

## MAJOR RECORD LABELS AND THE RIAA: DINOSAURS IN A DIGITAL AGE?\*

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\* The author plays bass in the band Pushmonkey, formerly signed to a major label, thus sparking his interest in this topic. He would like to thank his wife Melissa and his entire family for their love and support

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## I. INTRODUCTION

Music industry veteran Paul McCartney recently observed that “[t]he major record labels are having major problems. They’re a little puzzled as to what’s happening. . . . [T]he major labels these days are like dinosaurs sitting around discussing the asteroid.”<sup>1</sup>

Since 2003, the music industry’s four major record labels,<sup>2</sup> through their trade association the Recording Industry Association of America (“RIAA”), have waged war in the courts against individual computer users for the illegal downloading of copyrighted music.<sup>3</sup> While these suits have resulted primarily in default judgments in favor of the labels, they have not stemmed the tide of illegal downloading or the continuing plunge in CD sales.<sup>4</sup> Now, several recent court decisions indicate that the legal tide may be turning against the labels as well.<sup>5</sup>

This Comment explores the negative implications of these recent decisions for the major labels and suggests that there are more effective ways for the labels to solve their growing problems than by suing individual users. Part II discusses the copyright protection afforded to the major labels’ sound recordings and looks at the traditional business structure of the labels. Part III briefly describes the emergence of peer-to-peer (“P2P”) file-sharing technology and explains why this technology has presented such a threat to the labels. Part III also looks at the

1. Allan Kozinn, *Still Needing, Still Feeding the Muse at 64*, N.Y. TIMES, June 3, 2007, §2, available at <http://www.nytimes.com/2007/06/03/arts/music/03kozi.html>.

2. The four “major” labels consist of EMI Records, Vivendi Universal, Warner Brothers, and Sony BMG. In 2004, they collectively controlled about 80 percent of the \$32 billion global music market. Michael Coren, *Simple Downloads, Complex Change*, CNN, August 23, 2004, <http://www.cnn.com/2004/TECH/internet/08/18/online.overview/index.html>.

3. See Electronic Frontier Foundation, *RIAA v. The People: Four Years Later*, at 2, 5, [http://w2.eff.org/IP/P2P/riaa\\_at\\_four.pdf](http://w2.eff.org/IP/P2P/riaa_at_four.pdf) [hereinafter *The People*].

4. *Id.* at 7; see Recording Industry Association of America, 2006 Year-End Shipment Statistics, [http://www.riaa.com/keystatistics.php?content\\_selector=keystats\\_yearend\\_report](http://www.riaa.com/keystatistics.php?content_selector=keystats_yearend_report) (follow “2006 U.S. Manufacturers’ Unit Shipments and Value Chart” hyperlink under “Year-End”) [hereinafter 2006 Year-End Shipment Statistics]. According to RIAA statistics, CD sales have dropped one-third since 2000, from 942 million units shipped in 2000 to 615 million units shipped in 2006. 2006 Year-End Shipment Statistics.

5. See discussion *infra* Part III.

two-pronged legal response by the RIAA to the P2P issue and examines the effectiveness of their response. Part IV looks at several recent individual user cases in which courts have ruled against the labels and examines the implications of these decisions for the RIAA's legal strategy in the future. Part V concludes the Comment by looking at three different business models the labels may be able to use to adjust and prosper in the new era of digital downloading.

## II. COPYRIGHT LAW AND THE MAJOR LABELS

The Constitution provides that "Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>6</sup> To this end, Congress created the Copyright Act,<sup>7</sup> which grants the copyright holder a set of exclusive rights subject to certain statutory limitations.<sup>8</sup> This is meant to encourage and reward the authors of a creative work, while at the same time "promoting broad public availability of literature, music, and the other arts."<sup>9</sup> Among the works of authorship afforded copyright protection are musical works and sound recordings.<sup>10</sup> Copyright owners are granted many exclusive rights regarding use of the copyrighted work, including the rights to reproduce the work, prepare derivative works, distribute copies of the work, and perform the work publicly.<sup>11</sup>

### A. Sound Recording Protection

Rights in sound recordings are the type of copyright held by record labels.<sup>12</sup> Sound recordings are "works that result from the fixation of a series of musical . . . or other sounds."<sup>13</sup> Record labels typically acquire the rights to sound recordings in an

6. U.S. CONST. art. I, § 8, cl. 8.

7. Copyright Act, 17 U.S.C. §§ 101-1332 (2000).

8. 17 U.S.C. § 302(a)-(c) (2000). Currently, copyright in a work created on or after January 1, 1978 lasts for the life of the author plus 70 years. *Id.* § 302(a). Copyright in a work-for-hire lasts for a term of 95 years from date of first publication, or 120 years from year of creation, whichever expires first. *Id.* § 302(c).

9. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

10. 17 U.S.C. § 102 (Supp. 2000). Other works protected include literary works, dramatic works, pantomimes and choreography, sculptures, motion pictures, and architectural works. *Id.*

11. *Id.* § 106.

12. See W. Jonathan Cardi, *Uber-Middleman: Reshaping the Broken Landscape of Music Copyright*, 92 IOWA L. REV. 835, 848 (2007).

13. 17 U.S.C. § 101 (Supp. 2000).

artist's music "through work-for-hire agreements and assignments of ownership from the performing artists, producers" and others involved in creating the sound recording.<sup>14</sup> The sound recording copyright owner (i.e. the record label) has the exclusive right to: 1) reproduce the recording; 2) prepare derivative works based on the recording; 3) distribute copies of the recording to the public; and 4) perform the work publicly by means of digital audio transmission.<sup>15</sup> Special protection is afforded digital audio transmissions, which are defined as digital transmissions that embody the transmission of a sound recording.<sup>16</sup>

### 1. Digital Transmissions

Protection of digital transmissions was implemented by Congress in § 114(d) of the Copyright Act.<sup>17</sup> In particular, full exclusive rights are granted with regard to "interactive" internet transmissions, which are transmissions that provide the listener a choice of which sound recording is performed and when.<sup>18</sup> Such interactive digital services involve a high risk of copying.<sup>19</sup> A web service would be interactive, for example, "if it provide[d] a list of songs available" for a user to play at the click of a button.<sup>20</sup>

### 2. Infringement and Remedies

The Copyright Act provides that "a digital . . . delivery of a sound recording is actionable as an act of infringement" and is subject to the remedies provided for in the Act.<sup>21</sup> Remedies for infringement set out in the Act include "an award of statutory damages . . . with respect to any one work [i.e. a song] . . . in a sum of not less than \$750 or more than \$30,000 as the court considers just."<sup>22</sup> Damages for willful infringement may be

14. Cardi, *supra* note 12, at 847.

15. 17 U.S.C. § 106 (Supp. 2000).

16. *Id.* § 114(j)(5).

17. *Id.* § 114(d). Facing a technological change in the 1990s that would allow music delivery without purchase of a physical product, "Congress aimed to protect sound recording owners [the labels] against commercial displacement of sales from downloading and streaming services" by implementing § 114(d) of the Copyright Act. Michael Einhorn & Lewis Kurlantzick, *Traffic Jam on the Music Highway: Is it a Reproduction or a Performance?*, 49 J. COPYRIGHT SOC'Y U.S.A. 417, 426 (2001).

18. See Cardi, *supra* note 12, at 851.

19. See June M. Besek, *Biographical Information*, in *MUSIC ON THE INTERNET 2006*, at 248 (PLI Patents, Copyrights, Trademarks, and Literary Prop., Course Handbook Series No. 9017, 2006).

20. See Cardi, *supra* note 12, at 851.

21. 17 U.S.C. § 115(c)(3)(G) (2000).

22. *Id.* § 504(c)(1).

increased to as much as \$150,000.<sup>23</sup> This is the range of remedies courts award in lawsuits against individual downloaders.<sup>24</sup>

### B. *Major Labels and the Traditional Business Model*

As previously noted, the “major labels” currently are EMI Records, Vivendi Universal Records, Warner Brothers Records, and Sony BMG.<sup>25</sup> For decades, the major labels have depended upon their tried and true physical distribution business model to deliver music to the buying public.<sup>26</sup> The advent of internet file-sharing, however, has largely undermined this model.<sup>27</sup>

The traditional major label business model consists, in a nutshell, of: 1) finding an artist to sign a recording contract and making a recording of that artist; 2) promoting and marketing that recording; and 3) producing and distributing the physical embodiment (i.e. a CD, tape, or vinyl album) of the recording.<sup>28</sup> Approximately half of the gross sales price of a physical product (for example, \$7.70 of a \$17.00 CD) goes back to the label for production, distribution, and packaging costs.<sup>29</sup> Because physical production and distribution of a product is not necessary under an electronic distribution system, most of that \$7.70 gets stripped away from the bottom line of the labels, resulting in a large decrease in profits.<sup>30</sup>

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23. *Id.* § 504(c)(2). The standard for a finding of willful infringement is “simply whether the defendant had knowledge that its conduct represented infringement or perhaps recklessly disregarded the possibility.” *Twin Peaks Prods, Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1382 (2d Cir. 1993).

24. *See, e.g.*, *Atl. Recording Corp. v. Lopez*, No. 5:06-CV-179, 2007 WL 2010752, at \*1 (S.D. Tex. July 5, 2007) (awarding statutory damages of \$750 for each of five illegally downloaded songs).

25. *See* Coren, *supra* note 2. Two major labels, Sony and BMG, merged in 2004 in an effort to combat weak retail sales due in part to online file-sharing. *See Simple Downloads, Complex Change: Online Music Transforms Experience for Fans, Industry*, CNN.COM, Aug. 23, 2004, <http://www.cnn.com/2004/TECH/internet/08/18/online.overview/index.html?iref=newssearch>. Two others, EMI and Warner Brothers, are in discussions but have yet to merge. *See Sony, BMG Agree on Music Merger*, CNN.COM, Nov. 7, 2003, <http://edition.cnn.com/2003/BUSINESS/11/06/sony.bmg.reut/>.

26. *See generally*, Zeb G. Schorr, *The Future of Online Music: Balancing the Interests of Labels, Artists, and the Public*, 3 VA. SPORTS & ENT. L.J. 67, 68 (2003).

27. Coren, *supra* note 2.

28. *See* Robert L. Frost, *Rearchitecting the Music Business: Mitigating Music Piracy by Cutting Out the Record Companies*, FIRST MONDAY, August 2007, [http://www.firstmonday.org/issues/issue12\\_8/frost/index.html](http://www.firstmonday.org/issues/issue12_8/frost/index.html).

29. *Id.*; *see also* Ankur Srivastava, *The Anti-Competitive Music Industry and the Case for Compulsory Licensing in the Digital Distribution of Music*, 22 *TOURO L. REV.* 375, 430-31 (2006).

30. *See* Frost, *supra* note 28.

The labels also lose another competitive advantage with the loss of control over distribution.<sup>31</sup> Because the traditional model requires access to a large distribution network, each major label owns a distribution company. Thus, under the old model the labels did not have to compete with the numerous smaller independent labels for distribution on a national level and were able to monopolize retail shelf space.<sup>32</sup> These control mechanisms have become less relevant with online distribution and internet piracy.<sup>33</sup>

### III. EMERGENCE OF FILE-SHARING

In the late 1990's, three technologies emerged that would change the music industry forever: MP3 technology, broadband access, and file-sharing software.<sup>34</sup> These resulted in widespread music piracy and prompted a swift legal response by the recording industry.<sup>35</sup>

#### A. P2P Technology Explained

##### 1. MP3 Technology

MP3 (or MPEG-1, Audio Layer-3) is an audio compression technology that “creates relatively small digital audio files with high-fidelity sound.”<sup>36</sup> MP3 technology eliminates frequencies not recognized by the human ear, and thus requires much less storage capacity than a regular audio file.<sup>37</sup> The result is that MP3 audio files can be transferred from user to user without any loss of quality.<sup>38</sup> This “allows for the viral spread of MP3's and the virtually exponential growth of MP3 sound files across a file-sharing network.”<sup>39</sup>

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31. See Schorr, *supra* note 26, at 74-75.

32. See *id.*

33. See *id.* at 75.

34. See Srivastava, *supra* note 29, at 408.

35. See generally *id.* at 408-12 (reporting how the new MP3 file sharing network erupted in popularity, resulting in two billion music files being illegally traded each month and igniting debate at the Supreme Court as to whether file sharing actually harms artists and discourages innovation).

36. Michael Gowan, *How MP3 Works*, CNN.COM, Feb. 3, 2000, <http://archives.cnn.com/2000/TECH/computing/02/03/mp3.works.idg/index.html>.

37. Srivastava, *supra* note 29, at 405.

38. See *id.*

39. *Id.*

## 2. Broadband Access

The increased availability of broadband internet access in the late 1990's to residences and college campuses allowed users to connect to the internet at speeds seventy times faster than traditional dial up.<sup>40</sup> Broadband, commonly referred to as "high-speed" internet access, is carried through a "pipeline" rather than a phone line, which means that it is always on and accessible to the user, making it quick and convenient to swap files.<sup>41</sup>

## 3. File-Sharing Software

In 1999, college student Shawn Fanning created a software program called "Napster" that enabled computers and computer users to share files with each other over a common network.<sup>42</sup> All types of files were shareable, but the use that caught the interest of many was the sharing of music through MP3 files.<sup>43</sup> File-sharing technology in effect created a worldwide online library of millions of computers, in which each user could access the contents of every other user's computer.<sup>44</sup> Among the contents available were high quality MP3 copies of copyright protected songs.<sup>45</sup>

### B. *The Resulting Decline in Sales*

The financial consequences of the file-sharing revolution quickly became evident to the major labels.<sup>46</sup> A look at the CD sales statistics beginning in 2000, a year after the appearance of Napster, shows a rapid decline in sales for the major labels.<sup>47</sup>

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40. *Id* at 405-06.

41. *See id.*; *see also* Federal Communications Commission, Consumer & Governmental Affairs Bureau, *What Is Broadband?* (Apr. 17, 2007), <http://www.fcc.gov/cgb/broadband.html>.

42. Mark G. Tratos, *Entertainment on the Internet: The Evolution of Entertainment Production, Distribution, Ownership and Control in the Digital Age*, in THE IMPACT OF THE INTERNET & DIGITAL MEDIA ON THE ENTERTAINMENT INDUSTRY, at 169 (PLI Patents, Copyrights, Trademarks, and Literary Prop., Course Handbook Series No. 8874, 2006).

43. *See id.*

44. *See* Srivastava, *supra* note 29, at 406.

45. *See* Tratos, *supra* note 42, at 169-70.

46. *The People*, *supra* note 3. However, major label recording artists may be less financially affected by illegal downloading because CD sales comprise only one part of their income stream; touring and merchandising income remain strong. *Cf.* John M. Rolfe Jr. & John E. Murdock, III, *On the Record, How Music Connects with Law*, available at <http://www.abanet.org/buslaw/blt/2006-07-08/murdock.shtml>.

If the artist is also the songwriter, there are additional income streams from performance royalties and use of songs in movies, television shows, commercials, DVD's, Internet play, and ringtones. *See generally id.*

47. *The People*, *supra* note 3.

Over nine hundred forty-two million CD units were sold in 2000, compared with 881.9 million units in 2001, 746 million units in 2003, and 614.9 million units in 2006.<sup>48</sup> The picture does not seem to be getting any brighter, with sales down another 20% as of May 2007.<sup>49</sup>

### C. *The Labels' Legal Response*

The explosion of use in file-sharing programs and the resulting decline in sales did not escape the notice of the major labels for very long. Through their trade association, the Recording Industry Association of America, the labels initiated a legal attack to combat the perceived problem of illegal downloading.<sup>50</sup>

#### 1. The Recording Industry Association of America

The RIAA is a trade association comprised of the four major labels and many smaller labels.<sup>51</sup> They “coordinat[e] enforcement actions, assist[] in intra-industry negotiations, lobby[] Congress regarding proposed amendments to the Copyright Act, and [help] educat[e] the public about music copyright law.”<sup>52</sup> Their stated mission is to “work to protect intellectual property rights worldwide” and to “foster a business and legal climate that protects the ability of . . . [record companies] . . . to invest in the next generation of music.”<sup>53</sup> It is under this auspice that the labels initiate their lawsuits.<sup>54</sup>

#### 2. Suits Against P2P Companies

The RIAA began its legal fight against file-sharing by going after the providers of the P2P software and services.<sup>55</sup> They

48. *Id.*

49. Jeff Leeds, *Plunge in CD Sales Shakes up Big Labels*, N.Y. TIMES, May 28, 2007, at E1.

50. *See* Tratos, *supra* note 42, at 176-77.

51. *See* Cardi, *supra* note 12, at 849.

52. *Id.*

53. Recording Industry Association of America, *For Students Doing Reports*, available at <http://www.riaa.com/faq.php> (last visited Jan. 29, 2008)[hereinafter *For Students*].

54. *See id.* This is not the first time the entertainment industry has sued to preserve a dying business model. In 1984, the industry sued Sony, makers of the Betamax video recorders, for contributory copyright infringement. *See* Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 456 (1984). The court held that the Betamax recorder was capable of “substantial noninfringing uses” and that the recording of network television programs constituted “time shifting,” a permissible copying of the programs. *Id.*

55. Tratos, *supra* note 42, at 176.

started in 2000 with Napster, which the RIAA called “a giant online pirate bazaar” of illegal file-sharing.<sup>56</sup> Napster distributed free software that allowed users to swap and copy MP3 music files from the hard drives of other users.<sup>57</sup> Napster supplied a central database to help users find the song or artist they were looking for, but did not actually copy the songs itself.<sup>58</sup> The Ninth Circuit concluded that Napster had actual and constructive knowledge of direct infringement by its users, and thus had the required knowledge to establish contributory liability.<sup>59</sup> The Court modified and then affirmed the preliminary injunction against Napster imposed by the district court, effectively dealing Napster a deathblow.<sup>60</sup>

After *Napster*, the file-sharing community came up with ways to try to circumvent the *Napster* decision.<sup>61</sup> One loophole, employed by Aimster, eliminated the knowledge element by encrypting its users’ file transfers so that “it would be incapable of knowing what files were being sent over its network.”<sup>62</sup> The Aimster service allowed users to “swap files only when they were online and connected in a chat room enabled by AOL’s Instant Messaging Service.”<sup>63</sup> The RIAA successfully closed this loophole in 2003 with the *Aimster* decision. The Seventh Circuit upheld the district court’s preliminary injunction against Aimster and rejected Aimster’s non-infringing use argument.<sup>64</sup> In addition, the Seventh Circuit held that “willful blindness’ constituted knowledge sufficient to invoke contributory liability.”<sup>65</sup>

The Grokster service attempted to exploit a second loophole in the *Napster* decision.<sup>66</sup> Its network was completely

56. Gowan, *supra* note 36.

57. See Besek, *supra* note 19, at 251.

58. See *id.*

59. See *id.* at 252. Napster also derived a financial benefit from the infringement and had the ability to supervise and control user conduct. *Id.* (discussing *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001)).

60. See *id.*

61. See Bryan H. Choi, *The Grokster Dead End*, 19 HARV. J.L. & TECH. 393, 395 (2006).

62. *Id.* at 395-96.

63. Tratos, *supra* note 42, at 182.

64. See Tratos, *supra* note 42, at 181-82. In his opinion, Judge Richard Posner notes that although there may have been many substantial non-infringing uses for Aimster (in fact, he enumerates five of them in the opinion), Aimster failed to include even one in their argument. *Id.* Because “the evidence is sufficient, especially in a preliminary-injunction proceeding, which is summary in character, to shift the burden of production to Aimster to demonstrate that its service has substantial noninfringing uses,” the injunction against Aimster was granted. *In re Aimster*, 334 F.3d at 652.

65. Choi, *supra* note 61, at 397 (citing *Aimster*, 334 F.3d at 650).

66. *Id.*

decentralized: the Grokster service employed a system of “supernodes” to facilitate file-sharing.<sup>67</sup> When the RIAA sued, Grokster argued that decentralized software “meant there was no centralized file-sharing network, as there was in *Napster*, to supply the knowledge necessary for contributory infringement or the control necessary for vicarious infringement.”<sup>68</sup> The district court agreed, granting summary judgment to Grokster and concluding that “Grokster could be contributorily liable only if it had knowledge of specific infringements and failed to act.”<sup>69</sup> This was not a standard the plaintiffs could meet. The Ninth Circuit affirmed the decision.<sup>70</sup> Surprising many, however, the Supreme Court handed the RIAA a win<sup>71</sup> and reversed the Ninth Circuit by finding Grokster liable for contributory (or “induced”) infringement.<sup>72</sup>

While this decision opened the door for the RIAA to sue P2P software creators and distributors for secondary liability, *Grokster* was really not much more than a moral victory for the RIAA, because illegal file-sharing continued unabated.<sup>73</sup> This led to the second prong of the RIAA’s legal attack, which included suits against individual file-sharers.

### 3. Suits Against Individuals

Even with the big win over Grokster, the RIAA came to believe that “without the threat of consequences, far too many people were just not [going to change] their behavior.”<sup>74</sup> They felt it was crucial to “send a message to individuals that engaging

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67. See Besek, *supra* note 19, at 249. Each “supernode” is an individual computer acting as a server in the network; the computer being utilized varies with the needs of the system at the time. See *id.* at 250.

68. Choi, *supra* note 61, at 397.

69. Besek, *supra* note 19, at 250. The court reasoned that because of the design of Grokster’s network, any notice of infringing conduct would reach Grokster after the conduct had already taken place, when Grokster could do nothing about it. *Id.*

70. See Choi, *supra* note 61, at 397 (citing Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd. (*Grokster I*), 380 F.3d 1154 (9th Cir. 2004)).

71. The win came in Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd. (*Grokster II*), 545 U.S. 913 (2005).

72. See *Grokster II*, 545 U.S. at 936-37 (2005). The Supreme Court held that “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for . . . infringement by third parties.” *Id.* In this case, Grokster had distributed an electronic newsletter promoting its ability to access copyrighted music, and “respond[ed] affirmatively to requests for help in locating and playing copyrighted material.” *Id.* at 937-38.

73. See Choi, *supra* note 61, at 410-11.

74. *For Students*, *supra* note 53.

in the theft of music is illegal.”<sup>75</sup> The RIAA analogized illegal downloading to shoplifting merchandise from a store.<sup>76</sup>

At least 18,000 suits have been filed by the RIAA against individuals since September 2003.<sup>77</sup> However, most cases have resulted in summary judgments or settlements in the \$3,000-\$4,000 range.<sup>78</sup> This means that the RIAA is potentially spending significantly more in attorney fees and court costs than they are recouping in the resulting judgment. Sony BMG’s head of litigation recently admitted that the legal campaign is not making the labels any money, and, instead, the record labels have spent millions and have lost money on the lawsuits.<sup>79</sup> One commentator has called the RIAA’s campaign a “money pit.”<sup>80</sup>

These lawsuits failed to bring about a statistically proportionate deterrent effect.<sup>81</sup> The number of P2P users doubled between September 2003 (when the lawsuits began) and June 2005.<sup>82</sup> There was an additional 12% increase in the number of users in 2006, and the growth has not abated in 2007.<sup>83</sup>

Regarding the RIAA’s stated mission of educating the public through these lawsuits, it seems that the lesson has been “learned and ignored.”<sup>84</sup> The RIAA views enforcement through lawsuits as “a tough love form of education.”<sup>85</sup> However, a 2004 survey of college-bound high school students revealed that 89% of

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75. *Id.*

76. *Id.* The RIAA also points out that just like theft, illegal downloading is not a victimless crime: “[T]housands of record label employees have been laid off, hundreds of artists have been cut from label rosters, numerous record stores are closing throughout the country, and due to declining sales, record companies are finding their ability to invest in new artists at risk.” *Id.*

77. *The People*, *supra* note 3, at 4-6.

78. Eric Bangeman, *RIAA Anti-P2P Campaign a Real Money Pit, According to Testimony*, *Ars Technica*, Oct. 2, 2007, available at <http://arstechnica.com/news.ars/post/20071002-music-industry-exec-p2p-litigation-is-a-money-pit.html>.

79. *Id.*

80. *Id.*

81. *See The People*, *supra* note 3, at 11.

82. *See id.* at 11-12. In September 2003, the average number of global P2P users was 4,319,182. *Id.* at 12. In June 2005, this number reached 8,888,436. Seventy-five percent of this use was in the United States. *Id.* at 11-12.

83. *See id.* at 11-12. A marketing research firm recently announced that 15 million U.S. households downloaded from P2P networks in 2006, with total P2P file-sharing volume up 50% from 2005. *Id.* at 12 (citing Press Release, NPD Group, Legal Music Downloads Were Fastest Growing Digital Music Category in 2006 (Mar. 14, 2007), available at [http://www.npd.com/press/releases/press\\_0703141.html](http://www.npd.com/press/releases/press_0703141.html)).

84. *The People supra* note 3, at 13.

85. *Id.* (citing Steve Knopper, *RIAA Will Keep On Suing*, *ROLLING STONE*, (June 9, 2005), available at [http://www.rollingstone.com/news/story/7380412/riaa\\_will\\_keep\\_on\\_suing](http://www.rollingstone.com/news/story/7380412/riaa_will_keep_on_suing)).

them understood downloading was illegal but intended to continue doing it anyway.<sup>86</sup> In addition, the educational value of the litigation seems to be diminishing because media coverage of the campaign has largely dissipated and stories of the lawsuits no longer demand front-page attention.<sup>87</sup> “As press attention fades, the ‘bang for the buck’ provided by suing randomly chosen file-sharers has diminished . . . .”<sup>88</sup>

#### IV. EMERGING LEGAL ISSUES

The RIAA’s approach of suing individuals has been costly and ineffective in stemming the tide of illegal downloading. Now several emerging legal issues threaten to exacerbate these problems.

##### A. *Finding Who To Sue*

When an individual user logs onto a P2P network, the “P2P software has a default setting that automatically informs the network of [the user’s] name and the names and sizes of the files on [the user’s] hard drive that are available for copying.”<sup>89</sup> However, in order for the RIAA’s investigators, MediaSentry,<sup>90</sup> to tie a user name to the actual name and address of a person to bring suit against, they need the help of the user’s Internet Service Provider (“ISP”).<sup>91</sup>

##### 1. DMCA Subpoenas Won’t Work

In order to force ISPs to reveal the names and addresses of suspected infringers, the RIAA sought to use the subpoena power provided for in § 512(h) of the Digital Millennium Copyright Act

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86. See *id.* (citing News Release, Higher Education’s Problems With Illegal Student Downloading Have Just Begun (April 16, 2004), available at [http://www.bentley.edu/news-events/pr\\_view.cfm?CFID=668768&CFTOKEN=74886326&id=1440](http://www.bentley.edu/news-events/pr_view.cfm?CFID=668768&CFTOKEN=74886326&id=1440)) (last visited April 16, 2004).

87. See *The People*, *supra* note 3, at 13. Recognizing this, in 2006 the RIAA abandoned its monthly releases announcing the number of individuals it was suing. *Id.*

88. *Id.*

89. *For Students*, *supra* note 53, at 3.

90. MediaSentry is a company hired by the RIAA (and other entertainment and software industries) that locates and identifies IP addresses engaged in using online networks to share copyrighted material in possible violation of copyright. See SafeNet, Inc., Intellectual Property Protection with MediaSentry Services, [http://www.safenet-inc.com/products/sentinel/mediasentry\\_intellectual\\_property\\_protection.asp](http://www.safenet-inc.com/products/sentinel/mediasentry_intellectual_property_protection.asp) (last visited Jan. 29, 2008). The company’s services include monitoring popular online forums for copyright infringement, helping gather information for litigation, and early leak detection. *Id.*

91. See *The People*, *supra* note 3, at 3.

(“DMCA”) of 1998.<sup>92</sup> Under this portion of the DMCA, “a copyright owner is entitled to issue a subpoena to an ISP seeking the identity of a subscriber accused of copyright infringement.”<sup>93</sup> The RIAA reasoned that § 512(h) entitled it to obtain “names and addresses from an ISP with a mere allegation of infringement—no need to file a lawsuit, no requirement of proof, and no oversight by a judge.”<sup>94</sup>

Employing this approach, which some characterized as an “unprecedented breach of privacy,” the RIAA began a “test run” of this theory by serving subpoenas on several ISPs (including Verizon and Charter Communications) demanding the identities of alleged illegal downloaders.<sup>95</sup>

a. *RIAA v. Verizon*<sup>96</sup>

In 2003, Verizon refused to comply with a subpoena served by the RIAA seeking the identity of two of its users, one of whom had allegedly downloaded 600 songs in one day.<sup>97</sup> Verizon “argu[ed] that the subpoena power in § 512(h) was not applicable where the alleged infringing material was only transmitted over, but not stored on, Verizon’s system.”<sup>98</sup> The district court rejected Verizon’s argument and ordered Verizon to disclose the names to the RIAA.<sup>99</sup> Verizon appealed.<sup>100</sup>

The U.S. Court of Appeals for the D.C. Circuit engaged in a four step analysis of § 512.<sup>101</sup> Beginning with the text itself, the

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92. *Id.* The DMCA is the common name for 17 U.S.C. § 512. Specifically, § 512(h) provides in relevant part:

(1) Request. A copyright owner or a person authorized to act on the owner’s behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer in accordance with this subsection . . .

(5) Actions of Service Provider Receiving Subpoena. Upon receipt of the issued subpoena. . .the service provider shall expeditiously disclose to the copyright owner or person authorized by the copyright owner the information required by the subpoena.

17 U.S.C. § 512(h) (2000).

93. *The People*, *supra* note 3, at 3.

94. *Id.*

95. *See id.* at 3-4.

96. *Recording Indus. Ass’n of America v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003).

97. *See Besek*, *supra* note 19, at 257.

98. *Id.*

99. *See Verizon*, 351 F.3d at 1231.

100. *Id.* at 1231, 1233.

101. *Id.* at 1234-39.

court noted that § 512 creates four safe harbor provisions<sup>102</sup> for ISP's.<sup>103</sup> The court states:

Subsection 512(a), entitled “Transitory digital network communications,” provides a safe harbor “for infringement of copyright by reason of the [ISP's] transmitting, routing, or providing connections for” infringing material . . . [as long as] the transmission is initiated and directed by an internet user. Subsection 512(b), “System caching,” provides immunity from liability “for infringement of copyright by reason of the intermediate and temporary storage of material on a system or network controlled or operated by or for the [ISP],” . . . Subsection 512(c), “Information residing on systems or networks at the direction of users,” creates a safe harbor “for infringement . . . by reason of the storage at the direction of a user of material that resides on a system . . . operated by or for the [ISP]” as long as the ISP [has a] . . . lack of knowledge [of], financial benefit from, and [engages in] efforts to remove or deny access to [the infringing material]. Subsection 512(d), “Information location tools,” provides a safe harbor from liability “for infringement . . . by reason of the provider . . . linking users to [a site] containing infringing material . . .” such as “[an index] or hypertext link.”<sup>104</sup>

The Court noted that §§ 512(b)-(d) contained “notice and takedown” language pursuant to § 512(h), while § 512(a) did not.<sup>105</sup> The notice and takedown language “makes a condition of the ISP's protection from liability for copyright infringement that ‘upon notification of claimed infringement as described in [§512](c)(3),’ the ISP ‘responds expeditiously to remove, or disable access to, the material that is claimed to be infringing.’”<sup>106</sup>

102. A fifth safe harbor provision for nonprofit educational institution ISPs was not considered by the court in this case. *Compare* Recording Indus. Ass'n of America v. Verizon Internet Servs., Inc., 351 F.3d 1229, 1234 (D.C. Cir. 2003) (listing only four safe harbor provisions) *with* 17 U.S.C § 512(e) (2000) (listing all five safe harbor provisions).

103. *Verizon*, 351 F.3d at 1234 (stating that a safe harbor provision means that if an ISP falls into one of these four categories, they are immune from liability for alleged copyright infringement).

104. *Id.* (citations omitted).

105. *See id.*

106. *See Verizon*, 351 F.3d at 1234 (citing 17 U.S.C. §§ 512(2)(E), 512(c)(1)(C), and 512(d)(3) (2000)); *see* 17 U.S.C. §§ 512(c)(3)(A)(i)-(vi) (2000) (providing the elements of

Further, the court reasoned that because the infringing material is located on an individual's computer, "the ISP can neither 'remove' nor 'disable access to' the infringing material because . . . Verizon does not control the content on its subscribers' computers."<sup>107</sup> Thus, "§ 512(h) does not by its terms authorize the subpoenas issued [in this case]. A § 512(h) subpoena simply cannot meet the notice requirement of § 512(c)(3)(A)(iii)."<sup>108</sup>

The court then applied a structural analysis to § 512.<sup>109</sup> It found the ISP activities described in §§ 512(b), (c) and (d) to be storage functions, dissimilar from the transmission functions listed in § 512(a).<sup>110</sup> Therefore, "the cross-references to [the notification requirement] in §§ 512(b)-(d) demonstrate that [the subpoena power of] § 512(h) applies to an ISP storing infringing material on its servers . . . and does not apply to an ISP routing infringing material to or from a personal computer owned and used by a subscriber."<sup>111</sup> The safe harbors of § 512(b)-(d) are subject to the notification requirement, but "an ISP performing a [transmission] function described in § 512(a), such as transmitting e-mails, instant messages, or files . . . , cannot be sent an effective § 512 (c)(3)(A) notification."<sup>112</sup> Thus, the § 512(h) subpoena power is structurally linked to the storage function of an ISP, not the transmission function.<sup>113</sup>

The court next considered the legislative history of the DMCA.<sup>114</sup> The court noted that the "history of the DMCA betrays no awareness whatsoever that internet users might be able directly to exchange files containing copyrighted works" and that "P2P software was 'not even a glimmer in anyone's eye when the DMCA was enacted.'"<sup>115</sup> Further, the court states that "Congress had no reason to foresee the application of § 512(h) to

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notification found in 512(c)(3)(A): (i) an authorized physical or electronic signature of the person alleging infringement; (ii) identification of the alleged infringed work; (iii) identification of the material that is to be removed; (iv) sufficient information for the ISP to contact the complaining party; (v) a good faith belief statement on behalf of the complaining party; and (vi) an accuracy statement on behalf of the complaining party).

107. See *Verizon*, 351 F.3d at 1235.

108. *Id.* at 1236-37.

109. *Id.* at 1237.

110. See *id.*

111. *Id.*

112. See *id.*

113. See *id.*

114. See *id.* at 1237-38.

115. *Id.* at 1238.

P2P file sharing, nor did they draft the DMCA broadly enough to reach the new technology when it came along.”<sup>116</sup>

Ending with a look at the purpose of the DMCA, the court said it sympathized with the RIAA’s concern regarding copyright infringement and the “need for legal tools to protect those rights.”<sup>117</sup> However, it pointed out that it is the province of Congress, not the courts, to address such issues.<sup>118</sup>

Thus, the court found for Verizon and concluded that “from both the terms of § 512(h) and the overall structure of § 512 . . . a subpoena may be issued only to an ISP engaged in storing on its servers material that is infringing or the subject of infringing activity.”<sup>119</sup>

#### b. *In re Charter*

In 2003, the RIAA obtained subpoenas (pursuant to § 512(h)) requiring Charter to produce the names and contact information of approximately 200 of its subscribers.<sup>120</sup> The district court denied Charter’s motion to quash the subpoena, forcing Charter to turn over the names and addresses to the RIAA.<sup>121</sup> Charter appealed, and in 2005, the Eighth Circuit heard the case.<sup>122</sup>

The court engaged in an analysis of § 512(h) based on *Verizon* and adopted the D.C. Circuit’s reasoning regarding the statutory issue.<sup>123</sup> It concluded that “because the parties do not dispute that Charter’s function was limited to acting as a conduit for the allegedly copyright protected material, we agree § 512(h) does not authorize the subpoenas issued here.”<sup>124</sup> Other federal district courts have agreed with this analysis as well.<sup>125</sup>

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116. *Id.*

117. *Id.*

118. *See id.* “[O]nly ‘Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.’” *Id.* (quoting *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984)).

119. *Verizon*, 351 F.3d at 1233.

120. *In re Charter Commc’ns, Inc.*, 393 F.3d 771, 774 (8th Cir. 2005).

121. *Id.* at 774-75.

122. *See id.* at 771, 775.

123. *See id.* at 777.

124. *Id.* The court also raised but did not rule on the possible unconstitutional nature of § 512(h). *See id.* at 777-78. It may “invade the power of the judiciary by creating a statutory framework pursuant to which Congress, via statute, compels a clerk of a court to issue a subpoena, thereby invoking the court’s power.” *Id.* at 778.

125. *See, e.g., In re Subpoena to Univ. of North Carolina at Chapel Hill*, 367 F. Supp. 2d 945, 955 (M.D.N.C. 2005) (agreeing with the *Charter* and *Verizon* courts that the DMCA subpoena provision does not apply to a § 512(a) service provider).

c. Implications of *Verizon* and *Charter*

The *Verizon* and *Charter* decisions have a couple of implications for the RIAA's suits against individual users.<sup>126</sup> Now, if the RIAA wants to use a § 512(h) subpoena to obtain the identity of a user from an ISP, they will need to "classify the ISP's function under § 512(b)-(d)."<sup>127</sup> In addition, if the ISP is classified as a "conduit" under § 512(a), the only other option open to the RIAA is to initiate the more cumbersome and costly process of the John Doe lawsuit.<sup>128</sup>

2. John Doe Lawsuits

A John Doe lawsuit in the present context occurs when the RIAA is forced to file "lawsuits which identify the defendants only by their numerical IP addresses."<sup>129</sup> The lawsuit is filed in the district where the headquarters of the ISP is located, and the only thing the RIAA knows about the John Doe(s) is "that they are people who paid for an Internet access account for a particular . . . IP address."<sup>130</sup> Sometimes several hundred John Doe defendants are joined in a single litigation.<sup>131</sup>

Once the John Doe suit is filed, the RIAA files a motion for an *ex parte*<sup>132</sup> discovery order.<sup>133</sup> This *ex parte* order has thus far been routinely granted by United States courts.<sup>134</sup> It enables the RIAA to "take immediate discovery—before the defendants have been served or given notice—which authorizes the issuance of

126. See Julie E. Cohen, *Pervasively Distributed Copyright Enforcement*, 95 GEO. L. J. 1, 16-17 (2006).

127. Michelle Park, *In Re Charter Communications: The Newest Chapter in P2P File Sharing*, 11 B.U. J. SCI. & TECH. L. 324, 329 (2005).

128. See Declan McCullagh, *FAQ: How The Decision Will Affect File Swappers*, CNET News, Dec. 13, 2003, available at <http://www.news.com/2100-1028-5130033.html>.

129. Alice Kao, *RIAA v. Verizon: Applying the Subpoena Provision of the DMCA*, 19 BERKELEY TECH. L.J. 405, 418 (2004). The lawsuits are filed in the judicial district "where the corporate headquarters of the ISP is located." See also Ray Beckerman, *How the RIAA Litigation Process Works* (Nov. 3, 2007), available at [http://info.rialaawsuits.us/howriaa\\_printable.htm](http://info.rialaawsuits.us/howriaa_printable.htm).

130. Beckerman, *supra* note 129, at 2. In fact, most defendants may live hundreds of miles away from the city in which the suit is pending, and "are not subject to the jurisdiction of the Court, but the [RIAA brings] the case anyway." See *id.*

131. See *id.* This in spite of the fact that "under the Federal Rules of Civil Procedure there is no basis for joining all these defendants in a single lawsuit." *Id.*

132. An *ex parte* motion is one "made to the court without notice to the adverse party." BLACK'S LAW DICTIONARY (8th ed. 2004).

133. The law generally looks upon *ex parte* motions with disfavor, "except where irreparable harm would result to the applicant before notice can be served." 60 C.J.S. *Motions and Orders* § 14 (2007).

134. However, "both Canada and the Netherlands have found the RIAA's investigation too flimsy to warrant the invasion of subscriber privacy." Beckerman, *supra* note 129, at 3.

subpoenas to the ISPs asking for the names and addresses” of their subscribers.<sup>135</sup> The RIAA then drops the John Doe case “and sues the defendant in his own name in the district where he or she lives.”<sup>136</sup>

Thus, the first “notice” a John Doe defendant gets of a lawsuit is a letter from his or her ISP, accompanied by copies of the subpoena and discovery order, “indicating that an order has already been granted against them.”<sup>137</sup> Many recipients will not even realize the notice means there is a lawsuit against them, or why they are being sued.<sup>138</sup>

Even though the defendant could make a motion to quash the subpoena,<sup>139</sup> “if they were to talk to a lawyer they could not give the lawyer an iota of information as to what the case is about, what the basis for the subpoena is,” or any other information that would be helpful to lawyer who wished to take the case.<sup>140</sup> Additionally, “the lawyer would have to be admitted to practice in the jurisdiction in which the *ex parte* case is pending, in order to do anything at all.”<sup>141</sup>

The result is that the John Doe usually defaults, and the case “may drag on for months or even years, with the RIAA being the only party that has lawyers in court to talk to the judges and other judicial personnel.”<sup>142</sup> Obviously, this is a much more cumbersome and expensive process than the DMCA process the RIAA once enjoyed.<sup>143</sup>

### 3. University John Doe Lawsuits

The RIAA has recently initiated a new variation of the John Doe *ex parte* lawsuit campaign: specifically targeting universities as ISPs and college students.<sup>144</sup> Announced February 28, 2007, the new tactic involves sending out “hundreds of ‘pre-litigation’

135. See Beckerman, *supra* note 129, at 3.

136. *Id.*

137. *Id.* at 2.

138. *Id.* at 3.

139. The Federal Rules of Civil Procedure give a court discretion to quash or modify a subpoena that fails to allow a reasonable time to comply or subjects a person to undue burden. FED. R. CIV. P. 45(C)(3).

140. Beckerman, *supra* note 129, at 2.

141. *Id.* at 3.

142. *Id.* at 3.

143. See Declan McCullagh, *FAQ: How The Decision Will Affect File Swappers*, CNET News, Dec. 13, 2003, available at <http://www.news.com/2100-1028-5130033.html>.

144. See Beckerman, *supra* note 129, at 4; see also Eric Bangeman, *RIAA Launches Propaganda, Lawsuit Offensive Against College Students*, Ars Technica, Oct. 2, 2007, available at <http://arstechnica.com/news.ars/post/20070301-8953.html> [hereinafter *RIAA Launches Propaganda*].

letters each month to a variety of universities with the request that they forward these letters to unidentified students.”<sup>145</sup> The letters identify the IP address of the student, threaten legal action, and offer a “deal” in the form of a “reduced” settlement amount (generally around \$3,000) if the student settles within 20 days.<sup>146</sup> If the students are not given the letters by the university or do not respond, the RIAA files a John Doe suit.<sup>147</sup> The university then receives a subpoena and is “forced to respond in the same manner as any other ISP and reveal” the student’s identity.<sup>148</sup>

Along with the new campaign, the RIAA launched a lawsuit-settlement website<sup>149</sup> and says the website will allow students and network users to settle claims “at a lower cost and before lawsuits are filed.”<sup>150</sup> However, critics claim that the website “represents the RIAA’s best effort to date at making an end-run around the judicial system and extracting sizable, yet ‘discounted’—settlements from those it believes are guilty of infringing its copyrights.”<sup>151</sup> It also saves the RIAA “a substantial sum of money by completely avoiding the costs associated with actually having to file a ‘John Doe’ suit.”<sup>152</sup>

#### 4. Recent John Doe Cases and Developments

The key to the success of the John Doe suit is the granting of the *ex parte* discovery motion and, in the case of the university suits, the cooperation of the university with the RIAA.<sup>153</sup> However, several recent developments suggest there may be trouble on the horizon for the RIAA’s university and John Doe tactics.

##### a. Universities Refuse to Cooperate

Going against the general trend, in March, 2007, the University of Wisconsin-Madison informed the RIAA that it would refuse to forward settlement letters to its students.<sup>154</sup> A

145. *The People*, *supra* note 3, at 8.

146. *See id.* at 8-9. In the first six months, this campaign targeted 2,926 students at nearly 100 university campuses in the U.S. *See id.* at 9.

147. *Id.*

148. *RIAA Launches Propaganda*, *supra* note 144.

149. P2P Lawsuits, <https://www.p2plawsuits.com>.

150. *RIAA Launches Propaganda*, *supra* note 144.

151. *Id.*

152. *The People*, *supra* note 3, at 9.

153. *See, e.g.*, Beckerman, *supra* note 129, at 4.

154. *See* Nick Pezenstadler, *UW Warns Music Sharers* (March 19, 2007), available at [http://badgerherald.com/news/2007/03/19/uw\\_warns\\_music\\_share.php](http://badgerherald.com/news/2007/03/19/uw_warns_music_share.php).

university spokesman said the “letters are an attempt to short circuit the legal process [by relying] on universities to be their legal agent. . . . We do not want to be a party to that; we are not the legal agent for the [RIAA], nor do we aspire to (be).”<sup>155</sup>

Similarly, the University of Maine recently opted not to forward pre-litigation letters.<sup>156</sup> The University claimed “[i]t’s not the university’s role to, in effect, serve papers on our students for another party . . . [w]e want our students to be aware of it, but we do not feel that it is our obligation to be the arm of the RIAA beyond simply sharing the information.”<sup>157</sup>

Most recently, the University of Oregon, “represented by the state [Attorney General’s] office, has asked a federal judge to quash the RIAA’s *ex parte* subpoena” of 17 Oregon students.<sup>158</sup> The University states it will be difficult to identify some of the students without extensive investigation.<sup>159</sup> The school further argues that “the subpoena would put an undue burden on [the University]” because of the large amount of effort it would take to find the students’ identities.<sup>160</sup> “In short, the subpoena requires the University to create discoverable material to assist” the RIAA in its campaign, which is contrary to case law indicating “that non-parties ‘are not required to create documents that do not exist, simply for the purposes of discovery.’”<sup>161</sup>

In his response to the RIAA’s opposition to the motion to quash the subpoena, the Oregon Attorney General (“AG”) argues that the “RIAA’s investigation tactics were illegal because the firm it used to sniff out unauthorized users, MediaSentry, was

155. *Id.*

156. See Tony Reaves, *UMS Refuses to Hand Student Info to RIAA* (March 26, 2007), available at <http://media.www.maine-campus.com/media/storage/paper322/news/2007/03/26/News/Ums-Refuses.To.Hand.Student.Info.To.Riaa-2792041.shtml>.

157. *Id.* Urging the university not to give in to the RIAA’s “mafia-like” tactics, professor Jon Ippolito further stated “[The RIAA] have so many lawyers that they can afford to send frivolous subpoenas right and left, and the mere threat to do so has caused some universities to cave right away.” “Just Say No!” A few more reasons for universities to foster independent mediated voices, <http://bavatuesdays.com/just-say-no-a-few-more-reasons-for-universities-to-foster-independent-mediated-voices/> (March 27, 2007).

158. Eric Bangeman, *Quack Attack: U of Oregon Fights “Unduly Burdensome” RIAA Subpoenas*, ARS TECHNICA, Nov. 2, 2007, <http://arstechnica.com/news.ars/post/20071102-quack-attack-u-of-oregon-fights-unduly-burdensome-riaa-subpoenas.html> [hereinafter *Quack Attack*].

159. See *id.* Five of the seventeen students live in double occupancy dorm rooms, making it difficult to find out which student in the room accessed the network, or if it was a guest. *Id.* Also, students downloading using the wireless network log on with a username, but it is difficult to determine if the student assigned to that username actually performed the downloading in question. *Id.*

160. *Id.*

161. *Id.*

not a licensed investigator in Oregon.”<sup>162</sup> The AG criticizes the RIAA’s evidence in the case, how it gathers the evidence, and “how it uses these cases to squeeze money out of unsophisticated people.”<sup>163</sup> The AG also points out that “[w]hile the University is not a party to the case, [the RIAA’s] subpoena affects the University’s rights and obligations. . . . The University seeks the Court’s permission to serve . . . interrogatories [and perform depositions] on Plaintiffs” to determine what the investigative practices of MediaSentry are and if there is additional information available “with which to identify the John Does.”<sup>164</sup>

Finally, the University argues that the RIAA’s subpoena is “invalidated” by the DMCA,<sup>165</sup> an argument that could be successful given the outcome in other recent cases.<sup>166</sup> One commentator on the case states, “[i]f the judge sides with the University of Oregon on this issue, the RIAA will face a long, uphill battle to get the information it needs to continue its efforts to unmask the 17 students in question.”<sup>167</sup> It seems that this time “the RIAA may have messed with the wrong university in the wrong state.”<sup>168</sup>

An overall continuation of this university trend would mean “the RIAA will not be able to perform its customary end-run around the legal system, forcing it to follow the same rules its targets have to play by.”<sup>169</sup> In other words, they will be forced to pursue the more time-consuming and expensive John Doe process.

#### b. *Ex Parte* Discovery Challenges

On May 24, 2007, in *Capitol Records v. Does 1-16*, Judge Lorenzo Garcia denied the RIAA’s motion to engage in *ex parte* discovery in its suit against several University of New Mexico

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162. Posting of Mike Masnick to Techdirt Blog, <http://www.techdirt.com/articles/20071130/003324.shtml> (Nov. 30, 2007, 3:23am) (citing University of Oregon’s Reply in Support of Motion to Quash Plaintiff’s Subpoena at 5, *Arista v. Does 1-17*, No. 6:07-cv-06197-H (D. Or. Nov. 28, 2007)).

163. *Id.*

164. *Id.*

165. *Quack Attack*, *supra* note 158 (quoting Memorandum in Support of Motion to Quash Subpoena Pursuant to FRCP 45B(3)(A) by the University of Oregon at 7, *Arista v. Does 1-17*, No. 6:07-cv-06197-H (D. Or. Oct. 31, 2007)).

166. *See, e.g.*, *Interscope Records v. Does 1-7*, 494 F. Supp. 2d 388, 391 (2007) (denying a similar RIAA *ex parte* discovery motion).

167. *Quack Attack*, *supra* note 158.

168. Masnick, *supra* note 162.

169. Eric Bangeman, *University of Wisconsin Decides Not to Pass Along RIAA Settlement Letters*, ARS TECHNICA, March 20, 2007, <http://arstechnica.com/news.ars/post/20070320-university-of-wisconsin-decides-not-to-pass-along-riaa-settlement-letters.html>.

students.<sup>170</sup> The RIAA contended that if the Court did not allow *ex parte* discovery immediately, it would suffer irreparable harm.<sup>171</sup> The Judge was not convinced, however, citing concerns about the sensitive and confidential nature of the information sought by the RIAA.<sup>172</sup> While he acknowledged copyright infringement could result in harm, the Judge said it required a large ‘suspension of disbelief’ to accept that the harm is irreparable, especially when monetary damages can cure any alleged violation.”<sup>173</sup> The Judge felt disclosing confidential information contained in a student’s internet files could be “equally harmful.”<sup>174</sup>

Judge Garcia cited two other reasons for denying the RIAA’s *ex parte* application.<sup>175</sup> He expressed the general principle that “*ex parte* proceedings should be the exception, not the rule.”<sup>176</sup> He also stated, “the federal rules prohibit discovery until the parties have met and conferred, formulated an appropriate discovery plan, and made arrangements for disclosure of information.”<sup>177</sup> The Judge thus denied the *ex parte* discovery motion and ordered the RIAA to meet with University counsel “and attempt to agree on a fair and reasonable process that would allow [the RIAA] to identify limited information about the subscribers.”<sup>178</sup>

On July 12, 2007, the District Court for the Eastern District of Virginia denied a similar RIAA *ex parte* discovery motion, but on different grounds than in *Capitol*.<sup>179</sup> In *Interscope v. Does 1-7*, the RIAA attempted to obtain an *ex parte* discovery motion to determine the identities of seven College of William and Mary

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170. *Capitol Records, Inc. v. Does 1-16*, No. 07-485, (D. N.M. May 24, 2007) (order denying *ex parte* application to take discovery). *See also* Eric Bangeman, *Judge Deals Blow to RIAA, Says Students Can Respond to John Doe Lawsuit*, ARS TECHNICA, June 20, 2007, <http://arstechnica.com/news.ars/post/20070620-judge-deals-blow-to-riaa-says-students-can-respond-to-john-doe-lawsuit.html> [hereinafter *Judge Deals Blow to RIAA*].

171. *Capitol Records*, No. 07-485 at 1.

172. *See id.* at 1-2. Although the RIAA supposedly sought only the names and contact information of the students, the Judge cites concerns that “[a]ccess to a subscriber’s Internet information may include a wealth of information including . . . social security numbers, credit card information . . . [and] disclosure of their private e-mail communications.” *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 3.

176. *Id.*

177. *Id.* (citing FED. R. CIV. P. 26(d)(1)).

178. *Capitol Records, Inc. v. Does 1-16*, 2007 WL 1893603 at \*2 (D.N.M.).

179. *Interscope Records v. Does 1-7*, 494 F. Supp. 2d 388, 391 (E.D.Va. 2007).

students.<sup>180</sup> In its motion, the RIAA asserted “that the Cable Communications Policy Act of 1984 (CCPA) . . . authorize[d] their *ex parte* subpoena for subscriber information.”<sup>181</sup> According to the CCPA, a cable operator may “disclose such information if the disclosure is . . . made pursuant to a court order authorizing such disclosure.”<sup>182</sup>

The Judge, however, did not accept the argument.<sup>183</sup> He maintained the RIAA did not establish that the College fell within the definition of a cable operator under the CCPA, and “common sense dictates otherwise.”<sup>184</sup> Even if the College were defined as a cable operator, the CCPA provides that only a governmental entity may obtain such personal information.<sup>185</sup> Because the RIAA is not a governmental entity, the Judge reasoned that “the CCPA does not authorize their *ex parte* subpoena.”<sup>186</sup>

The Judge also pointed out the RIAA’s failure to mention that the DMCA provides a framework for subpoenas to identify copyright infringers in § 512(h), but that the College would fall within § 512(a) as a conduit; thus a subpoena would not be authorized under the DMCA.<sup>187</sup> The opinion states the following: “The Court is unaware of any other authority that authorizes the *ex parte* subpoena requested by plaintiffs.”<sup>188</sup> Thus, the court concludes that “the RIAA is barred from discovering the identities of the alleged file-sharers at the College of William and Mary under either the CCPA . . . or the DMCA.”<sup>189</sup>

*Capitol* and *Interscope* represent setbacks for the RIAA’s John Doe campaign.<sup>190</sup> Should other courts decide to follow the trend in these cases, “the litigation process will become a lot more expensive and time-consuming for the RIAA, as the John

180. *See id.* at 389.

181. *Id.* at 390.

182. 47 U.S.C. § 551(c)(2)(B) (2000).

183. *Interscope*, 494 F.Supp.2d at 390.

184. *Id.*

185. *Id.* (citing 47 U.S.C. § 551(h)).

186. *Id.* at 389.

187. *Id.* at 390-91 (citing 17 U.S.C. §§ 512(k)(1)(A), 512(h)).

188. *Id.* at 391.

189. Eric Bangeman, *Judge Deals Another Blow to RIAA’s War Against On-Campus File-Sharing*, ARS TECHNICA, July 15, 2007, available at <http://arstechnica.com/news.ars/post/20070715-judge-deals-another-blow-to-riaas-war-against-on-campus-filesharing.html>.

190. *But see* Atlantic Recording Corp. v. Does 1-25, No. 05 Civ. 911, (S.D.N.Y. June 5, 2006); Warner Bros. Records Inc. v. Does 1-149, No. 05-CV-8365 (S.D.N.Y. June 7, 2006) (in which the ISP *ex parte* process was unsuccessfully challenged and the John Doe defendants’ motions to vacate the *ex parte* discovery orders were denied).

Doe lawsuits would no longer be simple open-and-shut cases.”<sup>191</sup> Targeted file-sharers would be able to fight the RIAA in court from the beginning of the process, rather than “only learning that they were the target of a lawsuit once they receive a settlement letter.”<sup>192</sup>

### 5. Drawbacks to John Doe Suits

The obvious drawback to the John Doe suit is that it is a much more time-consuming and costly process of identifying infringers than the § 512 procedure.<sup>193</sup> Also, post-*Verizon*, the RIAA is less likely to receive support “from ISPs already furious with it for earlier tactics that spooked subscribers and resulted in suits against clearly innocent parties.”<sup>194</sup>

In addition to being lengthy and expensive, a John Doe lawsuit can lead to embarrassing situations for the RIAA and is costly from a public relations perspective.<sup>195</sup> When a John Doe lawsuit against an individual is filed, the complaint is against an anonymous internet account holder, meaning that “anyone engaged in music theft is at risk for a lawsuit.”<sup>196</sup> This could potentially include “suing a son or daughter of a record label executive or of a U.S. senator.”<sup>197</sup>

In fact, there have already been many embarrassing incidents for the RIAA. One instance was a suit against Sarah Ward, the 65 year old grandmother charged with using KaZaA software on a PC to download rock and rap songs, when in fact she only owned a Mac (which could not at the time run KaZaA) and listened only to classical and folk.<sup>198</sup> Other examples include a suit against Gertrude Walton, an 83-year old dead woman in West Virginia who hated computers for allegedly downloading over 700 songs,<sup>199</sup> and a suit against Lee Thao in Wisconsin for sharing files when he was not even a customer of the ISP at the

191. *Judge Deals Blow to RIAA*, *supra* note 170.

192. *Id.*

193. See Alex Salkever, *Big Music's Worst Move Yet* (January 27, 2004), available at [http://www.businessweek.com/technology/content/jan2004/tc20040127\\_2819\\_tc047.htm](http://www.businessweek.com/technology/content/jan2004/tc20040127_2819_tc047.htm).

194. *Id.*

195. *Id.*; See, e.g. McCullagh, *supra* note 128 (describing possible sources of embarrassment).

196. *For Students*, *supra* note 53.

197. McCullagh, *supra* note 128.

198. See Press Release, Electronic Frontier Foundation, Recording Industry Withdraws Music Sharing Lawsuit (Sept. 24, 2003) available at [http://w2.eff.org/IP/P2P/20030924\\_eff\\_pr.php](http://w2.eff.org/IP/P2P/20030924_eff_pr.php).

199. See Andrew Orlowski, *RIAA Sues the Dead*, *The Register*, Feb. 5, 2005, available at [http://www.theregister.co.uk/2005/02/05/riaa\\_sues\\_the\\_dead/print.html](http://www.theregister.co.uk/2005/02/05/riaa_sues_the_dead/print.html).

time of the infringement, but the old modem was still registered in his name.<sup>200</sup>

Overall, the RIAA's battle against individual users via the John Doe suit has been a losing one.<sup>201</sup> "Instead of a quick and easy cash machine, the labels' lawsuit machine has become a costly public relations disaster, and it seems unlikely that any sane and responsible manager would order the madness to continue much longer."<sup>202</sup>

### B. *Award of Attorney Fees to Individuals*

The filing of thousands of lawsuits can be a risky move because one can never be sure which way a judge or jury will decide. If "a handful of rulings go the wrong way, it could jeopardize the numerous other cases already in the system. This is a dilemma faced by the RIAA in its war against suspected file sharers."<sup>203</sup>

#### 1. With or Without Prejudice

Thus far, the RIAA's strategy has been to file for a dismissal without prejudice<sup>204</sup> in lawsuits against individuals that are not proceeding well—for example, if there is a case of mistaken identity or a poor chance of winning. "[E]verybody goes their own ways, footing their own legal bills, and no one is officially cleared of wrong-doing."<sup>205</sup>

However, "recent events may be casting a shadow over the wisdom of the RIAA's strategy."<sup>206</sup> There may be a trend developing of judges dismissing such cases *with* prejudice, which means, among other things, that the RIAA could be obligated to pay defendants' attorney fees as well as their own.<sup>207</sup>

200. See *The People*, *supra* note 3, at 7.

201. See Anders Bylund, *The Motley Fool, RIAA's Day in Court Nearly Over*, available at <http://www.fool.com/investing/general/2007/09/24/riaas-day-in-court-nearly-over.aspx>.

202. *Id.*

203. Eric Bangeman, *Why The RIAA Doesn't Want Defendants Exonerated*, ARS TECHNICA, March 29, 2007, available at <http://arstechnica.com/news.ars/post/20070329-why-the-riaa-doesnt-want-defendants-exonerated.html> [hereinafter *RIAA Doesn't Want Defendants Exonerated*].

204. In a dismissal without prejudice, the case is terminated, but the plaintiff may refile the same suit on the same claim in the future. See BLACK'S LAW DICTIONARY (8th ed. 1999).

205. *RIAA Doesn't Want Defendants Exonerated*, *supra* note 203.

206. *Id.*

207. See *id.* Dismissal with prejudice prevents a plaintiff from bringing the same lawsuit against the same defendant in the future. See BLACK'S LAW DICTIONARY (8th ed. 2004).

## 2. *Capitol v. Foster*

In November 2004, the RIAA sued Debbie Foster for copyright infringement.<sup>208</sup> She denied liability and initiated a defense against the RIAA. In July 2005, the RIAA added her adult daughter Amanda to the suit.<sup>209</sup> A default judgment in favor of the RIAA was granted against Amanda, but the RIAA sought to voluntarily dismiss with prejudice the claims against Debbie.<sup>210</sup> The court granted the RIAA's motion to dismiss with prejudice and went on to discuss Foster's eligibility for an award of attorney fees.<sup>211</sup>

Foster argued that she be found "the prevailing party for purposes of awarding her attorney fees and costs pursuant to both the Federal Rules of Civil Procedure and the Federal Copyright Act."<sup>212</sup> The court dismissed the F.R.C.P. argument, stating that "only in exceptional circumstances" may a court in the Tenth Circuit "condition a dismissal with prejudice upon the plaintiffs' payment of the defendant's attorney fees."<sup>213</sup> However, because the plaintiffs filed suit under the Federal Copyright Act, the court gave more credence to the Copyright Act argument.<sup>214</sup>

The RIAA brought its infringement claim under the Federal Copyright Act, which provides:

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the *prevailing party* as part of the costs.<sup>215</sup>

The court pointed out that according to the Supreme Court, "the touchstone of the prevailing party inquiry must be the material

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208. See Eric Bangeman, *RIAA's Final Tab For Capitol v. Foster: \$68,685.23*, ARS TECHNICA, July 16, 2007, at 1, <http://arstechnica.com/news.ars/post/20070716-riaas-final-tab-for-capitol-vs-foster-68685-23.html>.

209. *Id.*

210. See *Capitol Records, Inc. v. Foster (Capitol I)*, No. 04-CV-1569-W, 2006 WL 4558154, at \*1 (W.D. Okla. July 13, 2006).

<sup>195</sup> See *Capitol I*, 2006 WL 4558154, at \*3-4, 5. When a defendant has already filed a counterclaim, the plaintiff may only dismiss by order of the court. The dismissal is without prejudice unless the court states otherwise. See Fed. R. Civ. P. 41(a)(2).

212. *Capitol I*, 2006 WL 4558154, at \*5.

213. *Id.*

214. See *id.*, at \*5-6.

215. 17 U.S.C. § 505 (2000)(emphasis added).

alteration of the legal relationship of the parties.”<sup>216</sup> In addition, the Tenth Circuit has ruled “a plaintiff’s dismissal of its complaint renders the defendant . . . the prevailing party for purposes of costs.”<sup>217</sup>

In Foster’s case, “[b]ecause this Court finds that the plaintiffs’ voluntary dismissal with prejudice serves as a complete adjudication of the issues . . . [the] adjudication represents a . . . material alteration in the legal relationship between Deborah Foster and the plaintiffs. Ms. Foster is therefore the prevailing party for purposes of the Copyrights Act.”<sup>218</sup> Thus, Foster was allowed to apply for an award of attorney fees.<sup>219</sup>

In February 2007, the same court addressed Foster’s application for an award of attorney fees.<sup>220</sup> The Court noted that while there was no precise formula to apply in determining when a party is entitled to attorney fees under the Copyright Act, “factors the court may consider include frivolousness, motivation . . . and [the] need in particular circumstances to advance considerations of compensation and deterrence.”<sup>221</sup> Awards for attorney fees “are to be granted when equity and the ends of the Copyright Act are advanced.”<sup>222</sup>

The Court first considered the “frivolous” factor and noted that the RIAA’s claims against Ms. Foster were for both direct and contributory copyright infringement (or “vicarious liability”).<sup>223</sup> The RIAA’s claim of secondary liability was based solely on the fact that Foster “maintained an Internet account which a member of her household utilized to infringe the plaintiffs’ copyrights.”<sup>224</sup> However, one can only infringe “a copyright contributorily by intentionally inducing or encouraging a direct infringement,” not by “[m]erely supplying means to

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216. *Capitol I*, 2006 WL 4558154, at \*6 (quoting *Texas State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989)).

217. *See id.*

218. *Id.*

219. *See id.* at \*7.

220. *See Capitol Records, Inc. v. Foster (Capitol II)*, No. Civ. 04-1569-W, 2007 WL 1028532 (W.D. Okla. Feb. 6, 2007).

221. *Id.* at \*2-3 (citing *Palladium Music, Inc. v. Eatsleepmusic, Inc.*, 398 F.3d 1193 (10th Cir. 2005)).

222. *Id.* at \*3-4 (“Copyright law ‘ultimately serves the purpose of enriching the general public through access to creative works.’ . . . Because that end is served by delineating the boundaries of copyright law as clearly as possible, both plaintiffs and defendants should be encouraged to litigate their meritorious claims and defenses.”) (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994)).

223. *Capitol II*, 2007 WL 1028532, at \*4.

224. *Id.*

accomplish infringing activity.”<sup>225</sup> Further, Foster did not meet any of the elements for a claim of contributory infringement.<sup>226</sup> The Court was unable to find any other case holding the “mere owner of an Internet account contributorily or vicariously liable for the infringing activities of third persons.”<sup>227</sup> Thus, while the Court declined to call the RIAA’s contributory infringement claim outright frivolous, it found the claim “would certainly appear to be untested and marginal.”<sup>228</sup>

Next, the Court considered the RIAA’s motivations in pursuing the secondary infringement claims against Foster.<sup>229</sup> Disposing of the RIAA’s cited case law, the Court found there was an appearance that “the plaintiffs initiated the secondary infringement claims to press [Ms. Foster] into settlement after they had ceased to believe she was a direct or ‘primary’ infringer.”<sup>230</sup> Thus, the motivation prong weighed against the RIAA as well.

Finally, the Court considered the purposes of copyright law in general, and “whether a defendant should receive an award of attorney fees when she successfully defends against the novel application of secondary copyright infringement claims.”<sup>231</sup> The Supreme Court has recognized the importance of defining the boundaries of copyright law; thus, the Court reasoned defendants like Foster should be encouraged to advance and litigate their copyright defenses.<sup>232</sup> Without the possibility of recovering attorney fees, such defendants “might be forced into a nuisance settlement or deterred altogether from exercising [their] rights.”<sup>233</sup> This result “would not advance the aims of the Copyright Act [because] the plaintiffs’ . . . theory would remain untested. The Court concludes that under the facts of this case, the prevailing defendant is entitled to an award representing her reasonable attorney fees and costs pursuant to § 505 of the

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225. *Id.* (quoting *Newborn v. Yahoo!*, 391 F. Supp. 2d 181, 186 (D.D.C. 2005)).

226. *See Capitol II*, 2007 WL 1028532 at \*4 (“The elements of a claim for contributory copyright infringement are: (1) direct infringement by third party; (2) knowledge by the defendant that third parties were directly infringing; and (3) substantial participation by the defendant in infringing activities.”) (quoting *Newborn v. Yahoo!*, 391 F. Supp. 2d 181, 186 (D.D.C. 2005)).

227. *Capitol II*, 2007 WL 1028532, at \*5.

228. *Id.*

229. *See id.*

230. *Id.* at \*5.

231. *Id.* at \*7.

232. *See id.*

233. *Id.* at \*8 (quoting *Woodhaven Homes & Realty, Inc. v. Hotz*, 396 F.3d 822, 824 (7th Cir. 2005)).

Copyright Act.”<sup>234</sup> After an unsuccessful challenge by Capitol to this ruling,<sup>235</sup> the court awarded Foster “attorney fees, including litigation expenses and costs, in the total amount of \$68,685.23.”<sup>236</sup> While not a huge sum by itself, that amount multiplied by the thousands of cases the RIAA has initiated could be a massive figure. Unfortunately for the RIAA, several other courts have followed the lead of the *Capitol* court.<sup>237</sup>

### 3. An Emerging Trend?

In 2005 Patti Santangelo, a divorced mother of five, was sued for copyright infringement by the RIAA.<sup>238</sup> She denied any knowledge of the file-sharing and fought back.<sup>239</sup> In April 2007, the Court entered a stipulation of discontinuance with prejudice and stated that “Santangelo is the prevailing party and therefore eligible to file a motion to recover attorney fees.”<sup>240</sup> As of this writing, her motion for attorney fees had not been ruled on.

The most recent in this line of cases is “[o]ne of the most notorious file-sharing cases,” *Atlantic v. Andersen*.<sup>241</sup> Sued by the RIAA in 2005, Tanya Andersen is the disabled single mother of a nine-year-old daughter.<sup>242</sup> Denying accusations that she illegally downloaded songs like “Ho’s In My Room,” Andersen “filed a countersuit accusing the record industry of racketeering, fraud, and deceptive business practices, among other things.”<sup>243</sup>

After almost two years of discovery and mounting attorney fees on both sides, the RIAA moved for dismissal with prejudice, admitting that “evidence uncovered during discovery [against

234. *Capitol II*, 2007 WL 1028532, at \*8.

235. See *Capitol Records, Inc. v. Foster (Capitol III)*, No. Civ. 04-1569-W, 2007 WL 1223826 (W.D. Okla. April 23, 2007).

236. *Capitol Records, Inc. v. Foster (Capitol IV)*, No. Civ. 04-1569-W, at 14, 2007 U.S. Dist. LEXIS 97253 (W.D. Okla. July 16, 2007) (order granting attorney’s fees).

237. See e.g. *Elektra Entm’t Group, Inc. v. Santangelo*, No. 05-CV-2414(CM)(MDF)(S.D.N.Y. Apr. 9, 2007).

238. See Eric Bangeman, *Defendant Prevails In Another RIAA File-Sharing Case*, ARS TECHNICA, April 10, 2007, <http://arstechnica.com/news.ars/post/20070410-defendant-prevails-in-another-riaa-file-sharing-case.html> [hereinafter *Defendant Prevails*].

239. *Id.*

240. *Id.*; see also *Elektra Entm’t Group, Inc. v. Santangelo*, No. 05-CV-2414(CM)(MDF)(S.D.N.Y. Apr. 9, 2007) (stipulation of discontinuance with prejudice).

241. See Eric Bangeman, *RIAA Throws In The Towel in Atlantic v. Andersen*, ARS TECHNICA, June 4, 2007, <http://arstechnica.com/news.ars/post/20070604-riaa-throws-in-the-towel-in-atlantic-v-andersen.html>.

242. See *id.*

243. *Id.*

Andersen] proved inconsistent and inconclusive.”<sup>244</sup> The court found that the way the RIAA went about prosecuting the case against Andersen did “not appear to be justified as a reasonable exploration of the boundaries of copyright law . . . . In this case, plaintiffs dismissed their claims before any rulings on any significant legal issues under the Copyright Act . . . .”<sup>245</sup>

The court found this course of action dangerous because of its “potential chilling effect on the public’s access to creative works.”<sup>246</sup> The tactic of drawn out discovery and court proceedings forces defendants to mount a defense and incur substantial attorney fees.<sup>247</sup> If this tactic of protracted litigation becomes more commonplace, then “it [would be] reasonably foreseeable that members of the public would be more hesitant to use the Internet to share creative works in general” because they will not want to face a drawn out court battle.<sup>248</sup> Consequently, the court decided “[c]opyright holders generally, and these plaintiffs specifically, should be deterred from prosecuting infringement claims as plaintiffs did in this case.”<sup>249</sup> The court recommended an award of attorney fees in favor of Andersen.<sup>250</sup> The District Court of Oregon affirmed this recommendation on January 16, 2008.<sup>251</sup>

The awarding of attorney fees to defendants “is a scenario the RIAA has been anxious to avoid.”<sup>252</sup> The “courts may be ready to stop the record labels from just walking away from litigation when it doesn’t like the direction it is taking and give defendants justice by fully exonerating them of any wrongdoing.”<sup>253</sup> This would include the payment of defendant attorney fees.<sup>254</sup> “If [this] trend continues, the music industry’s legal strategy could end up being far more expensive than it anticipated.”<sup>255</sup>

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244. Atlantic Recording Corp. v. Andersen (*Atlantic I*), CV No. 05-933-AS, at 8 (D. Or. Sept. 21, 2007) (findings and recommendations granting defendant’s motion for attorney’s fees).

245. *Id.* at 13.

246. *Id.*

247. *See id.* at 14.

248. *Id.* at 13.

249. *Id.*

250. *See id.* at 15.

251. *See* Atlantic Recording Corp. v. Andersen (*Atlantic II*), No. CV 05-933-AS, 2008 WL 185806, at \*5-6 (D. Or. Jan. 16, 2008) (order granting motion for attorneys’ fees).

252. *Defendant Prevails*, *supra* note 238.

253. *RIAA Doesn’t Want Defendants Exonerated*, *supra* note 203.

254. *Id.*

255. *Defendant Prevails*, *supra* note 238.

## V. PROPOSED BUSINESS MODELS

Commenting on the current business model of the major labels, music producer and newly appointed Columbia Records president Rick Rubin<sup>256</sup> said:

Columbia is stuck in the dark ages. I have great confidence that we will have the best record company in the industry, but the reality is, in today's world, we might have the best dinosaur. Until a new model is agreed upon and rolling, we can be the best at the existing paradigm, but until the paradigm shifts, it's going to be a declining business. This model is done.<sup>257</sup>

This section discusses three possible business models the major labels could adopt to help transition into the digital age: the subscription service model, the collective licensing model, and the revenue sharing model. While no single model seems to be the ultimate solution by itself, a combination of the approaches outlined below could help save the major labels from extinction.

A. *Subscription Service Model*

The subscription service model would be patterned after paid cable service on a television set.<sup>258</sup> As Rick Rubin explains, "You would subscribe to music . . . [and] pay, say, \$19.95 a month, and the music will come anywhere you'd like. In this new world, there will be a virtual library that will be accessible from your car, from your cell phone, from your computer, from your television. Anywhere."<sup>259</sup> The service would be able to offer an unlimited number of artists and offer music in any context the artists want including, for example, demos, bootlegs, or concerts.<sup>260</sup>

The logic behind a subscription service is simple. "[T]he music business has been wrong about how much it can dictate to its audience. . . . iPods made it easy for people to share music, and Apple took a big percentage of the business that once

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256. Rubin is a chart-topping record producer, having produced hit albums by such diverse artists as the Beastie Boys, Red Hot Chili Peppers, the Dixie Chicks, Slayer, Johnny Cash, Neil Diamond, and System of a Down. See Lynn Hirschberg, *The Music Man*, N.Y. TIMES, Sept. 7, 2007, (Magazine), § 6, at 26.

257. *Id.*

258. *Id.*

259. *Id.*

260. *See id.*

belonged to the record companies.”<sup>261</sup> Making music cheap and easily available, in a user-friendly format, seems to be an obvious way to keep people from stealing it.<sup>262</sup> According to Rubin, “[O]nce that model is put into place, the industry will grow 10 times the size it is now.”<sup>263</sup>

There are potential problems with such a service, however. First, all the record companies will have to agree on the model, the logistics of which producer Mark DiDia compares to “getting the heads of the five families together” in *The Godfather*.<sup>264</sup> Also, a large part of the current model is predicated on charging a premium for currently popular artists.<sup>265</sup> The subscription model flat fee would do away with this revenue stream. Further, a new plan for revenue distribution would have to be implemented and be one that is “equitable, depending on the popularity of the artists.”<sup>266</sup>

### B. *Collective Licensing Model*

The Electronic Frontier Foundation proposes a voluntary collective licensing model similar to the one employed by the American Society of Composers, Authors and Publishers (“ASCAP”) and Broadcast Music, Inc. (“BMI”) who currently provide for public performances of copyrighted works.<sup>267</sup> The music industry would form a collecting society, which “then offers file-sharing music fans the opportunity to ‘get legit’ in exchange for a reasonable regular payment, say \$5 per month.”<sup>268</sup> This is a way to let the file-sharers keep doing what they are doing, for a low price, and avoid the fear of lawsuits.<sup>269</sup> The money would be

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261. *Id.* (quoting David Geffen, record executive and founder of Geffen Records).

262. *Id.*

263. *Id.* The subscription model is also being championed by Doug Morris, CEO of Universal Music Group. See Seth Mnookin, *Universal’s CEO Once Called iPod Users Thieves. Now He’s Giving Songs Away*, WIRED MAGAZINE, Nov. 27, 2007, available at [http://www.wired.com/print/entertainment/music/magazine/15-12/mf\\_morris](http://www.wired.com/print/entertainment/music/magazine/15-12/mf_morris).

264. See Hirschberg, *supra* note 256.

265. See *id.*

266. *Id.*

267. ASCAP and BMI collect fees for public performances of copyrighted works of their member songwriters and music publishers. See Lydia Pallas Loren, *Paying the Piper*, 3 J. SMALL & EMERGING BUS. L. 231, 233-34 (1999). They distribute these fees back to their members as royalties, depending upon the number of times a certain song is performed and the medium in which it is performed. See About ASCAP, <http://www.ascap.com/about/> (last visited January 29, 2008).

268. *The People*, *supra* note 3, at 16.

269. See *id.*

divided among rights holders (labels, songwriters, publishers) in proportion to the popularity of the shared music.<sup>270</sup>

There are several advantages to this system. Freeing fans to share what they want, when they want would relieve the record labels of the cost of lawsuits against file-sharers.<sup>271</sup> Also, it is a proven feasible business model, as demonstrated by the success of ASCAP and BMI, in more traditional areas.<sup>272</sup>

In addition, universities could provide an excellent test run for the collective license model. The “university would pay a flat fee to the record labels in exchange for the right to utilize peer-to-peer applications on campus.”<sup>273</sup> There is very little downside to the labels in trying this, because the rates of illegal file-sharing among college students is already so high.<sup>274</sup> Also, “colleges already have existing payment infrastructure in place that would make it easy to collect fees from students.”<sup>275</sup> Like commercial legal research services for law students, college licensing could “create demand for similar deals in the ‘real world’ as college students graduate.”<sup>276</sup>

### C. Revenue Sharing Model

The revenue sharing model, also known as the “360” record deal, is an approach becoming increasingly popular with the major labels.<sup>277</sup> With this model, the labels ask for a piece of every revenue stream an artist has (touring income, merchandise sales, and music publishing, in addition to CD and digital download sales).<sup>278</sup> This type of deal allows the labels to hedge their bets “against a sinking CD-sales market and also become an investor in the [artist]—giving [the label] added incentive to push [the artist’s] singles to radio and shell out marketing money.”<sup>279</sup>

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270. *See id.*

271. The occasional lawsuit would still be necessary, however, to spot check compliance with the proposed “honor system.” *Id.* at 17.

272. *See id.*

273. Timothy B. Lee, Analysis: RIAA Wants Universities to do Its Dirty Work (Sept. 3, 2007), <http://arstechnica.com/news.ars/post/20070903-analysis-riaa-wants-universities-to-do-its-dirty-work.html>. Universities already utilize a similar arrangement with software companies for blanket licenses. *See id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *See* Steve Knopper, *Reinventing Record Deals: Sinking Majors Ask Acts to Share Profits from Merch, Touring*, ROLLING STONE, Nov. 29, 2007, at 13.

278. *Id.*

279. *Id.*

“Record companies for years have funded the brand creation of artists and have only benefited through record sales.”<sup>280</sup> This model allows the labels to tap into new revenue streams, while still preserving a large part of the old business model they have worked to hone for so many years.<sup>281</sup> It allows the labels to see a return on an investment, even without huge record sales.<sup>282</sup> While the model seems more “suited to [new] acts that need a big push from a corporate parent”<sup>283</sup> even established artists have begun to look at the 360 deal.<sup>284</sup>

The advantages of the revenue sharing model are numerous. The “label’s ability to cross-market items like CD’s, ringtones, V.I.P. concert packages and merchandise might make for a bigger overall pie.”<sup>285</sup> The 360 deal could free the labels “from the tyranny of megahits because there would be less pressure to make back the label’s money immediately,” allowing a more “holistic approach to the development of an artist brand.”<sup>286</sup> It could also broaden the scope of the acts a label signs, allowing for a more diverse roster of talent.<sup>287</sup> As the manager of a rock band, Paramore says, “It really removes a certain amount of conflict . . . We’re all better off if we build something that’s greater than any of us could achieve on our own.”<sup>288</sup>

Which, if any, of the alternatives outlined in this Comment the major labels choose to adopt remains to be seen. But, as Rick Rubin puts it, “[e]ither all the record companies will get together or the industry will fall apart and someone like Microsoft will come in and buy . . . [the companies] for ten cents on the dollar.”<sup>289</sup>

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280. *See id.*

281. *See id.*

282. *See id.* at 14.

283. *Id.*

284. Madonna recently signed a \$120 million dollar deal with concert promoter Live Nation in return for a piece of her record sales, live performances, merchandise sales, and the rights to her name. Knopper, *supra* note 277, at 13-14. Metal band Korn also signed a deal with Live Nation, “receiving \$25 million for a thirty percent stake in future profits.” *Id.* at 13.

285. Jeff Leeds, *The New Deal: Band as Brand*, N.Y. TIMES, Nov. 11, 2007, available at <http://www.nytimes.com/2007/11/11/arts/music/11leed.html>.

286. *Id.* at 2.

287. For example, rap acts that may not traditionally sell enough CD’s to attract major label interest may still garner lucrative endorsement deals for shoes or soft drinks, a piece of which would go to the label. *Id.* Further, “jam” bands, who normally make the bulk of their income from touring and merchandise sales, could now be a good addition to the label roster. *See id.*

288. Knopper, *supra* note 277, at 14.

289. Hirschberg, *supra* note 256, at 8.

VI. CONCLUSION

The RIAA's legal strategy of suing individual file-sharers has proven to be expensive and ineffective at stopping illegal file-sharing.<sup>290</sup> The John Doe lawsuit process is beginning to unravel, and universities are starting to be uncooperative in the process. In addition, defendants are beginning to recover attorney fees from the RIAA, making the process even more costly.

Rather than continue along this fruitless path, the major labels should look to the future and rearrange their business model into one that will allow them to survive in a file-sharing world. If they do not, "future technology companies will . . . let [the labels] sink until they can buy them . . . and do what needs to be done."<sup>291</sup>

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290. See McCullagh, *supra* note 128.

291. Hirschberg, *supra* note 256, at 8.