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Valerie Alter

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by
VALERIE ALTER*

* J.D. Candidate 2005, Stanford University School of Law.

Introduction

When a new technology enters the entertainment market, incumbents may look backwards rather than forward. In 1984, Jack Valenti, president of the Motion Picture Association of America (MPAA), stated that Sony Corporation's Betamax video tape recorder (VTR) technology, predecessor of the video cassette recorder (VCR), "threatens an entire industry's economic vitality and future security."[1] Valenti's sentiments were commonplace among the major television and motion picture studios.

In an attempt to thwart the nascent VTR, Universal Studios filed a lawsuit against Sony Corporation, claiming that Sony was contributorily liable for VTR purchasers' unauthorized copying of plaintiff's television programs.[2] The *Sony* Court explained that "the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses."[3] The Court therefore held that Sony was not liable, even for the infringing uses that it could have predicted, because its product was capable of substantial noninfringing uses and because the company did not materially contribute to any infringing uses after the VTR left its hands. Although the movie industry lost the *Sony* case, home-viewing technology did anything but destroy the movie industry: currently, digital versatile disk (DVD) rentals generate more income for the movie industry than the box office.[4]

The music industry faces a similar problem today. Peer-to-peer file sharing services enable users to share files online, ranging from personal photos to computer programs to tax documents to copyrighted songs and movies. Rather than having to pay for a whole compact disc (CD), or at least a CD single, to get the weekly chart-toppers, peer-to-peer systems enable Internet users to download songs for free, depriving the record companies of their rightful royalties. The record companies fear that online peer-to-peer systems will mean the end of the recording industry, just as Jack Valenti believed that the VTR would mean the demise of the movie industry.

1. Wally Bock, *Napster*, Monday Memo, *available at* http://www.mondaymemo.net/010219feature.htm (Feb. 19, 2001).

2. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

3. *Id.* at 442.

4. James Poniewozik, *Has the Mainstream Run Dry?* TIME MAGAZINE (Dec. 29, 2003) at 149.

Like the movie studios, the Recording Industry Association of America (RIAA) took to the courts to attempt to demolish peer-to-peer systems. The record companies initially targeted the companies providing the file-sharing software, suing them for contributory and vicarious copyright infringement.

Generally, courts have followed the *Sony* decision in examining software providers' liability for peer-to-peer users' copyright infringement. In a lawsuit Fonovisa filed against Napster, the court reiterated previous courts' assertions "that the mere existence of Napster's peer-to-peer file sharing system does not give rise to sufficient knowledge for contributory liability."[5] When, however, the software provider knows of *and* facilitates infringement, the software provider may be found guilty of vicarious or secondary copyright infringement. In Fonovisa's suit against Napster, the District Court entered a preliminary injunction against Napster because it had actual knowledge of copyright infringement and failed to block users' access to infringing material. Unlike the defendants in *Sony*, the *Napster* defendants were able to prevent infringement—they controlled the server space over which the infringement took place—but did nothing. In *MGM Studios, Inc. v. Grokster*,[6] on the other hand, the court adhered to the *Sony* decision and found that defendant's peer-to-peer software did not amount to a contributory infringement of plaintiff's copyrighted material. The software, like the VTRs in *Sony*, had substantial noninfringing uses. It was irrelevant that the defendants knew that some people used their programs to pirate copyrighted material because they lacked the ability to control their users' activity; the *Grokster* defendants, unlike their *Napster* counterparts, did not utilize a centralized server. These two decisions suggest that using a *Grokster*-style decentralized peer-to-peer platform as opposed to a *Napster*-style centralized server will enable software companies to avoid contributory liability for their users' infringing activity, even though they undoubtedly benefit from that activity.[7]

5. Fonovisa, Inc. v. Napster, Inc., 2002 U.S. Dist. LEXIS 4270, at *21 (N.D. Cal. 2002).

6. MGM Studios, Inc. v. Grokster, Ltd., 259 F. Supp. 2d 1029, 1035-1036 (C.D. Cal. 2003).

7. "[I]t is clear that [software providers] derive a financial benefit from the infringing conduct. The ability to trade copyrighted songs and other copyrighted works certainly is a 'draw' for many users of [the providers'] software." Grokster, 259 F. Supp. 2d at 1043.

Although software companies may currently evade liability, end-users cannot: the RIAA has begun to prosecute individual users, including a 12-year-old girl.[8] In order to escape liability for downloading a copyrighted song from a peer-to-peer service, a user must claim fair use. To determine whether or not an alleged infringing use of a copyrighted work is a fair use, the Copyright Act dictates that courts consider "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes," the nature of the copyrighted work, the amount of the copyrighted work taken, and the effect of the defendant's use of the copyrighted work on the market for the copyrighted work.[9] No factor is determinative. As Judge Pierre Leval eloquently stated, "[e]ach factor directs attention to a different facet of the problem. The factors do not represent a score card that promises victory to the winner of the majority. Rather, they direct courts to examine the issue from every pertinent corner and to ask in each case whether, and how powerfully, a finding of fair use would serve or disserve the objectives of the copyright."[10]

In the first of the *Napster* cases, *A&M Records v. Napster*,[11] Napster alleged three fair uses on behalf of its users:[12] "sampling, where users make temporary copies of a work before purchasing; space-shifting, where users access a sound recording through the Napster system that they already own in audio CD format; and permissive distribution of recordings by both new and established artists." The *Napster* court ultimately decided that sampling was not a fair use because it hurt plaintiff's ability to enter the online distribution market; even though it increased CD sales, "increased sales of copyrighted material attributable to unauthorized use should not deprive the copyright holder of the right to license the material."[13] The court decided that space-shifting was not a fair use because in using Napster to remotely access their own music libraries, individuals

8. In September of this year, the RIAA settled a lawsuit with Brianna LaHara, a 12-year-old honors student living in New York City public housing. See John Borland, *RIAA Settles with 12-year-old girl*, CNET News *at* http://news.com.com/2100-1027-5073717.html (Sept. 9, 2003).

9. 17 U.S.C. § 107 (1996).

10. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1110-11 (1990).

11. 239 F.3d 1004.

12. *Id.* at 1014. Napster alleged a fair use defense because "there can be no contributory infringement by a defendant without direct infringement by another." Religious Tech. Ctr. v. Netcom On-Line Comm. Servs., Inc., 907 F. Supp. 1361, 1371 (N.D. Cal. 1995).

13. Napster, 239 F.3d at 1018.

made those libraries available to millions of other Napster users.[14] Lastly, the *Napster* court noted that the availability of noninfringing uses, such as downloading a song with the artist's permission, did not counteract the infringing uses; plaintiffs did not typically sue for copyright infringement for songs that are downloaded with permission.

Part I of this Note will focus primarily on the *Napster* court's analysis of sampling and will argue that sampling should be a fair use. Copyright attempts to promote creativity and mass dissemination of ideas by providing an incentive to create. It aims to strike an efficient balance between a world in which copyright owners control every aspect of their work, severely restricting the free flow of ideas, and a world in which copyright owners control no aspect of their work, leading to a public goods problem where no one has an incentive to create. Courts must balance the information-based benefit of a particular use against the financial incentive to create. A fair use is one which does not upset that balance.

Arguably, a sampling use that disseminates information and does not hurt the copyright owner financially should be a fair use; society gains from the free flow of information and the creator still receives a financial benefit. This Note will use a hypothetical to show that in the absence of economic injury to the producer, sampling is consistent with the purposes of the Copyright Act and should be considered a fair use. To do so, this Note will concentrate on the first and fourth fair use factors: the commercial nature of the use and the effect on the market for the copyrighted work. In deciding whether or not a use is commercial, courts consider "whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."[15] In considering the effect on the market, if a use is commercial in nature, the fact that it expands the market for the copyrighted work will not mitigate a previous finding of commercial

14. *Id.* at 1019.

15. Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 562 (1985).

use under the first factor.[16] This Note will argue that samplers do not download music to avoid paying the customary price, but rather to make an educated purchasing decision; therefore, their activity is not commercial and should be considered a fair use.

Part II will discuss problems with accepting sampling as a fair use. Sampling serves to draw in the marginal consumer: the person who is indifferent to purchasing a copy of the work without a chance to listen to it first, in full. Using the current peer-to-peer file sharing systems, it is almost impossible to distinguish those users who download files for sampling purposes from those who download music to avoid having to pay for it. This type of system makes sampling a gamble for both samplers and the recording industry: samplers risk being sued for legal activities, while the recording industry has no way to distinguish illegal piracy from sampling.

Lastly, Part III will present and critique two potential solutions to the sampling problem and the peer-to-peer problem at large. First, the recording industry could abandon its attempt to prevent digital piracy. Since courts have prevented the RIAA from recovering damages from the producers of peer-to-peer software, and sampling will likely be considered a fair use, it will be much harder for the RIAA to prevent piracy in the courts. Individuals using peer-to-peer software are too many, and their pockets are too empty, to give RIAA lawsuits or threats of them a real deterrent effect. As such, the RIAA could accept file sharing as a permanent reality and follow the lead of software companies like Red Hat; rather than focusing its efforts on CD sales as a means of generating revenue, it could look to supplemental merchandise or services.

Alternatively, the RIAA could develop its own cost-free sampling program, akin to a digital music public library. It could license users the right to listen to, but not to burn, a particular song for a limited period of time, at which point the file would delete itself automatically. At that point, the user would have a choice between purchasing a CD or downloading a licensed copy of the song. By this

16. A & M Records, Inc., v. Napster, 239 F.3d 1018 (9th Cir. 2001); *See also* UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000):

> Any allegedly positive impact of defendant's activities on plaintiffs' prior market in no way frees defendant to usurp a further market that directly derives from reproduction of the plaintiffs' copyrighted works . . . . This would be so even if the copyright holder had not yet entered the new market in issue, for a copyright holder's 'exclusive' rights, derived from the Constitution and the Copyright Act, include the right, within broad limits, to curb the development of such a derivative market by refusing to license a copyrighted work or by doing so only on terms the copyright owner finds acceptable.

method, the RIAA could effectively corner sampling; any copyrighted song on a peer-to-peer network could be viewed as a presumptive copyright violation.

I. Sampling and Fair Use

As explained in the introduction, in deciding whether the fair use defense applies, courts consider whether the defendant's use of the plaintiff's copyrighted work was commercial. They typically define commercial activity using the standard set forth in *Harper & Row*:[17] did the defendant receive and benefit from copyrighted material obtained without paying the copyright owner his royalty? The *Napster* court applied this standard to online sharing of music, holding that Napster users' downloading of copyrighted songs constituted copyright infringement. The court noted: "In the record before us, commercial use is demonstrated by a showing that repeated and exploitative unauthorized copies of copyrighted works were made to save the expense of purchasing authorized copies."[18] Napster, in providing users with server space upon which to trade unauthorized copies of copyrighted works, was vicariously liable for its users' infringement of plaintiffs' copyrights. The allegedly positive effect Napster had on record sales was irrelevant in light of the fourth fair use factor: "positive impact in one market, here the audio CD market, [does not] deprive the copyright holder of the right to develop identified alternative markets, here the digital download market."[19]

The *Napster* court did not stop there. It went on to hold that sampling—downloading a song to determine whether or not one wants to purchase the album—also infringes copyright. It found that sampling is a commercial use, even if a user ultimately buys the CD, because permitting users to sample songs freely on Napster deprives the record companies of royalties they could derive from sampling. I respectfully disagree with the court's analysis as it applies to end users. Sampling should be a fair use with respect to the end user, both in light of the court's arguments in *Napster* and the purpose of the Copyright Act. Consider the following example.

Harry Highschooler grew up in Big City, USA, listening to the Backstreet Boys, Britney Spears, and other music to which his parents affectionately referred to as "teenage dreck." Harry had no interest whatsoever—not even a penny's worth—in opera. However, one day,

17. *Supra* note 15.
18. Napster, 239 F.3d at 1015.
19. *Id.* at 1018.

while perusing his favorite peer-to-peer service, he came across the soundtrack to "The Marriage of Figaro." He thought to himself, "Well, it's here; I might as well listen to it," and downloaded the songs. Within a week, Harry fell in love with opera and became an opera aficionado, buying dozens of CDs, including "The Marriage of Figaro," and season tickets to the Big City opera. Months later, he received a complaint from the record company that owned the copyright to the recording of "The Marriage of Figaro" that he had downloaded.

Harry's sampling should be considered a fair use because it is not a commercial use. On its face, it appears Harry's download is a commercial use under the standard the Supreme Court set in *Harper & Row* and the district court used in *Napster*: he profited from a song for which he did not pay and downloaded the song to "save the expense of purchasing authorized copies."[20] However, when Harry initially downloaded the song from "The Marriage of Figaro," his expected marginal utility from it was zero—he expected to hate it—and he was unwilling to spend even a penny to see if he liked opera. He would have listened to the music for free, or he would have not listened at all. In this sense, Harry did not spare himself any expense by downloading a song instead of purchasing an authorized copy or paying for an RIAA-sanctioned sample (if such a thing existed); he never would have incurred the expense of a purchase to begin with. Harry, therefore, is more like a person who found a CD by an artist unknown to him on a street corner, took it home, listened to it, and became a huge fan and patron; his use should be considered noncommercial.

Harry's use should also be considered a fair use because it did not diminish the record companies' market for opera. On the contrary, Harry's initial download led to greater profit for the recording industry, as his sampling galvanized him into purchasing CDs he never would have considered otherwise. The *Napster* and *MP3.com* courts' assertion that the positive impact on the CD market does not excuse copyright infringement applies only when there is underlying infringement. In explaining its position, the *Napster* court relied on an example that Judge Leval provided. Leval stated:

> An unjustified taking that enhances the market for the copyrighted work is easy to imagine. If, for example, a film director takes an unknown copyrighted tune for the score of a movie that becomes a hit, the composer may realize a windfall from the aftermarket for his composition. Nonetheless, if the taking is unjustified under the

20. Napster, 239 F.3d at 1015.

> first factor [of the fair use test], it should be considered an infringement, regardless of the absence of market impairment.[21]

Using Leval's reasoning, a finding of commercial use under the first factor is a condition precedent to ignoring positive impact on the plaintiff's market when considering the fourth factor, effect on the market for plaintiff's goods. In Harry's case, as argued above, his use of the material was not commercial and the other fair use factors do not suggest that Harry infringed the record company's copyright. Therefore, under Leval's reasoning, the condition precedent to ignoring positive impact on a market is absent, and the increased profits that resulted from Harry's initial download may be used to mitigate against a finding of infringement under the fourth factor.

Harry's use should also be considered a fair use because he did not deprive the record companies of entry into any market. In *Napster* and *MP3.com*, defendant software providers claimed that increased sales of plaintiffs' CDs justified their having infringed plaintiffs' copyrights by digitally distributing unauthorized copies of plaintiffs' copyrighted material. The courts' decisions, in rejecting defendants' arguments, hinged on the idea that defendants' activities had led to increased CD sales for plaintiffs only because defendants usurped plaintiffs' place in the developing online distribution market. In the *Napster* case, the court found that "[t]he record supports a finding that free promotional downloads are highly regulated by the record company plaintiffs and that the companies collect royalties for song samples available on retail Internet sites."[22] It is important to note that the courts found a sampling market with respect to those who provide digital music, not with respect to those who download it.

Harry's actions did not infringe on the record companies' right to enter any market. Harry is not performing a service, and therefore cannot bar entry into any market. On the contrary, considering the national class of Harrys in the aggregate—those whose expected marginal benefit from the purchase of a particular song is zero—there is no consumer sampling market. Those in Harry's position would not pay to sample. The record companies may argue that while the "price" of the sample would be zero to attract the Harrys, there is still a sampling market with respect to provision of music-related services and advertising revenues. This is likely a valid argument. However, as explained above, it speaks to the liability of those providing the samples, not to the end users who download them.

21. Leval, 103 Harv. L. Rev. at 1124 n. 84.

22. Napster, at 1020.

Lastly, *Napster* and *MP3.com* aside, Harry's sampling should be considered a fair use because it is consistent with the purposes of the Copyright Act. Quoting a House Report on the Berne Convention, the Supreme Court recently reiterated in *Eldred v. Ashcroft* that "the constitutional purpose of copyright is to facilitate the flow of ideas in the interest of learning . . . . Under the U.S. Constitution, the primary objective of copyright law is not to reward the author, but rather to secure for the public the benefits derived from the authors' labors."[23] Harry's use clearly falls within the purposes of the Copyright Act. Sampling facilitates the mass dissemination of ideas by introducing people to musical styles that they would not otherwise have seen. It does not detract from the author's incentive to create, because it does not deprive the authors of any financial benefits they would have received in its absence. Rather, it secures further benefits to the authors by increasing the number of people who purchase CDs and attend their concerts.

In fact, despite the vocal opposition of Metallica drummer Lars Ulrich and others, many artists—the people to whom the drafters of the Copyright Act intended to provide incentive to create—support online distribution: it helps get their music to the masses. Considering that the artist, on average, earns $0.12 per record sold, this is not surprising.[24] For example, in September of 2000, the Smashing Pumpkins, as a result of a feud with their record company, released 25 copies of their album *Machina II: The Friends and Enemies of Modern Music* in vinyl form, and set it free on peer-to-peer services such as Napster, Gnutella, and Grokster.[25] Courtney Love's (Love is the lead singer of the band Hole and the widow of Kurt Cobain from the band Nirvana) speech to the Digital Hollywood online-entertainment conference clearly presented the arguments of those artists who support online distribution services. As she succinctly stated,

> Recording artists have essentially been giving their music away for free under the old system, so new technology that exposes our music to a larger audience can only be a good thing . . . There were a billion music downloads last year, but music sales are up. Where's the evidence that downloads hurt business? Downloads are creating more demand. Why aren't record companies embracing

23. Eldred v. Ashcroft, 537 U.S. 186, 247 (2003) (citations omitted).

24. Bill Wittur, *Selling Minor Chords in Exchange for a Happy Tune*: *Discovering and Implementing the Most Appropriate Media Distribution Model*, MUSIC DISH, *at* http://musicdish.com/mag/index.php3?id=4859 (Dec. 4, 2001).

25. *Smashing Pumpkins Smashes RIAA*. GEEK NEWS, *at* http://www.geek.com/news/geeknews/q22000/gee2000913002350.htm (Sept. 13, 2000).

> this great opportunity? Why aren't they trying to talk to the kids passing compilations around to learn what they like? Why is the RIAA suing the companies that are stimulating this new demand? What's the point of going after people swapping cruddy-sounding MP3s? Cash! Cash they have no intention of passing onto us, the writers of their profits.[26]

It is important to note that Love does not support use of Napster-like services in lieu of purchasing music. Rather, she argued that Napster-like services actually increase an artist's exposure to the masses and therefore lead to increased music sales.[27] She encourages record companies to find a way to lasso this new technology for their benefit, rather than focusing on legal action. In this sense, it would seem that Love and the artists in her camp would support Harry's use of downloaded music. His sampling increased his exposure to opera and led to increased opera sales.

In sum, because Harry's sampling does not run afoul of the premises underlying the *Napster* case, and furthers the purposes underlying the Copyright Act, it should be considered a fair use.

II. Consequences of Accepting Sampling as Fair Use

As explained above, sampling serves the purposes of the Copyright Act because it helps bring music to new audiences. However, there are practical consequences of accepting sampling as a fair use.

Currently, it is impossible to distinguish users downloading copyrighted music for sampling purposes from those who are

26. Courtney Love's speech to the Digital Hollywood online entertainment conference, given in New York on May 16, 2000. *Available at* http://www.cdbaby.net/articles/courtney_love.html.

27. The overall effect of Napster on the CD market is debatable. The RIAA claimed in 2001 that Napster was responsible for a 39% slump in the sale of CD singles. *See* BBC News, *Napster blamed for CD singles slump* (Feb. 26, 2000), *at* http://news.bbc.co.uk/1/hi/entertainment/1190724.stm. However, it is important to note that CD single sales make up only one percent of the recording industry's profits. Sales of full CDs, which account for 92 percent of the recording industry's revenue, increased in the year 2001, despite a price increase. The industry's profits from sales of full CDs increased by 3.1 percent, or roughly $400 million. While the industry's overall revenue was down 1.8 percent in 2001 from 1999, much of that loss was attributable to decreased cassette and music video sales, which Napster did not affect. *See* Slashdot, *Napster Helps RIAA Again; RIAA Still Ungrateful* (Feb. 26, 2001), *at* http://slashdot.org/articles/01/02/26/1812213.shtml. In 2002, on the other hand, e-commerce music sales were down 25 percent. *See* Beth Cox. *RIAA Was Right . . . The Sky Is Falling* (Nov. 5, 2002), *at* http://www.cioupdate.com/trends/article.php/1494781. It still remains unclear to what extent peer-to-peer services, as opposed to general economic downturn, are responsible for financial injuries to the music industry, as both sides continue to produce conflicting figures.

downloading music to avoid paying the record companies. When using a file sharing program such as Gnutella, a user searches for an audio file and then downloads it. From this information, the record company cannot divine why the user downloaded the song and whether his download will ultimately lead to his purchasing a copy of the artist's CD until it files a lawsuit against the user. This information gap leads to an inefficiency in the sampling market, with respect to both record companies and samplers.[28]

Since the record companies cannot determine whether a user downloaded a song for sampling purposes or not, the success of any lawsuits they file against potential infringers will, in many ways, be a function of luck. Sometimes they will sue a party who has downloaded and kept thousands of songs without paying the requisite royalties and succeed. Other times, they will sue a party like Harry, who downloaded songs for sampling purposes and discarded songs he did not purchase, and they will lose. Leaving the success of infringement suits to chance will lead to inefficiency.

The record companies sue people to keep illegal downloading at what they perceive as an acceptable level. They decide how many people to sue based on an estimate of their chances of success. Suppose, for argument's sake, that the record company sues 100 alleged infringers when it has an expected success rate of 40-percent, because it believes that 40 successful lawsuits will be enough to keep unauthorized downloading at bay. If 10 percent of those sued are samplers, against whom the record company has no chance of success, the record company has only effectively sued 90 infringers; therefore, with a 40 percent success rate, it can only expect success in 36 cases. Thus, the record companies' inability to distinguish samplers from infringers will lead them to file too few lawsuits to deter copyright infringement, leaving infringement at an unacceptably high level. Also, the record companies will waste resources—both their financial resources and the courts' time—by suing people who have a valid fair use defense.

The record companies may fix the problem of insufficient deterrence by increasing the total number of lawsuits. Continuing with the example used above, if the record companies increase the number of total suits to ensure that they convict 40 people of copyright infringement, they must sue approximately 111 people: 111

28. I am not using the term "market" to refer to a system in which one exchanges money for goods. Rather, I am using the term "market" to refer to a user's decision to download a song.

accounts for both their expected success rate against infringers and the proportion of samplers in the population. Although this would fix the problem of insufficient deterrence, it would lead to even more suits against samplers, wasting more time and money.

On the sampler side, the record companies' inability to distinguish sampling uses from infringing uses will also lead to inefficiency, as people will hesitate to or even refrain from sampling for fear of legal consequences. Since there is a risk of a lawsuit even when legally downloading songs for sampling purposes, samplers—especially those who are risk averse—will sample less to minimize their risk of a lawsuit and avoid the potential hassle of legal fees. As a result, fewer people will be exposed to new music when the record companies cannot distinguish between samplers and infringers than when they can distinguish.

The practical inefficiency that results from the distinction problem is insufficient to justify outlawing sampling. First, since sampling is within the purposes of the Copyright Act, the uncertainty that it causes with respect to filing lawsuits is arguably a natural and concomitant consequence of participation in the recording industry. Sampling does not change the fact that potential plaintiffs cannot distinguish between infringing or noninfringing uses; rather, it simply lowers the record labels' overall success rate (in the example above, from 40 percent to 36 percent), as would any other fair use defense. For example, a plaintiff may not know prior to filing a lawsuit whether a defendant's use is educational or not and may waste resources filing a fruitless lawsuit. Despite this uncertainty, educational use is still a fair use. The industry's desire to avoid unnecessary legal fees cannot justify excluding sampling as a fair use defense to copyright infringement. Second, the fact that the inability to distinguish sampling uses from infringing uses leads to less sampling does not require that we outlaw sampling. One cannot argue to outlaw a good thing because it occurs at an inefficiently low level. Even though the record industry will likely be stuck with sampling, despite its inefficiency, there are ways around the resulting inefficiency, as the next part will suggest.

III. Alternatives for the RIAA

The recording industry cannot likely use the legal system to eradicate file sharing wholesale. With respect to software providers, file-sharing software has substantial noninfringing uses and survives scrutiny under the *Sony* standard. With respect to end users, as explained in Part I, sampling is likely a fair use. The recording

industry also cannot likely use the legal system to protect itself from the inefficiency that results from its inability to distinguish sampling from infringement prior to filing a lawsuit, as explained in Part II. Regardless, the recording industry has continued to fight this losing battle in the courts. The RIAA has offered some evidence that the lawsuits are succeeding in deterring infringement. For example, the RIAA has pointed to a 15-percent drop in the number of people using file-sharing software during the summer months.[29] However, it is important to view this data in context: when use of file-sharing software dropped 15-percent, use of America Online's Instant Messenger program dropped 9-percent.[30] From these statistics, one may wonder whether the drop in illegal downloading over the summer months is more a function of college students leaving their campuses and their high-speed Internet connections than anything else.

Despite the RIAA's claims that the lawsuits deter infringing activity, simple statistics may contradict that assertion. Currently, the RIAA files hundreds of lawsuits a year against infringing individuals.[31] However, there are 5.5 million unique individuals registered on Kazaa, the most popular file-sharing software, alone,[32] and 65 million people using file-sharing programs in total.[33] Taken together, these statistics suggest that the RIAA annually sues approximately 0.0015 percent to 0.01 percent of those sharing music online.[34] Cindy Cohn, legal director of the Electronic Frontier Foundation, as quoted in the E-commerce Times, commented on the RIAA's lawsuits: "'It's fair to say that they're losing money on this,' she said, adding that the average settlement has been between US$2,000 and $5,000—less than what it probably costs the RIAA's

29. John Borland, *RIAA threat may be slowing file swapping*. CNET NEWS (Jul. 14, 2003), *at* http://news.com.com/2102-1027_3-1025684.html

30. *Id.*

31. John Borland, *Court: RIAA lawsuit strategy illegal*. CNET NEWS (Dec. 19, 2003), *at* http://news.com.com/2100-1027-5129687.html.

32. Borland, *supra* note 29.

33. Greg Kot, *Bands and labels at music conference stuck in the past, uncertain of the future*, CHICAGO TRIBUNE (Oct. 27, 2003), *at* 2003 WL 66437999.

34. This is a very rough approximation and I use it for illustrative purposes only. For simplicity's sake, I describe the likelihood that the RIAA will file suit against a particular person as a function of the number of people who use file sharing services. However, to do a more accurate empirical analysis, one must consider the frequency with which a person downloads music and the volume of music he downloads. That analysis is outside the scope of this paper.

legal team to search for people illegally sharing files, serve complaints and negotiate settlements."[35]

It is not just that the RIAA is losing money on the lawsuits. With an average settlement maximum of $5,000, and a 0.0015 percent to 0.01 percent chance that a lawsuit will be filed against any particular infringer, the average infringer has an expected cost of $0.08 to $0.50 from infringing activity, not including legal fees.[36] If the average person can expect to pay at most $0.50 for downloading copyrighted songs if caught, he will likely take the chance; unless he is incredibly risk averse, an expected penalty of $0.50 is not enough to even make him think twice, as CDs cost appoximately $13 each and downloading individual songs online costs approximately $0.99 per song.[37] To give the intended deterrent some teeth, the RIAA would have to either significantly increase the number of people it sues, or insist on higher settlements. If it does the former, it will waste more money on searching for people downloading files illegally and filing lawsuits; it could be that the lawsuits would cost more than the alleged infringment does. If it does the latter, it will seem like a bully, extracting thousands of dollars from people who do not have much money.[38]

35. Robyn Weisman, *RIAA Fires Warning Shots in Second Wave of War on Piracy*, ECOMMERCE TIMES (Oct. 20, 2003), *at* http://www.ecommercetimes.com/perl/story/31900.html.

36. The expected cost of a given illegal activity may be defined as the likelihood of getting caught multiplied by the cost one will incur if caught. Therefore, in this case, to calculate the expected cost of downloading music illegally, multiply the likelihood that the RIAA will file suit against an individual user, 0.0015 percent or 0.01 percent, by the amount of the average settlement, $5000 (I chose $5000 and 0.01 percent as opposed to $2000 and 0.0015 percent simply to err on the side of caution). Since legal fees vary widely, I have chosen to look at settlement value alone; however, even if a user were to incur $10,000 of legal fees along with a $5,000 settlement, his expected cost still only $1.50.

37. *See, e.g.,* http://www.amazon.com and http://www.apple.com/itunes/.

38. Sam Diaz, *Labels' action overshadow their message, observers say*. SAN JOSE MERCURY NEWS (Sept. 15, 2003), *available at* http://www.mercurynews.com/mld/mercurynews/business/6775671.htm ("And suddenly, the trade association [RIAA]—in its effort to squelch illegal music sharing over peer-to-peer networks such as Kazaa and Grokster—looked more like a schoolyard bully."); Jefferson Graham, *RIAA lawsuits bring consternation, chaos*. USA TODAY (Sep. 10, 2003), *available at* http://www.usatoday.com/tech/news/techpolicy/2003-09-10-riaa-suit-reax_x.htm:

> Anthony Prapkanis, a University of California-Santa Cruz professor of social psychology, says that while people may be sympathetic to the music industry's plight, "the image is out there of the bully ganging up on people with the least amount of money, the rich taking from the poor." "Are they taking a PR hit?" asks Lee Kovel, of L.A.-based Kovel/Fuller ad agency. "Of course. Massive. I think they asked, 'What's the pain vs. the reward?' They want to make a statement and strike fear. They don't care about PR."

See generally http://www.boycott-riaa.com/.

While the power of legal remedies against samplers and infringing users in general seems limited, there are practical solutions the recording industry may implement to protect itself. As Steven Vonder Haar, a digital media analyst explained,

> [T]he Internet will not kill the music industry . . . [b]ut it may prompt some core, fundamental changes in the business models . . . For the first time in more than three decades, the music industry is being forced to think creatively about its distribution model and the way it makes money from promoting artists . . . Digital distribution is putting pressure on the industry's core focus on selling pre-recorded music on CDs. The record labels need to be thinking more creatively about ways they can generate profits from the celebrities they help create.[39]

Similarly, Shari Steele, Executive Director of the Electronic Frontier Foundation, stated, "Rather than trying to sue people into submission, we need to find a better alternative that gets artists paid while making file sharing legal."[40] The following two solutions, although far from perfect, illustrate ways in which the recording industry might maintain its profits in the face of online infringement.

A. The Red Hat Approach

The RIAA may choose to accept file sharing—including sampling and all that goes with it—as the present reality and future of the music industry. Instead of attempting to fight the future and a losing battle in the courts, as the MPAA did with the VTR, the record companies might consider following the example of the computer industry's open-source movement[41] or the Creative Commons project.[42] The open-source movement and Creative Commons provide an alternative to proprietary software and music such as that which Microsoft and the RIAA currently produce. An open-source or Creative Commons license permits users to freely copy, redistribute,

39. Cox, *RIAA Was Right . . . The Sky Is Falling*, *at* http://www.cioupdate.com/trends/article.php/1494781.

40. Electronic Frontier Foundation, *Electronic Frontier Foundation "Let the Music Play" Campaign* (Jun. 30, 2003), *at* http://www.eff.org/IP/P2P/20030630_eff_pr.php.

41. The open source movement was born to give computer programmers more access to computer code. Since its inception, it has developed into a scheme under which programmers may freely copy, distribute, and make derivative works of open-source licensed programs, even for profit. Open Source Initiative, *The Open Source Definition*, *at* http://www.opensource.org/docs/definition.php (last visited Dec. 27, 2003).

42. The Creative Commons Project, modeled after the Free Software Foundation's GNU General Public License (GPL) applies a license similar to the GPL to "websites, scholarship, music, film, photography, literature, courseware, etc." *Some Rights Reserved: Building a Reasonable Layer of Copyright*, *at* http://creativecommons.org/learn/aboutus/ (last visited on Dec. 27, 2003)

and make derivative works, free of charge.[43] Depending on the specific terms of the license, a user may even make derivative works for commercial use.[44]

In using these licenses, companies such as Red Hat have abandoned the traditional, proprietary approach to making money. Instead of focusing primarily on sales of software or music to generate revenue, they lower the software's price and instead focus on selling support services.[45] Red Hat sells its software by an annual subscription that includes support, and allows consumers to choose their subscription based on the level of support that they want.[46] Red Hat also offers support services independent of the software it sells. For example, it offers an information-technology consulting service, custom open-source software, and training for company employees.[47] Red Hat's business model has been successful. Since going public in 1999, Red Hat survived the technology bust of 2000 and has maintained profitability.[48] Currently, its earnings are up 36 percent from last year's fiscal quarter.[49]

The RIAA and its members should consider adopting a Red Hat strategy and shift their focus from CD sales and marketing to something that cannot be as easily pirated. The RIAA asserts that CDs are as expensive as they are because marketing is astronomically expensive.[50] In this case, the very thing the RIAA wishes to shut

43. Open Source Initiative, *The Open Source Definition.* http://www.opensource.org/docs/definition.php. *See also The GNU General Public License (GPL)*, *at* http://www.opensource.org/licenses/gpl-license.php (last visited Dec. 28, 2003); Open Source Initiative, *MIT License*, *at* http://www.opensource.org/licenses/mit-license.php (last visited Dec. 28, 2003); *NonCommercial 1.0.*, *at* http://creativecommons.org/licenses/nc/1.0/legalcode (last visited Dec. 28, 2003).

44. *See* Creative Commons Legal Code, *Attribution 1.0*, *at* http://creativecommons.org/licenses/by/1.0/legalcode (last visited Dec. 28, 2003).

45. *See* Red Hat Inc., *Corporate Learning Solutions*, *at* http://www.redhat.com/services/consulting/learning/ (last visited Dec. 28, 2003).

46. "Red Hat's Enterprise Linux family of operating systems is available on a per-system, annual subscription basis. The subscriptions are offered in three editions: Basic, Standard, and Premium—each with varying support levels and delivery options—so you can choose the subscription combination that best meets the needs of your business." Red Hat Inc., *Red Hat Enterprise Linux Support Options and Pricing*, *at* http://www.redhat.com/software/rhel/purchase/index.html (last visited Dec. 28, 2003).

47. *The Right Services Now*, *at* http://www.redhat.com/services/ (last visited Dec. 28, 2003).

48. *See* Red Hat Inc., *Related Information for RHAT*, *at* http://finance.yahoo.com/q/is?s=RHAT (last visited Dec. 28, 2003).

49. Erin Joyce, *Red Hat's Earnings Jump; Buys Storage Company* (Dec. 18, 2003), *at* http://www.internetnews.com/fina-news/article.php/3291131.

50. In explaining why CD prices are what they are, the RIAA asserts that "marketing and promotion costs [are] perhaps the most expensive part of the music business today.

down—online file sharing—could be the thing that saves it millions of dollars in marketing costs, enabling it to reach millions of users inexpensively and shift to a Red Hat model. Currently, 65 million people use file sharing services,[51] including 35 percent of those over 25; [52] 37 percent of American households have broadband Internet access, and two-thirds of children between the ages of two and 17 years old logged on to the Internet during 2002.[53] I postulate that if the record companies give Napster-like services legitimacy, the percentage of Internet users who utilize them would skyrocket.

As artists have learned—some the hard way—free, mass, online distribution is an efficient, easy, and incredibly inexpensive way to get music to the American population en masse.[54] In saving themselves the marketing costs of a new album and the costs of continued lawsuits to fight infringing uses, the record companies should rely on the fact, as Courtney Love put it, that "[n]o one really prefers a cruddy-sounding Napster MP3 file to the real thing."[55] Despite releasing the music onto the Internet and enabling mass piracy, the record companies may, in fact, retain considerable profits from CD sales. Also, by harnessing peer-to-peer networks to do the record companies' marketing, the companies could use the funds that would have gone to marketing CDs to develop and sell tangible items that are not as easily pirated. They could continue to sell CDs for a much cheaper price, as Red Hat continues to sell its software, but could bundle the CDs with artist-related paraphernalia, such as concert tickets, T-shirts, or posters. They could also sell goods and services separately from CDs. For example, Jennifer Lopez, Jay-Z, and Hilary

They include increasingly expensive video clips, public relations, tour support, marketing campaigns, and promotion to get the songs played on the radio." RIAA Pressroom, *at* http://www.riaa.com/news/marketingdata/cost.asp (last visited Jan. 15, 2004).

51. *See* Kot, *supra* note 33.

52. *Trading Places*. WIRED MAGAZINE (Sept. 9, 2002), *at* http://www.wired.com/wired/archive/10.09/borndigital.html?pg=14.

53. Press Release, Corporation for Public Broadcasting, New Report from CPB Shows Surge in Internet Use Among Underserved Children (Mar. 19, 2003), *at* http://www.cpb.org/programs/pr.php?prn=314.

54. For example, in April of 2003, the artist Madonna placed fake MP3s of her album, *American Life*, on file sharing services. Users thought they were downloading the Madonna songs, but instead heard Madonna saying, "What the f*** do you think you are doing?" Hackers later responded by hacking Madonna's website and making the songs available from Madonna's new website. The hackers left Madonna a message: "This is what the f*** I think I'm doing." Associated Press, *Madonna Swears at Music Pirates*. BBC NEWS (Apr. 22, 2003), *available at* http://news.bbc.co.uk/1/hi/technology/2962475.stm.

55. Love, http://www.cdbaby.net/articles/courtney_love.html.

Duff have all released clothing lines.[56] Record companies could sell cosmetics, snacks, gourmet food, athletic gear, tools, furniture, bedding, or just about anything under the sun, as long as they put the artist's name on it.

The Red Hat model would be a dramatic departure from the music industry's entrenched business model, and represents a significant risk of income loss. There is no guarantee that Love is right—that consumers, particularly college students, prefer spending money on the superior quality of CD sound over listening to MP3s with lesser sound quality and saving money. Also, this plan threatens the recording companies at their core: if artists can promote their albums independent of the record companies using the Internet, as did the Smashing Pumpkins,[57] what prevents them from promoting their own goods as well? What purpose would the record companies—the middlemen—ultimately serve? This is a question that the industry must resolve before modifying its business model.

B. A Musical Equivalent to the Library of Congress

The RIAA should consider developing a cost-free sampling program, like the Library of Congress but for digital music, supplemented by digital retailers such as Apple's iTunes. This type of library would benefit the recording industry for three reasons. First, a digital library would enable the recording industry to distinguish between sampling and infringing uses. Second, it would increase the number of people with access to music, and thus the recording industry's profits, consistent with the Copyright Act. Lastly, it would mitigate the image of the recording industry as the playground bully.

To set up a digital music library, the recording industry should place all of its music online. If it allows users to download the files, it should program them to self-destruct after a reasonable period of time on the user's computer—say five days—and to prohibit burning the song onto CD. In the alternative, the RIAA could enable users to stream full songs from its web site. Users would thus be able to extensively preview a song or album before deciding whether or not to buy. Under either plan, the RIAA could require a user to input his computer's physical or wireless address. Since these addresses are unique to a particular computer and identifiable, inputting the

56. Cynthia Nellis, *Celebrity Clothing Lines: From J Lo to Snoop Dogg*, *at* http://fashion.about.com/cs/celebritystyle/a/celebritylines.htm (last visited Dec. 29, 2003).

57. Currently, approximately 25 artists have begun to profit from the Internet without suing their fans. *See* Electronic Frontier Foundation, *File Sharing: It's Music to Our Ears*, *at* http://www.eff.org/share/ (last visited Dec. 30, 2003).

address would prevent users from downloading multiple copies of the same song, or listening to a song ad nauseum to avoid purchasing the CD. The RIAA should couple the library with an informational campaign to educate people about which types of file sharing are legal and which are not so that people understand how and why to use the RIAA's system. It should also make sure that online music stores, such as iTunes and the revived Napster, price songs below the consumers' expected cost for downloading the songs illegally.[58]

The digital music library will perform a separating function. If the RIAA chooses to let users download files, it will be able to tell immediately whether or not the user downloaded the file for sampling purposes by whether the downloaded file was protected with the RIAA's coding. If the RIAA goes with streaming instead, it could assume that any downloaded file was an infringing use because legitimate sampling was done using streaming, not downloaded files.[59] In this sense, any file without RIAA coding on it could be presumed to infringe. If the RIAA wished to pursue legal action against infringing users, it could do so without wasting money on useless lawsuits against samplers, as discussed in Part II, *supra*.

Although the library would successfully perform a separating function, the RIAA may worry that placing all of its music online would expose it to mass piracy. Some teenage hacker could break its code, leaving all of its intellectual property free from technological protection, as has happened to DVDs, and most recently, Apple's iTunes.[60] The fact that it could distinguish infringers from samplers becomes irrelevant when the number of infringers increases drastically; it would spend the money saved by refraining from futile suits against samplers suing the increased number of infringers.

58. As explained earlier in this Part, the expected cost to a consumer from downloading illegal music is the likelihood that the RIAA will wage a lawsuit multiplied by the penalty the consumer will face if found guilty. If we assume that consumers are rational and will choose the less expensive of two options, they will buy a legitimate copy of a song online if the cost to them in buying the song, including transaction costs, is less than the expected cost of downloading the song illegally.

59. It is important to note that the separating function under either plan would not be perfect. Users might download illegitimate files for sampling purposes as opposed to RIAA-sanctioned files if the illegitimate ones are more convenient. Or, they might download files instead of streaming them to have access to the files without Internet.

60. For example, at the age of 16, Jon Lech Johansen (now 19) wrote a program that cracked CSS, which the movie industry used to prevent copying of digital versatile disks (DVDs) and posted it on his website. This year, he posted a program that cracks the protections Apple employed to prevent unauthorized uses of songs downloaded from its iTunes store. Associated Press, *DVD Hacker Appears to Be Targeting iTunes; A new security-cracking software, posted on the Internet, evades the Apple music service's anti-copying system.* LOS ANGELES TIMES (Nov. 27, 2003), *available at* 2003 WL 68900897.

However, it is unlikely that providing an online library would lead to any more piracy than already exists. As Courtney Love put it in 2000,

> At this point the "record collector" geniuses who use Napster don't have the coolest most arcane selection anyway, unless you're into techno. Hardly any pre-1982 REM fans, no '60s punk, even the Alan Parsons Project was underrepresented when I tried to find some Napster buddies. For the most part, it was college boy rawk without a lot of imagination. Maybe that's the demographic that cares—and in that case, My Bloody Valentine and Bert Jansch aren't going to get screwed just yet.[61]

With the success of legal online music retailers such as iTunes, would-be infringers have ample opportunity to pirate music already; one more source of legitimate music would not likely contribute significantly to the problem.

That said, the danger in providing RIAA-sanctioned files is not that they would increase the incidence of piracy but rather that they make piracy more difficult to detect. Currently, when searching for infringing uses, the record companies use a broader net than necessary and sweep up noninfringing uses, such as sampling, with the infringing uses. To the extent that the current system is overinclusive, it is likely that digital library system would be underinclusive. For example, consider what would happen if Jon Johansen or some other young hacker wrote a program that either disabled the protective code on the RIAA-sanctioned files or enabled users to digitally record RIAA-streamed files. An infringing user could download or stream the song legitimately from the RIAA database or other file sharing system and then disable the RIAA's protective coding or record the song; the user could then keep the song without paying for it. The RIAA would be unable to detect the piracy; rather, it would see that the user downloaded or streamed an RIAA-sanctioned file. The RIAA might try to prevent this scenario with downloadable files by making the sanctioned audio files "call home" before they self-destruct; however, for any program they write, a creative hacker will likely find a way around it. It may thus appear to the RIAA that there is little to no infringement, when in reality, the incidence of infringement has decreased little, if at all. Therefore, whether or not the RIAA would provide a digital library for sampling purposes depends on how effectively it could prevent clandestine infringement and a detailed cost-benefit analysis, which is outside the scope of this paper.

61. Love, http://www.cdbaby.net/articles/courtney_love.html.

Despite its drawbacks, a digital music library would also substantially increase access to music. For example, in a small town with limited and closely scrutinized radio outlets, young people would be able to legally access new music online that they could not hear on their local radio stations. An online digital library would enable them to listen to the music in full before deciding to purchase it on Amazon.com or another e-tailer. It would enable people like Harry, unwilling to pay for a song without first getting the opportunity to listen to it in full, to legally sample music prior to purchasing it. Getting music to a larger audience will also likely increase record companies' profits; with a legitimate online digital library, they will be able to reach out to a larger portion of the American population than before. In this sense, an online digital library will further the purposes of the Copyright Act: it facilitates the mass dissemination of ideas without detracting from the author's incentive to create.

The RIAA may find that the benefits that stem from increased musical exposure are not great enough to overcome the drawbacks mentioned above and the potentially astronomical expense of maintaining a digital library. It has to protect its economic interest in the music industry. After all, the government—not the RIAA—has the responsibility to promote the ideals of the Copyright Act and to bring music to the masses. While the RIAA cannot likely oppose sampling, as explained above, it does not have to facilitate it, either; as long as the RIAA complies with the Copyright Act, it has done its job. It does not have to maintain expensive servers to enable users to download RIAA-sanctioned files, nor does it have to employ computer personnel to patch holes in protective software to help the government fulfill its mission.

Although the RIAA is not legally obligated to provide an online library, doing so may mitigate the image of the record company as schoolyard bully.[62] The record companies would appear to reach out to their consumers—instead of their consumers' pockets—by insuring that people are able to make knowledgeable decisions about which music to purchase. An informational campaign to inform the public about copyright will also suggest that the record companies wish to

62. The RIAA has attempted to fight its negative image to some degree. For example, in September 2003, the RIAA announced an amnesty program. Any user who admitted to illegal file sharing would receive amnesty from the RIAA. While this plan seems benevolent on its face, the amnesty program actually does very little. It does not bind the recording companies, preventing them from filing individual suits, nor does it protect the user from criminal liability. *See* Electronic Frontier Foundation, *Why the RIAA's "Amnesty" Offer is a Sham*, *at* http://www.eff.org/share/amnesty.php (last visited Dec. 31, 2003).

avoid prosecuting well-meaning people or sympathetic defendants like 12-year-old Brianna LaHara. Although ignorance of the law is not a defense to liability, the public backlash against the RIAA does not seem to care about the law. As a poster on http://www.techdirt.com put it, "Are people breaking the law? Yes. Does this justify bullying twelve-year olds and grandfathers? Does this justify suing the writer of a campus search engine and stealing his life savings?"[63] If the RIAA appears to protect and care about "innocent" infringers and general public welfare, it will likely alleviate some of the anti-RIAA sentiment.

Conclusion

As this paper demonstrates, the file sharing issues the recording industry faces are complicated and not easily resolved. If it maintains the status quo, the RIAA will file unnecessary lawsuits against legitimate samplers and cater to a smaller market of people than that which it would encounter if it were to embrace widespread file sharing. If, on the other hand, it embraces large-scale file sharing immediately, it risks either transforming its business model entirely and possibly losing its place as the middleman, or opening a Pandora's box of uncontrollable, undetectable infringement. It seems that none of these scenarios is satisfactory. Therefore, the recording industry should look to take small steps away from the current model toward one where it relies less on CDs sales and more on tangible goods to generate revenue, so that illegal file sharing becomes less of a death knell.[64] In waiting for the recording industry to alter its business model to embrace online distribution, the American population should remain patient. It will take quite some time to evolve the industry's entrenched business model to accommodate file sharing—as they say, Rome wasn't built in a day.

63. David, *Boycott 'Em*, post to the site www.techdirt.com (Sept. 9, 2003), *at* http://www.techdirt.com/articles/20030909/0116235.shtml.

64. For a list and short description of other potential solution to the peer-to-peer problem, *see* Electronic Frontier Foundation, *Making P2P Pay Artists*, *at* http://www.eff.org/share/compensation.php (last visited Dec. 31, 2003).