

COSTS AND BENEFITS OF THE RECORDING INDUSTRY'S LITIGATION AGAINST INDIVIDUALS

By Kristina Groenning

For the past few years, academic discussion of the recording industry's efforts in the war on piracy has been focused on issues of contributory and vicarious infringement associated with litigation against peer-to-peer (P2P) networks.¹ There has also been significant debate over whether record company sales have actually been affected by file-sharing.² Yet, only the occasional discussion has addressed the costs and benefits of pursuing direct infringement claims.³ This is somewhat surprising, as the record industry is not the only content industry to go after direct infringers.⁴

In August 2003, the Recording Industry Association of America (RIAA) launched its own litigation campaign against individuals for uploading unauthorized music files via the Internet. As of November 11, 2004, a total of 6,200 file-sharers had been targeted in a litigation strategy that, since its inception, has been marked by unprecedented media cover-

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1. Peer-to-peer technology involves individual computers communicating over the Internet on custom networks that route search requests and conduct direct file transfers among the network's users. Unlike the centralized architecture of a client-server relationship—such as a website, where many users visit a single location to use the resources stored there—a P2P network directly connects many individual computers without any centralized server. To join a P2P network, users download software that, when launched, locates and connects to other users online at the time via an underlying network protocol. This software searches for files the user wants on other network members' computers, makes designated user files available to the network, and transfers files between users upon request.

Elizabeth Miles, Note, *In re Aimster & MGM, Inc. v. Grokster, Ltd.: Peer-to-Peer and the Sony Doctrine*, 19 BERKELEY TECH. L.J. 21, 26-27 (2004) (footnotes omitted).

2. See generally Felix Oberholzer, *The Effect of File Sharing on Record Sales—An Empirical Analysis*, Mar. 2004, available at http://www.unc.edu/~cigar/papers/File-Sharing_March2004.pdf#search='felix%20oberholzer%20The%20Effect%20of%20File%20Sharing%20on%20Record%20Sales'.

3. See Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1395-405 (2004).

4. Microsoft has sued many individuals for piracy of its software. See generally *Piracy News*, Microsoft Canada, at <http://www.asia.microsoft.com/canada/piracy/news/default.mspx> (last visited Mar. 11, 2004). DirectTV has pursued claims against individuals who own unauthorized decoding devices. *The Music Industry Strikes Back*, Dataquest, Oct. 30, 2003, at <http://dataquest.ciol.com/content/ebiz/103103001.asp>.

age and public scrutiny.⁵ In addition to the RIAA, recording industry associations worldwide are beginning to sue music fans.⁶ In June 2004, the Société Civile des Producteurs Phonographiques filed twenty "John Doe" suits targeting users throughout France.⁷ Moreover, in a highly publicized announcement in November 2004, the Motion Picture Association of America (MPAA) also initiated suits against alleged infringers.⁸

This Note analyzes the effectiveness of the RIAA's litigation against direct infringers. Part I places the RIAA's claims against individual users in context and discusses obstacles that the recording industry has faced in its litigation efforts thus far. Parts II and III discuss the costs and benefits to the record industry of the lawsuits against users, concluding that the benefits outweigh the costs. Finally, Part IV offers suggestions as to additional means by which the RIAA can increase the efficiency of its enforcement efforts.

I. BACKGROUND

By the fall of 2003, suing direct infringers may have been one of the only recourses left to the recording industry.⁹ Record companies faced a

5. Grant Gross, *MPAA to Sue Movie File Swappers*, PC WORLD, Nov. 4, 2004, at <http://www.pcworld.com/news/article/0,aid,118485,00.asp>.

6. dRD, *European P2P Users to Face American-Style Manhunt*, Dec. 17, 2003, at <http://www.afterdawn.com/news/archive/4797.cfm>.

7. Ketola, *P2P Lawsuits Filed in France*, AfterDawn.com, June 29, 2004, at <http://www.afterdawn.com/news/archive/5366.cfm>.

8. Press Release, PR Newswire, Studios to Begin Suing Illegal Film File Swappers (Nov. 4, 2004), available at <http://sev.prnewswire.com/entertainment/20041104/LATH07704112004-1.html>.

9. Stan Liebowitz, Will MP3 Downloads Annihilate the Record Industry? The Evidence so Far 29-30 (June 2003). Stan Liebowitz states:

It is also understandable that the record companies may not be willing participants in this laboratory for economic analysis. Why should they risk their revenues in an experiment that may end badly for them? How many of us would volunteer to undergo surgery without anesthesia to test a theory that claimed it wasn't really necessary? I think it is important to understand that a decline of 20-25% is a considerable number.

Id. By choosing the words "[w]hy should they risk their revenues in an experiment that may end badly for them," Liebowitz acknowledges the precarious situation that record companies faced in the fall of 2003 and the need to take some kind of immediate action. Liebowitz does not address litigation as an option, but does express a preference for resolution of the problem through digital rights management technology as opposed to non-market alternatives.

long-term trend of a decrease in sales, in part attributable to file-sharing.¹⁰ The decline in album sales following the inception of Napster, from 1999 through 2002, had been the most dramatic in the past 30 years.¹¹ CD sales were down from \$13.2 billion in 2000 to \$11.2 billion in 2003.¹² The industry's victory in *Napster* was fleeting as publicity over the issue increased awareness of P2P technology and users flocked to decentralized networks like Grokster and KaZaa, making the tracking of P2P use more difficult.¹³ In April 2003, the RIAA lost its case of contributory and vicarious infringement against Grokster in a California federal district court.¹⁴ In a desperate move to address the P2P epidemic, on September 8, 2003, the recording industry filed its first round of 261 lawsuits against its own fans.¹⁵

A number of obstacles have beset the RIAA since it began its campaign to sue individual file-sharers. In December 2003, the litigation process was made more arduous and costly by the District of Columbia Court of Appeals' decision in *Verizon* that prohibited the RIAA from using the Digital Millennium Copyright Act's (DMCA) subpoena provision to compel Internet service providers (ISPs)¹⁶ to disclose alleged infringers' iden-

10. *Id.* at 27-28 (concluding that there are no other explainable causes of the decline in album sales from 1999 to 2002 other than MP3 downloads and specifically stating that "MP3 downloads are harming the industry").

11. *Id.* at 27. Liebowitz's study analyzes several alternative explanations for this outcome, specifically economic factors including: the price and quantity of records; income changes; changes in recording formats; changes in quality or taste in music; and media portability. However, the author concludes that those factors are inferior to MP3 downloading as explanations for the decline in album sales from 1999-2002. *Id.* at 28.

12. Cade Metz, *Congress Targets Digital Pirates*, PC MAG., Apr. 6, 2004, available at <http://www.pcmag.com/article2/0,1759,1562415,00.asp>.

13. See *Fonovisa, Inc. v. Napster, Inc.*, No. C 01-02669 MHP [Related to No. C 99-05183 MHP], Nos. C 01-01412 MHP [Related to No. C 99-05183 MHP], C 01-02431 MHP [Related to No. C 99-05183 MHP], 2002 U.S. Dist. LEXIS 4270 (N.D. Cal. Jan. 28, 2002).

14. *MGM Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029 (C.D. Cal. 2003), *aff'd*, 380 F.3d 1154 (9th Cir.), *cert. granted*, 125 S. Ct. 686 (2004)..

15. Press Release, Recording Industry Association of America, Recording Industry to Begin Collecting Evidence and Preparing Lawsuits Against File "Sharers" Who Illegally Offer Music Online (June 25, 2003), *at* <http://www.riaa.com/news/newsletter/062503.asp>; *RIAA v. the People*, Elec. Frontier Found., *at* <http://www.eff.org/IP/P2P/riaa-v-thepeople.php> (last visited Feb. 24, 2004).

16. *ISP*, WHATIS.COM, *at* http://searchwebservices.techtarget.com/gDefinition/0,294236,sid26_gci214028,00.html (last updated July 1, 2001) (stating that an ISP is "a company that provides individuals and other companies access to the Internet and other related services").

ties.¹⁷ The court determined that ISPs that route material through their servers fall under the safe harbor provision of the DMCA, § 512(a), and are therefore not subject to § 512(h), the subpoena provision.¹⁸

Prior to *Verizon*, § 512(h) provided a fast, cheap mechanism for discovering suspected file-sharers' identities. The RIAA needed only to supply \$35, a copy of notification, the proposed subpoena, and a sworn declaration that the information sought was for the sole purpose of protecting copyright.¹⁹ Shortly before *Verizon* was decided, the RIAA had begun to bundle requests for subpoenas, paying only \$35 total for multiple issuances.²⁰ Courts presumed that no determination that the alleged offender had in fact violated any copyright laws was necessary to compel ISPs' disclosure of subscriber identification information. Without the benefit of the DMCA's subpoena provision, however, the RIAA must now file its lawsuits using alleged offenders' numerical IP addresses.²¹ Only after filing can the RIAA then apply for a subpoena to obtain subscribers' identification information.²² Thus, the RIAA must pay the full cost of filing a suit and any ensuing subpoenas before discovering the identities of alleged infringers and initiating settlement discussions. If mistaken, it is subject to sanctions for the pursuit of frivolous litigation.²³ Therefore, the recording industry must now spend more time and money to pursue its claims against individuals than was the case when its direct infringement campaign began.

Another roadblock for the RIAA has been motions to quash identity subpoenas by Doe defendants, who raise First Amendment, privacy, personal jurisdiction, and improper joinder claims.²⁴ Some courts have dismissed defendants' claims and affirmed the RIAA's right to subpoena

17. Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., 351 F.3d 1229, 1236 (D.C. Cir. 2003).

18. *Id.* at 1237.

19. 17 U.S.C. § 512(h)(2)(A)-(C) (2000).

20. Frank Ahrens, *A Reprise of Lawsuits Over Piracy; Music Industry Lacks Defendants' Names*, WASH. POST, Jan. 22, 2004, at E01, available at <http://www.washingtonpost.com/ac2/wp-dyn/A36795-2004Jan21?language=printer>.

21. *More Song Swappers Sued*, CNNMoney, Jan. 21, 2004, at http://money.cnn.com/2004/01/21/technology/riaa_suits/index.htm?cnn=yes.

22. *Id.*

23. Ahrens, *supra* note 20.

24. Sony Music Entm't Inc. v. Does 1-40, 326 F. Supp. 2d 556 (S.D.N.Y. 2004); Lee Rainie & Mary Madden, Pew Internet Project and comScore Media Metrix Data Memo (Jan. 2004) (discussing an individual's opposition to an RIAA subpoena based on the violation of state and federal privacy laws), available at http://www.pewinternet.org/pdfs/PIP_File_Swapping_Memo_0104.pdf#search='Pew%20Internet%20Project'.

Does.²⁵ For instance, a district court upheld the RIAA's right to subpoena and rejected the Doe defendants' first amendment argument.²⁶ The court held that while the act of file-sharing may qualify as speech because the user is making a statement that music should be free, the First Amendment is not a shield for intellectual property infringers.²⁷ The right of a copyright owner to use the judicial process to pursue well-substantiated infringement claims trumps the right to anonymous speech.²⁸ Additionally, the court ruled that issues of joinder and personal jurisdiction have no place in a motion to quash a subpoena.²⁹ A recent Pennsylvania federal district court decision also confirmed the RIAA's legal right to subpoena ISPs, although it additionally held that ISPs must provide notice to the targets of RIAA subpoenas.³⁰ However, another Pennsylvania court denied the RIAA the right to join claims, requiring the RIAA to instead file indi-

25. *Elektra Entm't Group, Inc. v. Does 1-9*, No. 04 Civ. 2289 (RWS), 2004 U.S. Dist. LEXIS 23560 (S.D.N.Y. Sept. 7, 2004); *Motown Record Co., L.P. v. Does 1-252*, No. 1:04-CV-439-WBH (N.D. Ga. Aug. 16, 2004), available at http://www.eff.org/IP/P2P/RIAA_v_ThePeople/JohnDoe/20040818_Motown_Opinion_re_Quash.pdf; *Sony Music Entm't*, 326 F. Supp. 2d at 558.

26. *Sony Music Entm't*, 326 F. Supp. 2d at 562-67 (dismissing First Amendment argument); *id.* at 566 (stating that the RIAA "lacks other means to obtain the subpoenaed information," and that "[a]scertaining the identities and residences of the Doe defendants is critical to plaintiffs' ability to pursue litigation, for without this information, plaintiffs will be unable to serve process").

27. *In re Capital Cities/ABC, Inc.*, 918 F. 2d 140, 143 (11th Cir. 1990)); *Sony Music Entm't*, 326 F. Supp. 2d at 563 (citing *Universal City Studios v. Reimerdes*, 82 F. Supp. 2d 211, 220 (S.D.N.Y 2000).

28. *Sony Music Entm't*, 326 F. Supp. 2d at 563.

29. *Id.* at 567-68. Retaining the right to join multiple Does in a suit may be vital to the feasibility of the RIAA's litigation strategy. The ability of the RIAA to obtain subscriber identification information from ISPs varies depending on how long an ISP retains log files of subscriber activity. Some ISPs erase information from subscriber logs within weeks or days. Moreover, the financial cost of filing individual suits may ultimately render the RIAA's litigation strategy cost-prohibitive. The issue of joinder may soon become yet another hurdle for the RIAA, however. A California federal district court recently ruled against MPAA joinder of suits against Doe defendants, finding that joinder was improper because the suits were "unrelated." *Court Blocks Movie Studios' Bulldozer Legal Strategy*, Elec. Frontier Found., Nov. 23, 2004 (discussing MPAA Twentieth Century Fox Film Corp. v. Does 1-12, No. C 04-04862 WHA (N.D. Cal. Nov. 16, 2004)), available at http://www.eff.org/news/archives/2004_11.php.

30. *Elektra Entm't Group, Inc. v. Does 1-6*, No. 04-1241, 2004 U.S. Dist. LEXIS 22673 (E.D. Pa. Oct. 12, 2004); Anita Ramasastry, *Privacy, Piracy, and Due Process in Peer-to-Peer File Swapping Suits: A Federal District Court Strikes a Good Balance*, DMusic.com, Nov. 10, 2004 (describing holding of court), at <http://news.dmusic.com/print/14913>.

vidual suits and pay the full filing fee for each defendant—in this case totaling \$30,000.³¹

Finally, the most recent setback for the RIAA's litigation strategy was the Ninth Circuit Court of Appeals' affirmation that P2P networks Grokster and Streamcast were not contributorily or vicariously liable for users' direct infringement.³² This decision made it clear that if the RIAA is going to pursue a litigation strategy to combat file-sharing, it must be focused exclusively against direct infringers.³³

Despite these multiple setbacks, the RIAA has proceeded, seemingly unphased, in its litigation strategy.³⁴ Its latest round of suits in December 2004 targeted 754 more Does.³⁵

II. THE COSTS AND BENEFITS OF LITIGATION AGAINST INDIVIDUAL FILE-SHARERS

Significant benefits to the music industry provide insight into its persistence. Litigation has caused a decrease in user activity on targeted illegitimate sites like KaZaa and increased public understanding of the illegality of file-sharing. Universities have adopted internal enforcement mechanisms and joint initiatives with legitimate online music providers. Finally, the increasing popularity of legal sites like iTunes and the initiation of litigation by other organizations like the MPAA can also be attributed to the RIAA's efforts. On the other hand, though lawsuits have curbed activity on targeted networks like FastTrack, a recent study suggests that overall file-sharing levels have been unaffected, as users are abandoning targeted networks for lesser-known, more sophisticated and secure P2P networks. Moreover, the RIAA's strategy has garnered resistance from civil rights

31. BMG Music v. Does 1-203, No. 04-650, 2004 U.S. Dist. LEXIS 8457 (E.D. Pa. Apr. 2, 2004); *File Cases Separately, RIAA Told*, P2PNet.net, Mar. 8, 2004, at <http://p2pnet.net/story/929>.

32. MGM Studios, Inc. v. Grokster Ltd., 380 F.3d 1154 (9th Cir. 2004).

33. *Id.* at 1160 (holding that “[t]he element of direct infringement is undisputed in this case”). The Supreme Court recently granted certiorari to review the Ninth Circuit’s opinion. MGM Studios, Inc. v. Grokster, Ltd., 125 S. Ct. 686 (2004).

34. Ahrens, *supra* note 20 (quoting RIAA President Cary Sherman, stating that “[t]he message to illegal file sharers should be as clear as ever—we can and will continue to bring lawsuits on a regular basis against those who illegally distribute copyrighted music”).

35. Press Release, Recording Industry Association of America, RIAA Files New Copyright Infringement Lawsuits Against 754 Illegal File Sharers (Dec. 16, 2004), available at <http://www.riaa.com/news/newsletter/121604.asp>. For a list of RIAA Doe suits, see RIAA v. The People, Electronic Frontier Foundation, at <http://www.eff.org/IP/P2P/?f=riaa-v-thepeople.html> (last visited Mar. 11, 2004).

organizations and caused the recording industry to fall into disfavor with many Americans.

A. Benefits of Direct Enforcement to the Recording Industry

The threat of an RIAA lawsuit will realistically do little to deter dedicated pirates. However, eliminating piracy altogether was never the RIAA's goal.³⁶ Studies show that many P2P users do respond to the threat of litigation.³⁷ Though reports on P2P activity vary in their depictions of litigation's overall effect on file-sharing, all reports confirm that lawsuits caused an initial and possibly lasting decrease in file-sharing on mainstream sites targeted by the RIAA such as KaZaa.³⁸ Some studies also show that litigation is working to deter those who casually download and those who have not yet engaged in criminal activity.³⁹ The predominant impact of the RIAA's strategy, however, is evidenced in less direct consequences of litigation that will work to combat piracy in the long term. For instance, universities are taking steps to stop piracy on campuses and are negotiating to provide legal online music options to students. Litigation has also contributed to the rise of legitimate business models for distributing music over the Internet such as iTunes. Finally, the RIAA's lawsuits have paved the way for similar litigation by other copyright owners whose efforts will in turn increase the effectiveness of the RIAA's campaign by helping to combat file-sharing worldwide.

36. *The RIAA: "The Piracy Rate is Growing"*, BUSINESSWEEK ONLINE, May 13, 2002 ("No record company expects to have a piracy-free world. It is the nature of intellectual property to always have some level of piracy.") (quoting Cary Sherman, President, RIAA), at http://www.businessweek.com/magazine/content/02_19/b3782609.htm.

37. See generally Jefferson Graham, *Online File Swapping Endures*, USA TODAY, July 11, 2004, at 1A, available at http://www.usatoday.com/tech/news/2004-07-11-fileswap_x.htm; Press Release, Netratings, Inc., File-Sharing Application Usage Dips After Warning from the Recording Industry (July 14, 2003), available at http://www.nielsen-netratings.com/pr/pr_030714.pdf; Lee Rainie & Mary Madden, Pew Internet Project and comScore Media Metrix Data Memo 6 (Apr. 2004), available at http://www.pewinternet.org/pdfs/PIP_Filessharing_April_04.pdf.

38. Graham, *supra* note 37; Press Release, Netratings, Inc., File-Sharing Application Usage Dips After Warning from the Recording Industry (July 14, 2003), available at <http://www.Nielsen-netratings.com>; Rainie & Madden, *supra* note 37, at 7.

39. David McGuire, *Internet Piracy: Recording Industry Lawsuits*, WASH. POST, Jan. 22, 2004, at <http://www.washingtonpost.com/ac2/wp-dyn/A363562004Jan21?>; *Music Downloading Up Since November*, ONLINE REP., May 1, 2004, at <http://www.online-reporter.com/TORbackissues/TOR394.htm#Music%20Downloading%20Up%20Since%20December>.

1. Direct Benefits of the Lawsuits

As a result of the litigation, networks targeted by the recording industry have shown a dramatic decrease in user base both in the short and long term. The RIAA initially targeted subpoenas at users who allowed their computers to be supernodes⁴⁰ on the FastTrack P2P network used by sites like KaZaa and Morpheus.⁴¹ Nielsen/NetRatings reflected immediate flight from those networks, with a fifteen percent drop in P2P usage of KaZaa and Morpheus just one week after the RIAA announced suits against individual users.⁴² Use of KaZaa alone dropped a total of forty-one percent from the end of June 2003 (pre-announcement of suits) through September 2003 (post-filing of initial round of suits).⁴³ P2P research company Big Champagne's data demonstrates that KaZaa's user base continued to drop after the campaign began, from 5.6 million users in October 2003 to 3.8 million in June 2004.⁴⁴

One explanation for the decrease in P2P activity on sites like KaZaa may not be due to the lawsuits at all, but may instead stem from the fact that spyware and slower downloading have made the mainstream networks less appealing to users than newer, more renegade networks.⁴⁵ However, the fact that the numbers of users on those sites dropped immediately following initiation of suits more likely implies that users fled the networks in response to the litigation threat.⁴⁶ Moreover, studies by the Pew Internet Project, a nonprofit organization never retained by the RIAA, show that the effect of litigation was not limited to those mainstream sites targeted by the lawsuits. The total number of P2P users from spring to

40. A supernode is a "hub within a P2P network where neighbor users (within the same ISP) automatically upload to the machine the list of files they are sharing. The file download takes place between the PC on which the file is shared and the PC that requested the file, not via the supernode." Alberto Escarlate, *Supernode Users May Face Legal Trouble*, thep2pweblog (Apr. 20, 2004), at <http://p2p.weblogsinc.com/entry/3352571835868803>. For an explanation of P2P technology, see Miles, *supra* note 1 and accompanying text.

41. *How to Not Get Sued by the RIAA for File-Sharing*, Electronic Frontier Foundation, at <http://www.eff.org/IP/P2P/howto-notgetsued.php> (last visited Feb. 24, 2005).

42. Press Release, Netratings, Inc., File-Sharing Application Usage Dips After Warning from the Recording Industry (July 14, 2003), available at www.Nielsen-netratings.com.

43. Rainie & Madden, *supra* note 37, at 7.

44. Graham, *supra* note 37, at 1A.

45. Spyware is "[a]ny software that covertly gathers user information through the user's Internet connection without his or her knowledge, usually for advertising purposes." *spyware*, WEBOPEDIA COMPUTER DICTIONARY, at <http://www.webopedia.com/TERM/s/spyware.html> (last modified Feb. 18, 2005).

46. Graham, *supra* note 37, at 1A.

winter of 2003 decreased by fifty percent.⁴⁷ Pew Internet survey results also show that the total number of individuals sharing files online dropped from twenty-eight percent in June 2003 to twenty-three percent in February 2004. And, only eighteen percent of total Internet users downloaded music files according to an April 2004 survey, compared to twenty-nine percent in the spring of 2003.⁴⁸ Thirty-eight percent of those in the April survey also claimed that the reason why they were downloading fewer files was because of the RIAA suits, up from twenty-seven percent before the end of 2003.⁴⁹ Reports from the NPD Internet Research Group and Nielsen/NetRatings also support these findings.⁵⁰

2. *Indirect Benefits of the Litigation Campaign*

RIAA suits against individual users have also had broader social effects that may serve the industry's goals. The litigation campaign has raised public consciousness about the illegality of downloading, been a catalyst for university deals with legitimate music sites, and helped spur the rise of legal sites like iTunes. In addition, other content owners now pursuing litigation against direct infringers benefit from the RIAA's initiatives.

a) Public Perception of the Legality of File-Sharing

Surveys demonstrate that the RIAA's lawsuits have been successful in stigmatizing downloading.⁵¹ In the fall of 2000, seventy-eight percent of downloaders did not think that it was stealing to save music to their hard drives. As of April 2004, that number had dropped to fifty-eight percent.⁵² The number of individuals who stated that they cared about copyright grew by ten percent from May 2003 to February 2004.⁵³ Between April

47. Rainie & Madden, *supra* note 37, at 6.

48. *Id.* at 4.

49. *Id.*

50. *Id.* at 6.

51. McGuire, *supra* note 39 (stating belief of Eric Garland, Chief Executive, Big Champagne).

52. AMANDA LENHART & SUSANNAH FOX, PEW INTERNET & AMERICAN LIFE PROJECT, DOWNLOADING FREE MUSIC: INTERNET MUSIC LOVERS DON'T THINK IT'S STEALING 2 (2000), *at* http://www.pewinternet.org/pdfs/PIP_Online_Music_Report2.pdf; Rainie & Madden, *supra* note 37, at 5. It is possible that the increase in public awareness may not be solely attributable to the RIAA's lawsuits against direct infringers. The decision in *Napster* and considerable press surrounding the RIAA's litigation against P2P networks may also have impacted public perception. See *Fonovisa, Inc. v. Napster, Inc.*, Nos. C 01-01412 MHP [Related to No. C 99-05183 MHP], C 01-02431 MHP [Related to No. C 99-05183 MHP], 2002 U.S. Dist. LEXIS 4270 (N.D. Cal. Jan. 28, 2002).

53. Rainie & Madden, *supra* note 37, at 5.

and October 2003, the number of teens who stated that downloading is illegal increased from 27.5 percent to 43.1 percent.⁵⁴ The number of teens who viewed downloading as morally wrong grew from one-fifth of those surveyed in April 2003 to one-third in October 2003.⁵⁵ Among users who had never downloaded, sixty percent stated that the lawsuits will prevent them from doing so in the future.⁵⁶

b) Piracy on University Campuses

In its efforts to address piracy on college campuses, the RIAA has used a combination of educational and judicial tactics, both pressing charges against student infringers and working with universities to implement long term solutions. As a result of this two-prong strategy, universities have begun to administer their own deterrent mechanisms, from creating copyright policies and methods for dealing with copyright infringement to partnering with legitimate music sites.

College campuses have been particularly fertile ground for illegal P2P use, as students with tight budgets in the prime music-consuming age group enjoy access to high speed network connections provided by colleges.⁵⁷ Students and more broadly, the college-age population, are more likely to engage in file-sharing activity than others. In July 2003, before initiation of litigation, fifty-two percent of individuals ages eighteen to twenty-nine downloaded music, as opposed to only twenty-seven percent of thirty-to forty-nine-year-olds and twelve percent of individuals over fifty.⁵⁸ More than a third of full-time students, and slightly less than a third of part-time students are file-sharers, compared to only eighteen percent of non-students.⁵⁹ Before initiation of the lawsuits, four out of five full-time students were "not concerned" with the fact that the files they were downloading were protected by copyright, compared with approximately three out of five non-students.⁶⁰

54. E-Poll, *Online piracy, Have Lawsuits Had An Impact On Downloads?*, Nov. 4, 2003, available at <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/11-04-2003/0002050963&EDATE>.

55. *Id.*

56. *Music Downloading Up Since November*, *supra* note 39.

57. Jared Wade, *The Music Industry's War on Piracy*, RISK MGMT., Feb. 1, 2004, LEXIS, Nexis Library.

58. Mary Madden & Amanda Lenhart, Pew Internet Project Data Memo: Music Downloading, File-sharing and Copyright 5 (July 2003), available at http://www.pewinternet.org/pdfs/PIP_Copyright_memo.pdf.

59. *Id.* at 6.

60. *Id.*

The RIAA has sought non-judicial solutions to file-sharing on college campuses. In the fall of 2002, the RIAA helped found the Joint Committee of the Higher Education and Entertainment Communities to address piracy on college campuses.⁶¹ The organization brings content owners and universities together to facilitate discussion regarding solutions to file-sharing at universities and collaboration on legislative initiatives, as well as to provide educational and technical support.⁶² The RIAA has also made efforts to educate university leaders on file-sharing, and urged them to pass on information to students. In addition, the association held an educational conference on file-sharing for university leaders,⁶³ and sent letters to college presidents asking them to "inform students of their moral and legal responsibilities to respect the rights of copyright owners."⁶⁴

In combination with non-judicial efforts to address piracy on college campuses, in 2003 the RIAA sued over 150 students at thirty-five universities.⁶⁵ In March 2004, it announced another wave of lawsuits against eighty-nine students from twenty-one colleges and universities, and in June, it filed suits against eight students and one staff member at the University of Michigan.⁶⁶ All of the suits target students that share a particularly great number of songs, averaging 837 each.⁶⁷ While the suits threaten a fine of \$750 per violation with a total fine up to \$150,000, they have been settling for less, averaging \$3,000.⁶⁸ After serving students with complaints, the RIAA generally refers students to a group of attorneys at a

61. Roy Mark, *College File Swapping: Making the Illegal, Legal?*, dc.internet.com, Sept. 2, 2003, available at <http://dc.internet.com/news/article.php/3071331>.

62. *Id.*

63. Aymar Jean, *U. Michigan Expects Subpoenas in Next Round of RIAA Legal Action*, MICH. DAILY, Mar. 25, 2004, LEXIS, Nexis Library, University Wire.

64. Grace J. Bergen, *A Conversation and Colloquia Concerning "Who Owns Your Digital Creations?": Litigation as a Tool Against Digital Piracy*, 35 MCGEOGE L. REV. 181, 201 (2004).

65. Luke Jennett, *Student Settles With RIAA*, IOWA STATE DAILY, Sept. 28, 2004, available at <http://www.iowastatedaily.com/vnews/display.v/ART/2004/09/28/4158e9d048bc8>.

66. Aymar Jean, *U. Releases Student Identities to RIAA*, MICH. DAILY, June 7, 2004, available at <http://www.michigandaily.com/vnews/display.v/ART/2004/06/07/40c407f7c7b79>.

67. *Id.*

68. Kari Bellingham, *New Round of RIAA Suits Does Not Deter All U. Wisconsin Students*, BADGER HERALD (Madison, Wis.), Mar. 25, 2004, LEXIS, Nexis Library, University Wire; Josh Huseby, *The RIAA Targets Colorado Campuses*, ROCKY MOUNTAIN COLLEGIAN, Apr. 1, 2004, available at <http://www.collegian.com/vnews/display.v/ART/2004/04/01/406ba75e8082d>. For instance, the RIAA agreed to a settlement of \$4500 with a student who uploaded 901 songs. Jennett, *supra* note 65, at 1.

Settlement Support Center.⁶⁹ After the RIAA's initiation of lawsuits, the percentage of Internet users ages eighteen to twenty-nine admitting to downloading music dropped from fifty-two to twenty-eight percent.⁷⁰

Specific university policies exemplary of those spawned by the recent litigation are those of the University of Colorado, Colorado State University, Pennsylvania State University, Iowa State University, and Indiana University.⁷¹ At these schools, repercussions for illegal activity conducted using university networks range from Internet disconnection to expulsion from the school.⁷² For example, students at Colorado State University and the University of Colorado at Colorado Springs must sign an agreement that states they will not conduct illegal activity on the university network.⁷³ The university monitors the network for high volumes of activity, and notifies a potential infringer that she must either stop or be disconnected.⁷⁴ Pennsylvania State University limits the amount of data students can download to 1.5 gigabytes. If a student exceeds this limit, the university slows down the Internet connection to dial-up speed.⁷⁵ The university sent a warning of the ramifications of file-sharing to 110,000 students in March 2003. In April 2003, it suspended Internet access of 220 students.⁷⁶ At Iowa State University, first-time offenders are only required to remove infringing copyrighted material. However, the university is threatening greater repercussions in the future, including disciplinary actions, probation, and even deferred expulsion for illegal file-sharing.⁷⁷ Repeat offender cases are turned over to the federal legal system.⁷⁸

Indiana University's program has been reported by the U.S. House Judiciary Committee's Subcommittee on Courts, the Internet, and Intellec-

69. Elizabeth Thomas, *Judge Orders Villanova U. to Deliver Names in RIAA Case*, DAILY PENNSYLVANIAN (Phila.), June 3, 2004, LEXIS, Nexis Library, University Wire.

70. *Id.*

71. See generally Huseby, *supra* note 68; Jennett, *supra* note 65; Nicholas Kershbaumer, *Penn State U. to Limit Downloads*, DAILY COLLEGIAN (University Park, Pa.), Jan. 11, 2002, LEXIS, Nexis library, University Wire; Adam VanOsdol, *IU Leads Pack in Combating Illegal Downloads, Report Says*, IND. DAILY, Aug. 31, 2003, available at <http://www.idsnews.com/print.php?id=24253>.

72. Huseby, *supra* note 68 (stating that infringers who persist post-notification of illegal activity are disconnected from the university network); Jennett, *supra* note 65 (stating that Iowa state is threatening expulsion for file-sharing offenses).

73. Huseby, *supra* note 68, at 1.

74. *Id.*

75. Kershbaumer, *supra* note 71, at 1.

76. Ryan Naraine, *Penn State Cuts off P2P File-Traders*, Apr. 22, 2003, available at <http://www.atnewyork.com/news/print.php/2194861>.

77. Jennett, *supra* note 65, at 1.

78. *Id.*

tual Property to be particularly effective in preventing illegal file-sharing.⁷⁹ The university implemented an online file-sharing tutorial and quiz to educate students about copyright laws.⁸⁰ Students who receive an illegal file-sharing notice must pass an online quiz and agree to delete infringing files. If they refuse, network access is terminated. For second-time offenders, termination is immediate and the individual's name is forwarded to the dean of students. The number of illegal file-sharing notices received by the university from the RIAA dropped by over fifty percent between the 2003 and 2004 academic years.⁸¹

A number of schools are also resorting to limitations on per-student bandwidth, due to the potential of high traffic to overburden school servers, a measure which increases downloading time.⁸² In addition, almost forty universities and colleges now use "CopySense Network Appliance," a product created by Audible Magic that prevents the transfer of copyrighted files to students' computers.⁸³ The University of Florida uses another program, ICARUS, to prevent file-sharing altogether.⁸⁴

Colleges and universities also made major changes in the way students can access digital entertainment content from 2003 to 2004.⁸⁵ Negotiations with legitimate music services, coupled with disincentives for illegal P2P use, may work to both immediately reduce file-sharing among university students and ultimately reduce illegal downloading by encouraging legal habits at an early age. Pennsylvania State University was the first to enter negotiations with the newly legitimate Napster. University students are given access to Napster's database of 500,000 songs. Tethered downloading is offered free of charge, and students are able to download each song on up to three personal computers.⁸⁶ In addition, students may purchase a

79. Joint Comm. of Higher Educ. & Entm't. Comtys., A Report to the Subcommittee on Courts, the Internet, and Intellectual Property House Judiciary Committee on Progress During the Past Academic Year Addressing Illegal File Sharing on College Campuses 3 (Aug. 24, 2004), available at <http://www.educause.edu/ir/library/pdf/EPO0412.pdf>

80. VanOsdol, *supra* note 71, at 1.

81. *Id.*

82. Beth A. Thomas, *Internet & Technology: Solutions are on Track: Digital File Sharing Spun in a Positive Light*, 6 VAND. J. ENT. L. & PRAC. 129 (2003).

83. Charlotte Hsu, *UCLA Uses its Own Creation to Fight Illegal File-Sharing*, DAILY BRUIN (Los Angeles), Oct. 5, 2004, LEXIS, Nexis Library, University Wire.

84. VanOsdol, *supra* note 71, at 1.

85. This was reported by the Congressional Subcommittee on Courts, the Internet and Intellectual Property. Jennett, *supra* note 65.

86. "A tethered download is a file that cannot be burned onto a CD or transferred to a portable device. The file will be stored on your computer's hard drive, but it is encoded so that it will no longer play once you stop being an active Napster member." Middlebury

song for 99 cents for permanent use.⁸⁷ On the fourth day that the service was provided, over 2,600 students had registered for the service and over 100,000 songs had been downloaded.⁸⁸ As of fall 2004, Napster, MusicNet, Rhapsody, and iTunes have all negotiated deals with multiple universities.⁸⁹ Duke University distributed over 1,500 iPods to freshmen, along with ten free downloads from iTunes.⁹⁰

c) The Rise of Legitimate Options

While the RIAA believes that "litigation is not a business strategy," the threat of litigation has increased the attractiveness of legitimate online music services.⁹¹ When the illegal Napster was available, the cost of downloading was zero and the cost of legal music considerably greater at \$17 per album. Now, due to the lawsuits, an illegal download carries with it a risk of a \$3,000 fine, whereas legitimate online sites offer singles for only 99 cents.

Immediately following initiation of lawsuits, BuyMusic.com, the largest online store for PC users, noted a thirty percent increase in traffic on its site from September 6th to the 13th.⁹² As of April 2004, seventeen percent

College, *Napster Frequently Asked Questions*, at <http://www.middlebury.edu/campuslife/services/napster/faq> (last visited Feb. 18, 2005).

87. *Penn State and Napster Team Up to Make Legal Tunes Available to Students; University Becomes First in the Nation to Offer Its Student Body a Legal and Quality Alternative to Pirate File Sharing Services*, PR NEWSWIRE, Nov. 6, 2003, LEXIS, Nexis Library, PR Newswire File.

88. *Id.*

89. Scott Banerjee & Bill Holland, *Biz Sees Campus Progress*, BILLBOARD MAG., Sept. 4, 2004, LEXIS, Nexis Library, Billboard File. University deals include the following: Napster—Cornell University, George Washington University, Middlebury College, University of Miami, University of Southern California, Write State University, and University of Rochester; MusicNet—Marietta College, Ohio University, Rochester Institute of Technology, and University of Denver; Rhapsody—The University of California at Berkeley and University of Minnesota.

90. Michele DeCamp, *Let's Get the Downloading Started*, TECHNICIAN (Raleigh, S.C.), Aug. 30, 2004, LEXIS, Nexis Library, University Wire.

91. Jennifer Norman, *Staying Alive: Can the Recording Industry Survive Peer-to-Peer?*, 26 COLUM. J.L. & ARTS 371, 401 (2003) (quoting Cary Sherman, President, RIAA); Press Release, Recording Industry Association of America, RIAA Files New Copyright Infringement Lawsuits Against 754 Illegal File Sharers, Dec. 16, 2004 ("Enforcement online or on the street is always a means to an end—helping foster business environments where legitimate commerce can take root and flourish, while creators can earn their fair share. In a relatively brief time, a whole new online marketplace has emerged and begun to establish itself,") (quoting Cary Sherman, President, RIAA), available at <http://www.riaa.com/news/newsletter/121604.asp>.

92. *BuyMusic.com's Traffic Climbs 30 Percent in Just One Week*, MUSIC INDUS. NEWS NETWORK, Sept. 18, 2003, at http://www.mi2n.com/press.php3?press_nb=57113.

of music downloaders claimed that they were using paid services, and over 11 million unique Internet users had visited legitimate music sites, including Musicmatch.com, Roxio, Inc. (the new Napster), iTunes, Listen.com, Walmart, and Liquid.com.⁹³ From October 2003 to April 2004, iTunes alone received over 2.3 million new visitors to its site.⁹⁴ And as of July 2004, over 100 million songs had been downloaded from iTunes.⁹⁵ In addition, the percentage of people who stated they would pay for legal downloads is up from 16 percent in 2003 to 19 percent in 2004.⁹⁶

d) Other Organizations Follow Suit

One of the most beneficial outcomes of the RIAA's bold initiation of lawsuits for the record industry is that it paved the way for other content owners to do the same. If the recording industry's lawsuits against individuals had no deterrent effect, it is unlikely that other content owners would be pursuing the same strategy. Yet in the summer of 2004, the MPAA hired one of the RIAA's top litigators to pursue claims against individuals. Press reports indicate that 200 alleged offenders are being targeted in the MPAA's first round of litigation.⁹⁷ The International Federation of Phonographic Industries (IFPI) had already pursued suits against file-sharers in Germany, Italy, and Denmark as of June 2004.⁹⁸ The music industries in France, Sweden and the United Kingdom have announced

93. Rainie & Madden, *supra* note 37, at 4.

94. *Id.*

95. *Online Music Survey*, Berkman Ctr. for Internet & Soc'y at Harvard Law Sch., at <http://cyber.law.harvard.edu/home/onlinemusicssurvey> (last visited Nov. 27, 2004).

96. Darren Waters, *Illegal Music Sites 'Here to Stay' RIAA Admits*, BBC NEWS ONLINE, at <http://www.freerepublic.com/focus/news/818822/posts> (citing Jupiter research group results) (last visited Nov. 26, 2004).

97. Benny Evangelista, *Movie Industry Sues File Sharers*, S.F. CHRON., Nov. 17, 2004, at C3, available at 2004 WL 58613494. Moreover, following the *Verizon* decision, the MPAA is filing John Doe suits as opposed to attempting to use the DMCA's subpoena provision. *Id.* For a complete list of Doe suits filed by the MPAA, see http://www.eff.org/IP/P2P/MPAA_v_ThePeople. The MPAA has also retained MediaSentry to search for P2P users who distribute copies of infringing material on the Internet. Decl. of Chad Tilbury at 4, Twentieth Century Fox Film Corp. v. Does 1-12, No. C 04 4862 WHA (N.D. Cal.), available at http://www.eff.org/IP/P2P/MPAA_v_ThePeople/20041117_20thtilbury.pdf.

98. Andrew Raff, *Filesharing Lawsuits Popular in Europe*, IPTA blog, at http://www.iptablog.org/2004/06/11/filesharing_lawsuits_popular_in_europe.html (last visited Nov. 27, 2004).

similar plans. The broadcast industry appears poised to follow in short order.⁹⁹

Moreover, the international nature of the Internet, combined with the ability of P2P networks to transmit files containing any type of content, suggests that widespread litigation will be required to have a significant deterrent effect on illegal downloading. The same P2P networks that are being used to share music are also being used to transmit movies. The MPAA is also focusing its litigation on KaZaa users who use the network to share copyrighted films.¹⁰⁰ Moreover, the same P2P networks used in the United States are used worldwide. Suing uploaders in the United States alone will not sufficiently address the problem, as domestic uploaders comprise only a small fraction of the overall file-sharing population. Only 45.1 percent of American users download from other American users.¹⁰¹ One out of every six downloads comes from Germany, and a little less than half that from Canada, Italy, and the United Kingdom.¹⁰² There are more European KaZaa users than American, and Europeans are the primary users of other P2P networks like eDonkey and DirectConnect.¹⁰³ Therefore, the prosecution of uploaders by IFPI-affiliated organizations in Germany, for instance, will work to decrease the amount of copyrighted content that individuals in the United States can access on illegal sites. Therefore, by setting an example of a litigation strategy against users that other content owners may learn from or emulate, the RIAA stands to indirectly increase the deterrence of alleged infringers without expending additional resources of its own.

B. Costs of Direct Enforcement to the Recording Industry

While studies of P2P activity all confirm that there was an initial decrease in P2P activity on RIAA-targeted sites like KaZaa and Morpheus post-initiation of suits, studies simultaneously show either a subsequent resurgence in filesharing or that filesharing levels overall have not been affected by litigation. In addition, reports indicate that in response to the threat of litigation, users have moved to less visible, more secure P2P networks that are employing technological measures to help users avoid de-

99. See Ben Fritz & Marc Graser, *Pirates Set Sail Toward TV Shores*, VARIETY, July 25, 2004, available at <http://www.variety.com/story.asp?l=story&a=VR1117908194&c=1009>.

100. Evangelista, *supra* note 97.

101. Oberholzer, *supra* note 2, at 37.

102. *Id.* at 17, 37.

103. dRD, *supra* note 6, at 1 (citing Nielsen/NetRatings Internet traffic study).

tection. Yet another cost of the RIAA's litigation strategy has been its toll on the public image of record companies.

1. *Effect on Overall, Long-Term P2P Activity*

Though Pew Internet Project reports that the percentage of individuals who download music is still less than it was in spring of 2003,¹⁰⁴ there has been a small resurgence in file-sharing since the initiation of suits.¹⁰⁵ Another recent report by the University of California at Riverside and the San Diego Supercomputer Center ("UC study") shows that though litigation caused a decrease in use of networks such as FastTrack targeted by the lawsuits, overall file-sharing has remained unchanged, as users of those sites simply migrated to more secure and anonymous file-sharing systems.

The UC study used highly technical means to measure the flow of P2P traffic from pre- through post-initiation of lawsuits. The findings were based on monitoring P2P traffic on eight of the most popular networks: FastTrack (KaZaa), eDonkey (including eMule and Overnet networks), WinMx, BitTorrent, Gnutella, Soulseek, and Direct Connect.¹⁰⁶ The study operated on the assumption that most P2P traffic is of copyrighted material.¹⁰⁷ It confirmed a decrease in FastTrack use (KaZaa) on known ports,¹⁰⁸ which it attributed to RIAA litigation efforts.¹⁰⁹ However, it also asserted that there was never a decrease in overall P2P activity and suggested that other reports have underestimated the rate of P2P traffic due to

104. The number of Internet users who said they downloaded music dropped from twenty-nine percent in the spring of 2003 to eighteen percent in the spring of 2004. Rainie & Madden, *supra* note 37, at 4.

105. The number of American Internet users who say they download music or share files online has increased slightly, but continues to sag well below peak levels. *Id.* at 1. File-sharing experienced a small resurgence of four percentage points from the end of 2003 through the spring of 2004. *Id.* at 4.

106. Thomas Karagiannis et al., *Is P2P Dying or Just Hiding?* at 2, available at <http://www.caida.org/outreach/papers/2004/p2p-dying/p2p-dying.pdf>.

107. *Id.* at 3.

108. A port is a means by which, when using the Internet's protocol TCP/IP (Transmission Control Protocol/Internet Protocol—the basic communication language, or protocol, of the Internet), "a client program specifies a particular server program on a computer in a network." Some ports, "well-known ports," have pre-assigned numbers, determined by the Internet Assigned Numbers Authority. "port", WHATIS.COM, at http://searchnetworking.techtarget.com/gDefinition/0,294236,sid_gci212807,00.html (last updated Jul. 31, 2001).

109. Karagiannis, *supra* note 106, at 6.

a failure to measure usage in P2P networks that are “intentionally camouflaging their traffic.”¹¹⁰

Current P2P migration mirrors events following the decision in *Napster*, in which P2P users migrated from the easily identifiable Napster network to the more elusive Gnutella protocol. Now, with the threat of being held directly liable, P2P users are going even further underground by abandoning known ports like FastTrack for more arbitrary ones like Bit-Torrent.¹¹¹ Data from one ISP on P2P traffic flow from 2002 through 2003 shows that while total P2P traffic either increased or remained the same, traffic on arbitrary ports increased, suggesting that downloaders are using less detectable routes through the Internet. For instance, traffic on BitTorrent grew more than 100 percent, becoming one of the most heavily used networks.¹¹² Data from comScore Media Metrix support the UC study’s findings, showing a growth between November 2003 and February 2004 on BitTorrent, eMule, and even iMesh despite the initiation of lawsuits against iMesh and its users in September.¹¹³ Unique users on BitTorrent in February 2004 almost doubled the number of users on the protocol in November 2003.¹¹⁴

2. Increased Sophistication of P2P Networks

The UC study suggests that the rate of total file-sharing on all P2P networks has not been slowed by RIAA efforts, which would mean that the RIAA has pursued litigation against users at great cost to the record industry solely to reap indirect benefits like those discussed in the previous section. But the repercussions of downloader response to the lawsuits may be even more serious. Studies also show that users are turning to more sophisticated P2P networks that are not only harder to detect on the Internet, but are also implementing technological countermeasures to help users evade RIAA litigation.¹¹⁵

110. Any port number can be used for the newest P2P protocols, even the port used for Web traffic, as opposed to older P2P protocols which had “well-defined port numbers” that were easier to identify. *Id.* at 1.

111. *Id.* at 7.

112. *Id.* at 6.

113. Press Release, comScore Networks, One in Seven Internet Users Say They No Longer Download Music Files (Apr. 26, 2004), available at <http://www.comscore.com/press/release.asp?press=449>.

114. Rainie & Madden, *supra* note 37, at 4.

115. Matthew Fordahl, *Internet Evolves Underground in Wake of Music-Swapping Suits*, SFGate.com, Oct. 4, 2003, at <http://www.sfgate.com/cgi-bin/article.cgi?f=/news/archive/2003/10/04/national1251EDT0553.DTL> (last visited Feb. 8, 2005).

As part of its campaign against file-sharing, the RIAA began to use Instant Messenger (IM) to notify FastTrack network users of the illegality of their activities. The network responded by changing IM "default" settings, thereby disabling the RIAA's instant messaging campaign and preventing the RIAA from sending warning messages.¹¹⁶ While this measure may have served only to stem RIAA threats, other technological adaptations may stymie online enforcement efforts altogether. Morpheus, KaZaa Lite, and Shareaza now help users identify Internet Protocol (IP) addresses of companies looking for pirates.¹¹⁷ Morpheus also allows users to connect to a site that links them to public proxy servers that mask the users' IP numbers.¹¹⁸ This makes it more difficult for the RIAA to identify infringers, as individuals' ISPs are identified through the IP numbers assigned to computers.¹¹⁹ A program called "Waste" encrypts instant messaging and content sharing networks of up to fifty users, and unlike most IM programs, its messages do not pass through a central server.¹²⁰ Two Spanish-based P2P programs, Filetopia and Blubster, boast superior ability to mask user identities.¹²¹

3. *Public Image of the Recording Industry*

Perhaps the greatest casualty in the RIAA's war on piracy has been the public's perception of the music industry. The origins of the RIAA's negative publicity include misguided and unpopular lawsuits, the individualistic and experimental nature of the Internet, and the public outcry of civil rights organizations, many of which have submitted amicus briefs on behalf of Doe defendants and supported opposition to RIAA enforcement strategies.

It is clear that in its desire to boost record sales, the RIAA has alienated many of its fans. The NPD Online Research Group's MusicLab survey conducted shortly after initiation of the suits revealed that most con-

116. Press Release, Recording Industry Association of America, Privacy & Piracy: The Paradox of Illegal File Sharing on Peer-to-Peer Networks and the Impact of Technology on the Entertainment Industry (Sept. 30, 2003) (citing statement of Mitch Bainwol, Chairman & CEO, Recording Industry Association of America, before the Permanent Subcommittee on Investigations Committee on Governmental Affairs, United States Senate), at http://www.riaa.com/news/newsletter/093003_2a.asp.

117. *Brawl Over File-Swapping Spawns 'Secure' Software*, SiliconValley.com, July 24, 2003, at <http://www.siliconvalley.com/mld/siliconvalley/news/editorial/6374384.htm>.

118. *Id.*

119. *Id.*

120. Fordahl, *supra* note 115, at 1.

121. *Brawl Over File-Swapping Spawns 'Secure' Software*, *supra* note 117.

sumers did not approve of the industry's measures.¹²² Only twenty-three percent of recent file-sharers agreed that "stopping people from freely sharing copyrighted music files through a file-sharing network is the honest and fair thing to do."¹²³ Two-thirds of recent file-sharers also stated that their opinion of the recording industry was negatively affected by RIAA lawsuits.¹²⁴

There are many possible explanations for public criticism of the RIAA's litigation strategy. In several highly-publicized cases, the targets of RIAA suits were misidentified. Examples include when the RIAA believed an astrophysics professor with the last name of Usher illegally uploaded files by well known R&B artist Usher,¹²⁵ sued a sculptor who had never installed file-sharing software for allegedly uploading 2000 songs,¹²⁶ and pressed charges against a grandmother for downloading and sharing rock and hip-hop music.¹²⁷ The RIAA also received extensive negative publicity for suing a twelve-year-old who lived in a New York housing project.¹²⁸

The RIAA is also fighting an Internet culture that cherishes the freedom of information the Internet allows and views such enforcement efforts as threats both to the culture and to the technological platform that enables it.¹²⁹ Although in its early days, the success of the Internet was largely contingent on financial backing from the government and universities,¹³⁰ Internet pioneers have classically been characterized as highly individual-

122. Press Release, NPD Group, Consumers Delete Large Numbers of Digital Music Files from PC Hard Drives (Nov. 5, 2003), available at http://www.npd.com/press/releases/press_031105.htm.

123. *Id.*

124. *Id.*

125. Sonia K. Katyal, *A War on CD Piracy, A War on Our Rights*, L.A. TIMES, June 27, 2003, at Cal. Metro, Part 2, at 17.

126. Chris Gaither, *Recording Industry Withdraws Suit Mistaken Identity Raises Questions on Legal Strategy*, BOSTON GLOBE, Sept. 24, 2003, at C1, available at http://www.boston.com/business/articles/2003/09/24/recording_industry_withdraws_suit.

127. Ketola, *RIAA Withdraws Charges Against 65-Year Old*, Afterdown.com, Sept. 26, 2003, at <http://www.afterdawn.com/news/archive/4529.cfm>.

128. Jefferson Graham, *Recording Industry Sues Parents*, USA TODAY, Sept. 14, 2003, at 4D, available at http://www.usatoday.com/life/music/news/2003-09-14-riaa_x.htm.

129. Steve Lohr, *The Price of Music: News Analysis; Fighting the Idea that All the Internet Is Free*, N.Y. TIMES, Sept. 9, 2003, at C1.

130. *Id.*

istic and resistant to government control.¹³¹ The notion that information on the Internet should be free has carried over to P2P users today, and makes it more difficult for the RIAA to justify its enforcement strategy to Internet users.¹³²

Another source of negative publicity for the RIAA has been the resistance to its litigation strategy by civil liberties groups and consumer rights advocates. The recording industry has been criticized for abusing civil liberties, due process, and privacy rights, as well as expending judicial resources. Boycott-RIAA.com, a coalition of many websites dedicated to representing “the consumer and independent artists positions on the battlefield that copyright has become,” is just one of a multitude of sites opposing RIAA initiatives.¹³³ The Electronic Frontier Foundation’s (EFF) “Let the Music Play Campaign” argues that “suing fans doesn’t pay artists. Neither does threatening every Internet user’s civil liberties.”¹³⁴ Moreover, since the initiation of lawsuits, groups like the EFF, the American Civil Liberties Union, and Public Citizen have filed numerous amicus briefs on behalf of Doe defendants.¹³⁵ The EFF’s website “SubpoenaDefense.org” also provides information for Doe defendants on how to proceed when served with a subpoena.¹³⁶

III. PROPOSALS TO INCREASE THE EFFICIENCY OF ENFORCEMENT

The RIAA continues to pursue its litigation strategy despite allegations that litigation has had potentially little effect on overall file-sharing activity, while driving users toward more sophisticated P2P sites and alienating many of its own fans. Yet without the threat of litigation, it is likely that

131. See Jeffrey D. Sullivan & Michael B. De Leeuw, *Spam After Can-Spam: How Inconsistent Thinking Has Made a Hash Out of Unsolicited Commercial E-Mail Policy*, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 887, 906-07 (2004).

132. See generally Lohr, *supra* note 129.

133. *Why We Are Here*, Mission Statement of Boycott-RIAA.com, at <http://www.boycott-riaa.com/mission> (last visited Feb. 24, 2005). Other anti-RIAA organizations include: Consumers Against the RIAA, at <http://www.geocities.com/riaasucks> (last visited Mar. 18, 2005), and Downhill Battle, at <http://downhillbattle.org> (last visited Mar. 18, 2005).

134. *File-Sharing: It’s Music To Our Ears*, Elec. Frontier Found., at <http://www.eff.org/share> (last visited Feb. 24, 2005).

135. *File Cases Separately, RIAA Told*, P2PNet.net, Mar. 8, 2004, at <http://p2pnet.net/story/929>.

136. *Subpoena Defense, Defending the Constitutional Rights of Internet Users and ISPs*, Elec. Frontier Found., at <http://www.subpoenadefense.org> (last visited Feb. 24, 2005).

P2P activity would be at least at the level that it is today, as litigation has sent the message that file-sharing is wrong and worked to deter users of targeted networks. In addition, the lawsuits are helping to change public attitudes and spur stakeholders to implement long term solutions to file-sharing. But, as there appears to be no sign of a cease-fire, in addition to continuing to sue individuals, it would be advantageous for the industry to consider more efficient means of fighting this war.

The RIAA could increase the efficiency of its enforcement strategy by: putting more resources into anti-piracy technology; supporting federal intellectual property enforcement initiatives; increasing the quality of legitimate options; and making changes to its litigation strategy.

A. Anti-Piracy Technology

The RIAA has attempted several technological solutions to the P2P problem, some more effective than others. Solutions have focused on either making CDs harder to convert to MP3 files via digital rights management,¹³⁷ or utilizing technological roadblocks to file-sharing. Thus far, the most successful initiatives have focused on the latter.

Attempts at selling CDs with digital rights management have not met with great success. A Norwegian teenager cracked the code to the recording industry's Content Scrambling System and posted it on the Internet.¹³⁸ The industry's Secure Digital Music Initiative, which challenged programmers to hack "digitally watermarked audio content," proved to be an embarrassment when a professor met the challenge within just a few weeks.¹³⁹ And in 2002, when the industry marketed CDs as copy proof, the technology was proved to be easily circumvented with the use of a felt-tip marker.¹⁴⁰ Thus, attempts to secure content have not been the most

137. Digital Rights Management (DRM) systems may be described as "secure packaging and delivery software designed to prevent purchasers and third parties from making unauthorized uses of digital works." C.J. Alice Chen & Aaron Burstein, *Foreword*, 18 BERKELEY TECH. L.J. 487, 488 (2003) (quoting Dan L. Burk and Julie E. Cohen). DRM restricts consumer behavior, for instance on DVDs may prevent copying or limit the kinds of devices used for playback. Julie E. Cohen, *DRM and Privacy*, 18 BERKELEY TECH. L.J. 575, 580 (2003).

138. The teenager, Jon Johansen, was acquitted in a Norwegian court in 2003. See *Norway v. Johansen*, Bogarting Appellate Court (Dec. 22, 2003). The original decision in Norwegian is available at <http://websir.lovdata.no/lex/frame-eu.html>, while an English translation is available at <http://www.ipjustice.org/johansen/DVD-Jon-Borgarting-1-eng.pdf>.

139. Lawrence Iser & James Toma, *Battling Digital Piracy: Recording Industry Has Taken a Multipronged Response to Illegally Downloaded Music*, NAT. L.J., Jan. 20, 2003, at C1.

140. *Id.*

effective. However, efforts to make content more difficult to find on the Internet have been more successful.

The most promising tactic to date may be “spoofing,” whereby the record industry floods P2P networks with decoy music files. Some files contain messages from the artist, some repeat the chorus *ad naseum*, while others contain annoying screeching sounds. The recording industry is using companies like Covenant and Overpeer to implement this tactic.¹⁴¹ Overpeer sends more than twenty-five billion spoofed songs per month on the FastTrack network.¹⁴² In one sampling, sixty percent of the Linkin Park song “Somewhere I Belong” files were found to be decoys on the LimeWire networks.¹⁴³ If the number of decoys is significant enough, less committed users may think twice about the time it could take them to find a quality copy of their favorite song. In this light, the 99 cents it costs to purchase an error-free song on a legitimate site may seem much more palatable.¹⁴⁴ In addition to flooding P2P networks with spoofed files, the RIAA should collaborate with the MPAA to distribute technology for parents to regulate file-sharing on home computers. The MPAA is currently developing free software for this purpose.¹⁴⁵

Other tactics rumored to be considered or in development by the music industry include: interdiction, which renders the user’s hard drive inaccessible to others and prevents the user from downloading;¹⁴⁶ a “freeze,” which locks up a computer system and gives a warning about file-sharing;¹⁴⁷ and a program that automatically directs users to legitimate music sites.¹⁴⁸ However, the first two tactics have privacy implications and may induce liability under the Computer Fraud and Abuse Act.¹⁴⁹ Interdic-

141. Thomas, *supra* note 82, at 135.

142. Berkman Ctr. for Internet & Soc’y at Harvard Law Sch., *Online Music Survey*, at <http://cyber.law.harvard.edu/home/onlinemusicssurvey> (last visited Feb. 18, 2005).

143. Thomas, *supra* note 82141, at 135.

144. *Id.*

145. The MPAA has not yet provided details regarding this software, but it will enable users to remove infringing movies, music, or P2P applications. The software will be available for download on the MPAA site. Jay Lyman, *MPAA Fights Film Swapping with Suits and Software*, TechNewsWorld, Nov. 17, 2004, at <http://www.technewsworld.com/story/news/38253.html>.

146. Iser & Toma, *supra* note 139, at C1.

147. Hillary M. Kowalski, Comment, *Peer-to-Peer File Sharing & Technological Sabotage Tactics: No Legislation Required*, 8 MARQ. INTELL. PROP. L. REV. 297, 302 (2004).

148. *Id.*

149. *Id.*

tion may be considered hacking¹⁵⁰ and a “freeze” may cause loss of data.¹⁵¹

B. Urge Federal Enforcement Using the NET Act

In the spring of 2004, the RIAA announced plans to work with the Department of Justice’s newly formed Intellectual Property Task Force in the prosecution of criminal charges against large scale infringers.¹⁵² Working in tandem with the task force to prosecute large-scale providers of illegal content is one of the most efficient means by which the RIAA can attack the piracy problem. However, the RIAA could make federal enforcement even more effective by urging the Justice Department to criminally prosecute individuals—that is, smaller-scale infringers—under the No Electronic Theft (NET) Act.

In the past, the Department of Justice has prosecuted a number of intellectual property claims, including those against counterfeiting of pharmaceuticals and pesticides, as well as trade secret theft and illegal movie distribution.¹⁵³ Whether spurred by national security motives or the effect of piracy on the vitality of the nation’s economy,¹⁵⁴ the creation of the task force signals the federal government’s renewed commitment to its fight against intellectual property infringers. The task force aims to target large-scale, organized perpetrators of intellectual property crimes, both domestic and international.¹⁵⁵ Through “Operation Digital Gridlock” in August 2004, the Justice Department successfully prosecuted its first criminal case against a United States-based P2P network that distributed over forty terabytes of infringing copyrighted material.¹⁵⁶

The NET Act is an important tool at the federal government’s disposal, yet there have been relatively few prosecutions of Web pirates and no reported prosecutions of P2P users under the Act. Passed in 1977, the NET Act makes it a felony to willfully infringe a copyright by reproducing or distributing ten or more copyrighted works with a value of at least \$2,500

150. Iser & Toma, *supra* note 139, at C1.

151. Kowalski, *supra* note 147, at 302.

152. Thomas Mennecke, *RIAA Applauds Creation of Intellectual Property Task Force*, Apr. 13, 2004, at <http://www.slyck.com/news.php?story=449>.

153. U.S. DEP’T OF JUSTICE, REPORT OF THE DEPARTMENT OF JUSTICE’S TASK FORCE ON INTELLECTUAL PROPERTY 23-24 (2004), available at http://www.usdoj.gov/ag/speeches/2004/ip_task_force_report.pdf.

154. See *id.* at 16 (stating that in 2002, the United States’ copyright industries, for instance, contributed 6% of the nation’s GDP and employed 4% of the nation’s work force).

155. *Id.* at 32.

156. *Id.* at 16. Forty terabytes is equivalent to 60,000 films. *Id.*

within a 180-day period, regardless of whether the infringer reaped actual financial gain.¹⁵⁷ Reproduction or distribution of copyrighted material, including by electronic means, is sufficient for prosecution under the Act.¹⁵⁸ This is the key provision for the copyright industry, because under the Act, the government can prosecute individuals that receive "anything of value," including other copyrighted works, in exchange for copyrighted materials.¹⁵⁹ In contrast, under existing copyright law, criminal charges may only be pressed for willful infringement cases in which the individual received commercial or private financial gain.¹⁶⁰ Penalties for NET Act violations may be up to three years in prison and \$250,000 in fines.¹⁶¹

Thus far, the Department of Justice has only used the NET Act to charge two non-P2P users who had uploaded only a single film to the Internet.¹⁶² If used more liberally to impose criminal charges against individual P2P users, the NET Act could be a powerful deterrent of individual copyright infringement above and beyond the civil suits currently being filed by the RIAA.

C. Increase Attractiveness of Legitimate Options

While illegal file-sharing now carries risks of direct liability for copyright infringement and is more time consuming as a result of spoofing and other tactics, legal alternatives still require improvement in several respects in order to compete with illegal file-sharing. By working with technology companies, the recording industry can make legal downloading more attractive by: (1) licensing more of their products to online retailers, thereby increasing the amount of music available on legal sites; (2) increasing public approval of the 99 cent fee by giving a greater portion to the artists; (3) renegotiating university licensing arrangements with legitimate sites to make legal music more affordable for students; and (4) facilitating greater compatibility of portable digital music players with multiple legitimate music sites.

157. 18 U.S.C. § 2319(b)(1) (2000).

158. 17 U.S.C. § 506(a) (2000).

159. *Id.*; Jonathan Peterson, *No Electronic Theft (NET) Act*, WAY.NU, July 22, 2002, at <http://www.way.nu/archives/000290.html>.

160. 17 U.S.C. §506(a).

161. Peterson, *supra* note 158, at 1.

162. See Press Release, U.S. Dep't of Justice, Man Pleads Guilty to Internet Piracy of Star Wars Film (Dec. 15, 2000), at <http://www.cybercrime.gov/spataforeplea.htm>; Gabriel Snyder, 'Hulk' Uploader Avoids Jail, VARIETY ONLINE, Sept. 28, 2003, available at <http://www.variety.com/article/VR1117893101?categoryid=22&cs=1> (subscription site).

1. Increase Licensing Speed and Quantity

In order to compete with illegal music providers, the record industry must move quickly to improve the quality of legitimate sites. Most importantly, it must license higher quantities of music more quickly. As of August 2004, the iTunes Music Store had over one hundred million songs available for American subscribers.¹⁶³ However, KaZaa offers ten times that amount.¹⁶⁴ Some of the most popular artists, such as the Beatles, the Dave Mathews Band, and the Grateful Dead, are still not available on legitimate sites.¹⁶⁵ Major artists such as Madonna and the Red Hot Chili Peppers have also been reluctant to license single songs, instead forcing users to purchase the whole album.¹⁶⁶ Some musicians only offer their songs on one site, or do not offer songs at all but rather books or biographies online.¹⁶⁷

There are several explanations for the inferior selection and delay. For instance: the artist may own the rights to his songs and not want to license, or have concerns about increasing piracy of its songs by Internet distribution;¹⁶⁸ performers may want to license but songwriters may not;¹⁶⁹ multiple rights holders may delay availability;¹⁷⁰ contracts created without Internet music sale provisions need to be renegotiated before artists can

163. *Apple's iTunes Music Store Offers 1 Million Songs*, macNN.com, Aug. 10, 2004, at <http://macnn.com/news/25788>.

164. Vern Seward, *Is iTMS the Answer to Music Swapping?*, WIRED NEWS, Oct. 22, 2003 (quoting Eric Garland of Big Champagne, stating that as of 2003, "there were 700 million files traded on KaZaa, and 900 million at its peak"), at <http://www.macobserver.com/article/2003/10/22.11.shtml>.

165. Tom Barger, *Music Fans Find Online Jukebox Half-Empty*, Jan. 19, 2004, at <http://www.boycottriaa.com/article/9956>.

166. *Id.*; Jenny Eliscu, *Chilis, Metallica Go Offline*, July 1, 2003, at http://www.rollingstone.com/news/story/_id/5922530?rnd=1101502772665&hasplayer=true&version=6.08.1024.

167. Barger, *supra* note 165 (stating that Led Zeppelin does not offer songs, but a spoken-word biography of the band online).

168. *Id.* (stating that Tom Petty may have avoided licensing some of his songs so as not to diminish the value of a 1995 boxed set that included them).

169. *Id.* (stating that complications arise due to the fact that each song has a performance-rights royalty and a publishing-rights royalty received by the performer and songwriter respectively).

170. EMI distributes the Beatles' songs but the group's performance rights are owned by the band members and spouses. (Michael Jackson owns the publishing rights.) EMI has held numerous meetings with Paul McCartney, Ringo Starr, Yoko Ono and the rest of the tight group that controls perhaps the most-loved songs in the pop canon. So far the group remains unswayed.

offer music online;¹⁷¹ and record companies must negotiate the Internet release of each song with the songwriters.¹⁷² Disputes between record companies and artists over licensing delayed the launch of iTunes in Europe by several months.¹⁷³

2. *Give More Digital Music Revenues to Artists*

Record companies could increase the volume of music that artists are willing to sell online, and simultaneously improve its public image by giving artists a higher percentage of the revenues from Internet sales. At present, Apple receives thirty-five percent of the revenues from each song sold on their site, while the record companies receive sixty-five percent and major label artists receive at best eight to fourteen cents per song.¹⁷⁴ Apple therefore receives over a third of the revenues while contributing few resources to make digital music available on its site.¹⁷⁵ The industry could structure licensing agreements to retain more money for artists and give less to companies like Apple. Additionally, the record labels themselves could take a smaller cut due to the money they save in marketing and manufacturing over the Internet.¹⁷⁶ In the alternative, legitimate music providers may bypass the record labels completely.¹⁷⁷ For instance, Apple currently permits independent artists not affiliated with record labels to offer music on iTunes, which means the artists receive approximately fifty-five cents per sale.¹⁷⁸

3. *Improve Upon University Deals with Legitimate Sites*

Deals between universities and legitimate sites are not optimal for two reasons. First, most universities make deals with one online music service.¹⁷⁹ This is problematic because no single legitimate site yet offers the

171. *Id.*

172. While most are represented by the Harry Fox Agency (65-70%), the RIAA must individually contact those who are not. *Id.*

173. *Licensing Problems Hamper Euro iTunes Store*, macNN.com, June 24, 2003, at <http://www.macnn.com/news/19897>.

174. *iTunes iSbogus*, at <http://www.downhillbattle.org/itunes> (last visited Jan. 25, 2005).

175. *Id.*

176. Barger, *supra* note 165, at 3 (stating that “[m]usicians should be paid a higher royalty for songs sold online than those sold in CD or album form, Henry said, because in the online world the record companies do not bear the costs associated with manufacturing CDs”).

177. *iTunes iSbogus*, *supra* note 174.

178. iTunes offers music from CD Baby. When an artist joins its service, it takes only nine cents, leaving the artist with fifty-five cents on average. *Id.*

179. See generally Banerjee & Holland, *supra* note 89.

quantity of music that illegal sites do.¹⁸⁰ Students will be more likely to take advantage of a program that offers access to multiple legal sites. Indiana University has come to this conclusion—it has not agreed to a deal with just one provider due to its belief that no single legitimate site yet offers enough selection.¹⁸¹ Second, universities are charging students more to use the legitimate sites than students would pay on their own.¹⁸² Students at Pennsylvania State University complain that the university charges them a \$160 fee per semester in addition to the 99 cents per download. The majority of that fee goes toward the university's information technology budget, while only a fraction is actually applied toward the Napster service.¹⁸³ If universities hope to combat piracy by offering students a legal alternative, that alternative must be at least cheap enough to be an acceptable alternative to file-sharing.

4. Urge Technology Companies to Sell Portable Digital Music Players Compatible with Music Purchased from Other Legal Music Sites

Finally, there are compatibility problems with portable digital music players that the RIAA should work to resolve through liaison efforts with technology companies and standard-setting bodies. iPods currently only play music purchased on the iTunes site. Music purchased from the site is encoded in Apple's Advanced Audio Codec (AAC) format, which is only readable by the iPod.¹⁸⁴ Consumers therefore cannot use the iPod to play music purchased from other sites, such as RealNetworks' Rhapsody.¹⁸⁵ Sony's newest portable music device similarly only plays music purchased from its site.¹⁸⁶ By limiting consumers to one device, the technology industry is forcing consumers to choose and stick with one provider. This may not be good business for the technology industry or the music indus-

180. Barger, *supra* note 165, at 2.

181. VanOsdol, *supra* note 71 ("Each downloading program is unique. Different programs offer different catalogues, and the ways to access music range from streaming audio to CD burns to MP3 player downloads.").

182. *Morning Edition (NPR) Profile: Penn State University Students Protest Schools Deal with Napster* (NPR Broadcast, Nov. 10, 2003), available at <http://www.npr.org/templates/story/story.php?storyId=1499285> (subscription site).

183. *Id.*

184. Arik Hesseldahl, *The iPod Is A Battlefield*, FORBES.COM, July 30, 2004, at http://www.forbes.com/2004/07/30/cx_ah_0730tentech_print.html.

185. RealNetworks recently announced the development that its software would permit users to play music downloaded from its site on iPods. Whether Apple will permit this remains to be seen. *Id.*

186. Arik Hesseldahl, *The Won't-Be iPod Killer*, FORBES.COM, July 2, 2004, at http://forbes.com/personaltech/2004/07/02/cx_ah_0702entech.html.

try. More iPods could be sold if consumers could use them to store music from multiple sites. Moreover, users reluctant to designate one service for all future purchases may instead resort to P2P networks.

D. Improve Educational Efforts

The RIAA has partnered with Scholastic, Inc. to create a program that teaches fifth graders at over 10,000 schools about the value of copyright and the illegality of file-sharing.¹⁸⁷ It would be helpful if the RIAA expanded its educational efforts to teach all age groups copyright basics, and include more specific information about piracy's effect on the industry in its reports.

While the RIAA has been very vocal about the effects of piracy on the record industry as a whole, citing statistics of decreased CD sales, unemployment, and decreased artist compensation, the public needs more tangible examples of this reality. A detailed illustration of how illegal copies of lesser known artists' albums affect the artists' compensation in relation to the costs of production, marketing, and distribution, for instance, might be more effective.¹⁸⁸ The industry should also voice the long-term effects of piracy, namely what will happen to the industry when artists are no longer compensated for their efforts. In addition, it is only fair that if the RIAA is going to pursue litigation against the public that it shed some light on one of the nation's most complicated bodies of law. It is just as important to educate consumers on illegal behavior as it is to clearly state what actions consumers can legally take such as making copies for personal use.¹⁸⁹

E. Alter Litigation Strategy

Finally, there are two ways in which the RIAA may increase the effectiveness of its current litigation strategy: by making its targets less predictable and by increasing the penalty for illegal file-sharing. Currently, the RIAA lawsuits exclusively target uploaders and, in particular, those that upload approximately 1,000 songs or more.¹⁹⁰ File-sharers can therefore evade the RIAA by uploading less than that target amount. The MPAA

187. Jane Black, *The Keys to Ending Music Piracy; The Record Labels' Legal Assault Is Winning Battles and Losing the War. Educating Copyright Thieves Is As Important As Prosecuting Them*, BUSINESSWEEK ONLINE, Jan. 27, 2003, at http://www.businessweek.com/bwdaily/dnflash/jan2003/nf20030127_9897.htm.

188. Norman, *supra* note 91, at 405.

189. *Id.*; Black, *supra* note 186, at 2.

190. Keavin, *RIAA Gives Advance Warning to Song-Swappers Before Lawsuits Are Filed*, antimusic.com, Oct. 18, 2003, at <http://www.antimusic.com/news/03/oct/item77.shtml>.

has employed this tactic in its litigation strategy, as the first wave of suits named seven alleged offenders who had only shared one film.¹⁹¹ The RIAA's strategy would benefit from a less predictable approach. In addition, recent case law suggests that punitive damages may be available for copyright owners who seek actual damages and profits for willful and malicious infringement as opposed to statutory damages.¹⁹² However, the deterrence rationale for punitive damages may already be served in an increase of the maximum statutory damage award from \$20,000 to \$100,000.¹⁹³

IV. CONCLUSION

The RIAA's litigation efforts against direct infringers have caused an initial decrease in file-sharing on P2P networks targeted by the suits, prompted universities to adopt strict copyright policies and initiate negotiations with legitimate sites, and worked to increase the appeal of legal online music services. Moreover, for the first time in several years, in the last quarter of 2003, album sales increased by 4.7 percent. In January 2004, sales showed a 10.4 percent increase since January of the previous year.¹⁹⁴ Total sales in 2004 are predicted to exceed those in the last two years, although the rate of increase has slowed.¹⁹⁵

However, these gains have not come without great costs. Studies call into question the effectiveness of litigation on overall and long term P2P activity. File-sharers are migrating to more sophisticated P2P networks, making illegal downloading more difficult to detect. Furthermore, the recording industry has unquestionably suffered a major loss in the arena of public perception.

Record companies realized the threat of file-sharing late in the game and were forced to play the defensive and seek a swift response to the problem. Many have criticized the RIAA for not looking to other solutions first, such as pursuing the online business model, before resorting to litigation. Yet, just as it would be unrealistic to expect a shop owner to stand by while his goods are being shoplifted, it seems unfair to expect an entire

191. Evangelista, *supra* note 97.

192. *Blanch v. Koons*, 329 F. Supp. 2d 568 (S.D.N.Y. 2004); *TVT Records v. Island Def Jam*, 262 F. Supp. 2d 185 (S.D.N.Y. 2003).

193. *Remedies for the Copyright Owner in the Ninth Circuit*, at <http://www.makilaw.com/copyright%20remedies%20030303.htm> (last visited Feb. 24, 2005) (citing *Kamakazi Music Corp. v. Robbins Music Corp.*, 534 F. Supp. 69, 78 (S.D.N.Y. 1982)).

194. Jeremy Paul Sirota, *Analog to Digital: Harnessing Peer Computing*, 55 HASTINGS L.J. 759, 765 (2004).

195. *Holiday Chill: Music Sales Slow*, WALL ST. J., Nov. 19, 2004, at B2.

industry to remain idle when faced with a potentially fatal piracy problem. In an ideal world, an understanding that file-sharing is illegal and the mere threat of legal repercussions would be sufficient to win the war on piracy. In the real world, one would be hard-pressed to find an industry that would limit itself to one response and not avail itself of all possible solutions to such a problem. Moreover, it takes time for an entire industry to alter a distribution model that has been used for more than three decades.¹⁹⁶

The RIAA's litigation campaign, therefore, provided an immediate answer to file-sharing that is both defensible and effective on multiple fronts. Perhaps there are means by which it can increase the effectiveness of its litigation strategy and bolster its technological response to file-sharing. In addition, it must propose new initiatives to fight file-sharing in the long term. To survive, the RIAA must answer the question of what purpose the middleman will now serve.¹⁹⁷ Indeed, it may even have to compromise. The recording industry cannot put an end to file-sharing. But the faster it can adapt to this new environment, the more quickly the industry can shift its attention and resources from deterring file-sharing to establishing a presence in the online business community.

196. Valerie Alter, *Building Rome in a Day: What Should We Expect from the RIAA?*, 26 HASTINGS COMM. & ENT. L.J. 155, 170-73 (2003).

197. For the first time in more than three decades, the music industry is being forced to think creatively about its distribution model and the way it makes money from promoting artists. . . . Digital distribution is putting pressure on the industry's core focus on selling pre-recorded music on CDs. The record labels need to be thinking more creatively about ways they can generate profits from the celebrities they help create.

Id. at 170 (quoting Steven Vonder Harr, a digital media analyst).

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