

File Sharing: A Tool for Innovation, or a Criminal Instrument?

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I. INTRODUCTION

The dawn of peer-to-peer networks and the subsequent rise of file sharing over the Internet have proved to be a considerable threat to the revenues of the Recording Industry Association of America (“RIAA”) and the international music community. While early music downloading across peer-to-peer networks on the Internet was largely limited “to college students with access to fast pipes and techno geeks sufficiently driven to search the Net for the latest Phish bootlegs,”¹ the market for illegally downloaded music taken from file sharing websites has expanded to astronomic proportions and continues to do so even at present.² The results of this expansion proved doubly costly to the RIAA, as the record industry has suffered reduced music sales and has simultaneously attempted to wage a multifaceted war against file sharers and their networks.³ Yet, the RIAA’s strategies have ultimately damaged the association’s reputation and also the music industry generally. Due to their choice of targets, “[t]he media and public have cast the RIAA as a villain that sues single mothers and even the deceased.”⁴ Despite pursuing their cause even to the extent of suffering harms to their reputation, the RIAA’s efforts have proven largely fruitless as record sales have continued their downward trend.⁵

The failure of the RIAA to properly handle the issue of file sharing is evident from the record industry’s depressed financial statistics⁶ and the general public’s outcry against the association’s tactics.⁷ This Note addresses some of the alternative (and potentially more popular) methods available to the RIAA in its efforts to overcome the rise of illegal file sharing.

II. THE HISTORY OF FILE SHARING

Peer-to-peer (“P2P”) networks and file sharing have had a longstanding role in the functionality of the Internet. The early Internet, under the control of the U.S. Department of Defense, “began as a series of peer-to-peer . . . networks which allow[ed] users to share files between computers without a centralized server.”⁸ Even after entering mainstream use, the Internet continued to preserve some of its original peer-to-peer characteristics.⁹ Such P2P features can “be found in one of the most basic web usages, the Domain Name Systems (“DNS”), which translate[s] numerical IP addresses into domain names, and which are essential for easy navigation of the Internet.”¹⁰

Despite their important role in the developmental history of the Internet, “P2P systems . . . are best known as a means of illegally sharing copyrighted work.”¹¹ While Napster was notorious for being the first program to bring illegal file sharing into popular use, it was not the first means available for users to illegally download music.¹² Opportunities for downloading music off of the Internet could be found as early as 1994, though the selection available at that time was largely limited.¹³ Finally, in 1999, Shawn Fanning, a young college student, introduced Napster, a program which would revolutionize the process of file sharing.¹⁴ Napster quickly surpassed other file sharing services “as a result of its simplicity, increased user friendliness, and compatibility with PCs.”¹⁵ Fanning’s service gained popularity so rapidly that it gathered over twenty five million users in less than one year of operation.¹⁶

In order to access Napster’s system, the user had to install Napster’s “MusicShare” software.¹⁷ Once a user had installed MusicShare and gained access to the primary service, “Napster provide[d] technical support for the indexing and searching of MP3 files, as well as for its other functions, including a ‘chat room,’ where users [could] meet to discuss music, and a directory where participating artists [could]

provide information about their music.”¹⁸ Napster’s ease and accessibility quickly turned it into something akin to “another appliance, like a toaster or washing machine,”¹⁹ for its users. The impact of Napster on the music market was so significant that there was a notable loss of album sales among college students²⁰ and the program was credited with “rais[ing] barriers to [the industry’s] entry into the market for the digital downloading of music.”²¹ In 2001, at least partially due to Napster, CD sales dropped by 10%.²²

While Napster was essentially a P2P system, it was also a centralized network,²³ meaning that Napster itself maintained a directory of the music that was available to its users.²⁴ Yet as file sharing systems moved into the next generation, they became increasingly decentralized, resulting in networks that no longer relied on access to a central directory for music downloading akin to the one used by Napster.²⁵ Systems like Morpheus, Limewire, Grokster, and Kazaa were decentralized, node-based P2P systems that made them increasingly more difficult to police after their release.²⁶ BitTorrent technology, another form of decentralized P2P protocol, further enhanced the ability of file sharers. With “[t]he advantage of BitTorrent technology [being] the cumulative nature of its downloading and economies of scale,”²⁷ BitTorrent offered a revolutionary new method of file sharing to users. As increased numbers of “users download a given file, there are more sources for the file pieces necessary for others.”²⁸ This process “prevents a backlog of users [from having to wait] to download from one individual user with the source file.”²⁹ The developing market of P2P systems and the increasing number of such systems’ availability eased the ability of users to download and trade copyrighted music,³⁰ earning the file sharing market the attention and aggressive hostility of the RIAA.

The RIAA is a trade organization that describes itself as “support[ing] and promot[ing] the creative and financial vitality of the major music companies.”³¹ Because “RIAA members create, manufacture and/or distribute approximately 85% of all legitimate recorded music produced and sold in the United States,”³² the RIAA has a strong business interest in controlling (and diminishing) the availability of free music that is easily accessible to the general public. After a failed attempt to prevent the sale and marketing of the Diamond Rio,³³ the earliest form of MP3 player,³⁴ the RIAA turned its attention towards “a new perceived villain, the file-sharing systems themselves.”³⁵ The RIAA participated in a number of lawsuits against various P2P networks,³⁶ with the most significant of the early suits being a case brought against Napster by A&M Records and other members of the music industry.³⁷ In the suit, the plaintiffs,³⁸ a group of record companies and music publishers, filed a “joint motion to preliminarily enjoin Napster, Inc. from engaging in or assisting others in copying, downloading, uploading, transmitting, or distributing copyrighted music without the express permission of the rights owner.”³⁹ The plaintiffs alleged numerous theories of copyright infringement against the defendant Napster, including both vicarious and contributory liability.⁴⁰ In its defense, Napster tried to argue fair use,⁴¹ substantial non-infringing activity,⁴² and protection under the safe harbor provisions⁴³ of the Digital Millennium Copyright Act (“DMCA”),⁴⁴ but the court rejected all of these defenses. Granting the preliminary injunction, the district court found that: “[b]ecause [the] defendant . . . contributed to illegal copying on a scale that [was] without precedent, it [bore] the burden of developing a means to comply with the injunction . . . [and to] insure that no work owned by [the] plaintiffs . . . is uploaded or downloaded on Napster.”⁴⁵ In effect, the court’s holding enjoined Napster, halting their operations and preventing them from continuing to share copyrighted materials.⁴⁶

By granting a preliminary injunction against Napster, the district court’s ruling struck at the very heart of Napster’s services and had a devastating effect on its ability to function, proving to be the beginning of the end for the service.⁴⁷ Napster appealed the decision, and “the Ninth Circuit largely upheld the district court’s findings on the direct, contributory and vicarious infringement claims and on Napster’s various defenses,”⁴⁸ but remanded because “the scope of the injunction was ‘overbroad.’”⁴⁹ Recognizing that the burden of controlling the system’s limits rested with Napster,⁵⁰ the Ninth Circuit suggested that “[i]n crafting the injunction on remand, the district court should recognize that Napster’s system does not currently appear to allow Napster access to users’ MP3 files.”⁵¹ In March, 2001, the district court issued a modified preliminary injunction that largely reflected the most restrictive terms of the original injunction.⁵² When again brought to the Ninth Circuit, the court affirmed both the modified injunction and a subsequent shut down order⁵³ which the district court had issued in response to Napster’s failure to comply with the terms and conditions of the preliminary injunction.⁵⁴ This time, the Ninth Circuit held that the lower court’s modified preliminary injunction properly reflected the appropriate laws regarding vicarious liability

and copyright infringement.⁵⁵ The court also held that the shut down order properly exercised the district court's authority to enforce Napster's compliance with the modified preliminary injunction.⁵⁶ With "Napster's ambitions . . . thwarted by the music industry's unwillingness to deal with the company"⁵⁷ and no longer able to survive "without sharing copyrighted materials,"⁵⁸ one of the original titans of peer-to-peer networking and file sharing was forced to file for bankruptcy.⁵⁹

III. THE MODERN ERA OF FILE SHARING LITIGATION AND DEBATE: BURNING BRIDGES AND PUBLIC BULLYING

Despite the best efforts of the RIAA to shut down P2P systems,⁶⁰ the association was unable to halt the continued problem of illegal file sharing.⁶¹ Certain "decentralized systems . . . were harder to sue than Napster because they lacked a centralized client that facilitated indexing, thus making [them] more difficult for the RIAA to pinpoint and sue."⁶² The RIAA also found that "by the time one communications technology company is sued out of existence, five more appear [think: Hydra]."⁶³

Perhaps even more troubling to their efforts, the RIAA was becoming keenly aware that a bothersome perception about file sharing rested in the Internet community's collective psyche and in the common practices of typical Internet users. In 2003, a survey found that 21% of Internet users shared files over P2P networks and, more alarmingly, that two-thirds of file sharers were simply unconcerned about copyright laws.⁶⁴ Much to the unpleasant surprise of the RIAA, "[f]ile sharers were not simply enamored of the Napster application; instead, they had internalized sharing norms that transcended any particular application or network."⁶⁵ Though the RIAA had successfully managed to remove the threat of Napster, the file sharers that used it had simply roamed on to other, similar networks⁶⁶ and continued with their illegal file sharing activities.

The idea that Internet users have "internalized [file] sharing norms"⁶⁷ is a very real possibility, as shown in 2007 with the release of the band Radiohead's album *In Rainbows*.⁶⁸ When the album was first released in October 2007, consumers could not purchase *In Rainbows* through traditional methods, such as in stores or through iTunes or Amazon.com.⁶⁹ Instead, the album was exclusively available through www.inrainbows.com, a special website run by the band where fans could download the album either for free or for a price of their own choosing.⁷⁰ Yet, despite the fact that *In Rainbows* was freely accessible for download⁷¹ through the album's website, more fans downloaded the album illegally from P2P and torrent websites rather than from the official site.⁷² According to the 2008 study performed by Will Page and Eric Garland on the release of *In Rainbows*,⁷³ "even when the price approaches zero, all other things being equal, people are more likely to act habitually (say, using The Pirate Bay) than to break their habit (say, visiting www.InRainbows.com)."⁷⁴ While Radiohead was ultimately successful with *In Rainbows*,⁷⁵ the album's legacy delivered a critically important message to the music industry – even where a legal option is available, "an illegal website like Pirate Bay may still be 'a powerful brand with a sterling reputation in the minds of millions of young music fans'"⁷⁶ because of increasingly normalized perceptions of file sharing as an acceptable means of acquiring music over the Internet.

Conscious of the increasingly complex nature of such problems and considerations, the RIAA realized that suing P2P systems into bankruptcy would no longer be sufficient to combat the distressing rise of file sharing; instead, it would have to target the individual file sharers themselves.⁷⁷ Following what the RIAA described as "a multi-year effort to educate the public about the illegality of unauthorized downloading"⁷⁸ and a movement of "major music companies [to] have made vast catalogues of music available to dozens of new high-quality, low-cost, legitimate online services,"⁷⁹ the RIAA declared what was essentially tantamount to war against individual P2P file sharers in a statement released on September 8, 2003.⁸⁰ As their terms of peace, the RIAA "announced that the industry [was] prepared to grant what amounts to amnesty to P2P users who voluntarily identif[ied] themselves and pledge[d] to stop illegally sharing music on the Internet."⁸¹ Offering clemency, "[t]he RIAA . . . guarantee[d] not to sue file sharers who ha[d] not yet been identified in any RIAA investigations and who provide[d] a signed and notarized affidavit in which they promise[d] to respect recording-company copyrights."⁸² Kicking off their battle against P2P users, the RIAA announced in their statement that in their "first round of lawsuits, RIAA member companies filed copyright infringement claims against 261 individual file sharers."⁸³ Continuing on its warpath, the RIAA's litigation strategy produced a series of lawsuits that would prove both financially and reputationally troubling for the music industry.⁸⁴ The association launched its aggressive

anti-piracy campaign against targets including, among others, youths,⁸⁵ students,⁸⁶ single mothers,⁸⁷ and even the dead.⁸⁸

When the association discovered that it was experiencing difficulties identifying the file sharers,⁸⁹ the RIAA turned to certain provisions of the DMCA⁹⁰ in an effort to smoke out infringing users from under the cover of their Internet service providers (“ISPs”).⁹¹ A “service provider,” according to the provisions of the DMCA, is defined as either “an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received”⁹² or “a provider of online services or network access, or the operator of facilities therefor [sic].”⁹³ While certain provisions of the DMCA exempt ISPs from liability for illegal activity occurring on their servers in certain circumstances,⁹⁴ ISPs that are able to control the information being shared on their networks fall beyond these protections and are instead categorized as intermediaries who are subject to liability under provisions of the DMCA.⁹⁵ Additionally, a different provision of the DMCA, 17 U.S.C. § 512(h), gave the RIAA the ability to “request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer in accordance with this subsection.”⁹⁶ After the ISP receives the subpoena, it would be required to “expeditiously disclose to the copyright owner or person authorized by the copyright owner the information required by the subpoena, notwithstanding any other provision of law and regardless of whether the service provider responds to the notification.”⁹⁷ After the ISP discloses an infringing user’s identity to the RIAA, the RIAA can use that information to seek damages from the user under 17 U.S.C. § 504(c), which allowed the RIAA to sue for damages ranging from \$750 to \$30,000 per work.⁹⁸

Recognizing the effectiveness of using the DMCA to manipulate ISPs in order to allow the RIAA to attack otherwise unreachable infringing users, the association rewrote its battle plans to align with this newfound strategy.⁹⁹ Although there was resistance by some of the ISPs in allowing the increased presence of external organizations in their business affairs,¹⁰⁰ the RIAA found enough support from ISPs to consider this new technique to be a significantly more effective way to battle the file sharing epidemic¹⁰¹ and decided to abandon their former strategies which centered on mass lawsuits.¹⁰² Still continuing with this new tactic, the RIAA has since used agreements “reached . . . with several ISPs to cut off subscribers’ internet connections if they ignore warnings to stop.”¹⁰³ Once the infringing user is caught illegally sharing, the “ISP will then either forward the RIAA’s e-mail or send the subscriber a warning e-mail telling them that music sharing is not permitted.”¹⁰⁴ After this initial warning, “[i]f they continue to share, the subscriber will receive one or two additional warnings, after which the ISP will slow their connection. If the allegedly infringing activity persists, the subscriber may find their internet connection stops working altogether.”¹⁰⁵

This strategy, also called the “graduated response plan,”¹⁰⁶ has been adopted by the RIAA as the next direction in which the association is taking its war against file sharing.¹⁰⁷ The question that must be asked is whether this is the best direction for the RIAA to take the battle, both for the association’s reputation and as a matter of public policy. The next section of this Note addresses these concerns and considers what alternative measures may be available to the RIAA as it decides its future plans.

IV. CHARTING THE COURSE: WHERE THE RIAA IS GOING, AND WHERE IT SHOULD BE GOING

While the RIAA has settled on the graduated response plan as their current course of action, there are a number of other avenues available to the RIAA as it proceeds in its efforts.¹⁰⁸ This section evaluates some of the possible options open to the RIAA and examines their prospective strengths and weaknesses, starting with their graduated response plan.¹⁰⁹

A. Graduated Response Plans

In adopting their graduated response plan, “the RIAA is trying to counteract years of negative public relations against it that stemmed from its unsuccessful litigation campaign.”¹¹⁰ On its face, the graduated response plan seems less aggressive than the tactics previously employed by the RIAA, stepping away from the disastrous litigious campaign previously employed by the industry¹¹¹ and by abandoning the use of highly publicized threat litigation against sympathetic and unreasonably-chosen targets.¹¹² While the

RIAA planned to continue all of the cases pending from its litigious attack,¹¹³ the association has largely withdrawn its overt aggression towards the masses.¹¹⁴ At least superficially, the new plan seems to be beneficial to both sides of the litigation process: “[m]usic fans may feel some relief that sharing music will no longer put them at risk of a lawsuit, assuming their ISP is one of those that has agreed to the plan,”¹¹⁵ while the RIAA benefits from the advantage of avoiding the courtroom, where it “has seen its investigative techniques questioned and suffered key setbacks . . . while paying extensive attorneys’ fees to pursue cases through the normal legal channels.”¹¹⁶

While these changes all appear to be a favorable deviation from the RIAA’s previous protocol, there are some very important considerations that weigh heavily against continued implementation of the graduated response plan. One underlying problem of the graduated response plan is that it does not eliminate the RIAA’s ability to bully others; it simply shifts its focus from the individual users to the ISPs to which those users subscribe. Under 17 U.S.C. § 512(j)(1)(A)(ii),¹¹⁷ the RIAA can practically demand that ISPs enforce the graduated response plan by threatening the ISP itself with an injunction. According to this provision of the DMCA, “the court may grant injunctive relief with respect to a service provider”¹¹⁸ by issuing “[a]n order restraining the service provider from providing access to a subscriber or account holder of the service provider’s system or network who is engaging in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.”¹¹⁹ Because such an injunction is granted against the ISPs (as opposed to the end users) and because the RIAA can further threaten ISPs with liability unless the ISPs cut off [the repeatedly infringing] user [’]s Internet access,¹²⁰ the DMCA puts the RIAA in a position where it can intrude upon the otherwise private contractual relationship between an ISP and its users. Considering that strategies for finding infringing users are not entirely accurate or reliable,¹²¹ and that “some people might be getting improperly accused of sharing copyrighted content, and could even be purposely framed by other users,”¹²² such intrusive measures are wildly inappropriate.

The RIAA’s tactics under the graduated response plan are also flagrant violations of the fundamental principles of net neutrality. The central theory of net neutrality is “that network operators should be barred from discriminating against or prioritizing Internet content that travels on their pipes.”¹²³ The core principle of the graduated response plan requires that ISPs discriminate against file sharers and subsequently limit their ability to use the Internet.¹²⁴ While some critics argue that net neutrality “laws are unnecessary because of a lack of visible discrimination problems by Internet service providers [and] because they could harm ISPs’ antipiracy efforts,”¹²⁵ supporters of net neutrality protest that such laws are “necessary to keep the Internet open and democratic.”¹²⁶ Currently, the topic of net neutrality is extremely controversial; Congress is so divided on the issue that neither supporters nor opposers of net neutrality can gather the necessary amount of votes to resolve the situation either way.¹²⁷ Despite its controversy, considerations of net neutrality policy in the development of future copyright law and, by necessary implication, in the future of the RIAA, are unmistakably important and cannot be simply ignored. In the words of Senator Al Franken of Minnesota, while “[n]et neutrality may sound like a technical issue, . . . it’s the most important First Amendment issue of our time.”¹²⁸

Additionally, the international response to similarly designed graduated response plans has been mixed. While proposals for comparable graduated response plans have been either proposed or implemented in both Europe and Asia,¹²⁹ some countries and institutions are firmly opposed to the use of such plans.¹³⁰ Graduated response plans are “not popular with the European Parliament”¹³¹ and have been criticized by public policy advocates as being “a draconian step in an increasingly digital world.”¹³² Furthermore, the Anti-Counterfeiting Trade Agreement (“ACTA”), a multinational intellectual property proposal¹³³ being drafted¹³⁴ for the purpose of “establish[ing] improved international standards for acting against large-scale infringements of protected intellectual property,”¹³⁵ has proven highly controversial¹³⁶ due to the “persistent rumor . . . [that the agreement] would require all signatory nations to have their ISPs impose a three-strikes policy against file-sharers,”¹³⁷ similar to the RIAA’s graduated response plan in the United States. Decrying such a provision as being tremendously restrictive of its citizens’ fundamental rights and freedoms,¹³⁸ the European Parliament voted “633-13 (with 16 abstentions) to adopt a resolution stating that ACTA ‘should not make it possible for any so-called three-strikes procedures to be imposed.’”¹³⁹

In light of considerable public policy concerns and the lukewarm response from the international community, the continued use of a graduated response plan does not seem to be the best option available to the RIAA.

B. Increased Use of Digital Rights Management Technology

Another option available to the RIAA is to advocate for the greater development and use of digital rights management (“DRM”) technology in the sale and distribution of digital music. DRM is essentially “[a]n invisible layer of software that bodyguards a computer file and limits what you can and can’t do with it.”¹⁴⁰ Apple, perhaps the most prominent user of DRM technology, distributes their digital music through iTunes with the company’s DRM software, FairPlay, included in the files,¹⁴¹ limiting the purchaser’s ability to copy the files to a maximum of five computers.¹⁴² Though DRM was never successfully used as a means of protecting music contained on CDs,¹⁴³ the widespread shift towards digital music in today’s industry¹⁴⁴ through services like Apple’s iTunes means that there is a greater opportunity for increased use and development of DRM technology as a means of protecting music from illegal file sharers. By coding digital music with DRM software, music distributors will potentially be able to curb the tide of music piracy by deterring users who are unwilling or unable to download DRM-removing software¹⁴⁵ and thereby restricting the accessibility of digital music files to large crowds of file sharers.

While DRM could potentially be a very powerful tool for digital music distributors and the music industry in their efforts to control piracy, a number of noteworthy arguments have been made which highlight the negative aspects of the technology and discourage its continued use. The most significant argument is that, after looking at “some hard data about how removing DRM restrictions from legitimately purchased tracks affects piracy . . . [t]he statistics show that there’s no effect on piracy.”¹⁴⁶ Assuming such statistics are reliable, the implications are astounding; “[i]f DRM does not in fact discourage piracy, then it is merely a nuisance for the user.”¹⁴⁷ From a public relations perspective, acknowledging this possibility suggests that the music industry indiscriminately tags all of its customers as criminals regardless of pirating activity,¹⁴⁸ further widening the already chasmal gap between the music industry and its consumers.¹⁴⁹ This perception is furthered because DRM technology unfairly prevents both legal and illegal copying.¹⁵⁰

Questionable business ethics standards are also implicated as a result of the use of DRM technology in the marketplace. As an example, one of the “side effects of Apple’s FairPlay software is that music purchased on iTunes plays only on Apple products--i.e., on iPods.”¹⁵¹ While Apple has begun to offer downloads that do not include its DRM technology¹⁵² (and is thereby starting to allow multiplatform music enjoyment), much of the damage has already been done; because “Apple wouldn’t license its version [of DRM technology] to rivals[,] . . . the best-selling iPod drove the iTunes store to its present position, where it is the third-largest music retailer in any form in the US.”¹⁵³ The result of this is that Apple’s “DRM [has] help[ed] perpetuate [their] quasi-monopoly in the portable digital-music-player market, which ironically has a slightly Microsoftesque air about it.”¹⁵⁴ The degree of control that Apple has gained through such crafty use of its DRM technology¹⁵⁵ creates an uneven balance of power in the market, where even the other players of the music industry dislike dealing with Apple due to its power in dictating the economics of their business relationships.¹⁵⁶

Considering the role that DRM technology has played in Apple’s ethically suspect rise to power in the digital music market, it is unclear whether increasing the use of DRM technology in the marketplace would be advantageous for either the music industry or the consuming public. Digital music distributors have been moving away from the prospect of using DRM technology for their digital downloads¹⁵⁷ and there are a growing number of services which are now actively marketing their music as being DRM-free, largely as a way to get a marketing edge over Apple’s iTunes.¹⁵⁸ Additionally, some critics of DRM technology argue that “DRM is a dinosaur that’s waiting for the asteroid to hit,”¹⁵⁹ which suggests that continued promotion of the technology would ultimately prove futile. When these factors are coupled with the fact that DRM creates interoperability difficulties¹⁶⁰ for consumers’ devices, it seems that choosing to advocate for the use and development of DRM technology would ultimately be a poor choice for the RIAA, both for its relationship with the rest of the music industry and for its general public image.

C. Voluntary Collective Licensing

A promising alternative available to the RIAA is the option of establishing a voluntary collective licensing system for the industry's customers, which could potentially ensure that musicians get paid while simultaneously legalizing file sharing.¹⁶¹ The idea behind a voluntary collective licensing system is relatively straightforward: "the music industry forms several 'collecting societies,' which then offer file-sharing music fans the opportunity to 'get legit' in exchange for a reasonable regular payment."¹⁶² As long as the file sharers continue to pay their dues,¹⁶³ they "will be free to download and share whatever they like, using whatever software works best for them,"¹⁶⁴ all without the threat of losing their internet or suffering a lawsuit.¹⁶⁵ To the benefit of the music industry, "[t]he money [that gets] collected [by the collecting societies] gets divided among rights-holders based on the popularity of their music"¹⁶⁶ and distributed accordingly. Under such a plan, "[t]he more people [that] share, the more money goes to rights-holders,"¹⁶⁷ and "[t]he more competition [there is] in applications, the more rapid the innovation and improvement"¹⁶⁸ of the system.

According to the Electronic Frontier Foundation ("EFF"), one of the leading advocates for the establishment of a voluntary collective licensing program,¹⁶⁹ the development of such a system is aligned with the future direction of the music industry and the broader music community. The EFF asserts that "file sharing is here to stay"¹⁷⁰ and that "new digital technologies are just going to make copying digital music easier and cheaper every year."¹⁷¹ If these assumptions are true, then continuing to fight against file sharers is going to be a perpetually uphill battle for the RIAA. The EFF further argues that file sharing music "fans will always do a better job making music available than the music industry."¹⁷² Asserting that "[t]he majority of the world's recorded music is 'out-of-print,'"¹⁷³ the EFF notes that "the fans are [nonetheless] making it available, every day, on P2P file sharing networks."¹⁷⁴ Considered from this perspective, it seems like file sharers, despite their currently illegal activity, are actually doing the music community a tremendous service and should be embraced for their efforts rather than shunned as rule breakers.¹⁷⁵ Finally, the EFF asserts that the future development of the music industry "should minimize government intervention in favor of market forces,"¹⁷⁶ arguing that "[m]arket-driven solutions are likely to work faster, and more efficiently, than top-down government regimes."¹⁷⁷ This perspective discourages heavy reliance on statutes like the DMCA and encourages natural development of the industry.

The use of a voluntary collective licensing system also has a successful history in the music and broadcasting industries, indicating a promising opportunity for its future implementation in the realm of file sharing. While "[s]ongwriters originally viewed radio . . . as [a form of] pira[cy],"¹⁷⁸ this perception was altered as "[b]roadcasters . . . [began to] use voluntary collective licensing almost exclusively to license music played on the radio, and in restaurants, clubs and other public places."¹⁷⁹ The adoption of voluntary collective licensing proved favorable to both sides; music artists received money through the licenses organized by performing-rights societies like ASCAP and BMI¹⁸⁰ while broadcasters could use copyrighted music without fear of being sued to the point of financial ruin.¹⁸¹

Theoretically, a similar system of voluntary collective licensing could work to resolve the problem of file sharing.¹⁸² File sharers, who are currently under perpetual threat of legal action by the RIAA,¹⁸³ would have "ample incentive to opt for a simple fee of a few dollars per month"¹⁸⁴ in lieu of risking the threat of litigation from the RIAA. The opportunities to purchase such a license could be as varied as market forces allow; file sharers could buy a license directly from the RIAA or another licensing organization, through their ISPs, or even through the P2P systems themselves.¹⁸⁵ Considering the undeniable popularity of file sharing, utilizing such "[l]egally operated file sharing services would create competition and other market forces that encourage investment in the newly legitimate business"¹⁸⁶ and could create new opportunities for investment and the development of new technologies.¹⁸⁷ Perhaps most importantly from the RIAA's perspective, considering "just the 60 million Americans who have been using file-sharing software, a few dollars a month [under such a license] would net over \$3 billion in new revenue annually to the music industry."¹⁸⁸

Of course, like any system, voluntary collective licensing is not a perfect solution to the concerns of the music industry and would face some significant hurdles to implementation. The RIAA, ever concerned with controlling the distribution of music across the Internet,¹⁸⁹ would need to sacrifice their ironfisted control over music distribution as a trade off for the opportunity to collect fair compensation.¹⁹⁰ There is also a concern that, because individual artists and rights holders would retain the choice of whether

or not to join a collecting society under this new system,¹⁹¹ those who would choose to “remain outside the system . . . may have no practical way to receive compensation for the file sharing that will inevitably continue.”¹⁹² Such a concern, however, would not be new to the industry; today, a similar problem exists because “a critical mass of major music copyright owners” are members of performance rights organizations such as ASCAP, BMI, and SESAC, which results in pressure for smaller copyright owners to also join such organizations.¹⁹³ This “strong incentive”¹⁹⁴ essentially coerces smaller copyright owners into joining these large organizations and is currently an issue without a clear solution.

Additionally, there is “the threat of antitrust issues with respect to the file sharing model, particularly in that [some] proposal[s for voluntary collective licensing] rel[y] on one single collecting organization to act as a clearinghouse for most, if not all, digital performance rights.”¹⁹⁵ This problem, however, might be sidestepped by considering the methods used by performance rights organizations like ASCAP and BMI, who have faced similar difficulties.¹⁹⁶ Through the use of consent decrees,¹⁹⁷ voluntary collective licensing organizations “will likely [be able to] provide the same workable solution to digital performance rights . . . as . . . existing performance rights organizations [have used] in avoiding and defending against antitrust allegations.”¹⁹⁸ Furthermore, if the United States music industry is able to overcome antitrust concerns and establish a successful, viable method of voluntary collective licensing, it is possible that other countries will be more receptive to creating similar systems,¹⁹⁹ potentially reversing the worldwide decrease in the revenues of the global music industry.²⁰⁰

While voluntary collective licensing does have a number of problems that require contemplation, its simplicity and potential for effectiveness are attractive enough that potential issues with such a system are well worth taking to time to address and resolve. Otherwise put, “voluntary collective licensing may simply be a superior choice . . . in a world where file sharing is inevitable.”²⁰¹

V. CONCLUSION

File sharing has had an undeniable impact on the functioning and strategic planning of the RIAA and more broadly on the global music community. The tactics that the RIAA has used to battle file sharing, however, have not only been highly unsuccessful, but also have managed to estrange the music industry from its customers. If the RIAA chooses to continue down its current warpath against file sharing, it will risk further social ostracism, an immeasurable number of legal problems, and, almost inevitably, the continued failure in their efforts to end file sharing.

Instead, by accepting the fact that file sharing is an inevitable part of the modern world and that “P2P file sharing is more popular [now] than ever,”²⁰² the RIAA and the rest of the global music industry can stop fighting an uphill battle against this new technology and can instead learn how to use it in a way that benefits both themselves and the general music community. By learning to utilize file sharing as a tool for distribution rather than stigmatizing it as a crime, the music industry can take steps towards repairing its public image and can begin to explore countless new possibilities for the future of music.

¹ Karl Taro Greenfeld, Chris Taylor & David E. Thigpen, *Meet the Napster*, Time, Oct. 2, 2000, available at: <http://www.time.com/time/magazine/article/0,9171,998068,00.html> (last accessed Nov. 23, 2010).

² See 2008 Analysis of Traffic Demographics in North-American Broadband Networks, available at: http://www.sandvine.com/downloads/documents/Traffic_Demographics_NA_Broadband_Networks.pdf (last accessed Nov. 23, 2010) (stating “[p]eer-to-peer file sharing traffic, despite some recent media reports, continues to increase in absolute terms.”).

³ See Genan Zilkha, *The RIAA’s Troubling Solution to File-Sharing*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 667, 669 (2010) (stating “[w]hile the RIAA has attempted to stop peer-to-peer file-sharing through litigation and reeducation plans, most of its efforts have not decreased file-sharing and instead have damaged its reputation.”) (internal citation omitted) [hereinafter *RIAA’s Troubling Solution*].

⁴ *Id.* at 685 (internal citation omitted).

⁵ *Id.*; see also Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, available at: <http://online.wsj.com/article/SB122966038836021137.html> (last accessed Dec. 11, 2010).

⁶ *Id.* (stating “[i]n 2003, the industry sold 656 million albums. In 2007, the number fell to 500 million CDs and digital albums, plus 844 million paid individual song downloads -- hardly enough to make up the decline in album sales.”).

⁷ See, e.g., Jon Newton, *Big Music Sues Schoolgirl, Mainstream Media Doesn't Care*, TechNewsWorld, Oct. 11, 2005, available at: <http://www.technewsworld.com/story/46626.html?wlc=1290308700> (last accessed Nov. 23, 2010) (writing that the RIAA “terrorize[d] a 14-year-old Michigan girl and her mother.”).

⁸ Zilkha, *RIAA's Troubling Solution*, *supra* note 3, at 669-70 (internal citations omitted).

⁹ *Id.* at 670.

¹⁰ *Id.* (internal citation omitted).

¹¹ *Id.* (citing RAYMOND T. NIMMER, LAW OF COMPUTER TECHNOLOGY §§ 15.5, 15.9 (2009)).

¹² *Id.* (internal citation omitted).

¹³ See *id.* (internal citation omitted).

¹⁴ Laura Sydell, *Napster: The File-Sharing Service That Started It All?*, NPR, Dec. 21, 2009, available at: <http://www.npr.org/templates/story/story.php?storyId=121690908> (last accessed Nov. 23, 2010).

¹⁵ Zilkha, *RIAA's Troubling Solution*, *supra* note 3, at 671.

¹⁶ Greenfeld et al., *Meet the Napster*, *supra* note 1.

¹⁷ See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001).

¹⁸ *Id.*

¹⁹ Greenfeld et al., *Meeting the Napster*, *supra* note 1.

²⁰ See *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 909-910 (N.D. Cal. 2000).

²¹ *Id.* at 913.

²² Zilkha, *RIAA's Troubling Solution*, *supra* note 3, at 672 (citing William Sloan Coats et al., *Blows Against the Empire: Napster, Aimster, Grokster & the War Against P2P File Sharing*, 765 PLI/Pat 445, 454 (2003)).

²³ *Id.* (citing *Napster*, 114 F. Supp. 2d at 902, 907).

²⁴ *Id.* (citing *Napster*, 114 F. Supp. 2d at 905).

²⁵ *Id.* at 673.

²⁶ See *id.* at 673-74.

²⁷ *Columbia Pictures Indus., Inc. v. Fung*, 2009 WL 6355911 at *3 (C.D. Cal. 2009).

²⁸ *Id.* (stating “[t]his process, whereby individuals maybe be uploading and/or downloading from many sources at any given time is known as a ‘swarm.’”).

²⁹ *Id.*

³⁰ Zilkha, *RIAA’s Troubling Solution*, *supra* note 3, at 674.

³¹ RIAA – “Who We Are,” *available at*: <http://www.riaa.com/aboutus.php> (last accessed Nov. 24, 2010).

³² *Id.*

³³ *See* Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys. Inc., 180 F.3d 1072 (9th Cir. 1999). The RIAA argued that “Internet distribution of serial digital copies of pirated copyrighted material will discourage the purchase of legitimate recordings, and predicts that losses to digital Internet piracy will soon surpass the \$300 million that is allegedly lost annually to other more traditional forms of piracy.” *Id.* at 1074.

³⁴ *See id.* at 1073, where the court described the Diamond Rio as “a small device . . . with headphones that allows a user to download MP3 audio files from a computer and to listen to them elsewhere” and praised the device as ushering in “the brave new world of Internet music distribution.”

³⁵ Zilkha, *RIAA’s Troubling Solution*, *supra* note 3, at 677.

³⁶ *See, e.g.*, A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (*aff’d in part, rev’d in part*, 239 F.3d 1004 (9th Cir. 2001)); *see also* MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 924 (2005) (where the RIAA filed an amicus brief in support of MGM’s stance that Morpheus (through its StreamCast program) and Grokster had “voiced the objective that recipients use [the services] to download copyrighted works[] and [actually] took active steps to encourage infringement”).

³⁷ *See Napster*, 114 F. Supp. 2d at 896.

³⁸ Many of the plaintiffs in the *Napster* case, such as A&M, are RIAA members. *See* RIAA – “Who We Are,” *available at*: http://www.riaa.com/aboutus.php?content_selector=aboutus_members (last accessed Dec. 8, 2010).

³⁹ *Napster*, 114 F. Supp. 2d at 900.

⁴⁰ *Id.* Some of the plaintiffs (the “record company plaintiffs”) also brought claims alleging “violations of the California Civil Code section 980(a)(2), and unfair competition.” *Id.*

⁴¹ Running through the fair use factors listed in § 107 of the Copyright Act, the court found that “the purpose and character of [Napster’s] use[s] militates against a finding of fair use.” *Id.* at 912. Though the defendant also asserted “several potential fair uses of the Napster service – including sampling, space-shifting, and the authorized distribution of new artists’ work,” the court did not find these alternatives persuasive and dismissed Napster’s arguments. *Id.* at 913.

⁴² Defeating the asserted defense of substantial non-infringing activity, the court found that “[t]he substantial or commercially significant use of the service was, and continues to be, the unauthorized downloading and uploading of popular music, most of which is copyrighted.” *Id.* at 912.

⁴³ The relevant Digital Millennium Copyright Act’s (“DMCA”) safe harbor provision “shelters an intermediary from liability if it was not aware of infringing activity happening on its server.” Zilkha, *RIAA’s Troubling Solution*, *supra* note 3, at 678.

⁴⁴ The court notes that “Napster . . . [argues] that subsection [17 U.S.C. §] 512(d) provides an applicable safe harbor. However, this subsection expressly excludes from protection any defendant who has ‘[a]ctual knowledge that the material or activity is infringing,’ § 512(d)(1)(A), or ‘is aware of facts or circumstances from which infringing activity is apparent.’ § 512(d)(1)(B).” *Napster*, 114 F. Supp. 2d at 919 n.24. Napster “failed to persuade [the] court that subsection 512(d) shelters contributory infringers.” *Id.*

⁴⁵ *Id.* at 927.

⁴⁶ See Zilkha, *RIAA’s Troubling Solution*, *supra* note 3, at 678.

⁴⁷ *Limits Put On Napster*, N.Y. Times, Mar. 7, 2001, at C1, available at: <http://www.nytimes.com/2001/03/07/business/limits-put-on-napster.html> (last accessed Dec. 8, 2010).

⁴⁸ Zilkha, *RIAA’s Troubling Solution*, *supra* note 3, at 679.

⁴⁹ *Id.* (quoting *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1027 (9th Cir. 2001) (“The preliminary injunction which we stayed is overbroad because it places on Napster the entire burden of ensuring that no “copying, downloading, uploading, transmitting, or distributing” of plaintiffs’ works occur on the system.”)).

⁵⁰ See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1027 (9th Cir. 2001).

⁵¹ *Id.*

⁵² See *A&M Records, Inc. v. Napster, Inc.*, 2001 WL 227083 (N.D. Cal. 2001).

⁵³ *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1099 (9th Cir. 2002).

⁵⁴ Zilkha, *RIAA’s Troubling Solution*, *supra* note 3, at 679.

⁵⁵ *Napster*, 284 F.3d at 1099.

⁵⁶ *Id.*

⁵⁷ Jim Hu, *Napster: Gimme Shelter in Title 11*, CNET.com, Jun. 3, 2002, available at: <http://news.cnet.com/2100-1023-930467.html> (last accessed Dec. 8, 2010) [hereinafter *Gimme Shelter in Title 11*].

⁵⁸ Zilkha, *RIAA’s Troubling Solution*, *supra* note 3, at 679.

⁵⁹ Hu, *Gimme Shelter in Title 11*, *supra* note 57.

⁶⁰ The efforts made by the RIAA and the music industry to shut down some of the major P2P systems were actually pretty successful. See Zilkha, *RIAA’s Troubling Solution*, *supra* note 3, at 680-81 (through litigious strategy and offered settlements, the RIAA managed to shut down not only Napster, but also Grokster, Morpheus, and Audiogalaxy).

⁶¹ In their 2009 Digital Music Report, the International Federation of the Phonographic Industry (“IFPI”) estimated that, after “[c]ollating separate studies in 16 countries over a three-year period, . . . more than 40 billion files were illegally file-shared in 2008.” *IFPI Digital Music Report 2009: Key Statistics*, available at: www.ifpi.org/content/library/DMR2009-key-statistics.pdf (last accessed Dec. 9, 2010).

⁶² Zilkha, *RIAA’s Troubling Solution*, *supra* note 3, at 680.

⁶³ Margo E. K. Reder, *P2P File-Sharing: What the Supreme Court Has An Opportunity to Consider*, 2005 B.C. INTELL. PROP. & TECH. F. 32901 (2005).

⁶⁴ See Zilkha, *RIAA's Troubling Solution*, *supra* note 3, at 681 (quoting David W. Opperbeck, *Peer-to-Peer Networks, Technological Evolution, and Intellectual Property Reverse Private Attorney General Litigation*, 20 BERKELEY TECH. L.J. 1685, 1714 (2005)).

⁶⁵ David W. Opperbeck, *Peer-to-Peer Networks, Technological Evolution, and Intellectual Property Reverse Private Attorney General Litigation*, 20 BERKELEY TECH. L.J. 1685, 1700-01 (2005).

⁶⁶ *Id.* at 1701.

⁶⁷ *Id.*

⁶⁸ RADIOHEAD, IN RAINBOWS (Warner/Chappell Music 2007).

⁶⁹ See David Malitz, *Radiohead's 'Rainbows': Is Free Release A Potential Pot of Gold?*, The Washington Post, Oct. 11, 2007, available at: <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/10/AR2007101002442.html> (last accessed Dec. 9, 2010).

⁷⁰ *Id.*

⁷¹ Sean Michaels, *Illegal Downloading Is Here To Stay*, The Guardian, Aug. 4, 2008, available at: <http://www.guardian.co.uk/music/2008/aug/04/illegal.downloading.is.here.to.stay> (last accessed Dec. 9, 2010).

⁷² *Id.*

⁷³ Will Page & Eric Garland, *In Rainbows, on Torrents*, Economic Insight, Issue 10, Jul. 29, 2008, available at: <http://www.prsformusic.com/creators/news/research/Documents/Economic%20Insight%2010.pdf> (last accessed Dec. 9, 2010).

⁷⁴ *Id.* at 4.

⁷⁵ See Michaels, *Illegal Downloading Is Here To Stay*, *supra* note 71 (Despite the high level of piracy, "CD versions were bestsellers and Radiohead tours continue[d] to sell out.").

⁷⁶ *Id.* (quoting Page & Garland, *In Rainbows, on Torrents*, *supra* note 73, at 3).

⁷⁷ See Zilkha, *RIAA's Troubling Solution*, *supra* note 3, at 681.

⁷⁸ RIAA, *Recording Industry Begins Suing P2P File Sharers Who Illegally Offer Copyrighted Music Online*, Sep. 8, 2003, available at: <http://www.riaa.org/newsitem.php?id=85183A9C-28F4-19CE-BDE6-F48E206CE8A1> (last accessed Dec. 9, 2010).

⁷⁹ *Id.*

⁸⁰ See generally *id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See Zilkha, *RIAA's Troubling Solution*, *supra* note 3, at 685 (citing Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, *supra* note 5).

⁸⁵ See, e.g., *12-Year-Old Sued for Music Downloading*, Fox News, Sept. 9, 2003, *available at*: <http://www.foxnews.com/story/0,2933,96797,00.html> (last accessed Dec. 10, 2010). Brianna LaHara, a twelve-year-old girl living with her mother and nine-year-old brother in New York City, was among the two hundred and sixty one file sharers targeted in the first wave of litigation by the RIAA.

⁸⁶ See, e.g., *Sony BMG Music Entm't v. Tenenbaum*, 672 F. Supp. 2d 217 (Mass. Dist. Ct. 2009) (laying out the facts of Tenenbaum's history of file sharing); see also Joel Fights Back, *About the Case*, *available at*: <http://joelfightsback.com/about-the-case/> (last accessed Dec. 10, 2010) (providing Tenenbaum's personal take on the case). Joel Tenenbaum, a Ph.D. student at Boston University, "was accused of using file-sharing software as a college sophomore [for] download[ing] and distribut[ing] 30 copyrighted songs belonging to the plaintiffs." *Tenenbaum*, 672 F. Supp. 2d at 219. The district court granted the plaintiffs a \$675,000 verdict against Tenenbaum. See *Sony BMG Music Entm't v. Tenenbaum*, 2009 WL 4723397 at *2 (D. Mass. 2009). This amount, however, was later reduced as a violation of the Due Process Clause. See *Sony BMG Music Entm't v. Tenenbaum*, 2010 WL 2705499 at *30 (D. Mass. 2010).

⁸⁷ See, e.g., *Capitol Records Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045 (Minn. Dist. Ct. 2010) (giving a synopsis of the facts and relevant trial history of Jammie Thomas-Rasset). At the first trial, "the jury found that Thomas-Rasset had willfully infringed all 24 of Plaintiffs' sound recordings at issue and awarded Plaintiffs statutory damages in the amount of \$9,250 for each willful infringement . . . [t]he total damages award [being] \$222,000." *Id.* Though this original amount was remitted, *Capital Records Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1228 (D. Minn. 2008), continued litigation against Thomas-Rasset by Capital Records has dramatically increased the damages against her. Most recently, the District Court of Minnesota awarded the plaintiffs \$1.5 million. *Capital Records v. Thomas-Rasset*, No. 06-CV-1497 (D. Minn. filed Nov. 3, 2010), *available at*: <http://www.scribd.com/doc/40927654/Jammie-Thomas-Rasset-Verdict> (last accessed Dec. 10, 2010). Thomas's case is also significant as the "nation's first file-sharing case to go before a jury." David Kravets, *RIAA Jury Finds Minnesota Woman Liable for Piracy, Awards \$222,000*, *Wired*, Oct. 4, 2007, *available at*: <http://www.wired.com/threatlevel/2007/10/riaa-jury-finds/> (last accessed Dec. 11, 2010).

⁸⁸ See, e.g., Andrew Orlowski, *RIAA Sues the Dead*, *The Register*, Feb. 5, 2005, *available at*: http://www.theregister.co.uk/2005/02/05/riaa_sues_the_dead/ (last accessed Dec. 10, 2010). Gertrude Walton, who died in December, 2004, was sued under allegations by record companies "that she made more than 700 songs available on the internet" for download. *Id.* Walton's daughter, Robin Chianumba, "sent a copy of her mother's death certificate to record company lawyers in response to an initial warning letter, over a week before the suit was filed," but this evidence did not deter the RIAA from filing the suit regardless. *Id.*

⁸⁹ See Zilkha, *RIAA's Troubling Solution*, *supra* note 3, at 681-82.

⁹⁰ The DMCA has proved to be an important piece of legislation for the music industry in its efforts to control file sharing. At its passing, the RIAA regarded the DMCA as a means to "discourage an electronic marketplace in stolen goods, and [to] encourage creative work to flourish online." RIAA, *House Passes Digital Millennium Copyright Act*, Aug. 4, 1998, *available at*: http://www.riaa.com/newsitem.php?news_year_filter=&resultpage=130&id=853C1D67-1FAD-6CB2-60F6-1853788AE4C3 (last accessed Dec. 10, 2010).

⁹¹ Zilkha, *RIAA's Troubling Solution*, *supra* note 3, at 682.

⁹² 17 U.S.C. § 512(k)(1)(A) (2006) (as used in subsection (a) of 17 U.S.C. § 512).

⁹³ 17 U.S.C. § 512(k)(1)(B) (2006) (as used in 17 U.S.C. § 512 except for subsection (a)).

⁹⁴ See, e.g., 17 U.S.C. §§ 512(a)-512(c) (2006), which provide various exceptions to liability.

⁹⁵ Zilkha, *RIAA's Troubling Solution*, *supra* note 3, at 683; see 17 U.S.C. §§ 512(a)-512(c) (2006) (where the statutory language indicates that those who fall within the listed exceptions are exempt from liability, while those who do not are liable as intermediaries and are liable for copyright infringement).

⁹⁶ 17 U.S.C. § 512(h)(1) (2006).

⁹⁷ 17 U.S.C. § 512(h)(5) (2006).

⁹⁸ 17 U.S.C. § 504(c)(1) (2006). The 1999 amendments to § 504(c)(1) (part of the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999) increased the damages range (previously \$500 to \$20,000 per infringed work) to its current rate of \$750 to \$30,000 per infringed work. See H.R. 3456, 106th Cong. (1st Sess. 1999).

⁹⁹ See McBride & Smith, *Music Industry to Abandon Mass Suits*, *supra* note 5.

¹⁰⁰ See, e.g., *Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003) (where “Verizon refused to comply with and instead ha[d] challenged the validity of the two § 512(h) subpoenas it ha[d] received” and where the court held that 17 U.S.C. § 512(h) only applied to ISPs that stored infringing data on their servers and not to those that acted only as intermediaries, *id.* at 1232.).

¹⁰¹ See McBride & Smith, *Music Industry to Abandon Mass Suits*, *supra* note 5.

¹⁰² *Id.* (stating “[a]fter years of suing thousands of people for allegedly stealing music via the Internet, the recording industry is set to drop its legal assault.” *Id.* This was a considerably “abrupt shift,” considering “the industry . . . [had] opened legal proceedings against about 35,000 people since 2003.” *Id.*).

¹⁰³ Eliot Van Buskirk, *RIAA to Stop Suing Music Fans, Cut Them Off Instead*, *Wired*, Dec. 19, 2008, available at: <http://www.wired.com/epicenter/2008/12/riaa-says-it-pl/> (last accessed Dec. 11, 2010).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ See Nate Anderson, *RIAA Graduated Response Plan: Q&A with Cary Sherman*, *Ars Technica*, Dec. 21, 2008, available at: <http://arstechnica.com/old/content/2008/12/riaa-graduated-response-plan-qa-with-cary-sherman.ars> (last accessed Dec. 10, 2010).

¹⁰⁷ See McBride & Smith, *Music Industry to Abandon Mass Suits*, *supra* note 5.

¹⁰⁸ Eric Garland, president of the piracy consulting company BigChampagne LLC, has noted that “[t]here isn't any silver-bullet anti-piracy solution.” *Id.* This perspective is similarly shared by John Malcolm, the Motion Picture Association of America's (“MPAA”) former Director of Worldwide Anti-Piracy Operations, who stated that “there is no one-size-fits-all solution.” David Kravets, *No ISP Filtering Under New RIAA Copyright Strategy*, *Wired*, Dec. 19, 2008, available at: <http://www.wired.com/threatlevel/2008/12/no-isp-filterin/> (last accessed Dec. 11, 2010).

¹⁰⁹ Not every possible option available to the RIAA is explored in this Note. One such alternative, which is not discussed in this Note, is the possibility of imposing a criminal sentence in severe cases of copyright infringement. A recent example of this can be seen in the controversy surrounding the file sharing website “The Pirate Bay.” See Eric Pfanner, *File-Sharing Site Violated Copyright, Court Says*, *N.Y. Times*, available at: <http://www.nytimes.com/2009/04/18/world/europe/18copy.html> (last accessed Dec. 16, 2010). Instead, this Note focuses on a selection of the more prevalent proposed alternatives and the ones which

will be most likely to both better the public image of the RIAA and move them towards achieving their objectives.

¹¹⁰ Zilkha, *RIAA's Troubling Solution*, *supra* note 3, at 689.

¹¹¹ McBride & Smith, *Music Industry to Abandon Mass Suits*, *supra* note 5.

¹¹² *See id.*

¹¹³ Kravets, *RIAA Jury Finds Minnesota Woman Liable for Piracy, Awards \$222,000*, *supra* note 87.

¹¹⁴ *Id.*

¹¹⁵ Buskirk, *RIAA to Stop Suing Music Fans, Cut Them Off Instead*, *supra* note 103.

¹¹⁶ *Id.*

¹¹⁷ 17 U.S.C. §512(j)(1)(A)(ii) (2006).

¹¹⁸ 17 U.S.C. §512(j)(1)(A) (2006).

¹¹⁹ 17 U.S.C. §512(j)(1)(A)(ii) (2000 OR 2006).

¹²⁰ Zilkha, *RIAA's Troubling Solution*, *supra* note 3, at 690.

¹²¹ Brad Stone, *The Inexact Science Behind D.M.C.A. Takedown Notices*, N.Y. Times, Jun. 5, 2008, available at: <http://bits.blogs.nytimes.com/2008/06/05/the-inexact-science-behind-dmca-takedown-notice/> (last accessed Dec. 11, 2010).

¹²² *Id.*

¹²³ Anne Broache, *RIAA: Don't Let Net Neutrality Hurt Piracy Fight*, CNET.com, May 6, 2008, available at: http://news.cnet.com/8301-10784_3-9937153-7.html (last accessed Dec. 11, 2010).

¹²⁴ *See* Kravets, *No ISP Filtering Under New RIAA Copyright Strategy*, *supra* note 108.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Derek Wallbank, *Franken: Net Neutrality the 'Most Important First Amendment Issue of Our Time,'* MinnPost, Aug. 5, 2010, available at: http://www.minnpost.com/derekwallbank/2010/08/05/20277/franken_net_neutrality_the_most_important_first_amendment_issue_of_our_time (last accessed Dec. 11, 2010).

¹²⁸ *Id.*

¹²⁹ *See* Zilkha, *RIAA's Troubling Solution*, *supra* note 3, at 698 (internal citations omitted).

¹³⁰ *See id.* at 699.

¹³¹ *Id.*

¹³² Steven Seidenberg, *The Record Business Blues*, ABA Journal, Jun. 1, 2010, available at: http://www.abajournal.com/magazine/article/the_record_business_blues/ (last accessed Dec. 11, 2010).

¹³³ *See id.* (countries involved in negotiating the ACTA include “[t]he United States[,] . . . the European Union, Japan, Canada, Switzerland, Australia, Jordan, Mexico, Morocco, New Zealand, South Korea, Singapore and the United Arab Emirates.”).

¹³⁴ *See id.* The ACTA is still in the process of being drafted.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Seidenberg, *The Record Business Blues*, *supra* note 132.

¹³⁹ *Id.*

¹⁴⁰ Lev Grossman, *The Battle Over Music Piracy*, *Time*, May 24, 2007, *available at*: <http://www.time.com/time/magazine/article/0,9171,1625209,00.html> (last accessed Dec. 12, 2010).

¹⁴¹ *See id.*

¹⁴² *See id.*

¹⁴³ *Id.*

¹⁴⁴ *See* Kate Holton, *U.S. Single Digital Music Sales Flat This Year: Nielsen*, *Reuters*, Sep. 27, 2010, *available at*: http://www.reuters.com/article/idUSTRE68Q2FM20100927?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed:+reuters/technologyNews+%28News+US+Technology%29 (last accessed Dec. 12, 2010).

¹⁴⁵ There are a number of programs available on the Internet (both for free and by purchase) which are capable of stripping a file of any DRM software embedded in it. *See, e.g.*, <http://undrm.info/remove-DRM-protection/> (a website offering a number of shareware programs capable of stripping programs of DRM protection) (last accessed Dec. 12, 2010); <http://www.wondershare.com/pro/media-converter.html> (purchasable software designed to “[r]emove DRM and convert DRM protected video/audio files for portable devices”) (last accessed Dec. 12, 2010).

¹⁴⁶ Tim Anderson, *How Apple Is Changing DRM*, *The Guardian*, May 15, 2008, at 1, *available at*: <http://www.guardian.co.uk/technology/2008/may/15/drm.apple> (last accessed Dec. 12, 2010) (quoting Bill Rosenplatt, DRM specialist and president of GiantSteps Media Technology Strategies).

¹⁴⁷ *Id.*

¹⁴⁸ *See* Grossman, *The Battle Over Music Piracy*, *supra* note 140.

¹⁴⁹ *But see id.* Grossman does acknowledge that “most of us really are criminals. Almost everybody owns a little stolen music.” *Id.* He goes on to argue that this is not necessarily a bad thing: “I ripped the audio of the Shins' Phantom Limb off a YouTube video. But on the strength of that minor copyright atrocity, I legally bought two complete Shins albums and shelled out for a Shins concert. The legit market feeds off the black market.” *Id.* The questionably symbiotic nature of the illegal and legal markets of the music industry is a fascinating subject for consideration, but one which can be better explored in another Note that focuses more exclusively on that topic.

¹⁵⁰ Riyadh Al Balushi, *The Problem With DRM*, MyITLawyer.com, Feb. 24, 2009, available at: <http://www.myitlawyer.com/2009/the-problem-with-drm/> (last accessed Dec. 12, 2010).

¹⁵¹ Grossman, *The Battle Over Music Piracy*, *supra* note 140.

¹⁵² See Anderson, *How Apple Is Changing DRM*, *supra* note 146.

¹⁵³ *Id.*

¹⁵⁴ Grossman, *The Battle Over Music Piracy*, *supra* note 140.

¹⁵⁵ Aside from its questionably immoral digital music market practices springing from its use of DRM technology, Apple is fairly notorious for business practices in other areas of the music market which come dangerously close to violating international antitrust law. See, e.g., *EU Drops Antitrust Case Against Apple's iTunes*, Google News, Jan. 9, 2008, available at: http://afp.google.com/article/ALeqM5gmnIrgq_NITt4LcgfYokGLeCzK_g (last accessed Dec. 12, 2010); Jim Dalrymple, *Apple May Face EU Antitrust Probe*, The Loop, Jul. 6, 2010, available at: <http://www.loopinsight.com/2010/07/06/apple-may-face-eu-antitrust-probe/> (last accessed Dec. 12, 2010).

¹⁵⁶ See Anderson, *How Apple Is Changing DRM*, *supra* note 146.

¹⁵⁷ See *id.*

¹⁵⁸ See *id.* (stating “Amazon has announced that its DRM-free MP3 download store, already online in the US, will be rolled out internationally later this year.”).

¹⁵⁹ Grossman, *The Battle Over Music Piracy*, *supra* note 140.

¹⁶⁰ See Anderson, *How Apple Is Changing DRM*, *supra* note 146. Interoperability is defined as “the ability of systems, units, or forces to provide services to and accept services from other systems, units, or forces and to use the services so exchanged to enable them to operate effectively together.” The Free Dictionary, available at: <http://www.thefreedictionary.com/interoperability> (last accessed Dec. 12, 2010).

¹⁶¹ See *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing*, Electronic Frontier Foundation, Apr. 2008, available at: <http://www.eff.org/wp/better-way-forward-voluntary-collective-licensing-music-file-sharing> (last accessed Dec. 12, 2010).

¹⁶² *Id.*

¹⁶³ The Electronic Frontier Foundation (“EFF”) suggests that users pay somewhere in the range of \$5 to \$10 per month under the reasoning that “services like Rhapsody sell all-you-can-eat music for around \$10 per month, so . . . the rate should be below that.” *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ See *id.*

¹⁶⁶ *Id.*

¹⁶⁷ *A Better Way Forward*, *supra* note 161.

¹⁶⁸ *Id.*

¹⁶⁹ For the ideological background of the EFF, see About EFF, available at: <http://www.eff.org/about> (last accessed Dec. 13, 2010).

¹⁷⁰ *A Better Way Forward*, *supra* note 161.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ “If we want to build a Library of Alexandria for our global musical heritage, it's the file sharing fans that will build it for us.” *Id.*

¹⁷⁶ *A Better Way Forward*, *supra* note 161.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Meghan Dougherty, *Voluntary Collective Licensing: The Solution to the Music Industry's File Sharing Crisis?*, 13 J. INTELL. PROP. L. 405, 409 (2006) [hereinafter *Voluntary Collective Licensing*].

¹⁸⁰ *See A Better Way Forward*, *supra* note 163. For a more comprehensive discussion and analysis of the various performing rights societies (also called performance rights organizations), *see generally* Dougherty, *Voluntary Collective Licensing*, *supra* note 179.

¹⁸¹ *See A Better Way Forward*, *supra* note 161.

¹⁸² This is not to say that a system that utilizes voluntary collective licensing would be entirely free from lawsuits, but they arguably would be much less likely or necessary. *See* Fred von Lohmann, *Is Suing Your Customers A Good Idea?*, Boycott-RIAA.com, Sept. 29, 2004, *available at*: <http://www.boycott-riaa.com/article/14369> (last accessed Dec. 13, 2010) (stating “[s]ome lawsuits would still be necessary, the same way that spot checks on the subway are necessary in cities that rely on an ‘honor system’ for mass transit.”).

¹⁸³ Previously by lawsuit, currently by threat of having their Internet revoked by their ISP. *See supra* Sections II and III of this Note.

¹⁸⁴ *A Better Way Forward*, *supra* note 161.

¹⁸⁵ *Id.*

¹⁸⁶ Dougherty, *Voluntary Collective Licensing*, *supra* note 179, at 426.

¹⁸⁷ *See id.* at 427.

¹⁸⁸ *A Better Way Forward*, *supra* note 161.

¹⁸⁹ *See supra* Sections II and III.

¹⁹⁰ *See* Lohmann, *Is Suing Your Customers A Good Idea?*, *supra* note 182.

¹⁹¹ *A Better Way Forward*, *supra* note 161.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Dougherty, *Voluntary Collective Licensing*, *supra* note 179, at 427.

¹⁹⁶ *See id.* (stating “[s]ince ASCAP was formed almost a century ago, performing rights organizations have been fending off allegations of antitrust violations.”).

¹⁹⁷ Consent decrees are “contracts between the copyright holder and the [licensing] organization . . . in which a court authorizes the arrangement, provided the license is nonexclusive. In exchange, the organization pays royalties: half to the publishers as a group, and half to the songwriters.” *Id.* at 412-13.

¹⁹⁸ *Id.* at 428.

¹⁹⁹ *A Better Way Forward*, *supra* note 161.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*