to have the principle of forced interoperability remain in place. As a result, the law will now introduce a DRM licensing authority for companies using rights protection which may order companies to provide information to competitors to enable interoperability. Effectively, this restriction may eliminate IP proprietors’ rights to negotiate the terms of an IP licensing agreement. Additionally, it has been implied from the language of the amended legislation that any party seeking to petition the DRM licensing authority must qualify as a “competitor” e.g., have the capability to compete with the company from whom it seeks license.

The Council also raised the penalties provision for file sharing at the consumer level which, as initially drafted, was the equivalent of a parking ticket, and maintained stricter fines of up to € 300,000 (about \$382,500 USD) and three years in prison.

A critical component of forced interoperability (i.e., the compulsory licensing mechanism) remains in place in the law that was formally put into effect. In April 2007, France implemented the independent regulatory body responsible for enforcing the law, Autorité de Régulation des Mesures Techniques (ARMT). It is apparent that the law will have far-reaching consequences for the software and entertainment industries in the long term. Currently, other European nations, such as Norway, Denmark, and Sweden are pursuing similar legislation and have begun to initiate proposals or regulatory moves.

In June 2008, an anti-piracy law based on the Sarkozy/Olivennes Agreement signed in 2007 by ISPs, music rights groups, and the government received the backing of the French cabinet. This law overwhelmingly passed the French Senate in a 297 to 15 vote in November 2008, and passed through the National Assembly, but was rejected in April 2009 when Socialist Members of Parliament led a majority of legislators voting against it. Under the so-called “three strikes” law, French Internet users who download illegal content via peer-to-peer sharing would receive an email warning for the first offense, followed by a registered letter for the second, and suspension of Internet access for up to a year after the third offense. ISPs would be responsible for monitoring the activity and issuing the warnings. Enforcement would be overseen by the High Authority of Diffusion of the Art Works and Protection of Rights on the Internet (HADOPI). In addition, the Olivennes Agreement included a commitment by the music industry, represented by IFPI, to phase out the use of non-interoperable DRM but only for sales of music tracks online. The bill was amended, reintroduced and passed in the National Assembly on May 12, 2009, and passed the house the following day.

On June 10, 2009, although the three strikes disconnection bill had passed in France in both Parliamentary chambers, the bill was held up upon review by the Conseil Constitutionnel, its final step towards passage, to the surprise of many. Serious questions of constitutionality have emerged over the HADOPI's ability to disconnect users from their Internet access (after two warnings, and therefore upon the "third strike") without first requiring judicial review. The rejected process would only have provided for judicial review after users were first disconnected by a HADOPI ruling. According to the group, "the disconnection ability unfairly violates cornerstones of freedom of speech and presumed innocence." The Conseil said that only a court can authorize such actions. This ruling meant a critical rewrite of the bill.

In July 2009, the French Senate passed a new version of the bill that would require a judge to review the accusations of repeat illegal file sharing before deciding whether to terminate a user's Internet connection for one year and fining the user up to €300,000. If children are responsible for file sharing in a home, parents could be fined up to €3,750 and the family could lose its Internet access for one month if the violations continue after warnings are sent. In September 2009, the National Assembly passed their version of the bill which was reconciled with the Senate version before being sent for review by the Conseil Constitutionnel. News of the revised bill's passage was greeted with praise from Culture Minister Frederic Mitterrand remarking, "Artists will remember that we at last had the courage to break with the laissez-faire approach and protect their rights from people who want to turn the 'net into their libertarian utopia."

In October 2009, the Conseil Constitutionnel approved the rewritten law, allowing it to take effect. Members of the HADOPI are expected to be appointed in November and warning letters may begin going out in early 2010, with the first suspensions of Internet access expected to occur within a few months. David El Syegh, director general of Syndicat National de l'Édition Phonographique, the French music industry association, reacted to the news by pointing out that "France is acting as a spearhead", acknowledging France's position as the first major industrialized nation to adopt such strict measures against file sharing.

France's effort to enact the "three strikes" law runs at odds with the European Parliament's members at large, who voted against the idea of cutting off infringers' access earlier in 2008. New regulations that prevent member countries from implementing measures to cut off Internet access unless the alleged infringer is subject to a prior decision from a competent legal authority are expected to be formally adopted in 2009. It remains to be seen whether France's European neighbors will effect similar provisions.

France is also actively pursuing lawsuits against companies outside of the country that promote music pirating and other illegal downloading. In November 2008, a French court ruled that lawsuits against US-based companies that develop peer-to-peer applications – Vuse, Limewire, Morpheus, and Shareaza – can be heard in French court. Because of an amendment to DADVSI, Article 14 Quarter, rights-holders can now seek court remedies against companies whose software facilitates illegal transmission of copyrighted materials. Under Article 14, a French judge may order the software companies to block or limit illegal use as much as possible in order to protect the rights-holders.

On January 7, 2010, during a speech to leaders of the French arts and entertainment industry, President Nicolas Sarkozy stated he was in favor of a possible tax on Internet giants that would benefit copyright holders who have been harmed by the online availability of illegal free content. The proposal is aimed at companies such as Google, Microsoft, and Yahoo. The tax would be on any online advertising revenues they earn in France. The taxes received would go towards helping creative sectors, such as the music industry. The proposal suggests that if passed, the taxes earned on the first year alone could be as high \$72 million USD. Sarkozy also stated he wanted France's antitrust body to rule on whether Google has a dominant market position in online advertising. Google France released a statement saying it hoped the government's plans would lead to innovation, rather than new taxes.

iv. Germany

In January 2005, Germany's Higher Regional Court of Frankfurt ruled that an ISP was not required to reveal the personal information of a customer who operated a music file server through the provider's network. The court ruled that a provider only supplies "technical access" to the Internet and need not police its network for infringing data. While a provider is obligated to block access when it learns of infringing content on its network, the court held that because the provider itself has not violated copyright law, it is not required to reveal the personal information of the customer. Separately in September 2007, the Higher Regional Court of Cologne upheld but modified an injunction sought by GEMA, Germany's performance rights organization, against the RapidShare webhosting sites. The court ruled that while the original injunction was too broad, operators of the sites still have the duty not only to check and remove unlawful recordings from their services, but also to check external third-party links on their sites that could lead RapidShare users to pirated content.

GEMA was granted another victory by a German court in June 2009 in its copyright-infringement case against Rapidshare. The file-hosting service was long known for serving as a hub of illegal distribution of copyrighted materials. It was ordered to pay a \$34 million fine to GEMA. It has also been ordered to start aggressively filtering copyrighted files it hosts and removing infringing content.

According to the official GEMA statement, "The judgment states that the hosting service itself is now responsible for making sure that none of the music tracks concerned are distributed via its platform in the future. This means that the copyright holder is no longer required to perform the ongoing and complex checks."

In an international context, many are taking issue with the ruling for a variety of reasons, especially in light of the recent Jammie Thomas-Rasset decision in the United States, where an individual user who posted just 24 copyrighted songs on a P2P network has been sentenced to pay \$1.92 million. To them, it would seem the Rapidshare damages should be much higher than \$34 million, considering tens of thousands of songs are downloaded and uploaded through the site each day.

In another German case, a state appeals court in Hamburg ruled against the band Kraftwerk in a copyright suit, after the band alleged infringement because a snippet of one of their songs was

used by Sabrina Setlur in her own work. The court held that since the clip used was only two seconds long, and did not make use of the original melody, it did not constitute infringement, and that there is no infringement when a sample is part of a new musical work bearing no resemblance to the original.

In February 2009, European record labels instituted a copyright infringement lawsuit against the Germany company producing the Songbeat Internet application. By searching various websites, some of which may enable peer-to-peer file sharing, Songbeat employs SeeqPod technology and allows a user to listen to, stream, and even download songs. While users may stream 25 songs for free on the site, Songbeat allows unlimited streaming for a fee. Although Warner Music Group petitioned the German court for a restraining order against Songbeat, the court did not allow it and instead scheduled hearings in early 2009 to rule on the merits of the suit.

In October 2009, a group of German independent music labels, publishers, and artists filed a criminal complaint against YouTube and its parent company Google claiming that YouTube had not responded to requests to take down more than 8000 videos containing music whose rights belong to members of the group. In addition, the group alleged that YouTube had not permitted some of its members to participate in their Content ID program that identifies songs used in videos based on their similarity to sample song files provided by rights holders, who can then choose whether to request the video be taken down or monetize the use of the song through advertising. As a result of the complaint, Hamburg's prosecutor sought assistance from U.S. prosecutors to compel YouTube to surrender logs of who uploaded and viewed 500 of the video files alleged to contain infringing songs.

v. Ireland

In January 2009, an Internet Service Provider in Ireland joined the growing movement to implement a three-strikes process to manage copyright infringement online. Irish ISP Eircom agreed to a settlement with major record labels that will pursue infringing customers, and eventually cut off user access if the infringement continues.

In contrast to Norwegian ISP Telenor, Eircom also decided to block Swedish file-sharing site, "Pirate Bay" as well as other sites determined to facilitate copyright infringement.

As of June 2009, the Irish Recorded Music Association (IRMA) acknowledged that it is organizing and coordinating legal actions for major record labels against two of Ireland's ISPs over users' illegal file-sharing. Although there is no current legislation to support such an action, IRMA is essentially attempting to enforce a three-strikes system. After reaching the Eircom settlement, IRMA wrote other ISPs and commanded them to put in place a system of informing copyright-infringing users, cutting off repeat offenders and blocking websites which allow users to illegally access infringing materials. The ISPs plan to defend their position maintaining, "there is no basis under Irish law requiring ISPs to control, access or block the Internet content its users download" (UPC spokesperson to the Irish Times). IRMA has purportedly refused to consider UPC's proposed "stakeholder" forum for ISPs and government officials.

vi. Netherlands

In December 2003, the Supreme Court of the Netherlands upheld an appellate court's holding that the file-swapping software company, Kazaa BV, was not liable for the copyright infringement of its users. The appellate court's decision was the first anywhere to protect a file-swapping company against copyright liability.

In July 2009, as a result of a copyright infringement suit by Stichting Brein, the Dutch anti-piracy group, Judge Wil Tonkens ordered that the Pirate Bay file-sharing site will be prohibited from operating in the Netherlands as of August 9, 2009. The penalty for non-compliance has been set to a range as high as €30,000 per day. In addition, the three current Pirate Bay owners were ordered to pay €42,000 in court costs, jointly. On appeal, the three Swedish men who allegedly operate the Web site claimed that they either never owned the Pirate Bay or had sold it in 2006. They claimed that it was now owned by Reservella Ltd. Unconvinced by their argument, the court again ordered that they block access of the site from within the Netherlands within three months or face daily fines. This is a different approach than taken in Ireland and Denmark, where ISPs blocked the Pirate Bay.

In August 2009, Stichting Brein received another victory in court when they successfully were awarded an injunction against Mininova, another popular BitTorrent site that operates similarly to the Pirate Bay, ordering them to remove all files pointing to copyrighted material within three months or face a fine up to \$7.1 million. On November 26, 2009, Mininova removed links to all unauthorized, copyrighted content from their website in compliance with the court order. The website now provides a "Content Distribution" service that allows content producers and artists to make their work available for free download.

vii. Spain

Most recently, Spanish telecom company Telefonica SA refused to give Promusicae (described as "a Spanish trade group for film and music producers") the names and information of customers who had used Kazaa to "distribute copyrighted materials owned by [Promusicae's] members." The company's refusal was upheld in January 2008 by an EU court. The decision offers a precedent to EU member countries. The EU approach has not been entirely consistent on a national basis: a Belgian court required Internet companies to include blocking software to prohibit file sharing, but a German court ruled against record labels which had requested that Internet providers be required to give labels user information. The decision does leave open music owners' rights to seek redress in civil action. In its opinion, the court also acknowledged the need for all EU countries to balance the right to privacy with the need to enforce intellectual property rights.

In June 2008, the government announced a mandated anti-piracy tax on media devices, such as iPods, to begin July 1. The surcharge will likely amount to mere cents on a purchase which manufacturers may either pass on to consumers or absorb themselves. The tax will be doled out to collecting societies.

viii. Sweden

The Pirate Bay, a Swedish “file sharing hub” website established in 2003 by the Swedish anti-copyright organization “The Piracy Bureau” and within which an estimated 157,000 motion pictures have been illegally downloaded, was temporarily shut down in 2006. In January 2008, Swedish prosecutors filed charges against four of the individuals behind the site. Because the servers which house the content are hosted in various countries, The Pirate Bay may pose a challenge for copyright owners for some time to come. The trial against Pirate Bay took place in Sweden in February 2009. On the second date of trial, half of the charges were dropped, including reduction of the charge of “assisting copyright infringement to a lesser charge of “assisting making available copyright material.” One of the arguments that Pirate Bay made in court was that it is essentially like the search engine Google, since both sites allow users to link to some copyrighted material. The Swedish prosecutors counter-argued that unlike Google, Pirate Bay does not cooperate with rights-holders. The district court in Stockholm sided with the prosecutors on behalf of the plaintiff media companies and held that the defendants were liable for being accessories to copyright infringement. The four were sentenced with one-year jail sentences and fines of over 30 million kronor (equivalent to \$3.56 million). The Pirate Bay operators appealed this decision, alleging that they should be given a new trial because the judge was biased. The judge, Tomas Norstrom, is a member of the Swedish Association for Copyright, the board of which includes a lawyer who represented the music and film industry in the trial. The appeal also included a request for the court to reach out to the European Court of Justice for a preliminary ruling. After filing an appeal, lawyers for the four defendants filed a complaint against two of the Svea Court of Appeal judges claiming they were biased because of their involvement with pro-copyright organizations. While the appeals court rejected the claim, Sweden’s Supreme Court has agreed to hear Pirate Bay’s appeal of their bias claim, delaying the copyright infringement case’s appeal for several months.

The Pirate Party, a new political party fueled by outrage over the Pirate Bay decision, continues to gain support in Sweden and all over Europe, and has won a seat on the European Parliament, but in June 2009 a review panel on the Swedish Court of Appeals still refused to throw out the guilty verdict for Pirate Bay. The panel held that Judge Norstrom was not biased, though it did acknowledge that Norstrom should have been more open as to his involvement in the organizations so the issue could have been dealt with at an earlier stage.

In October 2009, the court ruled that the founders of Pirate Bay must cease its operations or else pay fines of \$71,000 each. In November 2009, Pirate Bay removed its BitTorrent tracking system in an attempt to comply with the October ruling. However, the record labels still insist that Pirate Bay is functioning as a file-sharing service. In January 2010, the four major labels petitioned the Swedish Courts to compel the operators to pay the \$142,000 fine resulting from continued operation of Pirate Bay. One founder has come forward denying any current involvement with Pirate Bay, thereby refusing to pay. This case is viewed by many as a notable setback for providers of online torrent and file searching sites, and a real victory for the music industry. It could have significant repercussions for other file sharing operations as well.

In addition to the Swedish judgment, a ruling by the district court of Amsterdam in July 2009, prohibits Pirate Bay from operating in the Netherlands. The Pirate Bay owners plan to appeal the injunction (see “Netherlands” above).

Pirate Bay also faces a suit filed in a Swedish civil court by Hollywood production companies in July 2009, seeking to block the site from distributing films and television shows illegally.

Global Gaming Factory X AB (GGF), a Swedish firm, announced plans to acquire Pirate Bay in a 60 million kronor (\$7.83 million) buyout in early July 2009. Though the deal has not been finalized, Global promising a changed system for the site which will require users to pay for downloads, pledges it will also compensate users (in addition to the copyright holders) for sharing their files. Files will be hosted legally on the P2P network, as well as create a money-making alternative when ISPs become overloaded upon popular new releases. However, as of December 2009, no deal had been formalized. GGF recently stated that “the closing of the Pirate Bay tracker affects the opportunities to monetize the site, as the file transfers are no longer coordinated by Pirate Bay. However, it is not ruling out moving again to acquire the site.”

On April 1, 2009, a new Swedish law came into effect to assist in the fight to defeat copyright infringement on the Internet. The new law is based on the European Union’s Intellectual Property Rights Enforcement Directive (IPRED), and makes it possible for copyright holders to obtain a court order requesting the release of information about IP addresses if there is cause to believe that the copyrights in question have been infringed. Copyright holders can directly contact the alleged violators and ask them to cease their illegal activity. If the infringement continues, then information gathered by service providers will be able to be used as the basis for lawsuits against infringing parties.

In mid-December 2009, Swedish police, acting on a tip off, arrested a twenty-five year old man on suspicion of copyright infringement and his computer was seized. During questioning, the man admitted to making available 12,000 songs on the internet. He was later released and his case will be dealt with in criminal court.

ix. United Kingdom

The United Kingdom Internet Service Providers’ Association believes that ISPs should not be responsible for monitoring all the information passing through their networks and should bear no liability for infringing content that is not on their servers.

In October 2007, the music file-sharing website, OiNK, was shut down. After a two-year investigation by Interpol, International Federation of the Phonographic Industry (IFPI), British Phonographic Industry (BPI), and British police, officers arrested 24-year-old Alan Ellis, the administrator of OiNK.cd for suspicion of conspiracy to defraud and infringement of copyright law. Officers raided the man’s home, as well as his employer’s offices and his father’s house. OiNK’s Amsterdam-based servers were also seized in the raids.

OiNK used BitTorrent, a peer-to-peer file sharing (P2P) communications protocol, which allowed users to create a music index from which members could enjoy free music.

Approximately 180,000 members joined the site on an invite-only basis. Upon joining, members could download five gigabytes of music - approximately 1,000 songs. Members did not pay a fee, but were given the option to contribute donations to the site's maintenance. These monetary donations are the source for investigators' claims that this was a criminal network. IFPI described the site as the "world's biggest source of pirated pre-release albums." In 2007, it is estimated that the UK-run site leaked 60 major pre-release albums.

In May 2008, six other former members were arrested and questioned. All of them were investigated for leaking one or more pre-released music albums. Police were granted a third extension until July 1, 2008, to bring charges against Ellis. The arrests themselves, though, represent an unusual criminal slant to the attack on file-sharing rather than the usual civil action brought against both providers and users of these services.

During a December 2008 court proceeding, four of five members facing criminal charges for Internet piracy pled guilty. In what some have called a draconian ruling, the court sentenced three of them to perform between 50 and 180 hours of community service. They must also pay court costs of £378 for each. Another user, was not given a sentence of community service, but must still pay a £500 fine. In January 2010, after a seven day trial, a jury unanimously found Ellis not guilty of conspiracy to defraud the music industry. The verdict cannot be appealed.

In June 2008, British ISPs and music rights holders began negotiations to resolve massive piracy issues after pressure from legislators that they would step in if the groups could not reach their own solutions. One option under consideration is a licensed file-sharing framework through broadband subscription services. In July 2008, British ISPs signed the Memorandum of Understanding (MoU) and agreed to send letters to subscribers responsible for illegal downloading. The ISPs have clarified that undertaking termination of subscriber accounts is not part of this agreement.

The Isle of Man, a self-governing British Island, has been considering a plan to allow peer-to-peer music file sharing at a cost of one euro per person per year. This plan would be voluntary and would provide an opt-out for those who do not want to pay for it. The Isle's government has suggested that missing revenues would be made up to copyright owners by additional "value added services" offered to the Isle's population, but critics have remarked that the vagueness of these services would not ensure adequate royalties.

Google-owned YouTube attempted to allow premium music videos to be viewed on YouTube in the United Kingdom, but after disputes with U.K. collecting society Performing Rights Society For Music (PRS) concerning royalties, YouTube announced in March 2009 that it would not continue to publish the music videos. The U.K.'s Music Publishers Association spoke out against this decision. In September 2009, YouTube struck a royalty deal with PRS and began carrying premium music videos in the U.K. again. The terms of the agreement were not disclosed.

In the U.K. in late June 2009, members from the IFPI (the International Federation of the Phonographic Industry) and the trade body of the BPI (British Recorded Music Industry), working with the London Police and the Intellectual Property Office, questioned a 33-year-old

man regarding his alleged involvement in DV8, a group known for leaking pre-released music on peer-to-peer file sharing networks. Shortly thereafter, he was arrested. According to BPI, the DV8 is responsible for leaking more than 2,500 titles across the Internet. The Intellectual Property Office, together with the IFPI and the BPI are intent on “sending a clear message [that they are] serious about tackling the problem of Intellectual Property theft,” and they consider pre-release leaks one of the most damaging forms of Internet piracy, David Lammy (Minister of State for Intellectual Property) announced in a statement. The BPI handles all negotiations between the government and the British record industry. The purpose of the IFPI is to promote the value of recorded music, safeguard the rights of record producers and expand the commercial uses of recorded music. In doing so, it has teamed up with BPI, the City of London Police and The Intellectual Property Office to crack down on pre-release leaks and other forms of Internet piracy. The collaboration having already led to two notorious pre-release groups, Lammy said, “This [arrest] is an example of partnership working ... I want to ensure that consumers, legitimate businesses and their employees are protected from those that choose to break the law.”

As part of its Digital Britain project launched by the British government in October 2008 in the hopes of keeping the UK at the forefront of digital and telecommunications adoption and innovation, the government looked at legal and regulatory alternatives to combat digital piracy. The report recommended that legislation be passed to require that ISPs send warnings to file sharers that they are violating copyright law and to provide their personal information to copyright holders upon presentation of a court order. Following publication of the report, Business Secretary Lord Mandelson advocated that the UK adopt a three-strikes policy where repeat copyright infringers engaged in file sharing would receive two written warnings and following a third infringement they would be fined and have their Internet access disconnected for one year. BT, the largest ISP in the UK, claimed that it would cost British ISPs £1 million a day to comply with the policy if it were enacted.

In opposition to the suggested three-strikes policy, dozens of British musicians formed the Featured Artists Coalition (“FAC”) to lobby for the best interests of recording artists in the UK in light of the rapidly changing music industry. The FAC includes many of the UK’s most recognizable musicians among its ranks, such as members of Pink Floyd and Radiohead, Elton John, Paul McCartney, and George Michael. Initially, the FAC lobbied against the three-strikes policy, claiming that cutting off Internet access for everyday users was too extreme of a response and would harm their fans. Their press releases on the subject extolled the possible benefits of file sharing, such as providing fans an opportunity to sample new music before deciding whether they wanted to buy it.

On September 14th, British recording artist Lily Allen added a new post to her blog titled “My Thoughts on File Sharing” where she struck back at the FAC and some of its more vocal members for their outright support of file sharing. Allen’s post sparked a vigorous debate throughout Britain over file sharing that received substantial media coverage of opinions from musician, industry insider, and politicians. Allen’s stance was attacked by other musicians and many blog writers. In response to the attacks on Allen and the heated debate, members of the FAC met to discuss the group’s position on file sharing and afterward released a statement declaring their newfound support of a three-strikes policy as long as the final result was not the complete disconnection of a repeat infringer’s Internet access, but instead a reduction of the

speed of the infringer's Internet connection that would allow them to access basic email and web functionality but make it difficult to share files.

6. Japan

In November 2009, Japanese police in eleven cities launched a crackdown on users of the peer-to-peer file-sharing software program Share who were illegally distributing copyrighted music, movies, video games, and television programs online. Users of the program were arrested for distributing popular titles from Sony Music, Universal Pictures, Nintendo, and other media companies. This initiative follows the arrest of three other Japanese users of the Share program in May 2009 for illegally distributing copyrighted material. While Share's anonymous developer claimed that the software protected users' anonymity through the use of various security measures that made users untraceable, Japanese security researchers have developed a means of breaking through these security features to discover the IP addresses of the file sharers. At the time of the arrests, Japanese copyright law prohibited only distribution or uploading of copyrighted material online and expressly permitted citizens to download such material. Beginning in January 2010, a new law will go into effect that makes unauthorized downloading of copyrighted works a criminal act.

7. New Zealand

Following the trend favored by parts of Europe and the U.S. RIAA, New Zealand planned to enact Section 92A of the Copyright (New Technologies) Amendment Act, in March 2009, a law to thwart illegal file-sharing through a "three strikes" system. Like the France law, the New Zealand law was intended to be a "three strikes" system, with ISPs warning infringers with the first two strikes, and if the infringement continues, then access to the Internet will be cut off. Although the government had agreements with most of the ISPs, TelstraClear stated in March 2009 that the proposed practice is unfair and refused to participate. Later that month, the government announced that the plan was too uncertain and would have to be rewritten before implementation. In July, the government released a rewritten version of the section for public comment. Although the threat of termination of Internet access was still included as a possible punishment for a third occurrence of copyright infringement, the new version required that copyright holders file an infringement complaint with the Copyright Tribunal who would hear complaints if the matter could not be settled by mediation. The Copyright Tribunal hearing phase addressed the concern voiced by many critics that the originally proposed system did not provide sufficient due process.

8. Norway

In June 2006, Norway's consumer protection agency first filed a complaint against Apple, alleging it violates Norwegian consumer law by prohibiting consumers to play songs bought on iTunes with competitors' digital devices other than iPods. In January 2007, the Norwegian consumer ombudsman gave Apple until the end of September 2007 to change its business practices by making iTunes downloads interoperable with competitors' devices. A March 2008 report from the Norwegian ombudsman website, states that iTunes amended its contract terms

and at the same time the four largest record companies decided to sell digital music without DRM.

In February 2009, Norway's consumer protection agency dropped the lawsuit against iTunes, because iTunes recently decided to make all of its available music DRM-free. As the entire collection of music procurable from the iTunes site can now be played on a variety of digital devices, the suit no longer had merit.

In March 2009, Norwegian telecommunications company Telenor refused to block access to the Swedish file-sharing site, the Pirate Bay. Telenor expressed that it should not control and assess what Internet users can and cannot download, raising issues of individual privacy.

9. South Korea

In January 2005, a South Korean appeals court acquitted the owners of file-swapping site Soribada of copyright infringement charges brought by the Korean music industry. Like Grokster, Soribada had no centralized file server through which the owners could monitor their users' allegedly unauthorized file swapping. As a result, the court held that although Soribada's users may have infringed copyrights, the owners themselves did not for purposes of that lawsuit. However, that same day the Seoul High Court found in a separate ruling that the Soribada service itself was contributorily or vicariously liable for its users' copyright violations and ordered the site shut down. The site's owners were ordered to pay approximately \$18,500 to the Korean Music Copyright Association.

In April 2009, the National Assembly in South Korea passed a law to prevent unauthorized file sharing. The law is based on the "three strikes" strategy, and punishes users who illegally transfer files by cutting off their Internet access after being caught exchanging infringing materials three times. The law also applies to websites and forums in which illegal file sharing takes place, and the government has the power to shut down such sites for six months.

10. Taiwan

In June 2007, Taiwan amended its Copyright Act making illegal "the unauthorized distribution of copyrighted works over peer-to-peer networks." Penalties for infringement include fines up to approximately \$15,000, and/or imprisonment of up to twenty-four months. Additionally, once convicted, infringers may be immediately enjoined from further infringement.

In April 2009, Taiwan passed a "three strikes" law as an amendment to its Copyright Act. This law details procedures for combating infringement, allowing rights holders to either enact judiciary proceedings against alleged violators, or to follow a notice and takedown process to have the infringing content removed. Similar to other "three strikes" provisions, the Taiwanese law instructs ISPs to restrict Internet access of users who illegally download copyrighted material more than twice.

11. Anti-Counterfeiting Trade Agreement (“ACTA”)

Since June 2008, representatives from the United States, the European Union, Canada, Australia, Japan, Jordan, Korea, Morocco, Mexico, New Zealand, Singapore, Switzerland, and the United Arab Emirates have been negotiating the Anti-Counterfeiting Trade Agreement (“ACTA”) designed to counter the worldwide growth in availability of counterfeited goods and pirated copyrighted material, such as digital music and films. As of November 2009, the group has met for six negotiation sessions and has released very limited information on the terms of the negotiation despite Freedom of Information Act requests made to the Office of the U.S. Trade Representative (“USTR”) by digital rights groups the Electronic Frontier Foundation and Public Knowledge. Following a lawsuit by the two groups against the USTR, the USTR released 159 pages of information about ACTA but stated that the remaining 1300 pages were not being released because of national security concerns or because it could harm the negotiation process.

In November 2009, a summary of the ACTA draft chapter on the Internet was leaked to the public. The leaked summary, written by negotiators from the European Commission and intended for distribution to representatives from member states, revealed that the U.S. was attempting to convince the other parties to adopt provisions similar to those in the Digital Millennium Copyright Act regarding both illegal file sharing and the steps Internet service providers (“ISPs”) would be required to take in order to avoid third-party liability for copyright violations committed by subscribers. While early media reports revealed concerns that the U.S. was considering including a provision for a graduated response to illegal file sharing similar to the “three strikes” policy that was adopted in France in 2009, leaked reports following the sixth round of negotiations in Seoul, Korea indicated that a graduated response involving ISPs was not included in the U.S. negotiators’ draft of the Internet chapter.

VII. Conclusion

Digital transmission has deeply changed the landscape of the media industries, creating potential new outlets for record companies and movie studios but also new concerns about unauthorized copying and distribution. While digital transmission allows listeners anywhere in the world quick and easy access to high quality sound and video files, such wide availability creates a much greater danger of illegal copying and distribution. Copyright owners, users, and lawmakers have yet to come to a common understanding on the solutions that could strike the appropriate balance between the interests of consumers and those of copyright owners. If anything, the number of interested parties in the copyright world has grown (creators, distributors, consumers, ISPs, pirates, etc.) to a level that makes achieving consensus on copyright difficult. Because copyright is a creature of national law and Internet distribution is inherently international, finding frameworks for legal worldwide distribution is ultimately one of the most complex tasks ahead. Consumers want music, video, and other content everywhere. The challenge for copyright owners is to find a business model that permits wide availability of content for consumers while protecting the interests of – and providing incentives for -- content creators and distributors. The music industry will survive, even thrive, in new forms. Essential to the endeavor is an equitable revenue model. If one thing is certain, musicians will always create music and we will always want to hear and enjoy music.

Thanks to those who have assisted in this project including Kimberly Chen, Elizabeth Goldman, Noah Goldstein, Grace Goodearl, Alex B. Matamoros, Ben Montgomery, Jessica Rosekrans, Meg Sallay, Kristen Sibiga, and Melissa Tarab.