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PEER-TO-PEER FILE SHARING AND COPYRIGHT INFRINGEMENT: DANGER AHEAD FOR INDIVIDUALS SHARING FILES ON THE INTERNET

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I. INTRODUCTION

One definition of the Internet is "a global information system that allows communications and services to public and private users."[1] A clearer definition of the Internet, given in *Reno v. ACLU*,[2] is "an international network of interconnected computers that enables millions of people to communicate with one another in 'cyberspace' and to access vast amounts of information from around the world."[3] It is estimated that by the end of 2003, 633 million people worldwide will have access to the Internet.[4] In other words, roughly ten percent of the entire population of the world will have access to the Internet.[5] In the United States, recent figures suggest slightly less than sixty percent of the population has access to the Internet;[6] the United States alone accounts for approxi-

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1. *See* Federal Networking Council, *definition of Internet*, *at* http://www.itrd.gov/fnc/Internet_res.html (last modified Oct. 30, 1995).

2. Reno v. ACLU, 521 U.S. 844 (1997).

3. *Id.* at 844.

4. *Tech Shares Bubble Raises Its Ugly Head*, LA VIE FINANCIERE, July 11, 2003, at 26.

5. As of May 10, 2004, the U.S. Census Bureau estimated the world population to be 6,367,482,410. *See* U.S. Census Bureau POPClock Projection, *at* http://www.census.gov/main/www/popclock.html (last revised Mar. 30, 2004). This particular source provides real time updates of world population growth, so 6,367,482,410is a somewhat conservative estimate.

6. *See* NUA Internet Surveys, *How Many Online? – U.S. and Canada*, *at* http://www.nua.com/surveys/how_many_online/n_america.html (last visited Feb. 17, 2004).

mately twenty-eight percent of the worldwide Internet usage.[7]

One Internet activity that has become popular over the last few years is file sharing, specifically peer-to-peer (P2P) file sharing.[8] P2P file sharing's popularity is such that the overall Internet bandwidth used by users sharing files dwarfs the bandwidth used by regular Internet users. File sharing is, as its name implies, the practice of sharing files between users connected to the Internet.[9] The vast majority of files shared on these file-sharing networks are unlicensed copyrighted works.[10] Currently, the file-sharing networks allow the sharing of not only music files, but any type of file, including video, images, and software.[11]

P2P file sharing consumes as much as seventy percent of overall Internet bandwidth.[12] Although the number of Internet users that have engaged in P2P file sharing is difficult to estimate,[13] bandwidth numbers provide a metric to estimate the popularity of file sharing, and suggest that file sharing is quite popular.[14] One study indicates that as many as eighty-one percent of computer users in the eighteen to twenty-four age group have downloaded and stored music files on their

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7. As of April 2002, 165,750,000 people in the United States had access to the Internet. *See id.*

8. For an example of the size and breadth of the file-sharing community, see Slyck, a web site devoted to news, information, and statistics related to Internet file sharing, *at* http://www.slyck.com/index.php (last visited Feb. 17, 2004) [hereinafter Slyck]; *see also* Zeropaid.com, a file-sharing portal, *at* http://www.zeropaid.com/ (last visited Feb. 17, 2004).

9. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011 (9th Cir. 2000) (requiring users to establish "peer to peer" connections on the Internet for the file sharing at issue).

10. *See id.* (noting that the plaintiffs labeled the file-sharing network of Napster, Inc., a "vicious copyright infringer").

11. John Markoff, *Five Giants in Technology Unite to Deter File Sharing*, N.Y. TIMES, Jan. 5, 2004, at C1.

12. *See* p2pnet.net, *Getting a Handle on P2P*, *at* http://p2pnet.net/story/475 (last visited Feb. 16, 2004).

13. When Napster was at its peak, one study found that there were more than one million different users connected to Napster over an eight-day period. Siu Man Lui & Sai Ho Kwok, *Interoperability of Peer-to-Peer File Sharing Protocols*, 3 ACM SIGECOM EXCHANGES 25 (Aug. 2002). Further, for the month of October, 2003, Nielsen//NetRatings reported: "During that period, 9.35 million Europeans used the Kazaa application or visited its Web site from home, representing some 9.6% of the European home audience. This is compared with 8.24 million at-home users in the U.S., or 6.5% of the U.S. home audience." Lars Brandle & Emmanuel Legrand, *IFPI: We'll Use Legal Action to Fight P2P*, BILLBOARD, Dec. 27, 2003, at 9.

14. Brandle & Legrand, *supra* note 13.

computers.[15]

Although the popularity of file sharing continues to grow,[16] many users apparently lack an understanding of the legal issues, especially copyright infringement issues, and the legal ramifications of sharing files on a P2P network.[17] Many users, however, do recognize the legal ramifications of file sharing, but choose to ignore them.[18] File sharing has become a rallying cry for rebellion against the greed of corporate entertainment.[19] File sharers commonly believe that the industry has overcharged consumers, and that file sharing is simply a backlash against corporate greed.[20] Consumer lawsuits lend some support to that belief. The recent settlement of *Trowbridge v. Sony Music Entertainment*,[21] a class action between compact disc (CD) buyers and the recording industry,

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15. *See* Robyn Greenspan, *Music Fans Rip More, Spend More*, *at* http://cyberatlas.internet.com/big_picture/applications/article.php/1025351 (Apr. 30, 2002).

16. *See* Slyck, *P2P Shows Its Strength*, *at* http://www.slyck.com/news/200210oct/110502a.html (Nov. 5, 2002).

17. "P2P file sharing is like a library where everyone brings their books as they arrive. People come in and search through the card catalog for a book they want. If somebody at the library has the book, then you can copy it." *See* Brad King & Greg Melton, *P2P File Sharing*, *at* http://www.techtv.com/callforhelp/howto/story/0,24330,3302011,00.html (May 14, 2002). This recommendation represents the advice given on sites that discuss P2P and file sharing. However, the library analogy would violate a copyright owner's exclusive rights. *See* 17 U.S.C. § 106(1) (2003) (outlining copyright protections).

18. *See generally* The Electronic Frontier Foundation Website (last visited Feb. 17, 2004), *at* http://www.eff.org/about/; *see also* Taxster, *Is File Sharing Legal?*, *at* http://taxster.fateback.com/isitlegal.htm (last visited Feb. 17, 2004) [hereinafter Taxster].

19. There are many examples of file sharing as a defense against the tyranny of corporate entertainment. *See, e.g.*, Dave Marsh, *The Politics of File Sharing: Clay Pigeons*, *at* http://www.counterpunch.org/marsh1017.html (Oct. 17, 2002); *see also* Paul Boutin, *She Wants P2P for the People*, *at* http://www.wired.com/news/politics/0,1283,54693,00.html (Aug. 23, 2002). For ongoing discussions on file sharing and its relationship to corporate entertainment, see generally http://www.slashdot.org (last visited Feb. 17, 2004).

20. An extreme example of this sentiment is the belief by some that the murder of Gene Kan, the creator of the Gnutella file-sharing network, was perpetrated by assassins hired by the Recording Industry Association of America. *See* Scott McCollum, *Gnutella Pioneer Dead at Age 25. Suicide or Corporate Assassination?*, *at* http://www.worldtechtribune.com/worldtechtribune/asparticles/buzz/bz071020002.asp (July 10, 2002).

21. *See In re* Compact Disc Minimum Advertised Price Antitrust Litigation Settlement (Oct. 25, 2002) (No. 1361), *at* http://musiccdsettlement.com/english/notice.htm.

calls for a refund of as much as twenty dollars for each person who purchased CDs (or cassettes or record albums) between 1995 and 2001.[22] Others believe that file sharing is the first step towards a new paradigm in fair use and copyright protection.[23] Stanford University law professor Lawrence Lessig has argued for an expansion of the fair use exemption for the Internet.[24] Many users would like nothing more than to see the entertainment industry in a position where it is forced to support file sharing.[25] The majority of users of P2P file sharing, however, are not rebels—they simply want something for nothing.[26] Regardless of the motives P2P users have for engaging in file sharing, be it "getting back" at alleged wrongs committed upon them by the entertainment industry or trying to forge a brave new world of freedom from copyright restrictions,[27] the practice of sharing files must be scrutinized in light of the current legal landscape.[28]

Part II of this comment discusses the background of the problem, including an overview of P2P technologies and a discussion of copyright law as it relates to file sharing. Part III introduces the problems faced by individuals sharing files on P2P networks, and part IV analyzes the problems in light of

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22. *See id.*; *see also* The Information Web Site for the In re Compact Disc Minimum Advertised Price Antitrust Litigation Settlement, *at* http://musiccdsettlement.com/english/default.htm (last visited Jan. 23, 2003).

23. *See* Dan Thu Thi Phan, *Will Fair Use Function on the Internet?*, 98 COLUM. L. REV. 169, 170-71 (1998).

24. *See generally* LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD (2001). Another noted author, Siva Vaidhyanathan, Assistant Professor of Information Studies at the University of Wisconsin, Madison, has also written a book with similar themes; chapter five deals specifically with the digital movement and the end of copyright. *See generally* SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY (2001). For reviews of both books, see Sonia K. Katyal, *Ending the Revolution*, 80 TEX. L. REV. 1465 (2002) (book review).

25. *See generally* Kimberly Kerry, *Music on the Internet: Is Technology Moving Faster Than Copyright Law?*, 42 SANTA CLARA L. REV. 967 (2002).

26. "[I]n a Greenfield Online survey of 5,200 online music shoppers, nearly 70 per cent say that they have not paid—and will not pay—for digital music downloads." Jon Katz, *The Truth About File Sharing*, *at* http://slashdot.org/features/00/12/28/1653257.shtml (Jan. 2, 2001).

27. "In some quarters of the public you hear cries of infringement and piracy. While in others, you hear complaints of excessive control and monopoly." Howard C. Anawalt, *Nine Guidelines and a Reflection on Internet Copyright Practice*, 22 U. DAYTON L. REV. 393, 394 (1997).

28. However, even some of the most ardent file-sharing proponents realize the lawlessness of their activities. *See* Taxster, *supra* note 18.

the current legal climate. Part V introduces a proposal to use existing case law to extend a fair use defense to individuals sharing files in a limited number of specific situations. Finally, Part VI summarizes the problems, analyses, and proposals, and concludes this comment.

II. BACKGROUND

A. Peer-to-Peer File Sharing

In order to understand the current state of liability for individuals using file-sharing P2P networks, it is necessary to have some understanding of how P2P networks work. In its simplest form, P2P is a technology that allows a computer connected to a network to both initiate communication and respond directly to queries from other computers connected to the same network, without having to go through an intermediate server.[29] A common application for a P2P network is file sharing. In a P2P network, a computer connected to the network can query the other computers on the network for a particular file and once the file is located, request a copy of the file directly from that computer.[30] In addition, the computer can respond to queries from other computers, and if the file requested exists on the queried computer, that computer can send a copy of the file directly to the querying computer.[31] In contrast, a non-P2P network generally uses a client-server communications architecture, in which a computer connected to the network sends queries to a server and can only communicate with other computers connected to the network via the server.[32]

In standard client-server network architecture, access to particular types of data—such as copyrighted materials—can be limited to protect the rights of the copyright holders.[33] For example, copyrighted material on the server could be segre-

29. Lui & Kwok, *supra* note 13.

30. *See id.*

31. *See id.*

32. *See id.*

33. For a general overview of network security and methods of limiting access to data on a network, see Carnegie-Mellon Software Engineering Institute CERT Coordination Center web site, *at* http://www.cert.org/security-improvement/modules/m07.html (last updated Aug. 6, 1999) [hereinafter Carnegie-Mellon].

gated from "free" material, and only persons with valid authorization would be allowed to download the copyrighted material.[34] In addition, since there is no way for individual client computers to communicate with one another directly, any unauthorized transfer of copyrighted material can be monitored or filtered at the server.[35] In a P2P network, however, the ability to control access to copyrighted material is limited.[36] The software itself can be designed to filter transfers, but this configuration requires each computer attached to the P2P network to perform checks on material being shared against a database of enumerated "banned" files.[37] If the file-sharing activity is high, the computers have to check many files, thereby slowing the system dramatically. Furthermore, this type of system is only effective if the enumerated lists of files are accurate and up-to-date.[38]

The Internet itself is a type of global client-server network;[39] software enables computers to communicate in a P2P

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> An individual who downloads material takes possession or accepts delivery of the visual image; he has therefore certainly received it. In fact, guides to computer terminology often analogize downloading to receiving information and uploading to transmitting or sending. "To transmit a file from one computer to another. When conducting the session, down-load means receive, upload means transmit."

United States v. Mohrbacher, 182 F.3d 1041, 1048 (9th Cir. 1999) (citing ALAN FREEDMAN, COMPUTER WORDS YOU GOTTA KNOW! ESSENTIAL DEFINITIONS FOR SURVIVAL IN A HIGH-TECH WORLD 49 (1993)).

35. *See* Carnegie-Mellon, *supra* note 33.

36. Pointera developed a methodology to filter out copyrighted works, and attempted to build a user base based on file sharing of legal works (public domain and licensed works). Unfortunately, Pointera did not last long in the marketplace. For information on Pointera, see Carolyn Duffy Marsan, *Napster Rival Offers Copyright Protection, available at* http://www.cnn.com/2000/TECH/computing/06/08/pointera.idg/ (June 8, 2000).

37. Bloomberg News and Wire Services, *Napster Visits Drop After Filtering Starts*, SUN-SENTINEL (Fort Lauderdale, Fla.), Apr. 15, 2001, at 3F.

38. There are many ways to filter out copyrighted material from non-copyrighted material, including pattern recognition and "digital fingerprints." However, Napster chose to use an enumerated list of materials that, if shared over Napster, would constitute copyright infringement, requiring the Recording Industry Association of America ("RIAA") to hand over lists of songs that are covered by copyright. The RIAA in return asked Napster to monitor the Billboard Top 100 and 200 lists and automatically add songs in those lists to the database of restricted songs. *See* Maria Godoy, *Napster Vows to Block Access to Songs, at* http://www.techtv.com/news/politicsandlaw/story/0,24195,3314904,00.html (Mar. 2, 2001).

39. *See* Stefan Saroiu et al., *An Analysis of Internet Content Delivery Sys-*

fashion via the Internet.[40] Any two users connected to the Internet who are running the same P2P software can communicate directly with each other as if they were on a separate P2P network.[41] P2P communication over the Internet first became popular with the rise of companies offering free P2P networking over the web. The most notable of these companies was Napster;[42] Napster offered its users free software to share their files easily with other Napster users via Napster's own P2P network.[43]

Napster used a specific type of P2P architecture known as a centralized framework.[44] In a centralized framework, requests for files go through a central server, while actual file transfers are conducted between individual peers.[45] This centralized server architecture made Napster susceptible to charges of contributory copyright infringement.[46] Newer P2P software, the most popular of which is currently KaZaa,[47] uses a different architecture known as a hybrid framework or a controlled decentralized framework.[48] A controlled decentral-

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tems, PROCEEDINGS OF THE 5TH SYMPOSIUM ON OPERATING SYSTEMS DESIGN AND IMPLEMENTATION (OSDI), § 2.1 (Dec. 2002), *available at* http://www.cs.washington.edu/research/networking/websys/pubs/osdi_2002/osdi.html.

40. *See* Definition of Peer-to-Peer, *at* http://searchnetworking.techtarget.com/sDefinition/0,,sid7_gci212769,00.html (last visited Nov. 11, 2003).

41. KaZaa, WinMX, eDonkey2K, and Morpheus are all examples of P2P software packages.

42. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011 (9th Cir. 2000).

43. *See* What Is P2P, Really?, *at* http://compnetworking.about.com/library/weekly/aa093000a.htm (last visited Feb. 17, 2004).

44. *See* Lui & Kwok, *supra* note 13.

45. *See id.*

46. *See Napster*, 239 F.3d at 1019.

47. KaZaa is just one of many P2P software packages available. A fairly complete list of P2P software available for download can be found at afternapster, *at* http://www.afternapster.com/ (last visited Feb. 17, 2004). KaZaa, along with Gnutella, another P2P software package may account for as much as 40% to 60% of all Internet traffic. *See* Nick Farrell, *KaZaa and Gnutella Hog the Internet*, *at* http://www.vnunet.com/News/1134977 (Dec. 9, 2002).

48. *See* Jie Lu & Jamie Callan, *Content-Based Retrieval in Hybrid Peer-to-Peer Networks*, PROCEEDINGS OF THE TWELFTH INTERNATIONAL CONFERENCE ON INFORMATION AND KNOWLEDGE MANAGEMENT 199-206 (2003), *at* http://portal.acm.org/citation.cfm?id=956903&dl=ACM&coll=GUIDE (last visited May 10, 2004). In a hybrid or controlled decentralized framework, a computer with high performance and bandwidth may be selected to be a "supernode" that contains information on what files are available for sharing on a

ized framework relies on supernodes to make the server work. Unlike the static servers in the Napster scheme, the supernodes move from computer to computer as users connect and disconnect, which makes it difficult or impossible to use an approach as in *A&M Records v. Napster*[49] to stop the infringement.[50]

The Recording Industry Association of America ("RIAA")[51] is an industry consortium of record labels and other members of the recording arts industry. The RIAA has launched a lawsuit against KaZaa,[52] but the decentralized nature of the KaZaa P2P network,[53] combined with the fact that, like many of the companies developing P2P software, KaZaa is based outside of the United States,[54] may make winning a lawsuit more difficult than in *Napster*.[55]

A recent court ruling provides some insight into the issues involved in using a *Napster* approach against the decentralized P2P networks. In *Metro-Goldwyn-Mayer Studios,*

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number of connected computers. When a computer wants a file, it queries a supernode, and that supernode queries other supernodes for a file's location. Once the location is known, the supernode relays that information back to the querying computer, and then that computer sets up a P2P transfer with the computer that has the file.

49. *See Napster*, 239 F.3d at 1004.

50. Another network that employs a decentralized framework, Freenet, is a P2P network that is attempting to make itself "immune to physical and legal attack." *See* Ryan Roemer, *The Digital Evolution: Freenet and the Future of Copyright on the Internet*, UCLA J. L. & TECH. 5 (2002).

51. Information on the Recording Industry Association of America can be found on the RIAA web site, *at* http://www.riaa.org (last visited Feb. 17, 2004).

52. *See KaZaa File-Swapping Lawsuit Gets OK*, *at* http://www.cnn.com/2003/TECH/internet/01/13/music.trial.ap/index.html (Jan. 13, 2003) [hereinafter *Kazaa Lawsuit*].

53. "Although companies like Scour.com . . . has laid off most of its staff due to legal threats . . . there are other similar, decentralized and anonymous services like Gnutella and Freenet that will be harder for the RIAA to sue." Sarah H. McWane, Comment, *Hollywood vs. Silicon Valley: DeCSS Down, Napster to Go?*, 9 COMMLAW CONSPECTUS 87, 107 (2001).

54. KaZaa is an Australian company incorporated in the South Pacific nation of Vanuatu. *See KaZaa Lawsuit*, *supra* note 52.

55. Additionally, KaZaa and most of the other post-Napster P2P networks, unlike Napster, allow the sharing of any file type. Napster was limited to MP3 (music) files; with KaZaa, users can share music, movies, pictures, and software, which opens KaZaa and the other newer file-sharing networks to causes of action from not only the recording industry, but also the movie and software industries. The Harry Potter movie, *Harry Potter and the Sorcerer's Stone*, was available to download via KaZaa before it appeared in U.S. theaters. *See* Joanna Glasner, *Harry Potter in Theaters, Online*, *at* http://www.wired.com/news/holidays/0,1882,56400,00.html (Nov. 15, 2002).

Inc. v. Grokster, Ltd. (*MGM*),[56] the District Court for the Central District of California granted summary judgment to the defendants and denied the plaintiffs' request for a preliminary injunction.[57] In *MGM*, the plaintiffs, a group of motion picture corporations and the RIAA, filed suit against Grokster and StreamCast (Morpheus), two U.S.-based developers of P2P software, for copyright infringement as in *Napster*. The court held that "neither Grokster nor StreamCast provides the 'site and facilities' for direct infringement."[58] The limits on the legal liability of the decentralized P2P providers should become clearer as courts hand down decisions that define the scope of contributory copyright infringement in this new technology space.

B. Copyright Law and Copyright Infringement on the Internet

Federal copyright law is codified in Title 17 of the United States Code.[59] The substantive law and federal judicial decisions are designed to protect the exclusive rights copyright owners have in their works and to provide remedies when the rights are infringed.[60] These exclusive rights are enumerated in section 106 of the Copyright Act of 1976 (Copyright Act),[61] and the limitations on these exclusive rights are covered in the sections following 106.[62]

Because file sharing is tied so closely with copyright infringement, this section will briefly review a few key topics in

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56. Metro-Goldwyn Mayer Studios, Inc. v. Grokster Ltd., 259 F. Supp. 2d 1029 (C.D. Cal. 2003).

57. *Id.* at 1031.

58. *Id.* at 1041.

59. Copyright Act of 1976, 17 U.S.C. §§ 101-810 (2003).

60. *See id.*

61. The exclusive rights enumerated in § 106 are the exclusive right
(1) to reproduce the copyrighted work in copies or phonorecords (the reproduction right);
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work (the distribution right);
(4) to perform the copyrighted work publicly;
(5) to display the work publicly; and
(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.
17 U.S.C. § 106.

62. *Id.* §§ 108-22.

copyright law.[63]

1. Direct Infringement

Direct copyright infringement is covered in section 501 of the Copyright Act.[64] A person directly infringes when, by his own actions, he violates one of the exclusive rights enumerated in section 106 of the Copyright Act.[65] A prima facie case of direct infringement requires a showing of ownership of the allegedly infringed material, and "a demonstrated violation of at least one exclusive right granted to copyright holders under 17 U.S.C. § 106."[66]

2. Contributory and Vicarious Infringement

In contrast to direct infringement, contributory and vicarious copyright infringements are third-party violations of the exclusive rights enumerated in section 106 of the Copyright Act.[67] For contributory infringement to exist, the party accused of infringement must have had constructive notice of direct infringement activity by another, and induced, caused, or materially contributed to its occurrence.[68] On the other hand, vicarious infringement requires that the party actually supervised or exercised control over the direct infringer or infringement activity, and that the party had a direct financial interest in the infringing activity.[69]

In cases where there are a large number of direct infringers but only a small number of vicarious or contributory infringers, going after the smaller group of vicarious and contributory infringers is a sensible strategy. The direct infringers are often individuals without significant resources

63. For an analysis of general copyright law following the *Napster* case, see generally Anna Claveria Brannan, *Fair Use Doctrine and the Digital Millenium Copyright Act: Does Fair Use Exist on the Internet Under the DMCA?*, 42 SANTA CLARA L. REV. 247 (2001).

64. Section 501 provides: "Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 12[2], or of the author as provided in section 106A(a) . . . is an infringer of the copyright or the right of the author, as the case may be." 17 U.S.C. § 501(a).

65. *Id.* § 106.

66. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2000).

67. 17 U.S.C. § 106.

68. *See* Wendy M. Pollack, *Tuning In: The Future of Copyright Protection for Online Music in the Digital Millennium*, 68 FORDHAM L. REV. 2445, 2456 (2000).

69. *See id.* at 2457.

to compensate the copyright holders for their damages, whereas the contributory and vicarious infringers, such as Napster, are often corporations with significant income and assets.[70]

3. Statutory Fair Use

Section 107 of the Copyright Act presents the fair use exemptions to the exclusive rights granted by the Copyright Act.[71] The Copyright Act defines four factors that must be considered to determine whether a specific unauthorized use of a copyrighted work constitutes a fair use of that work.[72] The factors are

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[73]

In determining if a particular use falls under the § 107 fair use exemption, a court considers and balances all four of the factors.[74] Each factor is to be considered and balanced separately from the other three in favor of either the plaintiff or the defendant. The last factor, the effect upon the potential market for or value of the work,[75] is "undoubtedly the single most important element of fair use."[76]

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70. *See* Joseph A. Sifferd, *The Peer-to-Peer Revolution: A Post-Napster Analysis of the Rapidly Developing File-Sharing Technology*, 4 VAND. J. ENT. L. & PRAC. 92, 94-95 (2002).

71. 17 U.S.C. § 107.

72. *Id.*; *see also* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 (2003) (providing a detailed description of the four factors).

73. 17 U.S.C. § 107.

74. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994) ("Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.").

75. *See* Anawalt, *supra* note 27, at 398 ("As a practical matter, copyright law in the United States primarily vindicates commercial value . . . .").

76. *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985).

4. Audio Home Recording Act

In 1992, Congress enacted the Audio Home Recording Act ("AHRA") to specifically address copyright issues surrounding the introduction of the digital audio tape ("DAT") player.[77] Although the AHRA was added to Title 17 in a new Chapter 10,[78] violations of the AHRA do not give rise to actions for copyright infringement, but instead use a separate set of enforcement mechanisms.[79] Section 1008 provides that "[n]o action may be brought . . . based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog music recordings."[80] *Vault Corp. v. Quaid Software, Ltd.*[81] held that, under the AHRA, archival copies of computer programs for personal use (in the case of a system failure that would require restoring the software to the computer) would be lawful.[82] More generally, in *Recording Industry Association of America v. Diamond Multimedia Systems*,[83] the court held that copying music for personal, noncommercial use was consistent with the AHRA's main purpose of facilitating personal use.[84]

C. Current Events

In response to the difficulty in bringing *Napster* causes of action against KaZaa and other P2P networks,[85] the RIAA has begun turning its enforcement actions towards the users of the file-sharing software—those who share music and those who download music.[86] In *RIAA v. Verizon*,[87] the circuit court

77. *See* Sifferd, *supra* note 70, at 96.

78. *See* 17 U.S.C. §§ 1001–1010 (1978) (amended 1992).

79. *See id.*

80. 17 U.S.C. § 1008.

81. Vault Corp. v. Quaid Software, Ltd., 847 F.2d 255 (5th Cir. 1988).

82. *See id.* at 267 ("Congress imposed no restriction upon the purpose or reason of the owner in making the archival copy; only the use made of that copy is restricted.").

83. Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., 180 F.3d 1072 (9th Cir. 1999).

84. *Id.* at 1079.

85. *See, e.g.*, Metro-Goldwyn Mayer Studios, Inc. v. Grokster, Ltd., 259 F. Supp. 2d 1029 (C.D. Cal. 2003); *see also* McWane, *supra* note 53.

86. In addition, the RIAA is also seeking royalties from Internet Service Providers ("ISPs"), claiming that the ISPs need to be held responsible for their role in allowing file sharing. *See* CNET News.com, *RIAA: ISPs Should Pay for Music Swapping* (Jan. 18, 2003), *at* http://news.com.com/2100-1023-981281.html?tag=lh.

87. Recording Indus. of Am. v Verizon Internet Servs. (*In re* Verizon Inter-

ruled that Verizon, an Internet service provider ("ISP"), was required to turn over the contact information of a Verizon subscriber who had downloaded some 600 copyrighted files via P2P networking in a single day.[88] Although the appellate court eventually ruled against the RIAA and reversed the lower court's decision in *Verizon*, this case represented the first direct action targeted at the actual users of the P2P software instead of the creators of the software (KaZaa) or the company that controls the P2P network (Napster).[89]

With the information on users obtained from the ISPs prior to the reversal of the original *Verizon* decision, the RIAA launched a legal assault on the users sharing music files over the P2P networks. The RIAA filed suit against four students who were running file-sharing networks at their respective universities;[90] the cases were settled in amounts ranging from $12,500 to $17,000 each.[91] The RIAA subpoenaed the contact information for 1600 users of P2P networks, and on September 8, 2003, filed lawsuits against 261 persons alleging that each had shared copyrighted music files over the P2P networks.[92] Among those sued by the RIAA were a twelve-year-old honor student[93] and a Yale University photography professor.[94] On October 31, 2003, the RIAA filed another eighty lawsuits against alleged music swappers.[95]

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net Servs.), 257 F. Supp. 2d 244 (D.D.C. 2003), *reversed by* Recording Indus. of Am. v. Verizon Internet Servs., 351 F.3d 1229 (D.C. Cir. 2003).

88. *See* Dawn C. Chmielewski, *Verizon Ordered to ID Two Accused of Piracy* (Apr. 25, 2003), *at* http://www.siliconvalley.com/mld/siliconvalley/5715434.htm.

89. Although this is the first action in the United States, the Danish Antipiracy Group sent invoices in late 2002 to users of KaZaa and eDonkey for unpaid license fees on copyrighted works they had downloaded. *See* Patti Waldmeir, *Material Published on the Internet and Thus Accessible Anywhere in the World Is Increasingly Being Challenged Under the Laws of Individual Nation States*, FINANCIAL TIMES (London), Dec. 16, 2002, at 19.

90. *See* John Borland, *RIAA Sues Campus File-swappers* (Apr. 3, 2003), *at* http://news.com.com/2100-1027-995429.html.

91. *See* Jeordan Legon, *261 Music File Swappers Sued; Amnesty Program Unveiled* (Sept. 9, 2003), *at* http://www.cnn.com/2003/TECH/internet/09/08/music.downloading/index.html.

92. *See id.*

93. *See* Frank Ahrens, *RIAA's Lawsuits Meet Surprised Targets: Single Mother in Calif., 12-Year-Old Girl in N.Y. Among Defendants* (Sept. 10, 2003), *at* http://www.computercops.biz/article3066.html (noting that the twelve-year-old's mother settled with the RIAA for $2,000).

94. *See id.*

95. *See* CNN, *More Lawsuits Filed Against Downloaders* (Oct. 31, 2003), *at*

Since the RIAA and others are now setting their sights on those who are sharing the files themselves, users of P2P file-sharing networks need to understand what rights, if any, they have.

III. IDENTIFICATION OF THE PROBLEM

Although the *Napster* court held that the users of the network were liable for direct infringement, the decision does not clearly define the scope of liability for the individuals using the network to share files.[96] On its face, *Napster* appears to foreclose file sharing of copyrighted works;[97] however, in limited situations users of file-sharing networks may have some defenses to protect themselves against *Napster's* direct infringement actions. This comment will analyze the exposure of users of P2P file-sharing networks to causes of action for copyright infringement, as well possible defenses, including fair use exemptions that the users of file-sharing services—both those who are sharing material, and those who are downloading material—might have in certain limited cases. Although *Napster* does not appear to leave much room for users of P2P networks to defend themselves against infringement claims, the courts should carve out a limited fair use defense that would allow users of P2P networks to use the networks in a manner consistent with the AHRA and statutory fair use.

IV. ANALYSIS

In *Napster*, the court found that Napster was liable for both contributory and vicarious infringement, and that the users of the Napster service would not have a fair use defense to claims of direct infringement of copyrights.[98] This blanket statement assumes that, for all practical purposes, all of the material being shared on the file-sharing networks is indeed infringing on a copyright.[99]

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http://www.cnn.com/2003/TECH/internet/10/31/downloading.suits.ap/index.html.

96. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2000).

97. *See id.*

98. *See id.*

99. *See* A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 902-03 (N.D. Cal. 2000) ("The evidence shows that virtually all Napster users download or upload copyrighted files and that the vast majority of the music available on

A. *Is All Material Being Shared Infringing a Copyright?*

Not all material being shared over P2P networks is infringing someone's copyright—but the vast majority of it is.[100] When Napster was the predominant P2P file-sharing network, virtually all of the material being shared was copyrighted music.[101] KaZaa and a vast majority of the post-Napster P2P file-sharing networks allow at least the sharing of image and video files in addition to music files, and most of the post-Napster P2P networks allow the sharing of any type of file.[102] Different types of files infringe on a copyright owner's exclusive rights in different ways.[103] Issues specific to each of the four main types of files shared over the newer generations of P2P networks—music files, images, video, and software—will be discussed separately.

1. Music Files (MP3)

MP3 is the name of a specific encoding scheme that allows digital sound files to be compressed by a factor of eight to twelve[104] while maintaining high sound quality.[105] Before the advent of the MP3 compression scheme, the large file size of the uncompressed music files made large-scale sharing impractical. The smaller file sizes allowed by the MP3 algorithm made the sharing of files over slow connections practical,[106] and became the catalyst for Napster's success.[107] MP3 music files were essentially the only kind of files that could be shared over the Napster P2P network,[108] and make up the

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Napster is copyrighted.")

100. *See id.*

101. Napster's file sharing was limited to MP3 (music) files. To get around that limitation, software was developed to encode any type of file—usually pictures or short movies, but not limited to those two file types—into MP3 format, so that it could be shared over Napster. The most common encoding system was Wrapster, *at* http://www.unwrapper.com/ (last visited Feb. 17, 2004).

102. Numerous P2P systems provide the capability to download numerous file types. *See* TheRecordIndustry.com, *at* http://www.therecordindustry.com/file_sharing/file_sharing_dir.htm (last visited Feb. 17, 2004).

103. *See* 17 U.S.C. § 106 (2003).

104. *See* Andrei Gule, *MP3 Compression*, *at* http://www.digitlife.com/articles/mp3comp/ (last visited Feb. 17, 2004).

105. *See id.*

106. *See* Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., 180 F.3d 1072, 1073-74 (9th Cir. 1999).

107. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2000).

108. *See id.* at 1011.

vast majority of files being shared over the post-Napster P2P networks.[109] Virtually all of these files are unlicensed copies of copyrighted, major-label songs by popular artists.[110]

Supporters of file sharing complain that even if most of the music shared on the P2P networks is shared illegally, not all of the music available is infringing. Every P2P network has works by relatively unknown artists who are using file sharing to expand their audience and make a name for themselves.[111] However, there is little evidence to support the assertion that unknown artists, who have presumably shared the material themselves and thereby granted a license to anyone downloading the songs,[112] ever make up more than a tiny fraction of the music available on the network.[113]

Although KaZaa and other post-Napster P2P file-sharing networks have the capability to share more than just MP3 files, the majority of files shared are still audio music files.[114] Sharing copyrighted music files on any of the post-Napster file-sharing networks will subject any sharer accused of copyright infringement to the same four-part test defined in section 107 of the Copyright Act used to hold Napster users liable for direct copyright infringement.[115] The language in *Napster* leaves little room for argument; downloading and uploading music over a file-sharing network infringes on both the distribution rights and the rights of reproduction.[116] Since all of the post-Napster file-sharing networks use essentially the same mechanism for sharing the files, uploading and

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109. *See* Greenspan, *supra* note 15.

110. *See Napster*, 239 F.3d at 1013.

111. *See Diamond*, 180 F.3d at 1074.

112.

> Apart from music on which the copyright has expired (not much of which, however, is of interest to the teenagers and young adults interested in swapping music), startup bands and performers may waive copyright in the hope that it will encourage the playing of their music and create a following that they can convert to customers of their subsequent works.

In re Aimster Copyright Litig., 334 F.3d 643, 652 (7th Cir. 2003).

113. *See* Katz, *supra* note 26.

114. *See* David Rowan, *Inside the Web of Thieves*, GUARDIAN UNLIMITED (Apr. 21, 2002), *at* http://www.guardian.co.uk/internetnews/story/0,7369,688022,00.html (commenting that "music remains the most commonly swapped format").

115. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013-14 (9th Cir. 2000).

116. *Id.*

downloading from KaZaa or any other post-Napster network will infringe the same exclusive rights of reproduction and distribution.[117]

However, as mentioned above, some shared audio files do not fall under the copyright control of the music industry, such as music files created and distributed to the file-sharing network by independent artists themselves.[118] Sharing these music files may also be problematic for P2P network users. In the absence of an express license to the contrary, merely uploading or sharing a file does not give others the right to violate an artist's rights to control reproduction and distribution unless an implied license or a fair use exception exists.[119] Although the voluntary submission of one's own work to a file-sharing network would appear to create an implied license, at least as far as the rights of reproduction and distribution are concerned, no such automatic license agreement is created.[120] The courts have held that implied licenses occur only in "narrow circumstances"[121] where the copyright holder "voluntarily submitted the work to the defendant for publication"[122] and where there is a "meeting of the minds."[123] The "meeting of the minds" test would be nearly impossible to satisfy given the anonymous nature of P2P file sharing, which would mitigate against a theory of implied license as a way to avoid infringement when sharing files by "unsigned" artists. These files would also receive no less protection from a fair

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117.

> We agree that plaintiffs have shown that Napster users infringe at least two of the copyright holders' exclusive rights: the rights of reproduction, § 106(1); and distribution, § 106(3). Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights. Napster users who download files containing copyrighted music violate plaintiffs' reproduction rights.

Id. at 1014.

118. For example, Grokster is a P2P file-sharing network that uses the same network backbone as KaZaa, but focuses on unsigned artists. *See* TechTV on Grokster, *at* http://www.techtv.com/audiofile/jump/0,23009,3342095,00.html (last visited Feb. 17, 2004); *see also* text accompanying notes 111-13.

119. *See* April M. Major, *Copyright Law Tackles Yet Another Challenge: The Electronic Frontier of the World Wide Web*, 24 RUTGERS COMPUTER & TECH. L.J. 75, 89 (1998); *see also* NIMMER, *supra* note 72, § 10.03A.

120. *See* Major, *supra* note 119, at 89.

121. *See* SmithKline Beecham Consumer Healthcare, L.P. v. Watson Pharms., Inc., 211 F.3d 21, 25 (2d Cir. 2000).

122. *See* Herbert v. United States, 32 Fed. Cl. 293, 298 (1994).

123. *See* N.A.D.A. Servs. Corp. v. Bus. Data of Va., Inc., 651 F. Supp. 44, 49 (E.D. Va. 1986).

use argument than would files by big name music stars; therefore, in the absence of an express or implied license granting rights of reproduction and distribution, sharing material from "unsigned" artists or individuals still results in direct infringement of copyright protections.[124]

Finally, there is one more possible source of infringement related to the sharing of MP3 files over P2P networks. Virtually all of the post-Napster P2P networks support "previewing" audio files,[125] which involve listening to the partially downloaded audio file (MP3 file) as it is copied to a computer, rather than waiting for the entire file to be copied before listening to it.[126]

The Digital Performance Right in Sound Recordings Act ("DSPRSA")[127] added the sixth exclusive right to the Copyright Act, the right to perform a copyrighted work publicly by means of a digital audio transmission.[128] In addition, the DSPSRA amended section 115 of the Copyright Act,[129] adding clear language that digital *delivery* of a sound recording[130] is an infringement unless authorized or licensed.[131] The Digital Millennium Copyright Act ("DMCA")[132] further amended the language of section 114 of the Copyright Act to include "webcasts" as a transmission method requiring a license.[133]

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124. *See* 17 U.S.C. § 501 (2003).

125. For example, KaZaa has a built in music player that allows users to preview their downloaded MP3s. *See* Filesharing Program Review, *at* http://www.techinv.com/limewire-kazaa-blubster/limewire-kazaa-blubster-index3.htm (last visited Feb. 20, 2004).

126. The term "preview" is a little ambiguous, since users must have some of the file downloaded to their computers before being able to preview. However, it is a preview in the sense that the user can listen to the partially downloaded file prior to the completion of the download.

127. *See* NIMMER, *supra* note 72, § 8.21.

128. 17 U.S.C. § 106(6).

129. *Id.* § 115.

130. Digital *delivery* of a sound recording is defined as sending a digital copy of a sound recording to someone via a digital transmission.

131.

> A digital phonorecord delivery of a sound recording is actionable as an act of infringement unless "the digital phonorecord delivery has been authorized by the copyright owner of the sound recording," or the owner of the copyright or the entity making the delivery "has obtained a compulsory license under this section or has been otherwise authorized by the copyright owner. . . .

See id. § 115(c)(3)(H).

132. *See* NIMMER, *supra* note 72, § 8.21.

133. 17 U.S.C. § 114(f)(5)(a).

The *Napster* court did not discuss infringements of exclusive rights under Copyright Act section 106(6), primarily because the users of the system rather than the network itself would infringe. However, the use of P2P file-sharing networks may indeed result in infringement of section 106(6) rights, in addition to the rights of reproduction and distribution.[134] Section 115 of the Copyright Act under DSPSRA was developed to protect copyright owners from the then-emerging technology of the World Wide Web, which copyright owners feared would lead to widespread transmission of sound recordings and "render traditional store-based systems for distribution of sound recordings obsolete."[135]

As mentioned above, section 115 specifies that delivering a digital copy[136] of a sound recording without a license infringes on that sound recording's copyright.[137] In a P2P file-sharing network, allowing another user to download a file from someone else's computer is analogous to a delivery.[138] In *Rodgers & Hammerstein Organization v. UMG Recordings Inc.*,[139] the court found that making songs available on a web site for public downloading was a delivery that required a license under section 115 of the Copyright Act.[140] The analogy between freely downloading songs from a public web site and freely downloading songs from an anonymous peer on a P2P file-sharing network is so close that persons who share files

134. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2000).

135. *See* CRAIG JOYCE ET AL., COPYRIGHT LAW 609-10 (5th ed. 2001).

136. Since all data transmitted over the Internet and used by a computer is in digital form, by definition any sound recordings transmitted over the Internet must therefore be digital copies of sound recordings, even if the original copy of the sound recording was analog.

137. *See* 17 U.S.C. § 115(c)(3)(H).

138. Since P2P file-sharing networks work when one computer queries another for a file, and that second computer responds to the query by facilitating a download, this appears to be precisely the type of interactive digital audio delivery system discussed in the U.S. Copyright Act. *See* 17 U.S.C. § 115(d).

139. Rodgers & Hammerstein Org. v. UMG Recordings Inc., 60 U.S.P.Q.2D (BNA) 1354 (S.D.N.Y. 2001).

140.

> It is obvious that Defendants do not want to pay the Plaintiffs the license fee for a record every time one of their customers listens to recording on the Internet. However, the only license that Defendants rely on here is one that is limited to the distribution of records to the public for which there is an established fee. Defendants choice is to obtain a license for that purpose and pay the fee or cease their infringing activity.

Id. at 1361.

would certainly be liable for copyright infringement under the *Rodgers* analysis.

Liability for copyright infringement under sections 106(6) and 114 of the Copyright Act, however, may be more difficult to justify. As noted above, many[141] file-sharing services provide for previewing files before download is complete—is this previewing analogous to a performance? One could argue that previewing is not a performance, since it relies on viewing the part of the file that has already been downloaded and stored on the viewer's computer.[142] In other words, what is being played is the new (partial) copy of the audio work that has been obtained by the viewer. Under this analysis, previewing a file would not be performance; however, streaming audio works in essentially the same fashion and unlicensed streaming audio transmissions—or webcasts[143]—infringe on section 106(6) exclusive rights.[144] Once a user connects to an audio stream, usually from a web site, the digital audio is sent to the listener's computer. Although no permanent or complete copy is made of the stream on the listener's computer, the computer does store a temporary copy of some subpart of the stream.[145] Since previewing audio files over the P2P file-sharing network also makes use of partial copies of audio files, previewing is likely such a close analogy to streaming audio that it could reasonably be considered a performance. Therefore, streaming potentially infringes a copyright owner's section 106(6) rights.[146]

However, for infringement to exist under section 106(6),

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141. For example, the latest version of Grokster supports previewing files as they are being downloaded. Grokster 1.6 Description, *at* http://www.networkingfiles.com/FileShar/Grokster.htm (last visited Feb. 16, 2004).

142. *See supra* note 126.

143. "AM/FM broadcasters who stream their broadcasts over the Internet, or 'AM/FM webcasters' as the Copyright Office refers to them, are not exempt from the digital performance right of section 106." Bonneville Int'l Corp. v. Peters, 153 F. Supp. 2d 763, 770-71 (E.D. Pa. 2001) (citing the copyright office rule).

144. *See* 17 U.S.C. § 114(a)-(d) (2003).

145. Streaming audio provides real-time playback of audio transmitted over the Internet by copying part of the stream to a temporary memory location, and then playing that copied section while making a copy of the next piece of stream in the same location. The copies of the partial streams are very ephemeral. *See* Deliver Your Media: Streaming Audio Primer, *at* http://www.deliveryourmedia.com/article-audio-primer.html (last visited Feb. 17, 2004).

146. *See* 17 U.S.C. § 106.

the performance has to be public.[147] Section 101 of the Copyright Act defines "public performance" as follows: "a work is performed 'publicly' if it is performed 'at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.'"[148] Someone sharing a particular file may have several other users attempting to download and preview the file simultaneously, which could be construed as a public performance.[149] For a performance to be public, the number of users is not as important as the relationship of the users to the sharing party.[150] Because the evidentiary hurdles are so high, however, it is unlikely that a person sharing a file over a P2P file-sharing network would be liable for copyright infringement under sections 106(6) and 114. Since there is no way for someone who is sharing a file to know whether or not any of the users downloading a given file are previewing it, and there is no tracking mechanism built into the software to log who is previewing while downloading, no one can prove that a performance took place.[151] Although offering a file to share could be considered an invitation to view a performance, the lack of evidence to show whether anyone actually *was* previewing the file would mitigate against a finding of public performance.[152]

2. Image Files (Pictures)

Although Napster made sharing images technically possible,[153] the number of images shared was very small, and the *Napster* court did not consider images.[154] However, sharing images over P2P file-sharing networks poses the same problems for the person downloading or uploading the images as

147. For sound recordings, infringement occurs when the copyrighted work is performed "publicly by means of a digital audio transmission." *See id.* § 106(6).

148. *Id.* § 101.

149. *See id.*

150. "The fact that only an insubstantial number of people actually attend a performance will not derogate from its character as a public performance." *See* NIMMER, *supra* note 72, § 8.14(c)(1).

151. "[T]he mere issuance of an invitation does not by itself warrant liability." *Id.* § 8.14(c)(2).

152. *See id.* § 8.22. Because the digital performance right under 17 U.S.C. 106(6) is "limited to performances that occur 'publicly,'" without a showing of "public performance" there would be no infringement of this right. *Id.*

153. *See* Wrapster, *supra* note 101.

154. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d. 1004 (9th Cir. 2000).

do MP3 files—infringement on the rights to reproduction and distribution.[155] In *Playboy Enterprises, Inc. v. Chuckleberry Publications, Inc.*,[156] the publication of copyrighted images to a bulletin board where others were free to download the pictures was found to infringe on the exclusive right to control distribution.[157]

In addition, sharing images can lead to infringement of exclusive publication rights. In *Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc.*,[158] the defendant was found to have infringed Playboy's exclusive publication rights by uploading copyrighted images to a bulletin board service ("BBS").[159] Additionally, in *Playboy Enterprises, Inc. v. Frena*,[160] unauthorized uploading of files to a BBS with the knowledge that the images could be downloaded by others "constituted an infringement of plaintiff's exclusive publication right."[161] These cases show that uploading to a bulletin board infringes on publication rights.[162]

In many ways, P2P file-sharing networks are a modern version of the computer bulletin board.[163] In fact, as BBSs began to wane in popularity with the advent of the World Wide Web, BBSs either died out or moved to the Web in a different format.[164] Much like the P2P file-sharing networks of today, BBSs generally required each user to be a member of that BBS, although the login name was usually anonymous.[165] All of the current P2P networks require users to register, al-

155. *See* 17 U.S.C. § 106 (2003).

156. *See* Playboy Enters., Inc. v. Chuckleberry Publ'n, Inc., 939 F. Supp. 1032, 1039 (S.D.N.Y. 1996).

157. *See id.*

158. Playboy Enters., Inc. v. Russ Hardenburgh, Inc., 982 F. Supp. 503 (N.D. Ohio 1997).

159. *See id.* at 513.

160. Playboy Enters., Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993).

161. *See id.* at 1556 (citing Getaped.com Inc. v. Congemi, 188 F. Supp. 2d 398 (2002)).

162. *See id.*

163. Prior to the Internet becoming publicly available in the mid- to late-1990s, bulletin boards ("BBSs") were the primary way computer users shared materials and communicated with others. BBSs eventually evolved into markets to upload and download software and images—the forerunner of today's P2P file-sharing networks. *See* The Microcomputer BBS History Page, *at* http://www.portcommodore.com/commodore/bbs/bbshist.html (last visited Feb. 17, 2004) [hereinafter BBS History].

164. *See id.*

165. *See id.*

though the actual login is anonymous.[166]

Although both *Hardenburgh* and *Frena* concern BBSs, the similarities between BBSs and current P2P networks are such that the holdings of both cases will apply to P2P networks as well.[167] The result of applying *Hardenburgh* and *Frena* to P2P networks is that uploaders—those sharing files on the network—are liable for infringing on the exclusive publication rights of the copyright owner, in addition to infringing on the rights to reproduction and distribution.[168] Neither *Playboy* nor *Frena* discuss whether the downloaders of such material would infringe on the exclusive publication rights; however, as mentioned above, downloaders are still liable for infringing on the rights of reproduction and distribution under *Napster*.[169]

3. Video Files

On KaZaa, the downloading of video files is beginning to catch up with the downloading of MP3 files, at least from a total bandwidth perspective.[170] A separate P2P network is dedicated solely to full-length movies.[171] Much like audio files and the MP3 format, video files have started to become popular as a result of three factors: inexpensive storage capacity,[172] the development of compression algorithms, namely DivX,[173] and the adoption of broadband Internet access.[174]

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166. KaZaa, for example, simply requires a valid e-mail address and an anonymous username in order to "register" to connect to the network.

167. *See* BBS History, *supra* note 163.

168. *See generally* Playboy Enters., Inc. v. Russ Hardenburgh, Inc., 982 F. Supp. 503 (N.D. Ohio 1997); Playboy Enters., Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993).

169. A&M Records, Inc. v. Napster, Inc., 239 F.3d. 1004 (9th Cir. 2000).

170. *See* Rowan, *supra* note 114.

171. Direct Connect is a P2P network dedicated to full-length movies. *See* Direct Connect's web site, *at* http://www.neo-modus.com/ (last visited Feb. 17, 2004). For a review of Direct Connect, see http://taxster.fateback.com/directconnect.htm (last visited Feb. 17, 2004).

172. A full-length movie compressed using a modern compression algorithm takes up at least 750 Megabytes (MB) of storage space, generally on a fixed disk (hard disk) drive; having more than a single movie on your computer therefore requires a hard disk in the gigabyte (1024 MB) range.

173. Uncompressed full-length movies are roughly 40 gigabytes (GB) in size; DivX is a compression method that can compress a full-length movie down to 1 GB or less, with excellent video and audio quality. *See* DivX.com support, *at* http://www.divx.com/support/what.php (last visited Jan. 24, 2003).

174. Broadband Internet connections typically allow download speeds as high as 1 MB per second; at this rate, a typical 700 MB DivX-encoded movie could

Video files are beginning to garner more attention from both the media and copyright holders, as more and more movies are appearing online soon after (or even before) their release in theaters.[175] Recently, a digital copy of the movie *The Hulk* was discovered on the P2P networks a full month prior to its theatrical release.[176] As noted above, *Napster* held that sharing audio files infringed on the reproduction and distribution rights; because audio works and video works are treated identically under the Copyright Act, the act of sharing video files would be subject to a *Napster* analysis as well.[177]

Because a work must be performed publicly to constitute a performance,[178] file sharing would be unlikely to result in infringement of the copyright owner's performance rights. Even if a P2P network user downloaded a movie and played it for his friends and family, this act would not be considered a public performance that would infringe on the owner's right to perform the work publicly.[179]

Of course, the same issue arises as with audio files con-

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theoretically be downloaded in 700 seconds. However, upload speeds are typically capped at 0.25 MB per second or less, increasing the theoretical download time by at least a factor of four, and, in actual use, it is rare to see a connection over 0.05 MB per second for any sustained length of time. At 0.05 MB per second, a 700 MB file will take around four hours to upload.

Compare that time to the fastest non-broadband Internet connection available, the 56.6 KB modem. The fastest possible speed such a modem could attain is 56.6 kilobits per second, or about 7 kilobytes (kB) per second. (1 MB = 1064 kB) So, the shortest possible download time for a 700 MB file would be around 280 hours. This is the primary reason why sharing video files became popular concurrent with broadband penetration into the marketplace. *See* Internetnews.com, *Hollywood: Hooray for Broadband* (Nov. 11, 2002), *at* http://www.internetnews.com/ec-news/article.php/1498091.

175. *See* Glasner, *supra* note 55.

176. *See* Veronique De Freitas, *Hulk Thief Pleads Guilty to Piracy* (June 26, 2003), *at* http://www.web-user.co.uk/news/40.html; *see also* Troy Graham, *Federal Case Made of 'Hulk' Piracy* (June 26, 2003), *at* http://www.philly.com/mld/inquirer/news/local/6172522.htm. The person who posted the movie to the P2P networks obtained the movie from a friend working for a marketing agency; the poster plead guilty to felony copyright infringement, and was sentenced to six months home confinement, three years probation, a $2,000 fine, and $5,000 in restitution to the owner of the film, Vivendi Universal Entertainment. *See* Vivendi Universal Entertainment, *Hulk Pirate Sentenced for Felony Copyright Infringement* (Sept. 26, 2003), *at* http://biz.yahoo.com/prnews/030926/laf042_1.html.

177. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d. 1004, 1014 (9th Cir. 2000).

178. *See* NIMMER, *supra* note 72, § 8.14.

179. *See id.*

cerning performance rights and previewing of files. However, the problems of proof of public performance exist for video files as they do for audio files; therefore, sharing of a video file on a P2P file-sharing network is unlikely to infringe on Copyright Act sections 106(6) and 114.[180]

4. Software

Although virtually all music files, pictures, and videos shared on a P2P network today violate copyright laws, a significant fraction of the software available on the file-sharing networks is freeware, shareware, or demonstration ("demo") software,[181] and therefore can be shared with anyone.[182] Of all

180. 17 U.S.C. §§ 106(6), 114 (2003).

181. Freeware is software released into the public domain. Freeware typically consists of relatively small, focused applications written by a single programmer. *See* Whatis.com, *at* http://whatis.techtarget.com/definition/0,289893,sid9_gci212159,00.html (last visited Feb. 17, 2004). Shareware ranges from simple applications to full-blown software suites. Shareware is typically distributed free with a trial license—a paid license is required to use the software lawfully after a certain time period has elapsed. Oftentimes shareware is distributed with many features locked out, which can be activated with a paid license. *See* http://www.herne.com/share.htm (last visited Feb. 17, 2004). Demos are pared-down versions of programs (often games) distributed free by the manufacturers in order to get people to try out the software. *See* http://www.gamedemo.com/dirdb/XcDirectory/gddhome.asp (last visited Feb. 17, 2004); *see also* http://www.gnu.org/philosophy/categories.html (updated Dec. 29, 2002).

182. Unlike the problems with implied licenses surrounding the sharing of music from unsigned bands, freeware, shareware, and demos are nearly always bundled with a license agreement that specifically allows the free distribution of the software, subject to some limitations. Typical limitations include a prohibition on modifying the software, distributing the software without attribution, or bundling the software with other pieces of software that are to be sold as a bundle. A very common license used in freeware applications is the Gnu public license, *at* http://www.gnu.org/copyleft/gpl.html (updated July 15, 2001). Shareware is usually bundled with a stricter license, but generally gives a license for free distribution and reproduction of the software. An example of a shareware license is the license for the shareware trading software Forex Trader:

> The Publisher, in cooperation with Data Broadcasting Corporation and ADP/GTIS, grants the User a nonexclusive, nontransferable license to copy and use the program, data and documentation (collectively referred to hereafter as the "software") in accordance with the terms and conditions of this Agreement.
>
> The User shall always copy the software, trade name and copyright notice in its entirety without any additions, deletions or modifications whatsoever. The User shall not distribute or use the software (or any part thereof) for any commercial purpose whatsoever, nor charge any fee for the medium on which the User stores or transfers the software,

of the types of files examined here, freeware, shareware, and demonstration software are the only types that can be shared freely without infringing on a copyright owner's rights.[183]

As with music and video files, however, the unauthorized distribution of copyrighted software on the file-sharing networks is an infringing act.[184] In *Sega Enterprises Ltd. v. Maphia*,[185] the court held that "the unauthorized copying of copyrighted computer programs is prima facie an infringement of the copyright;"[186] uploading or downloading a file creates the offending copy.[187] Although the *Vault* court held that making an archival copy was a permissible infringement, *Vault* can be distinguished from *Sega*. Unlike *Sega*, *Vault* concerned a single archival copy, not the multiple copies created by multiple persons downloading the software from the BBS.[188] Since multiple archival copies apparently are not allowed under *Vault*, there is no permissible infringement in *Sega* as in *Vault*, and therefore, the downloading from the BBS in *Sega* was unauthorized copying that infringed the copyright of the software.[189]

Another issue related to sharing software over a P2P network is licensing. In contrast to the question of implied licenses with independent music, virtually all software produced and sold today is supplied with a licensing agreement.[190] Generally, unauthorized duplication of the software (by uploading and downloading),[191] distribution of the soft-

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without the prior written permission of Publisher.
Forex Trader License, *at* http://www.inusa.com/tour/license.htm (last visited Feb. 16, 2004).

183. *See id.*

184. 17 U.S.C. § 106(3).

185. Sega Enters. Ltd. v. Maphia, 857 F. Supp. 679 (N.D. Cal. 1994).

186. *Id.* at 686.

187. "[I]nput of a copyrighted work onto a computer constitutes the making of a copy under the Copyright Act." *In re* Aimster Copyright Litig., 252 F. Supp. 2d 634, 648 (N.D. Ill. 2002) (enjoining Aimster from "copying, downloading, distributing, uploading, linking to, or transmitting Plaintiff's Copyrighted Works").

188. "MAPHIA bulletin board is open to the public and has approximately 400 users who routinely download and upload files from and to the MAPHIA BBS." Sega Enters. Ltd. v. Mamphia, 948 F. Supp. 923, 927 (N.D. Cal. 1996).

189. *See id.*

190. *See generally* Robert W. Gomulkiewicz, *The License Is the Product: Comments on the Promise of Article 2B for Software and Information Licensing*, 13 BERKELEY TECH. L.J. 891 (1998); *see also* Robert W. Gomulkiewicz & Mary L. Williamson, *A Brief Defense of Mass Market Software License Agreements*, 22 RUTGERS COMPUTER & TECH. L.J. 335 (1996).

191. For example, Microsoft's licensing frequently asked questions (FAQ)

ware (by uploading and downloading),[192] and use (by the downloader)[193] violate the common terms in most license agreements.[194]

B. Users Downloading Material from the P2P Network

Users downloading files from the P2P network to which they are connected face numerous challenges if they wish to avoid liability for copyright infringement. The *Napster* decision identifies the liability for direct infringement on the rights of reproduction and distribution for users of P2P file sharing.[195] The court in *Napster* was clear in its judgment that there was no fair use defense for the users of the file-sharing service.[196]

There may be a place, however limited, for fair use in file sharing. Additionally, under certain circumstances, a user may have a valid license to download copyrighted materials. Clearly, downloading copyrighted material from other users without a valid license violates the rights to reproduction and

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page specifically details Microsoft's position on unauthorized duplication. *See* http://www.microsoft.com/windows2000/en/professional/help/default.asp?url=/windows2000/en/professional/help/lic_violate_agreement.htm (updated Feb. 28, 2000).

192. The following example of language limiting the distribution rights can be found in a sample Microsoft End User License Agreement (EULA), *at* http://www.csai.unipa.it/pmb/msdnaa/Eula-MSDNAA.html (last visited Feb. 17, 2004).

> You may permanently transfer all of your rights under this EULA, provided you retain no copies, you transfer all of the Product (including all COMPONENTS, UPDATES, the media and printed materials, any upgrades, and this EULA), you provide Microsoft notice of your name, company, and address and the name, company, and address of the person to whom you are transferring the rights granted herein, and the recipient agrees to the terms of this EULA. If the Product is an upgrade, any transfer must include all prior versions of the Product. If the Product is received as part of a subscription, any transfer must include all prior deliverables of Product and all other subscription deliverables.

Id.

193. "If you purchased your software from a store, through a mail-order catalog, or even from an individual, and a EULA did not accompany the product, you may have purchased illegal software. Illegal software, commonly called 'pirated' software, may expose you and/or your business to legal liabilities." Microsoft's licensing FAQ on missing End User License Agreements, *at* http://www.microsoft.com/windows2000/en/server/help/default.asp?url=/windows2000/en/server/help/lic_no_eula.htm (last visited Feb. 16, 2004).

194. *See id.*

195. *See* A&M Records Inc., v. Napster, Inc., 239 F.3d 1004, 1014 (9th Cir. 2000).

196. *Id.* at 1015.

distribution and is not a fair use of the copyrighted material, as detailed in *Napster*.[197] However, the case for downloading copyrighted material for which the downloader does have a license or valid exception is not quite as settled.[198]

After a CD is purchased, that copy of the CD belongs to the purchaser. The "first sale" doctrine[199] provides that one of the rights obtained upon purchase of a CD is the right to re-sell the CD to another person without authorization from the copyright holder.[200] This doctrine implies that the owner of the CD is allowed to make use of the CD in any non-infringing manner without further license or authorization.[201] What rights remain, however, if the CD is damaged in some way that renders it unplayable? The court in *Recording Industry of America v. Diamond Multimedia Systems* suggests it is acceptable to create an archival copy of a CD for personal use.[202] If an archival (or backup) copy of a CD exists, then after the original CD is rendered unusable, the backup copy can take its place without infringement.[203] If an archival copy is

197. *Id.*

198. The *Napster* court did not discuss how a license might enter into the equation; rather the court simply stated that the plaintiff had met the burden of establishing a prima facie case of direct infringement. *See* A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 911 (N.D. Cal. 2000).

199. "Under this doctrine, once a legally manufactured, copyrighted product is placed on the market for the first time with the copyright owner's authority, that owner's subsequent distribution rights in the product are extinguished, and he or she cannot control any future sales of that physical copy of the product." *See* Esti Miller, *Nafta: Protector of National Intellectual Property Rights or Blueprint for Globalization? The Effect of Nafta on the First Sale Doctrine in Copyright Law*, 16 LOY. L.A. ENT. L. REV. 475, 475-76 (1995).

200. "Read literally, § 109(a) unambiguously states that such an owner 'is entitled, without the authority of the copyright owner, to sell' that item." *See* Quality King Distribs., Inc. v. L'anza Research Int'l, Inc., 523 U.S. 135, 145 (1998).

201. The rights of an owner of a CD (or phonorecord) are limited, however:

> Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

17 U.S.C. § 202 (2003).

202. "We first note that limiting the exemption to computer programs is contrary to the plain meaning of the exemption." *See* Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., 180 F.3d. 1072, 1077 (9th Cir. 1999).

203. Of course, if the owner of the CD exercises his rights to sell his copy of

unavailable, however, could the CD owner download the songs from a file-sharing network and write them to another CD, thereby creating an archival copy where none existed before, without violating copyright law? If such a post facto archival copy could be allowed as an exception under the Copyright Act section 117 and *Diamond*, the owner would likely have to retain the original damaged CD to prove the section 117 exception existed.

UMG Recordings, Inc. v. MP3.com, Inc.,[204] however, appears to bar such a use of downloaded material, even if the user could prove that he owned the CD.[205] The court in *UMG* held that "space-shifting" a CD onto a web site so that the CD could be heard via the web site was not a permissible fair use after the decision in *Sony v. Universal City*.[206] In fact, such use amounts to an unauthorized retransmission of the CD,[207] and therefore a "presumptive case of infringement."[208] The court in *Napster* concluded that *UMG* "[found] space-shifting of MP3 files not a fair use even when previous ownership is demonstrated before a download is allowed."[209]

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the CD to another, he must also transfer the archival copy to the new owner, or he must destroy it; he cannot retain it. *See* 17 U.S.C. § 117.

204. UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

205. My.MP3.com was a service offered by MP3.com that would allow subscribers, once they had proved ownership of a certain CD, to listen to that CD over the Internet.

> Specifically, in order to first access such a recording, a subscriber to MP3.com must either "prove" that he already owns the CD version of the recording by inserting his copy of the commercial CD into his computer CD-Rom drive for a few seconds (the "Beam-it Service") or must purchase the CD from one of defendant's cooperating online retailers (the "Instant Listening Service").

Id. at 350.

206. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (holding that the plaintiff, a manufacturer of video cassette recorders, was not liable for copyright infringement when the purchasers of VCRs used them to "time-shift," or record copyrighted works for later viewing, because such recording for private, non-commercial use was considered a fair use of the copyrighted work).

207. "Here, although defendant recites that My.MP3.com provides a transformative 'space-shift' by which subscribers can enjoy the sound recordings contained on their CDs without lugging around the physical discs themselves, this is simply another way of saying that the unauthorized copies are being retransmitted in another medium . . . ." *See UMG Recordings*, 92 F. Supp. 2d at 350.

208. *See id.* at 351.

209. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1019 (9th Cir. 2000).

This analysis appears to be overbroad, however. The court in *UMG* found that the "presumptive infringement"[210] was actually the "unauthorized retransmission"[211] of the space-shifted material, which would be an infringement of exclusive rights under sections 106(6) and 114 of the Copyright Act.[212] In the case of trying to produce a post facto backup of a CD, however, the files are being transferred, not in real-time as an audio stream, which would involve section 114 issues, but as digital audio files. Unauthorized delivery of digital audio media is still an infringement under section 115;[213] however, if the delivery is authorized or licensed, then it is not infringing.[214] Whether or not ownership of a CD will provide the necessary license or authorization to fall under a section 115 exception is an open question.

Although the *Napster* reading of *UMG* appears to leave no question as to the illegality of space shifting, the prohibition on downloading MP3 files for the purposes of space shifting CDs may also be an overbroad reading of *UMG*. Generally, the default behavior for file-sharing networks is that they will automatically place any downloaded file into a shared directory, where other users connected to the P2P network can access it.[215] This behavior would raise the question of unauthorized delivery, and be analogous to the MP3.com system discussed in *UMG*. However, if instead the downloaded files were placed into a directory that was only accessible to the user who downloaded the files, this situation would be more analogous to the permissible space shifting in *Diamond*.[216] In the broadest sense, when a user downloads a

210. *See UMG Recordings*, 92 F. Supp. 2d at 351.

211. *Id.*

212. 17 U.S.C. §§ 106(6), 114 (2003).

213. *Id.*

214. *See* 17 U.S.C. § 115.

215. KaZaa and other file-sharing systems use the concept of shared folders to determine which files are to be shared with others. By default, the directory into which files are downloaded is a shared directory, although an individual may have other folders designated as shared directories as well. It is also possible to have no shared directories, or to have downloaded files placed into a non-shared directory, but the default behavior is to share. Any file in the shared directory is accessible to the other users connected to the network. KaZaa Guide, *Sharing and the P2P Philosophy*, *at* http://www.kazaa.com/us/help/glossary/p2p_philosophy.htm (last visited Feb. 16, 2004).

216. "In fact, the Rio's operation is entirely consistent with the Act's main purpose - the facilitation of personal use. As the Senate Report explains, '[t]he

file via a P2P connection, the file is copied from the hard drive of the person sharing the file to the hard drive of the user seeking the file. This is analogous to the situation in *Diamond* where files from a user's computer hard drive were copied to the hard drive of a portable music player.[217] The legal result is unclear if the person seeking to download is looking to space shift a CD he owns, and the shared files have been space shifted under *Diamond*. Courts have not addressed the question of whether a person seeking to space-shift a copyrighted work has to create the copy himself or whether he can obtain the lawfully-created copy from another source for permissible space shifting to occur.

However, the court in *Napster* distinguished the permissible *Diamond* and *Sony* space shifting by noting that in both of those cases, the space-shifted materials were never outside of the control of the owner of the original copy.[218] Although each file shared over a P2P network is transferred from one computer directly to another,[219] the transfer across the Internet does require the file to be out of a user's control while traversing the network. Therefore, files shared across the Internet, regardless of whether they were created lawfully under *Diamond*, would constitute illegal space shifting under *Napster*.[220]

C. Users Sharing Material on the P2P Network

Users sharing material on a P2P file-sharing network are those connected users who allow their computers to be accessed by other connected users looking to download a copy of a file.[221] Users who are sharing files face all of the same issues regarding copyright infringement as do users downloading material. In addition, several other issues surround the sharing process. Since many users who download later share

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purpose of [the Act] is to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their *private, noncommercial use*.'" Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., 180 F.3d 1072, 1079 (9th Cir. 1999) (quoting S. REP. NO. 102-294, at 86 (1992) (emphasis added)).

217. *Id.* at 1077.

218. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1019 (9th Cir. 2000).

219. *See* Lui &Kwok, *supra* note 13.

220. *See Napster*, 239 F.3d at 1019.

221. *See* Lui & Kwok, *supra* note 13.

those files back to the network,[222] most P2P file-sharing users will have to face possible liability for both copying and sharing.

Napster does not draw a distinction between people who share files and people who download files—people who share and people who download are painted equally with the same infringing brush.[223] The last section discussed the liability of users who download files; but would a user who shared files without downloading any files be liable for direct infringement? In *Chuckleberry*[224] the court found that a web site that used copyrighted images without a license and allowed others to download pictures from that site was "engaged in distribution" and violated the copyright holder's exclusive right to distribution.[225] Posting images on a web site for users to download is analogous to the situation where a user of a P2P file-sharing network is only sharing files, and not downloading files. Based on *Chuckleberry*, such a user would be violating the copyright holder's section 106(3) rights.[226]

V. PROPOSAL

With the popularity of P2P networks and file sharing growing hand-in-hand with the RIAA's desire to go after individuals who directly infringe on exclusive rights,[227] users of P2P file-sharing networks must have a clear understanding of the applicable copyright laws in order to ensure that they do not run afoul of the RIAA. The vast majority of the traffic on

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222. *See supra* note 214.

223. *Napster*, 239 F.3d at 1019.

224. Playboy Enters., Inc. v. Chuckleberry Publ'n., Inc., 939 F. Supp. 1032, 1039 (S.D.N.Y. 1996).

225. *Id.* at 1043.

> Moreover, . . . , these pictorial images can be downloaded to and stored upon the computers of subscribers to the service. In fact, Defendant actively invites such use: the Internet site allows the user to decide between viewing and downloading the images. Thus this use of Defendant's Internet site constitutes a distribution.

Id.

226. 17 U.S.C. § 106(3) (2003). Furthermore, it is interesting to note that the RIAA's recent spate of lawsuit filings have targeted those *sharing* the music files, rather than those merely downloading the music files. *See supra* notes 90-94.

227. *See* Recording Indus. of Am. v. Verizon Internet Servs., , 257 F. Supp. 2d 244 (D.D.C. 2003), *reversed by* Recording Indus. of Am. v. Verizon Internet Servs., 351 F.3d 1229 (D.C. Cir. 2003); *see also* Borland, *supra* note 90; Legon, *supra* note 91; CNN, *supra* note 95.

P2P file-sharing networks is copyrighted material being shared and copied without licenses.[228] The *Napster* court found that the users of P2P file-sharing networks were directly infringing on the exclusive rights to reproduction and distribution and that file sharing was not entitled to a fair use exemption.[229] *Napster* correctly concluded that the current wave of illegal copying was not permitted under current copyright law.[230] There are few exceptions to *Napster* that may provide a defense to claims of infringement in certain cases.

Courts should address the issue of whether a copyrighted file shared on a file-sharing network by the owner of the copyright or with the permission of the copyright owner carries an implied license for further downloading and sharing. For example, Napster argued that it was developing a program to promote the works of new, unsigned artists,[231] and a growing number of artists were seeking to use this model to gain exposure.[232] However, even the artists themselves are unsure as to how such a licensing agreement works.[233] In order to avoid confusion, the P2P networks themselves could add a provision to their service specifying that any copyright owner who shares his copyrighted material grants an implied license to reproduce and distribute via the P2P network. Another, and possibly better method, would be to require that any copyright owner sharing copyrighted materials must provide an explicit license to reproduce and distribute on the P2P network.[234]

Although *Napster* apparently forecloses most fair use ar-

228. *See Napster*, 239 F.3d at 1011.

229. *See id.*

230. *See generally* Brannan, *supra* note 63.

231. *See Napster*, 239 F.3d at 1019.

232. *See* TheRecordIndustry.com, *at* http://www.therecordindustry.com/record-mp3sitelisting.htm (last visited Jan. 25, 2003) (providing a portal for unsigned and independent musicians to get information and support on how to distribute their music on the web and through file-sharing networks).

233. *See* Eliot Van Buskirk, *File Sharing After AudioGalaxy* (June 21, 2002), *at* http://electronics.cnet.com/electronics/0-3219397-8-20067407-1.html.

234. This method could easily be done by taking the copyrighted material (MP3 file, DivX file, etc.) along with a text file containing the license provisions and wrapping them into a self-extracting "zipped" file. While slightly more cumbersome than the raw MP3 or DivX file, this process would provide substantially more security with respect to licensing. Freeware and shareware software packages are often distributed with their licenses in this manner.

guments for file sharing,[235] the use of file sharing to build backup libraries and to space shift could possibly be a reasonable fair use in certain circumstances. For example, a CD owner might want to make a backup copy of a work post facto, after the original is rendered useless. If a CD is damaged, it seems reasonable for the owner, who has already paid for the CD and has a right to make a backup copy under *Diamond*,[236] to be permitted to secure a backup of the disk that was originally purchased. Carving out an exception to *Napster* for post facto backup files obtained via P2P file sharing would be a fair and equitable use of file sharing.[237]

Courts should create another exception to *Napster* for users who download files for the purpose of space shifting of files that he or she has purchased. Space shifting under *Diamond* as distinguished by *Napster* is permissible only when the files never leave control of the user.[238] Although users might also take advantage of free or low-cost software packages[239] to create MP3 files directly from CDs for space shifting, using P2P file sharing to build space-shifting libraries is a reasonable use of the file-sharing network. Creating MP3 files[240] generally takes several minutes per song to complete, depending on the desired quality of the MP3. For a person with a large library of music, the time required to create the MP3 files can become excessive. Because a P2P file-sharing network allows a single user to perform many downloads simultaneously, a user trying to space-shift a large number of files could do so considerably faster and easier if copyright laws permitted him to obtain those files via file sharing. Therefore, allowing a person to lawfully obtain copies of files he already owns for the purpose of space shifting via file sharing would be a reasonable use of a P2P network.

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235. *See Napster*, 239 F.3d at 1019.

236. *See id.*

237. This would be especially useful for making post facto copies of software titles; the sharing peer could share the software without the license, so only those downloaders who already have a valid license (but are unable to use the original software due to defect, etc.) would be able to use the downloaded software.

238. *See Napster*, 239 F.3d at 1019.

239. *See, e.g.*, http://www.fdepot.com/mp3.asp (last visited Feb. 17, 2004) (containing links to download sites for free MP3 rippers and other related software).

240. Generally referred to as "ripping"—one "rips" songs from a CD into MP3 format. *See Napster*, 239 F.3d at 1011.

The more difficult problem lies with file sharing. Even if fair use exceptions are carved out for those seeking to create archival copies or space-shift their music collections, the files have to come from somewhere. In order to provide the files necessary for others to make use of file sharing to lawfully space-shift or create archival copies, some type of exception would need to be created for those sharing the files. One method might be to create a limited fair-use exception that allows those who have lawfully space-shifted or archived copyrighted works to share those works with others who are seeking to space-shift or archive lawfully. However, there is no way for the person sharing the files to determine whether or not the person seeking to download the files has the necessary "rights" to do so lawfully; therefore, such an exception would essentially prevent copyright holders from enforcing their rights to control distribution and reproduction of their works.[241] This weakening of the copyright protections runs contrary to the current interpretation of the Copyright Act.[242]

Thus, even if exceptions are created to allow downloaders to use the P2P networks to engage in lawful space shifting or archiving, there appears to be little opportunity to provide similar protections for those sharing the materials.

VI. CONCLUSION

Now that users of P2P file-sharing networks, and not just the networks themselves, are under fire from the RIAA, users must know what rights they have when they are using file-sharing networks. Although the reversal of the original *Verizon* ruling was a loss for the RIAA and increases the difficulties in identifying individual users of the file-sharing networks, users of file-sharing networks are still not anonymous.[243] If the reasoning in the district court's sum-

241. *See* 17 U.S.C. § 106 (2003).

242. *See* Eldred v. Ashcroft, 537 U.S. 186 (2003) (upholding Sony Bono Copyright Extension Act, 17 U.S.C. § 302 (1998)).

243. File sharers should not look to the reversal of *Verizon* as a shift in the battle between file sharers and the RIAA. This reversal does not indicate a shift in the court's attitudes vis-à-vis file sharing; the original *Verizon* decision was overturned because of the requirement in the "Safe Harbor" provisions in section 512 of the Copyright Act for the ISP to "host" infringing materials on its servers rather than simply "route" infringing materials through its servers. In fact, the court noted that "[w]e are not unsympathetic either to the RIAA's concern regarding the widespread infringement of its members' copyrights, or to

mary judgment ruling in *MGM* is followed in other cases, the RIAA and others will be unable to pursue *Napster*-like suits against the file-sharing networks, and will have no choice but to go after the direct infringers—the users of the file-sharing services.[244] Direct copyright infringement lawsuits against individual users of the file-sharing systems are not a matter of if, but when.

Unfortunately for patrons of P2P file-sharing networks, under current statutory and case law there is no "safe harbor" for those users wishing to download or share copyrighted material without an express license or authorization from the copyright owner. Users who wish to continue to make use of P2P file-sharing networks must either shift their usage to downloading lawful files—files for which an express license to download and reproduce is given or files that are in the public domain—or they must accept the fact that every time they download or share a copyrighted work, they are violating the law and must be willing to face the RIAA and other organizations looking to protect their exclusive rights. Since the copyright laws provide for both civil and criminal penalties for infringement,[245] users who wish to continue their use of P2P networks must do so with their eyes open to the possible consequences.

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the need for legal tools to protect those rights" but stated that it was up to Congress to ensure that the laws are kept up-to-date with respect to technology. Recording Indus. of Am. v. Verizon Internet Servs., 351 F.3d 1229, 1229 (D.C. Cir. 2003).

244. *See* Metro-Goldwyn Mayer Studios, Inc. v. Grokster, Ltd., 259 F. Supp. 2d 1029 (C.D. Cal. 2003).

245. *See* 17 U.S.C. §§ 502-06.