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The RIAA Litigation War on File Sharing and Alternatives More Compatible with Public Morality

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Note

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INTRODUCTION

The Recording Industry Association of America (RIAA)'s lawsuit campaign against copyright-infringing file sharing is controversial. Many critics allege that this campaign is unfair and paint the RIAA as mean and a bully. Some critics even claim that the RIAA is subversive toward the rights of the public. At the same time, many file sharers continue to violate the distribution and reproduction rights of copyright holders, record labels, and artists, all who have justified expectations of payment for their products.

This Note examines the RIAA's approach and alternative approaches to the file sharing problem, and proposes an integrated, comprehensive strategy for dealing with the problem of illegal file sharing. Part I provides a background on the RIAA and its opinions, the development of the RIAA lawsuits, the public backlash against these lawsuits, and the relevant law. Part II describes the challenges to be met by any solution to the file sharing problem, reviews a series of proposals for their strengths and weaknesses, and sets forth a strategy that balances the strengths of a number of previous proposals against each other's weaknesses. This Note concludes with the assertion that the file sharing problem is solvable without wasteful, unpopular lawsuits or major changes to the law, provided that the music industry is willing to adapt to and take cues from the consuming public.

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I. THE RIAA, MUSIC FILE SHARING LITIGATION, PUBLIC BACKLASH, AND THE LAW

A. THE RIAA AND ITS OPINIONS ON MUSIC FILE SHARING

The RIAA is a trade group, representing the U. S. recording industry.[1] Its membership creates, manufactures, or distributes an overwhelming majority of the audio recordings produced and sold in the United States.[2] Its avowed mission is "to foster a business and legal climate that supports and promotes [its] members' creative and financial vitality."[3] To that end, it labors to protect intellectual property rights.[4]

The RIAA's view of sharing copyrighted music files is, some believe, harsh. The RIAA calls this sharing "online piracy" and describes it as "the unauthorized uploading of a copyrighted sound recording and making it available to the public, or downloading a sound recording from an Internet site, even if the recording isn't resold."[5] The RIAA characterizes sharing copyrighted music files as a kind of theft[6] and claims that millions of dollars and investment in the future of music are both jeopardized by the practice.[7]

As part of its work to protect intellectual property rights, the RIAA is waging a "multi-faceted" campaign against "online theft of music."[8] That campaign includes offering legal alternatives to music fans, educating music fans about intellectual property, and litigating on behalf of member companies.[9] The RIAA's stated goal for this multi-faceted campaign is to protect the industry's capacity to invest in new artists and nurture the development of legal online services.[10]

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1. RIAA, Who We Are, http://www.riaa.com/aboutus.php (last visited Mar. 21, 2008).
2. *Id.*
3. *Id.*
4. *Id.*
5. RIAA, Piracy: Online, http://riaa.com/physicalpiracy.php?content_selector=piracy_details_online (last visited Mar. 21, 2008).
6. RIAA, Piracy: Online and On the Street, http://riaa.com/physicalpiracy.php (last visited Sept. 13, 2007).
7. RIAA, *supra* note 5.
8. *Id*.
9. *Id.*
10. RIAA, *supra* note 6.

The RIAA devotes a page of its website to setting forth its view of copyright law.[11] As the RIAA explains, making unauthorized copies of audio recordings is stealing.[12] To make or distribute recordings illegally is to take something of value from the copyright holder without permission.[13] Copyright infringement carries with it potential civil and criminal liability.[14] The RIAA implies that the penalties are likely to be severe.[15]

The RIAA believes it is easy to break the law. Emailing music files to others; ripping an MP3 from a purchased CD, then making the file available over a network; downloading music others have made available over a network, regardless of whether one offers music in return; joining a network for a fee to download or upload music without authorization; and sharing music without authorization via instant messaging are all examples of wrongful conduct.[16]

The RIAA strategy of bringing lawsuits is not without foundation. The notion of "private attorney general" action, in which private civil suits become a tool for teaching obedience to the law is not novel, nor is it devoid of adherents.[17] At least one law professor has endorsed the RIAA litigation strategy as likely to promote deterrence.[18] At least one member of the legal community has endorsed the litigation as necessary to promote respect for copyright in light of the failure of moral

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[11] . RIAA, The Law, http://riaa.com/physicalpiracy.php?content_selector= piracy_online_the_law (last visited Sept. 30, 2007).

[12] . *Id.* ("When you make illegal copies of someone's creative work, you are stealing and breaking the law.")

[13] . *Id.*

[14] . *Id.*

[15] . *See Id.* ("Don't you have a better way to spend five years and $250,000?"). Penalties for a first-time offender can be as high as $250,000 and five years of incarceration. *Id.* The site does not mention how likely such a high penalty would be, or what conditions would prompt it, leaving the impression that it might be assessed against anyone—even a marginal downloader.

[16] . *Id.*

[17] . David W. Opderbeck, *Peer-to-Peer Networks, Technological Evolution, and Intellectual Property Reverse Private Attorney General Litigation*, 20 BERKELEY TECH. L.J. 1685, 1685–96 (2005).

[18] . Matthew Sag, *Piracy: Twelve Year-Olds, Grandmothers, and Other Good Targets for the Recording Industry's File Sharing Litigation*, 4 NW. J. TECH. & INTELL. PROP. 133, 155 (2006).

appeals to halt illegal file sharing.[19]

B. MUSIC FILE SHARING LITIGATION

The recording industry fired its first shots in the file sharing litigation war against peer-to-peer (P2P) file sharing networks, rather than individual users. In 2000, the industry brought suit against Napster, alleging contributory and vicarious violation of copyright.[20] The Ninth Circuit ordered Napster to make sure that no copyrighted work owned by the plaintiffs would be uploaded or downloaded on Napster without the permission of the copyright holders.[21]

After the *Napster* decision, file sharing changed. In 2003, Grokster and StreamCast evaded the judgment that befell Napster.[22] They escaped because, unlike Napster, they were not centralized.[23] Instead, these services, and others like them, allowed users to share files without first transferring information identifying the files to a space under the service's control.[24]

Eventually, the *Grokster* plaintiffs prevailed.[25] The Supreme Court held that "one who distributes a device with the object of promoting its use to infringe copyright . . . is liable for the resulting acts of infringement by third parties."[26] Going to the Grokster URL now brings up a page with an ominous warning: "Don't think you can't get caught. You are not anonymous."[27]

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19 . Stacey M. Lantagne, *The Morality of MP3s: The Failure of the Recording Industry's Plan of Attack*, 18 HARV. J.L. & TECH. 269, 270, 284–88 (2004).

20 . A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 900 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 239 F. 3d 1004 (9th Cir. 2001).

21 . *Id.* at 927.

22 . Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 259 F. Supp. 2d 1029, 1046 (C.D. Cal. 2003), *aff'd* 380 F.3d 1154 (9th Cir. 2004), *vacated*, 545 U.S. 913 (2005).

23 . *Id.* at 1039–42.

24 . *Id.*

25 . Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).

26 . *Id.* at 936–37.

27 . Grokster, http://www.grokster.com/ (last visited Oct. 6, 2007). After mentioning the Supreme Court's decision that using Grokster and other services like it to trade copyrighted files is illegal, the page displays the user's IP address and gives the above message. *Id.*

In the meantime, however, the RIAA began targeting individual users as part of their strategy against copyright infringement.[28] In September of 2003, the RIAA filed lawsuits against 261 individuals it accused of uploading files in violation of copyright law.[29] The recording industry has filed about 26,000 file sharing suits since 2003.[30]

On his blog, Recording Industry vs The People, attorney Ray Beckerman, who has defended individuals against the RIAA, documents the process the RIAA uses to prosecute its lawsuits.[31] Although the suits are often described as being against "downloaders," that label is misleading. The RIAA does not know if there has been any downloading when it starts a suit.[32] As Beckerman states, "[i]t is more accurate to refer to the cases as cases against persons who paid for internet access which the RIAA has reason to believe was used by some person . . . to engage in peer to peer file sharing."[33] To put it another way, the suits are more precisely concerned with uploading than with downloading.

The RIAA lawsuit process begins with a suit against anonymous defendants.[34] After obtaining an ex parte order—an order obtained without notice to or the presence of an opposing party—the RIAA sends a subpoena to a defendant's Internet Service Provider (ISP) to get the allegedly wrongdoing ISP customer's name and address.[35] The RIAA then drops the "John Doe" suit and pursues the ISP customer.[36] When the RIAA sues college

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[28] . Benny Evangelista, *Online Music Finally Starts to Rock 'N' Roll: Industry Punishes Downloaders While Getting Into the Act Itself*, S.F. CHRON., Dec. 29, 2003, at E1.

[29] . Dan Thanh Dang, *Recording Industry Sues 261 for Piracy: Association Also Offering Music-Swapping Amnesty*, BALT. SUN, Sept. 9, 2003, at 1A.

[30] . Joshua Freed, *Record Companies Win Music Sharing Trial*, ASSOCIATED PRESS, Oct. 5, 2007.

[31] . Ray Beckerman, *How the RIAA Litigation Process Works*, Jan. 11, 2008, http://recordingindustryvspeople.blogspot.com/2007/01/how-riaa-litigation-process-works.html.

[32] . *Id.*

[33] . *Id.*

[34] . *Id.* at "Ex Parte Discovery—The 'John Doe' Phase."

[35] . ELECTRONIC FRONTIER FOUNDATION, RIAA V. THE PEOPLE: FOUR YEARS LATER 1, http://w2.eff.org/IP/P2P/riaa_at_four.pdf [hereinafter RIAA V. PEOPLE] ; Beckerman, *supra* note 31, at "Ex Parte Discovery—The 'John Doe' Phase."

[36] . RIAA V. PEOPLE, *supra* note 35, at 5; Beckerman, *supra* note 31,

students, a college or university—instead of a conventional ISP—is subject to an ex parte hearing.[37] The RIAA has encountered more resistance from these educational institutions than it has from conventional ISPs.[38]

In the next phase of the litigation, the RIAA sends the ISP customer a letter offering a settlement.[39] Typically, the settlement offered is $3750, nonnegotiable, and contains a number of one-sided provisions, including "a representation that peer to peer file sharing of copyrighted music is a copyright infringement."[40] The RIAA encourages early settle-ments and has set up a website for making early settlements.[41]

In the absence of a settlement, the RIAA brings a suit against the now-known defendant.[42] The complaint features a list of songs alleged to exist in the defendant's shared files folder and a second list of songs which the RIAA's investigators allegedly downloaded from the defendant's computer.[43]

"If the defendant defaults, plaintiffs apply for, and apparently usually obtain, a default judgement, . . . for $750 per song . . . [,] over 1000 times the 70-cent amount for which the license to the song could have been purchased."[44] Default judgments may be likely in RIAA cases because of the economic burden of obtaining legal

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at "Ex Parte Discovery—The 'John Doe' Phase."

37 . *Id.*

38 . *Id.* In at least one case, a motion for an ex parte hearing has been dismissed sua sponte. In others, the ex parte motions have been challenged. *Id. But see* RIAA V. PEOPLE, *supra* note 35, at 9–10 (characterizing university and college response as varied and ambivalent).

39 . Beckerman, *supra* note 31, at "Pre-Lawsuit Settlement Phase."

40 . *Id.* This representation is troubling because it does not violate copyright to share copyrighted files with permission. Also, settlement amounts may be as high as $11,000. RIAA V. PEOPLE, *supra* note 35.

41 . Beckerman, *supra* note 31, at "Pre-Lawsuit Settlement Phase." This program has been criticized as a sham that gets users to incriminate themselves because it does not bind the copyright holders. RIAA V. PEOPLE, *supra* note 35, at 5.

42 . Beckerman, *supra* note 31, at "Litigations Against Named Defendants."

43 . *Id.*

44 . *Id.*

representation.[45]

As soon as possible, the RIAA serves pretrial discovery requests, seeking to examine, among other things, the accused's hard drive.[46] If this tactic does not turn up evidence of copyright infringement, the RIAA seeks to depose others who may have used the Internet account (e.g., family members), and may claim spoliation of evidence or that the accused has switched hard drives.[47]

Instead of attempting to prove damages, the RIAA routinely seeks statutory damages of $750 per song.[48] This damages theory is being challenged on statutory and constitutional grounds.[49] Sometimes the RIAA offers a nonnegotiable settlement during the course of litigation for a substantially greater dollar amount than the pre-litigation offer.[50] In an October, 2007, case, the only widely publicized case of an RIAA lawsuit running to trial completion, the plaintiffs obtained an enormous, and possibly unfair, judgment against the defendant.[51]

C. PUBLIC BACKLASH AND PUBLIC MORALITY

Defendants have fought back against the RIAA in court with challenges including complaint sufficiency,

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45 . *See id.* (noting the economic burden of obtaining representation and advising pro se litigants as to options and tactics); RIAA V. PEOPLE, *supra* note 35, at 6 (noting the cost of settling is likely to be lower than that of fighting the suit or suffering a default judgment).

46 . Beckerman, *supra* note 31, at "Litigations Against Named Defendants."

47 . *Id.*

48 . *Id.*

49 . *Id.* A court may reduce statutory damages to $200 where an infringer proves that he or she "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright." 17 U.S.C. § 504(c)(2) (2000). The Supreme Court has held that excessive punitive damages violate the Constitution's guarantees of due process. *See generally* J. Cam Barker, Note, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 TEX. L. REV. 525, 537–41 (2004).

50 . Beckerman, *supra* note 31, at "Litigations Against Named Defendants" ("[T]ypically $4500 plus $375 court costs . . . .").

51 . Freed, *supra* note 30. In Duluth, Minnesota, a $222,000 judgment was assessed against a woman who "lives from paycheck to paycheck." *Id.*; Virgin Records America, Inc. v. Thomas, No. 06-1497, slip op. at 1 (D. Minn. 2007).

affirmative defenses, and counterclaims.[52] Also, critics have publicly attacked the RIAA and its lawsuits. The subject matter of the attacks range from the RIAA's choice of litigation targets and tactics to the RIAA's view of the law. The following quote is emblematic of the criticism:

> It's as if the music companies spent months with focus groups, developing a strategy most likely to piss off and alienate the demographic that is most likely to purchase their products. . . . [W]hen your values pit massive corporations against high school kids, single moms and G.I.s, you have to wonder about the underlying strategy.[53]

The RIAA has taken criticism for pursuing a U.S. serviceman (and threatening to expose sexually explicit files on his computer).[54] Other unpopular targets are teenagers, college students, parents, grandparents, disabled persons, and deceased persons.[55] Even if the strategy is sound from the standpoint of rational deterrence,[56] that fact does not guarantee that the public will or should approve.[57]

The litigation targets report feeling violated and otherwise treated unfairly by the lawsuits and the tactics used. They characterize the damages as too high,

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[52] . Beckerman, *supra* note 31, at "Litigations Against Named Defendants"; Ryan Carter, RIAA, extortion, and conspiracy, in the same sentence, http://www.downloadsquad.com/2007/06/06/riaa-extortion-and-conspiracy-in-the-same-sentence/ (last visited Sept. 13, 2007); Grant Robertson, Downloader fights back against RIAA, http://www.Downloadsquad. com/2007/01/31/downloader-fights-back-against-riaa/ (last visited Sept. 13, 2007).

[53] . Eric Eggertson, RIAA Isn't Trying to Win a Popularity Contest (Maybe it Should Consider Trying), http://www.commonsensepr.com/2007/07/30/riaa-isnt-trying-to-win-a-popularity-contest-maybe-it-should-consider-trying/ (last visited Sept. 19, 2007).

[54] . Eric Bangeman, *RIAA Backtracks After Embarrassing P2P Defendant,* ARS TECHNICA, July 30, 2007, http://arstechnica.com/news.ars/post/20070730-riaa-backtracks-after-embarrassing-p2p-defendant.html.

[55] . RIAA V. PEOPLE, *supra* note 35, at 6–8; Beckerman, *supra* note 31, at "Litigations Against Named Defendants"; Grant Robertson, RIAA targets college students, again, http://www.downloadsquad.com/2007/03/09/riaa-targets-college-students-again/ (last visited Sept. 13, 2007); Sag, *supra* note 19, at 146–47.

[56] . Sag, *supra* note 18, at 145–52.

[57] . *See id.* at 155 ("There may be social welfare or public policy considerations that cast the . . . tactic of end user litigation in a negative light").

particularly in light of the non-commercial nature of the file sharing or the status of the defendants.[58] Defendants have alleged trespass, fraud, unfair trade practices, extortion, conspiracy, and defamation against the RIAA.[59] Journalists, public interest groups, and other public commentators have offered similar criticisms.[60] Practicing lawyers have characterized RIAA tactics as violative of procedural rights.[61] At the same time, RIAA critics have voiced respect for intellectual property rights and for the profit interests of content producers.[62] Therefore, the criticism should not be dismissed as mere quarreling with the existence of intellectual property or the commerciality of music.

Critics have also taken issue with the RIAA's view of the law. The Computer & Communications Industry Association and the U.S. Internet Association, both trade groups, along with the Electronic Frontier Foundation (EFF), a public interest group, have attacked the RIAA's theory that making copyrighted files available for downloading constitutes infringement.[63] Critics have also challenged the RIAA's view that copyright infringement is theft.[64] Some criticism has focused on the RIAA's

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58 . *See, e.g.*, Freed, *supra* note 30; Anna Jo Bratton, Lawsuits trouble music downloaders, http://www.usatoday.com/tech/news/2007-05-13-down loading_n.htm (last visited Sept. 24, 2007).

59 . Carter, *supra* note 52; Robertson, *supra* note 52.

60 . *See, e.g.*, RIAA V. PEOPLE, *supra* note 35, at 4, 6–8; Press Release, ACLU, Citing Right to Anonymity Online, ACLU Asks Boston Court to Block Recording Industry Subpoena (Sept. 29, 2003), *available at* http://www.aclu. org/privacy/anon/15590prs20030929.html; Boycott-RIAA, Our Mission, http:// www.boycott-riaa.com/mission (last visited Oct. 7, 2007); Carter, *supra* note 52; Jon Newton, RIAA - Recording Infamy Ass of America, http://www.p2pnet. net/story/13570 (last visited Oct. 7, 2007).

61 . *See, e.g.*, Beckerman, *supra* note 31.

62 . *See, e.g.*, Barker, *supra* note 49, at 525; Boycott-RIAA, *supra* note 60; Bratton, *supra* note 58; Fred von Lohmann, *Copyright Silliness on Campus*, WASH. POST, June 6, 2007, at A23.

63 . Boycott-RIAA, On the Importance of Elektra v. Barker, http://www.boycott-riaa.com/article/19960 (last visited Oct. 11, 2007). Amicus curiae briefs are available at http://info.riaalawsuits.us/documents.htm# Elektra_v_Barker.

64 . *See, e.g.*, Eliot Van Buskirk, The RIAA Lawsuits Clarified Once and for All, http://reviews.cnet.com/4520-6450_7-5081098-1.html?tag=feat.1 (last visited Sept. 13, 2007); Stephen Dionne, Letter to the Editor: RIAA Crackdown Attacks "Creative Freedom,"

perceived hijacking of copyright law to the detriment of the public.[65]

Besides these criticisms, there is other evidence of the failure of the RIAA to successfully appeal to public morality over file sharing. Despite the lawsuits, file sharing continues to grow[66] and commercial online music services lag behind.[67] There is the widespread belief that copyright infringement is not immoral.[68] Even sophisticated members of the public may hold this view.[69] Lastly, there is the belief that the recording industry is a hypocritical bully deserving to have its intellectual property infringed.[70]

D. THE PERTINENT COPYRIGHT LAW

Despite what critics of the RIAA may believe, sharing copyrighted music files without authorization *is* infringement.[71] Reproduction and distribution are among the exclusive rights vested in an author at the moment a work is fixed in a tangible medium of expression.[72] The obvious interpretation is that downloading is a kind of reproduction and uploading is a kind of distribution.[73]

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http://media.www.dailyfreepress.com/media/storage/paper87/news/2004/12/03/Opinion/Letter.To.The.Editor.Riaa.Crack down.Attacks.creative.Freedom-821127.shtml (last visited Sept. 19, 2007).

65 . *See*, *e.g.*, Boycott-RIAA, *supra* note 60; Dionne, *supra* note 64.

66 . RIAA V. PEOPLE, *supra* note 35, at 11–13.

67 . *Id.* at 14–15.

68 . AMANDA LENHART & SUSANNAH FOX, DOWNLOADING FREE MUSIC: INTERNET MUSIC LOVERS DON'T THINK IT'S STEALING 5–6 (2000), *available at* http://www.pewinternet.org/pdfs/PIP_Online_Music_Report2.pdf. File sharing was already a public issue by 2000. *See* notes 64–65 and accompanying text. That file sharing has continued to increase suggests that the public does not find file sharing morally unacceptable. Also, the public may view copyright infringement as a malum prohibitum (wrong because forbidden by law) offense rather than a malum in se (inherently wrong) one. Lantagne, *supra* note 19, at 282.

69 . LENHART & FOX, *supra* note 69, at 6.

70 . Lantagne, *supra* note 19, at 280–81.

71 . *In re* Aimster Copyright Litig., 334 F.3d 643, 645 (7th Cir. 2003).

72 . 17 U.S.C. § 106 (2000).

73 . *See*, *e.g.*, A&M Records, Inc. v. Napster, Inc. 239 F.3d 1004, 1014 (9th Cir. 2001). It is important to note that making a file available for downloading is not actual uploading, making controversial the RIAA's argument that merely "making available" is infringement. *See* Boycott-RIAA, *supra* 63. *But see Napster*, 239 F. 3d at 1014 (stating that "users who upload file names to the search index . . . violate plaintiffs'

As a remedy for infringement, a copyright owner may recover actual damages plus the infringer's profits, or statutory damages.[74] The owner gets to recover one award of statutory damages per individual work infringed by the defendant.[75] At its discretion, the court sets damages within a range of $750 to $30,000.[76] If the court finds the infringement "was committed willfully," the court may increase the damages up to $150,000.[77] On the other hand, if the court finds that infringement was committed innocently, it may reduce the damages to $200.[78] The standard for finding innocent infringement is high and file sharers are not likely to meet it.[79]

If a jury tries a case, the jury can set the award of damages,[80] which is what happened in the recent case against Jammie Thomas.[81] The jury awarded damages of over $9,000 per song (for a total of $222,000) against the single mother, after having found her violation to be willful.[82] According to the plaintiffs' attorney in that case, the jury did not explain their verdict.[83]

In file sharing cases, the bulk of a statutory damage award will be punitive in nature, if not in name, because the minimum statutory award vastly exceeds actual damage suffered.[84] A critic has offered that these damages may, through aggregation of awards for each in a series of instances, violate constitutional due process.[85]

II. SOLUTIONS TO THE FILE SHARING PROBLEM

The ideal solution to the file sharing problem is one that fulfills the needs of both consumers and copyright

distribution rights").

74 . 17 U.S.C. § 504 (2000).

75 . 17 U.S.C. § 504(c)(1) (2000).

76 . *Id.*

77 . 17 U.S.C. § 504(c)(2) (2000).

78 . *Id.*

79 . Barker, *supra* note 49, at 533–34.

80 . Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 353 (1998).

81 . Freed, *supra* note 30.

82 . *Id.*

83 . *Id.* Although the jury awarded for each of twenty-four songs, the record companies alleged she had traded 1702 songs. *Id.*

84 . Barker, *supra* note 49, at 525.

85 . *See generally id.*

holders to the maximum degree that both sets of needs are compatible. In the context of music commerce, what copyright holders chiefly need is relief and protection from thievery. They have justified expectations of payment for their products, and they ought to be fairly compensated—as they would be in standard commercial transactions (e.g., purchasing a CD from a store). What consumers chiefly need—what they are apparently unwilling to do without—is efficient and convenient access to the music they want. The challenge is to find some legal means of accommodating both consumers and copyright holders.

Secondarily, this Note assumes a preference for private over public solutions. Government regulation is a heavy-handed tool. In a society where property and freedom of contract are respected as between private actors, the state has a peerless coercive power: the power to compel behavior without providing anything of value in return. This makes for a unique market immunity that is more valuable in dealing with some matters—law and order concerns, for example—than with others—matters where what is "good" can be plausibly defined in market terms.[86] This Note assumes that the allocation of music products and services is best served by a free, legally secure market.

A. EXTANT PROPOSALS

Thinkers have put forward a number of proposals for solving the file sharing problem. These proposals vary in their practicality, effectiveness, and compatibility with public morality.

1. Business as Usual or the RIAA Plan

The current approach to the file sharing problem is the RIAA's three-pronged attack of legal music services,

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86 . Communist countries, such as the old Soviet Union and modern Cuba, have suffered notorious supply failures due to their policy choice that government decision makers, immune to market demands, should decide who gets how much of what is to be supplied. *See generally* THOMAS SOWELL, BASIC ECONOMICS 11–37 (3d ed. 2007). These failures might have been avoided by letting prices, capacity to pay, and purchasing priorities serve their natural functions, as they do under the free market.

education, and lawsuits.[87] This strategy is a deterrence-based one, designed to persuade people not to share music files illegally. Is any or all of this approach effective? The RIAA claims that without the recording industry's efforts, there would be more illegal downloading, and that "the industry's efforts have made an impact on attitudes, practices, cultural norms, awareness and the business climate for legal services."[88] These claims are so modest and they make such intuitive sense that it would be surprising if they were not true. There are ego costs in doing something one knows to be illegal, particularly when there are legal alternatives, and there are financial and ego costs in risking lawsuits.

As the cost of a behavior increases, that behavior should become less likely than it would be if its cost stayed the same. Focusing on the litigation aspect, Professor Sag has argued that the RIAA's strategy of targeting end-users, particularly including marginal and sympathetic infringers, makes sense from a rational choice perspective because the practice elevates the cost of copyright infringement for those most likely to be persuaded to switch from illegal to legal habits of acquiring music.[89]

Regardless of the rationality of the theory supporting it, the evidence is discouraging. According to a 2004 source, the percentage of Americans downloading music files dropped by half since the RIAA began its user lawsuit campaign in 2003.[90] However, the data may have been skewed by reluctance to report downloading caused by publicity of the lawsuits.[91] More recent data indicate that since 2003 file sharing activity has more than doubled after that initial drop.[92] "[T]ens of millions of U.S. music fans continue to use P2P networks and other new technologies to share music."[93] So while it may be true that the RIAA's tactics are more effective than doing

87 . RIAA, *supra* note 6.

88 . *Id.*

89 . Sag, *supra* note 18, at 155.

90 . LEE RAINIE ET AL., THE IMPACT OF RECORDING INDUSTRY SUITS AGAINST FILE SWAPPERS 1 (2004), *available at* http://www.pewinternet.org/pdfs/PIP_File_Swapping_Memo_0104.pdf.

91 . *Id.* at 3.

92 . RIAA V. PEOPLE, *supra* note 35, at 11–13.

93 . *Id.* at 13.

nothing at all, the current approach has, at best, slowed the growth of file sharing, and not actually diminished file sharing.

The failure of the RIAA approach is probably not due to failure to make users aware of copyright law and the potential consequences of violating it. A 2004 poll of a key group of music consumers, children aged eight to eighteen, found that "[m]ore than half . . . with Internet access continue to download free music even though they know they are breaking the law . . . ."[94] Although 88% of those polled knew that popular music is usually copyrighted, 56% of them downloaded music.[95] A survey of college students published in 2005 indicated that 70% have downloaded music in violation of copyright,[96] despite awareness that there could be consequences.[97] The EFF, an RIAA critic, agrees with the assessment that the RIAA has "increase[d] awareness of the copyright laws."[98]

The failure may be due to the fact that the RIAA approach is a deterrence-based strategy. Professor Schultz explored this possibility in a 2006 article, examining the theory and practice of deterrence in relation to the file sharing problem.[99] He advised that deterrence is not effective due to the lack of consistency with which file sharers are punished and the absence of social norms, among file sharers, against copyright infringement.[100] Against the millions of file sharers, fewer than 30,000 lawsuits have been filed.[101] Deterrence strategies are not just a matter of severity of punishment

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94 . David McGuire, *Report: Kids Pirate Music Freely*, WASHINGTONPOST.com, May 18, 2004, http://www.washingtonpost.com/wp-dyn/articles/A37231-2004 (last visited Oct. 18, 2007) (relying on a Harris Interactive April 2004 poll, citation omitted in original).

95 . *Id.*

96 . MICHAEL GROSS, HIGHER EDUCATION UNLICENSED SOFTWARE EXPERIENCE—STUDENTS AND ACADEMICS SURVEY 30 (2005), *available at* http://definetheline.com/resources/BSA-Ipsos-Education-Survey-June2005.pdf.

97 . *Id.* at 2.

98 . RIAA V. PEOPLE, *supra* note 35, at 13.

99 . Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651, 661–65 (2006).

100 . *Id.*

101 . Freed, *supra* note 30.

but also certainty of punishment.[102] As mentioned earlier, Sag has noted the utility of litigating against marginal file sharers.[103] Such litigation increases certainty in demonstrating that even small-time violators may be targeted. However, the statistical unlikelihood of being targeted remains great. If Schultz's analysis is correct, it would be impractically expensive to achieve the requisite consistency of litigation against file sharers necessary for a deterrence approach to be effective. Also, declining press attention to RIAA lawsuits due to their being commonplace may diminish the certainty of punishment in the eyes of potential violators.[104]

Another factor to consider is the inadequacy of legitimate online music services. Fully legal music services, such as iTunes and the reformed version of Napster, once carried high hopes of being strong medicine for the file sharing problem.[105]

During the initial dip in file sharing, after the RIAA began suing individual users, use of legal music services rose.[106] As of February 2006, Apple's iTunes, launched in 2003, had already sold more than 600 million songs.[107] iTunes offers customers the option of purchasing individual tracks as well as entire albums for substantial savings over the cost of purchasing a CD in a retail store.[108] The new Napster offers a subscription service with unlimited downloads for a monthly fee.[109] Napster and iTunes are only the most well-known of legitimate music services; there are others, including Yahoo! Music[110]

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102 . SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS, 116–20 (7th ed. 2001).

103 . Sag, *supra* note 18, at 155.

104 . RIAA V. PEOPLE, *supra* note 35, at 13.

105 . *See generally* Lantagne, *supra* note 19, at 289.

106 . Eric J. Sinrod, *RIAA Music Lawsuits Chill Online Downloading*, USA TODAY.COM, Jan. 14, 2004, http://www.usatoday.com/tech/columnist/ericjsinrod/2004-01-15-sinrod_x.htm.

107 . Glenn Peoples, *Your Rights Reserved?*, MACWORLD, Feb. 1, 2006, at 22.

108 . Individual tracks cost $0.99 and albums cost $ 9.99. iTunes Store, http://www.apple.com/itunes/store/music.html (last visited Mar. 22, 2008).

109 . Try Napster Free for 7 Days, http://www.napster.com/choose/index. html (last visited Oct. 21, 2007).

110 . Yahoo! Music, http://music.yahoo.com/ (last visited Oct. 21, 2007).

and Real Networks.[111] Music services offer streaming media, downloads, cell phone ringtones, exclusive media, and even free, user-friendly client programs for downloading and managing music, video, and other media.[112]

That these services have achieved some measure of success and acceptance is clear. However, it appears that these services, like the lawsuits, have merely slowed the growth of illegal file sharing rather than actually diminished it. The number of legal downloads through these services is marginal compared to the number of illegal downloads across file sharing networks.[113] A 2006 article reported that the International Federation of Phonographic Industries (IFPI), a recording industry trade group, estimates that the ratio of illegal to legal downloads is forty to one.[114]

The EFF has identified three flaws that make legal music services inadequate substitutes for file sharing: "(1) anti-consumer . . . restrictions[,] (2) limited inventory[,] and (3) high prices."[115] Various features, such as Digital Rights Manage-ment, restrict consumers from transferring music from computers to other devices and prevent consumers from accessing their music after discontinuing subscription to a service.[116] Music obtained through file sharing is not hampered by such restrictions.[117] Legal services have limited catalogs that may exclude even popular acts, such as The Beatles, as well as smaller acts.[118] File sharing is, at least in theory, not subject to this limitation.[119]

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111 . Products and Services > ASP Services, http://www.realnetworks.com/ products/asp/index.html (last visited Oct. 21, 2007).

112 . *Id.*

113 . RIAA V. PEOPLE, *supra* note 35, at 14.

114 . BBC News, Universal Backs Free Music Offer, http://news.bbc.co.uk/ 2/hi/business/5294842.stm (last visited Oct. 21, 2007).

115 . RIAA V. PEOPLE, *supra* note 35, at 14.

116 . *Id.*

117 . This statement assumes that the files users share are rendered from CDs, DVDs, or other original sources through processes that do not restrict transfer or use of the resulting data. Most discussions of file sharing assume likewise. *See, e.g., id.* at 14–15.

118 . *Id.* at 15.

119 . Availability of music across file sharing networks is not limited

The EFF's criticism that legal music services charge too much is its weakest. The nature of the free market renders dubious any claim that a popular product is too high-priced in any objective way. Such criticisms assume, or at least appear to assume, that there is an objectively "correct" price for a given thing. In reality, market prices are information-conveying entities determined by realities that are mostly, if not entirely, beyond a seller's control.[120] A detailed discussion of the economics of music pricing is neither feasible nor necessary here. Plainly, any price, whether a per-download fee or a monthly subscription fee, is unattractive when the same product[121] is available for free—and without profit, the music industry would go away altogether.

The RIAA approach appears to be ineffective. Millions of U.S. citizens are violating copyright through file sharing. Besides being ineffective, as discussed above, the RIAA approach, through its litigation component, offends a popular sense of decency and fairness.[122]

One of the RIAA's essential problems is that its business model is stuck in the past: the recording industry is trying to force a potentially inconvenient purchase of products that can be conveniently obtained for free online.[123] The RIAA's practice runs contrary to the

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by a pre-determined catalog. It is, however, limited by what other users across the network make available. One of the advantages of legal services is the reliable availability of their catalog, however limited by licensing and storage space that catalog may be.

120 . *See generally* SOWELL, *supra* note 87. Prices convey information about scarcity and demand. *Id.*

121 . Of course, a corrupted, virus-infected, or misidentified file copied from another user is *not* the same product as a commercial service's well-formed, wholesome file that is what it purports to be.

122 . Public opinion is not monolithic, but the research for this note uncovered little evidence of support in the general public for the RIAA and its strategy. Evidence found did little or nothing more than affirm the existence of intellectual property rights and the corollary right to vindicate them. *Supra* note 62 and accompanying text. Such sentiments are difficult to read as support for the RIAA's strategy.

123 . *See* Lincoln Russell, *Why We Love Google and Hate the RIAA*, ICRONTIC, July 11, 2006, http://icrontic.com/articles/why_we_love_google_hate _riaa ("[The RIAA's] profit margin lives and dies by whether they can get you to buy the copies of the intellectual property they sell, rather than the free ones you can find online.").

progress of technology.[124] One key to the file sharing problem may be to embrace the Internet's power for convenient and efficient exchange of information among free actors who do not charge a fee for transactions. Such a choice would be inherently more compatible with public morality to the extent that the internet-using public has adopted an ethos of sharing. One writer articulated the normalcy of downloading this way: "The thing that I always try to say to the movie and music executives frothing at the mouth . . . is that *everybody* can't be an outlaw. If everybody does it, it's normal rather than aberrant behavior."[125] The recording industry should not fight entrenched norms if it can find some way to leverage them for profit.

2. Changing the Law

Some critics have proposed that the file sharing problem be resolved by changing copyright law. One such proposal is to reduce the duration of copyright.[126] Critics taking this tack focus on the original brevity of copyright and its enormous dilation to its present length of virtually two lifetimes.[127] As they see it, keeping works out of the public domain for such a great length of time does not properly balance the interests of the public and of creators.[128] More importantly, they also argue that this length of copyright is outside the Constitution's "limited

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[124] . The progress of technology is not only the development of new means of transmitting information, but also the way people choose to use them. The famous popularity of free and accessible file sharing client software such as Limewire, blogging services such as Blogger, networking services such as MySpace and Facebook, and media sharing services such as Flickr and YouTube reflect a "sharing ethos" that can be summarized under the phrase, "the internet is for sharing." *See*, *e.g.*, William Gould, Links, http://www. harmony.demon.co.uk/links.htm (last visited Apr. 17, 2008). This phrase has become highly popular with multiple variations findable with Google searches.

[125] . Michael Wolff, *Stop, Thief!*, N.Y. MAG., Mar. 3., 2003, at 24, 26 (italics original), *available at* http://nymag.com/nymetro/news/media/columns/media life/n_8384/.

[126] . *See* Dionne, *supra* note 64 (author's criticism of current duration of copyright and invitation to movement of like-minded individuals imply that law should be changed).

[127] . *See, e.g., id.* ("Copyright terms now last the creator's lifetime plus 70 years.")

[128] . *Id.*

times" clause.[129] Professor Ku has asserted that copyright is no longer necessary due to new, more direct, means of production (desktop) and distribution (digital), and that intermediary content distributors (e.g., record labels), protected by copyright, add no creative value.[130]

Under current constitutional jurisprudence, the merit of the constitutional criticism is doubtful.[131] The merit of the public policy criticism is debatable. The U.S. understanding of intellectual property appears to revolve around economic incentive,[132] and lengthy copyright provides a major incentive to create artistic works. The idea that this question is one of balancing private and public benefits is simplistic, obscuring the notion that, without incentives, people will not create in the first place. That a broader public domain, and fewer works altogether, would be more beneficial to the public is doubtful.

Shrinking copyright duration is of dubious feasibility. The trend over the course of U.S. history has been expansion.[133] Also, the private beneficiaries of copyright have active and, reputedly, powerful lobbies.[134] More importantly, only a very drastic diminishment of copyright duration—beyond the modest allowance of 1790—would

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[129] . *Id.* The relevant text states that Congress has authority to secure exclusive rights to creators for "limited [t]imes." U.S. CONST. art. I. § 8.

[130] . Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 295–300 (2002).

[131] . *See* Eldred v. Ashcroft, 537 U.S. 186, 222 (2003) (holding that the 1998 Copyright Term Extension Act, extending copyright to author's lifetime plus seventy years, is not unconstitutional).

[132] . The relevant portion of the Constitution, U.S. CONST. art. I. § 8, prefaces the operative clause with a utilitarian justification of promoting "Progress of Science and useful Arts." *Id*. Protection of copyright institutes a financial incentive to create. *See* Kimberly Kerry, *Music on the Internet: Is Technology Moving Faster than Copyright Law?*, 42 SANTA CLARA L. REV. 967, 986–87 (2002). The American public appears to think of copyright as a financial, rather than a moral, matter. Lantagne, *supra* note 19, at 283.

[133] . *Eldred*, 537 U.S. at 194–96 (noting that federal copyright was fourteen years—exclusive of the permitted renewal—in 1790 and was expanded under the 1909, 1976, and 1998 Acts).

[134] . *See* Boycott-RIAA, *supra* note 61 ("Copyright reform will undoubtedly be extremely difficult to achieve due to the fact that the RIAA's entire purpose is to lobby our government to change the law in their favor.")

benefit the millions of users sharing music or movies of recent vintage.[135] Copyright duration appears to be of little or no real relevance to the file sharing problem.

Also, while Ku's argument about major record labels being unnecessary to the recording of modern music is likely true with respect to some kinds of music, it is likely not true with regard to the chart-topping, highly profitable, heavily produced music widely traded among file sharers.[136] The costly production, talent, and equipment involved require greater resources than independent recording artists are likely to have at their disposal. Additionally, intermediary distributors serve important functions of promotion and channeling consumer choice[137]—functions that benefit both artists and consumers. More importantly, copyright not only enables the intermediary-dependent music business model, for better or for worse; it also protects the rights of content producers. Even with desktop studio production and regionally or locally targeted internet distribution, copyright is still necessary to protect against freeloading.

A more feasible proposal is copyright damages reform. This proposal starts with the idea that aggregation of statutory damages across multiple similar violations can distort incentive to sue and impose, inappropriately, "'wholly proportionate' reprehensibility."[138] Such aggregation may also violate due process.[139]

As to the first effect, "once the plaintiff has an adequate incentive to sue, there is little need to increase this monetary incentive by multiplying the penalty thousands of times."[140] The idea is that the punitive portion of statutory damages—the part that goes above and beyond compensation—is often an important motivator for plaintiffs to vindicate their rights, but this motivational threshold is easily met and further incentive

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135 . A commonplace assumption in discussions of music file sharing is that the bulk of music being shared was recorded within the last thirty years. *See, e.g.*, Dionne, *supra* note 65 ("Arrhh! Time to be illegally downloadin' me Britney Spears!").

136 . *See* Opderbeck, *supra* note 17, at 1746.

137 . *Id.*

138 . Barker, *supra* note 49, at 549.

139 . *Id.* at 526.

140 . *Id.* at 549.

is unnecessary.[141] As to the second effect, the argument is that, because a major part of the defendant's reprehensibility comes from having committed to an unlawful course of action, it is fairer to treat each instance of a series of infringements as part of a larger scheme.[142] A proponent of this reform noted that "an analogy can be drawn between the criminal defendant who enters a store and steals multiple items and the civil defendant who installs file-sharing software and downloads many files."[143]

As to due process, punitive damages may be so grossly excessive as to violate it.[144] The Supreme Court has articulated three guideposts for deciding when a damage award is grossly excessive: the reprehensibility of the defendant's conduct, the ratio of punitive damages awarded to harm inflicted on the plaintiff, and a comparison between the punitive damages awarded and the criminal and civil penalties for similar misconduct.[145] One proponent of statutory damages reform maintains that aggregated statutory damages do violate due process under the Court's test, but that the courts will be loath to overturn aggregated statutory damages, due to "practical institutional considerations."[146]

The proponent offered two congressional options for reforming statutory copyright damages. Congress could enact a statutory damage scheme permitting courts to assign below the current damages floor in the aggregation of many similar claims.[147] Alternatively, Congress could authorize a "specialized dispute resolution system" to detect and punish illegal file sharing with greater efficiency, imposing smaller penalties on a wider net of the file sharing public.[148]

Statutory damages reform would alleviate some of the apparent unfairness to file sharing defendants, but it might also undermine the deterrence power of lawsuits—

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141 . *Id.* at 549–52.

142 . *Id.* at 552–53.

143 . *Id.* at 553.

144 . TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 459–62 (1993).

145 . BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–85 (1996).

146 . Barker, *supra* note 49, at 554–56.

147 . *Id.* at 558.

148 . *Id.* at 559.

something the RIAA values and is determined, for the time being, to exploit. The RIAA and others invested in deterrence strategies would likely lobby against such reform.

What these proposals to change the law have in common is an aim to protect file sharers from undesirable consequences. Neither attempts to vindicate the infringed interests of the copyright holders. Because the current statutory damages structure is offensive, reforming it could be a useful component in a comprehensive solution that also addresses the needs of copyright holders.

3. Levies

One way to address the needs of copyright holders is an alternative compensation system. The RIAA's characterization of music piracy as a kind of theft relies on a misappropriation-of-value theory.[149] Unlike theft of tangible property or services, there is no taking of scarce resources with alternative uses. The theft consists of the fact that something of value (music) has been wrongfully taken (infringing on exclusive rights) from its owner (the copyright holder). In the context of music commerce, the wrongful taking consists of copying music without paying for it. Thus, for the principal concern of music commerce, if copyright holders are compensated for the taking of their property, the theft disappears and their rights are vindicated.[150]

One alternative compensation system is for the government to levy fees and pay copyright holders from the proceeds. The levy system could permit the free flow of information on P2P networks for "noncommercial dissemi-nation, modification, and copying of works made available to the public."[151] The revenue lost to copyright

[149] . RIAA, *supra* note 11.

[150] . On the other hand, profitable transactions, the principal concern of commerce, necessarily implicates other concerns, such as control of distribution. Control of distribution is an obvious artistic concern; an artist may believe that a particular work is unique and, therefore, deserving of limited release to devoted fans. Somewhat less obviously, control of distribution is also a commercial concern because contrived scarcity combined with high demand raises market value. The diamond trade is the most notorious example of this principle in action.

[151] . Lori A. Morea, *The Future of Music in a Digital Age: The Ongoing Conflict Between Copyright Law and Peer-to-Peer Technology*, 28

holders could be restored through fees on software, services, or hardware related to copying or file sharing.[152]

There is precedent for analogous systems in other countries and in the United States. In Germany, for example, the law does not hold individuals liable for making personal copies because there is a levy on the sale of relevant copying and recording equipment and media.[153] In the United States, the Audio Home Recording Act (AHRA) of 1992 barred claims against individuals using "digital recording technology to copy music."[154] In exchange for that immunity to individual consumers, U.S. manufacturers had to pay a two percent tax on "digital audio recording devices" and a three percent tax on "digital audio recording media" to compensate copyright holders.[155] This tax is passed on to consumers in the form of higher prices. The government would collect the payments, and then divide the monies among the various right holders, each of whom had to file a claim with the Librarian of Congress.[156] At the time of the AHRA, Digital Audio Tape (DAT) and CD duplication appeared to be a threat to the music industry due to their capacity to make high quality copies of recorded music. The AHRA is largely irrelevant to current challenges except by way of example.[157]

In imitation of the AHRA, Congress could enact legislation that bars suits against file sharers in exchange for levies on computers, blank CDs, music players (e.g., iPods), or internet service. The proceeds from the collected fees could be distrib-uted pro rata to copyright holders based on a determination of how often their content is downloaded and its retail value.

Abstractly considered, this solution appears almost ideal. It grants users convenient and efficient access to the music they want and compensates copyright holders without the ugliness and inefficiency of lawsuits. As

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CAMPBELL L. REV. 195, 239–40 (2006).

152 . Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 43 (2003)

153 . *Id.* at 32.

154 . Morea, *supra* note 151, at 246.

155 . *Id.*

156 . *Id.* at 247.

157 . *See id*. at 247.

applied, however, it presents some problems. If a broad range of technology is subject to the levy, a broad range of consumers will end up subsidizing the activities of a small range of consumers.[158] CDs and computers have many uses other than file sharing, and, while file sharing is widespread, only a minority of computer users share files.[159] Some commentators favor a levy on bandwidth as use of bandwidth is related to file sharing,[160] but even a levy on bandwidth can be overbroad as plenty of legitimate computer activities—such as network gaming—are also associated with high use of bandwidth.[161] "[B]andwidth usage is unlikely to constitute a reasonable proxy for infringement."[162]

Additionally, artists and record companies might learn how to manipulate the tracking system to fraudulently assign to themselves a greater share than they deserve of the levy proceeds.[163] More importantly, governmental tracking of file sharing implicates privacy concerns and the government's involvement in the collection and assignment of monies may stifle the development of alternative content distribution systems that might better fulfill the needs of some consumers but be ill-suited to the government's methods of determining downloads (or whatever metric a levy system would use to discern market share).

4. Large Scale Private Licensing

Another alternative compensation system, similar in some respects to government levies, is large scale private licensing, in which copyright holders would arrange, directly or through intermediaries, with ISPs, educational institutions, or end users for the right to freely trade files in exchange for fees. A principal advocate for such a system is the EFF, and its articulation is concise and easily understood:

> [T]he music industry forms one or more collecting societies, which then offers file sharing music fans the opportunity to "get

158 . Opderbeck, *supra* note 17, at 1749.
159 . Morea, *supra* note 151, at 248.
160 . Opderbeck, *supra* note 17, at 1749.
161 . *Id.*
162 . *Id.* at 1750.
163 . Morea, *supra* note 151, at 248.

> legit" in exchange for a reasonable regular payment, say $5 per month. So long as they pay, the fans are free to keep doing what they are going to do anyway—share the music they love using whatever software they like on whatever computer platform they prefer—without fear of lawsuits. The money collected gets divided among rightsholders based on the popularity of their music. In exchange, file sharing music fans who pay (or have their ISP or software provider or other intermediary pay on their behalf) will be free to download whatever they like, using whatever software works best for them. The more people share, the more money goes to rights-holders. The more competition in P2P software, the more rapid the innovation and improvement. The more freedom for fans to upload what they care about, the deeper the catalog.[164]

There is precedent for something similar. The American Society of Composers, Authors, and Publishers (ASCAP), and Broadcast Music, Inc. (BMI) collect fees from broadcasters, performance venues, and eating and drinking establishments in exchange for the right of these entities to play "whatever music they like, from whatever source, as often as they like."[165]

The facial appeal of such a system is obvious. It has the strengths of the levy model mentioned earlier: it is technology-embracing, it provides consumers the access they insist on having, and it ensures that copyright holders get paid, while reducing lawsuits and without having to tinker with copyright law. It also has advantages over the levy model. It permits private actors to hash out for themselves the terms of a bargain, which, besides being likely to result in satisfactory terms, also gives the parties involved a valuable feeling of control.[166] It is also free from the government intrusion of tracking downloads or other file sharing activity.

Voluntary licensing is not without potential problems. To work, the system would require the voluntary cooperation of almost all rights holders so that end users

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164 . RIAA V. PEOPLE, *supra* note 35, at 16.

165 . *Id.* at 17; *see also* Morea, *supra* note 151, at 236–37.

166 . Assuming the EFF model, the contracts for end users would most likely be contracts of adhesion, granting the end user no opportunity to bargain over terms. These adhesion contracts would, however, be the product of more nimble bargaining among more equal parties (artists, record companies, collecting societies, etc.) as to fee collection and proration. More importantly, adhesion contracts are widely used in situations where practicality calls for them and take-it-or-leave-it, while not an ideal choice, is still a choice.

will experience broad freedom from the threat of lawsuits.[167] Also, collection services, if too few, might create monopolistic problems.[168] There is also the matter of determining fee proration to record labels and artists. However, the music industry has already overcome similar challenges in the previously mentioned licensing handled by ASCAP and BMI.[169]

One complaint that could be raised against both levies and voluntary licensing is that they do nothing to vindicate the copyright holder's right to control distribution. To put the matter in perspective, at this time copyright holders are not able to keep their work from being distributed against their will and also are not able to get profit from that unpermitted distribution. Being able to at least get profit is better than nothing at all and is the best available option until an effective method of maintaining control comes along. Also, relinquishment of control in exchange for a guarantee of payment is nothing new to the music industry. There is compulsory licensing in music recording in the United States; after public release of a song, any individual can record that song for a fee paid to the copyright holder.[170]

All things considered, large scale licensing appears highly desirable for meeting the needs of both the recording industry and music consumers, with the added bonus of embracing and promoting the development of technology. It promises to eliminate wasteful lawsuits without requiring major changes to copyright law or major increases in government regulation. It could easily serve as the primary component of a comprehensive solution to the file sharing problem.

5. Jambands and Reciprocity

Schultz believes that the deterrence strategy of lawsuits against file sharers is not likely to succeed because "it is very difficult to project threats of detection and legal action credible enough to alter behavior."[171] He posits that social norms, rather than threat of punishment,

167 . Morea, *supra* note 151, at 239.

168 . *Id.*

169 . *See generally id*. at 236–37.

170 . *Id.* at 245.

171 . Schultz, *supra* note 99, at 655.

account for most lawful behavior.[172] Under his view, a part of the solution to the file sharing problem is fostering new norms of respect for intellectual property.[173] For insight as to how this project might be done, he studied the jamband culture and community.[174] Jamband fans are notoriously loyal and, apparently, lawful toward their musical idols.

> These fans scrupulously observe restrictions bands impose on the copying and distribution of their music. They keep track of these rules and make sure their fellow fans are aware of them. If they find fellow fans stepping out of line, they quickly scold them. They even cooperate with bands' lawyers to enforce the rules.[175]

Jambands have a distinctive policy toward intellectual property. Fans are free to record, copy, and distribute live performances.[176] On the other hand, studio recordings and commercial live recordings are off-limits, and the fans abide by these rules.[177] According to Schultz, the community's pro-copyright norms are not rooted in circumstances unique to jambands, but in the principle of reciprocity—cooperation begets cooperation.[178] He advocates that the music industry drop its current practice of trying to sell collections of less desirable songs on the basis of one or two hits per album in favor of cultivating "loyal communities that have reciprocal relationships with artists."[179] In these reciprocal relationships, the recognized generosity, fairness, and commitment of the artists elicit loyalty and respectful conduct by music consumers.[180] Community sanctions against renegade behavior reinforce the good conduct.[181]

The reciprocity of musician-fan and fan-fan relationships in the jamband model is admirable. Unfortunately, that model is so deeply antithetical to the

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172 . *Id.*

173 . *Id.* at 655–56.

174 . Jambands are musical acts, such as the Grateful Dead, known for live performances that include long improvisational stretches ("jam sessions").

175 . *Id.* at 653.

176 . *Id.*

177 . *Id.*

178 . *Id.* at 656.

179 . *Id.* at 657.

180 . *Id.* at 668–91.

181 . *Id.* at 717.

modern music business—of which distance, impersonality, and retail consumerism are essential features—that it likely cannot be implemented on a broad scale in the foreseeable future. On the other hand, Schultz impressively sets forth an alternative vision for music as a business that enterprising musicians may find compelling and may choose to emulate regardless of what the majority of other musicians do.

The principle of reciprocity itself is more immediately applicable. If the music industry were to treat its customers in a way its customers experience as more fair and more generous, in reciprocation those consumers would likely behave more respectfully of copyright.

6. Digital Rights Management

Digital Rights Management (DRM), mentioned earlier,[182] is a technological measure against illegal file sharing that works by limiting the ability to use downloaded music files.[183]

DRM sounds good in theory, but its performance is disappointing. To begin, DRM does nothing to protect against the illegal distribution of files created by users from their own CDs or other music sources. Also, it is possible to crack DRM encryption schemes and programs that decrypt DRM-protected files are available.[184]

More importantly, DRM endows content providers with the ability to restrict use of their content beyond what copyright law guarantees.[185] DRM, understandably, is controversial. Apple's Steve Jobs voiced his disapproval of mandatory DRM and Apple's iTunes store began to offer DRM-free music.[186] Other commercial online music services sell unrestricted music as well.[187]

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182 . *See supra* notes 36, 116 and accompanying text.

183 . Opderbeck, *supra* note 17, at 1750. One example is the Apple Fairplay system, applied to iTunes downloads, which limits the use of music files to five computers and also limits the number of CD burns of a playlist. *Id.*

184 . *Id*.

185 . *Id.* at 1751.

186 . RIAA V. PEOPLE, *supra* note 35, at 15. iTunes now offers DRM-free music for the same price as DRM-encrypted tracks. iTunes Store, *supra* note 108.

187 . *Id. See*, *e.g.*, eMusic, Why Join?, http://www.emusic.com/promo/why. html (last visited Jan. 6, 2008).

DRM must be effective to some degree against file sharing, as it prevents enjoyment of the misappropriated music. However, it is only effective with regard to DRM-encrypted files originating from legitimate music services. It is useless against user-created files and non-DRM files purchased online. Also, DRM restricts the ability of consumers to make legitimate use of their music files. In that restriction, DRM incentivizes illegal file sharing, because a user-created or decrypted file that can be used on any number of devices and burned any number of times is more valuable than one limited by DRM. Given the weakness and dislike of DRM, it is unattractive as part of a solution to the file sharing problem.

B. AN INTEGRATED, COMPREHENSIVE SOLUTION

A number of the proposed solutions to the file sharing problem have both attractive features and weaknesses that can be remedied by other proposed solutions. The best way to approach the file sharing problem is to take the good ideas and integrate them in such a way that they complement each other, maximizing each other's strengths and shoring up each other's weak points.

A licensing plan more or less similar to the EFF's proposal ought to be the core of an integrated, comprehensive solution. This model meets the needs of the music industry for fair compensation, and it meets the needs of consumers for efficient, convenient access to the music they want. It also promotes the development of technology and does not require any radical changes to existing law or any congressional action.

As an internal matter, the record labels and their artists will need to work out a proration scheme, but this challenge is not a new one for the music industry, and artists and record labels will be motivated to come to mutually satisfactory terms. More importantly, this model is in the best interest of the music industry, because it will empower the industry to profit by meeting a legitimate need that is not currently met by legitimate means.

The music industry could form one or more collection agencies that would, in turn, contract on one side with record labels and independent artists and on the other side with end users, ISPs, or educational institutions. It

would be most efficient to contract with ISPs or educational institutions where possible, and let those entities deal directly with (e.g., contract with, collect frees from) end users. In any case, agreements with end users should be voluntary for the users.

Lawsuits could still be used against those users who do not opt in to the program and continue to infringe copyright. Large scale licensing and lawsuits would be complementary in at least two ways. First, licensing shrinks and identifies the pool of users the industry needs to monitor for copyright infringement. If the collection agencies contract with ISPs or other intermediary entities, those entities could furnish lists of IP addresses of users who are and users who are not participating in the program.[188] Right now, the RIAA's detectives have a limitless pool of potentially infringing users to track; a diminished and better defined pool would make enforcement easier.

Second, in the context of the generosity and fair dealing the licensing model would likely represent to consumers, the principle of reciprocity would, in addition to attracting consumers to the program, diminish public hostility to the music industry's enforcement efforts and make the RIAA and other copyright holders more sympathetic plaintiffs and infringers less sympathetic defendants.

With respect to the lawsuits themselves, damages reform may or may not be in order as a constitutional matter. The subject is worthy of further review and analysis. Rights holders and their lobbyists would likely object to damages reform for fear that it would diminish the deterrence power of lawsuits. However, if file sharing is legalized through licensing, as a matter of reciprocity the resentment and rage directed against allegedly excessive damages would likely diminish, anyway.

Large scale licensing could threaten the market share of commercial online music services, but competition is

188 . Some of this policy may not be feasible depending on the intermediary's privacy obligations to users. It would be easy to obtain permission to disclose identifying information from those users who opt in as part of their voluntary contracts, but getting permission to disclose identifying information for those users who decline to participate may be considerably more challenging.

ultimately beneficial to the public. Commercial services will not necessarily be unable to compete with file sharers. These services could still provide unique value in the form of reliable availability of virus-free, uncorrupted, properly identified files, something file sharers cannot promise. They would also be free, as they are now, to experiment with business models and filling niches in order to maximize their profits. DRM, often associated with legal music services, should be discarded. It prevents consumers from making lawful use of their files and, more importantly, with a licensing system in place, DRM would be unnecessary and unfair to everyone participating in the licensing system.

Lastly, artists and labels should consider changing their practices to promote a sense of community and mutually beneficial reciprocity with music consumers. The organic community development enjoyed by jambands may not be practical for most recording artists and labels, but some means of promoting reciprocity are practical for most artists and labels, such as freely distributing alternate versions of songs or songs discarded from an album's final track list, and permitting live recording and trading of concerts.

CONCLUSION

The file sharing problem can be characterized two ways. From the music industry perspective, the problem is that consumers are stealing music. From the consumer perspective, the problem is that consumers do not have legal access to the music they want that is as convenient and efficient as they want. The industry's approach to dealing with the problem to date has been more ineffective than not and has embittered or calloused a substantial portion of the public. In particular, the lawsuit component of the industry's approach, besides being ineffective, has proven highly repugnant.

In response to the perceived need for a less offensive and more effective solution to the file sharing problem, critics have suggested a number of alternative approaches with various strengths and weaknesses. The best approach to the file sharing problem is to integrate the best ideas from the various proposals in a

complementary fashion, maximizing each other's strengths and remedying each other's weaknesses. Large scale licensing belongs at the core of such an integrated, comprehensive solution. Lawsuits can be used as breach measures against those consumers who do not opt in to the program and continue to share files anyway. Legal music services will be free to compete via alternative business models, filling niches, and reliably providing virus-free, uncorrupted, properly identified files.

The file sharing problem can be solved without wasteful, unpopular lawsuits or major change to the law, provided that the music industry is willing to adapt and take cues from the consuming public. What is in the best interest of both the industry and the consuming public is to stop fighting an apparently unstoppable tide of behavior and exploit it for growth and profit. The industry has accomplished similar feats before with other large scale licensing programs, and it should be able to do the same with file sharing.