

**THE MORALITY OF MP3S:
THE FAILURE OF THE RECORDING
INDUSTRY'S PLAN OF ATTACK**

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TABLE OF CONTENTS

I. INTRODUCTION.....	270
II. THE RISE OF MP3S, NAPSTER, AND A NEW NATIONAL PASTIME.....	271
<i>A. The Birth of File-Sharing</i>	271
<i>B. Music Downloading Sweeps the Nation</i>	273
<i>C. The Appeal of P2P</i>	274
III. THE RECORDING INDUSTRY'S FIRST ROUND OF ATTACKS AGAINST FILE-SHARING	275
<i>A. Attacking P2P Vendors</i>	276
<i>B. Appealing to Morals</i>	277
IV. THE FAILURE OF THE RECORDING INDUSTRY'S APPEAL TO AMERICAN MORALS	277
<i>A. Shrugging Off the Moral Argument</i>	277
1. High CD Prices.....	279
2. Perceived Hypocrisy	280
3. Public Apathy	281
4. The Mores of the Internet.....	281
<i>B. Copyright and Moral Rights in the United States</i>	282
V. LAWSUITS AGAINST INDIVIDUALS.....	284
<i>A. The Decision to Bring the Lawsuits</i>	284
<i>B. The Impact of the Lawsuits</i>	285
VI. THE FUTURE OF MUSIC DOWNLOADING	288
VII. CONCLUSION	292

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I. INTRODUCTION

The popularity of downloading music over the Internet began inauspiciously enough in a college dorm room with the creation of Napster, the first peer-to-peer (“P2P”) network that brought MP3¹ file-sharing into the mainstream.² In the span of a few short years, so many students in college dorm rooms spent so much time downloading music that university bandwidth was quickly becoming overloaded by file-sharing.³ The widespread use of Napster, and successor programs like Kazaa and Morpheus, was perceived to be suffocating the music industry,⁴ which soon fought back against music downloading. The Recording Industry Association of America (“RIAA”) attacked the legality of P2P networks that enabled the vastly popular practice of file-sharing.⁵ The RIAA also appealed to the moral values of the millions of Americans who were downloading music every day, hoping to attach a moral stigma to actions that the recording industry viewed as illegal copyright infringement.⁶ Both the attempt to eradicate file-sharing software and the attempt to appeal to the moral consciousness of American music downloaders largely failed.

The RIAA’s appeal to American morals was unsuccessful partly because American copyright law focuses on pecuniary rewards and generally fails to recognize moral rights.⁷ Americans usually do not perceive copyright law as implicating moral issues. Thus, the RIAA’s charge that downloading music is immoral has failed to resonate with many in the American file-sharing community. While the RIAA’s lawsuits successfully educated Americans about the illegality of file-

1. “MP3” is an acronym for Motion Picture Experts Group (“MPEG”) Audio Layer 3, the compression technology used to create MP3 files. See Fraunhofer IIS, Audio & Multimedia: MPEG Audio Layer 3, at <http://www.iis.fraunhofer.de/amm/techinf/layer3/> (last visited Dec. 5, 2004). “File-sharing” refers to the practice of uploading and downloading files (e.g., MP3 files) between different computers over the Internet. See FindLaw’s Modern Practice, Glossary of Technology, at <http://practice.findlaw.com/glossary.html> (last visited Dec. 5, 2004).

2. See Maggie A. Lange, *Digital Music Distribution Technologies Challenge Copyright Law: A Review of RIAA v. MP3.com and RIAA v. Napster*, BOSTON B.J., Mar.–Apr. 2001, at 14.

3. See *id.* at 15; Kimberly Kerry, *Music on the Internet: Is Technology Moving Faster than Copyright Law?*, 42 SANTA CLARA L. REV. 967, 969–70 (2002); Calvin R. Trice, *VMI Targets File Sharing: Illegal Downloading Is Now an Offense That Can Lead to Expulsion*, RICHMOND TIMES-DISPATCH, Oct. 27, 2003, at B1.

4. See *infra* Part III.

5. See *infra* Part III.A.

6. While the recording industry clearly perceives music downloading as illegal, the legality of file-sharing is a topic of debate among legal scholars. See Jon Healey & Jeff Leeds, *Tone Deaf to a Moral Dilemma? Millions Download Songs Illegally But Don’t Feel Guilty*, L.A. TIMES, Sept. 2, 2003, at A1; Christopher Yasjejko, *Downloading Ethics*, NEWS J. (Wilmington, Del.), Oct. 14, 2003, at A4.

7. For a list of moral rights, see 3 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 8D.01[A] (2004).

sharing, their success in changing perceptions about the immorality of copyright infringement is questionable at best. Since the phenomenon of music downloading appears unlikely to go away, the recording industry must find a way to deal with the problems that file-sharing has engendered. However, attacking music downloaders on moral grounds is an ineffective way of solving these problems, particularly when viewed against the background of the history and development of U.S. copyright law.

Part II of this Note describes the history of music downloading and examines some of the reasons for its enormous popularity. This section also discusses the decline in music sales that has been blamed on the rise of Napster and subsequent P2P networks. Part III outlines the initial strategies employed by the recording industry to curb file-sharing. Part IV analyzes the reaction of the American public to some of these strategies. Part V of this Note discusses the history of moral rights in U.S. copyright law. Part VI argues that the recording industry's lawsuits against individual downloaders are a better tool for coping with the MP3 phenomenon than moral reprimands. Finally, Part VII looks ahead to the future of the medium.

II. THE RISE OF MP3S, NAPSTER, AND A NEW NATIONAL PASTIME

A. The Birth of File-Sharing

The viability of online music sharing as a widespread activity required the confluence of several developments. First, the size of digital music files had to be compressed without substantially sacrificing the quality of the recording. If the quality of digital music files was poor, music downloading would not be an attractive substitute for the purchase of compact discs. If music files were too large, the files would take too long to download, making purchasing the CD easier and less time consuming, and thus more attractive.

The development of Motion Picture Experts Group Audio Layer 3, an audio compression algorithm, solved both of these problems. Popularly known as "MP3," this technology made it possible to substantially compress the size of a typical music file while maintaining appreciably high sound quality.⁸ These achievements set the stage for music file-sharing.

8. The technology accomplishes this by using perceptual noise shaping. Sounds that cannot be heard by the human ear, or sounds that cannot be heard well by the human ear, are purged from the song. Additionally, softer sounds played simultaneously with louder sounds are removed, since the human ear can only hear the louder sound. In this way, relatively unnecessary parts of the song are eliminated, making the remaining file smaller. An MP3

Although MP3 technology made it possible to greatly reduce the size of song files, it took (and still takes) over ten minutes to download a typical MP3-formatted music file using even the fastest available dial-up modems.⁹ Without faster Internet connections, trading MP3s on a large scale would have been impractical and unappealing to many Internet users. By 1999, however, most colleges were offering much faster Internet connections than standard dial-up modems could provide,¹⁰ enabling students to trade MP3s quickly among themselves.

While speed was no longer a concern, locating another Internet user with the music files one desired was still an arduous task.¹¹ Enter Shawn Fanning. A freshman at Northeastern University,¹² Fanning developed Napster,¹³ the first P2P file-sharing program. Napster opened the floodgates to music downloading.¹⁴ The program became freely available for download at Napster.com in August of 1999.¹⁵ By the end of 1999, two hundred thousand Napster users were sharing roughly seventy-five thousand music files.¹⁶ By the middle of 2000, Napster use was at its peak,¹⁷ with twenty million users sharing six hundred thousand MP3 files.¹⁸ The MP3 revolution was well on its way.

version of a song is not identical to the CD version, because parts have been removed, but it is perceived as being almost identical, because most of the eliminated parts could not have been perceived by the human ear to begin with. See HowStuffWorks, *How MP3 Files Work*, at <http://www.howstuffworks.com/mp3.htm> (last visited Dec. 5, 2004).

9. See Keith Darnay, *The Need for Speed* (Aug. 23, 2002), at <http://www.darnay.com/icc/columns/2002/082302.html>.

10. See Kerry, *supra* note 3, at 970.

11. See Nick P. Walsh, *Teen Never Intended to Start a Music Revolution*, PITTSBURGH POST-GAZETTE, June 4, 2000, at G3; see also Sarah D. Glasebrook, Comment, "Sharing's Only Fun When It's Not Your Stuff": Napster.com Pushes the Envelope of Indirect Copyright Infringement, 69 UMKC L. REV. 811, 811 (2001).

12. See Lange, *supra* note 2, at 14.

13. Although Fanning had assistance in writing Napster, the development of the program has been popularly attributed to him. See *id.*; Glasebrook, *supra* note 11, at 811; Walsh, *supra* note 11, at G3. Fanning also became the public face of Napster, appearing at the 2000 MTV Video Music Awards in a Metallica T-shirt, a jab at the band that had been most outspoken against Napster. See *MTV Triumph for Eminem*, BBC NEWS (Sept. 8, 2000), at <http://news.bbc.co.uk/1/hi/entertainment/915686.stm>.

14. See, e.g., Benny Evangelista, *Parents Start to Rein In Kids Downloading Music: Recording Industry Suits Put a Crimp in Another Teen Pastime*, SAN FRANCISCO CHRON., Sept. 22, 2003, at E1 (describing Napster as having "ignited" the P2P craze).

15. See Ariel Berschadsky, *RIAA v. Napster: A Window Onto the Future of Copyright Law in the Internet Age*, 18 J. MARSHALL J. COMPUTER & INFO. L. 755, 761 (2000).

16. See Lange, *supra* note 2, at 15. While music downloading occurs in many countries throughout the world, this Note focuses on American file-sharing only. Not all of Napster's users were necessarily American, but, given the large number of Americans who do download music, see *infra* notes 21–24 and accompanying text, a significant number of Americans are undoubtedly included in this statistic.

17. See Evangelista, *supra* note 14, at E1.

18. See Lange, *supra* note 2, at 15.

B. Music Downloading Sweeps the Nation

The most common estimates claim that sixty million Americans — more than the number of people who voted for George W. Bush in the 2000 presidential election¹⁹ and roughly half of all Internet users in the United States²⁰ — have used P2P networks to swap files.²¹ A popular radio song is typically available for download on millions of computers.²² At any given moment, five million Americans are participating in file-sharing,²³ making for a total of 2.6 billion downloads each month.²⁴

KaZaA, the primary successor to Napster, is the most downloaded program in history, with over 308 million copies downloaded.²⁵ During a recent week, users on KaZaA had 441 million files available to them,²⁶ putting to shame the six hundred thousand files boasted by Napster at its height.²⁷ Music downloading has become so prevalent that the word “MP3” recently replaced “sex” as the most searched-for word on the Internet.²⁸

Nor is music downloading restricted to college students and teenagers. As the fast Internet connections offered by colleges have spread to the general population,²⁹ the practice of downloading music has followed in their wake; today, twenty-seven percent of Internet users between the ages of thirty and forty-nine and twelve percent of Internet users over the age of fifty are P2P file-sharers.³⁰ While college students might be considered “the heart of the MP3 problem,”³¹ the

19. See Infoplease, Presidential Election of 2000: Electoral and Popular Vote Summary, at <http://www.infoplease.com/ipa/A0876793.html> (last visited Dec. 5, 2004).

20. See Healey & Leeds, *supra* note 6, at A1.

21. See Benny Evangelista, *Online Music Finally Starts to Rock ‘N’ Roll: Industry Punishes Downloaders While Getting into the Act Itself*, SAN FRANCISCO CHRON., Dec. 29, 2003, at E1; Evangelista, *supra* note 14, at E1; Healey & Leeds, *supra* note 6, at A1.

22. See Amy Harmon & John Schwartz, *Many See No Wrong in Music-File Swapping*, INT’L HERALD TRIB., Sept. 20, 2003, at 13 (noting that “the pop radio hit ‘Right Thurr’ was available for download free from 3.5 million American personal computers last week”).

23. See *Recording Industry Sues Over Sharing*, SEATTLE TIMES, Mar. 24, 2004, at C3.

24. See *id.* (“The music industry claims some 2.6 billion songs are illegally downloaded each month . . .”); Crystal Yednak, *Will You Get Caught? Record Companies Continue to Wage a Battle Against Online Pirates, But Internet Users Keep Downloading*, CHI. TRIB., Jan. 28, 2003, at 6.

25. See Evangelista, *supra* note 21, at E1.

26. See *id.* Not all of the files shared on KaZaA are music files, however.

27. See Lange, *supra* note 2, at 15.

28. See Wendy M. Pollack, Note, *Tuning In: The Future of Copyright Protection for Online Music in the Digital Millennium*, 68 FORDHAM L. REV. 2445, 2446 (2000).

29. See Jack Kapica, *Broadband Finally Taking Over*, GLOBE & MAIL UPDATE (Toronto), Feb. 18, 2004 (noting that “[m]ore people around the world connect to the Internet via a broadband connection than by telephone dial-up,” and that forty-seven percent of Internet users in the United States use a high-speed connection).

30. See Harmon & Schwartz, *supra* note 22, at 13.

31. Pollack, *supra* note 28, at 2469.

use of P2P is too widespread to be confined to any single, easily identifiable group.³² P2P file-sharing cannot be dismissed as simply the product of skewed moral development in modern teenagers.

C. *The Appeal of P2P*

There are several reasons behind the phenomenal success of P2P file-sharing. Aside from the obvious attraction of free music, P2P seems to offer consumers what they want: a wide range of music in an electronic format that is easily downloadable to computer hard drives. More and more consumers seem to want their entertainment delivered online.³³ P2P networks give users more control over the entertainment they consume.³⁴ They “give consumers what they appear to want”³⁵ and are more “focused on customers’ wants and concerns.”³⁶ As the executive vice-president of Sharman Networks, the software distributor responsible for KaZaA, has stated, “I’ve got [sixty million] users, loads of artists, very happy independents and lots of other people saying they want more of it”³⁷

Rock star Courtney Love has suggested that people would be willing to pay for music if what they want is made available to them.³⁸ However, without a recording industry alternative that offered the usability of P2P networks, file-sharers had no reason to break from trading music online.³⁹ Despite warnings that P2P technology had to

32. See, e.g., Downhill Battle, *Civil Disobedience* (Aug. 26, 2003), at <http://www.downhillbattle.org/articles/civil.php> (“Are we supposed to believe that [the millions of P2P users are] all apologetic teenagers and vintage record collectors?”); Gary Younge, *Music Giants Sue 12-Year-Old for Net Theft*, *GUARDIAN* (London), Sept. 10, 2003, at 2 (“A 12-year-old girl in New York, a professor at Yale University and an elderly man in Texas who rarely uses his computer have been included in the first civil actions against people accused of illegally sharing songs on the internet.”).

33. See Lange, *supra* note 2, at 14.

34. See Greg Quill & Nick McCabe-Lokos, *CD Price Cuts Give Honesty a Chance*, *TORONTO STAR*, Sept. 5, 2003, at D10 (listing one P2P file-sharer’s reasons for downloading music as including the ability to delete songs he ends up not liking and being able to get one song without having to buy an entire twenty-song CD).

35. Lange, *supra* note 2, at 14.

36. Matthew Creamer, *Music Downloading*, *PR WK.*, Jan. 19, 2004, at 9; see also Yednak, *supra* note 24, at 6 (“Legitimate sites have been slow to meet customers’ demands . . .”).

37. Kate Bulkley & Paul Sexton, *Maestro Tries to Lose His Label of Music Pirate*, *FIN. TIMES* (U.S. Ed.), Nov. 11, 2003, at 13.

38. See Courtney Love, *Courtney Love Does the Math*, *SALON* (June 14, 2000), at <http://dir.salon.com/tech/feature/2000/06/14/love/index.html>, *5 (using the hypothetical of bootlegged T-shirts to illustrate the point).

39. See Alan Breznick, *New Trade Group Sees Cable as Model for Online Music Sales*, *CABLE DATACOM NEWS* (Jan. 1, 2004), at <http://www.cabledatcomnews.com/jan04/jan04-6.html> (quoting the senior vice president for marketing of RealNetworks: “In our view, the onus is really on the music industry and the distribution services to provide something that’s competitive.”).

be countered quickly by a legitimate online music service,⁴⁰ years went by while the recording industry tried to decide what to do.⁴¹

While the industry eventually entered the MP3 market,⁴² many observers felt it was simply “too late in the game to do anything about music piracy”⁴³ According to the CEO of Sony Music Entertainment, “If the [record] business could have done one thing differently over the past few years . . . it would have been to find a smoother, faster path to [fee-based music downloading] services.”⁴⁴

III. THE RECORDING INDUSTRY’S FIRST ROUND OF ATTACKS AGAINST FILE-SHARING

As the popularity of P2P file-sharing grew and the recording industry struggled to formulate its response, music sales sharply declined. Between 1999 (when Napster was released) and 2002, CD sales dropped fourteen percent, with the recording industry losing an estimated seven hundred million dollars annually in sales.⁴⁵ By 2003, music sales had plummeted as much as twenty-six percent.⁴⁶ Researchers estimated that the recording industry had lost \$425 million in sales to consumers between ages twelve and twenty-two alone.⁴⁷ Songwriters complained that their royalties were being “cut in half,”⁴⁸

40. See Kerry, *supra* note 3, at 990 (“The music industry must act soon, otherwise the popularity of the MP3 sites will only increase.”); R. Anthony Reese, *Copyright and Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions*, 55 U. MIAMI L. REV. 237, 240 (2001) (“[M]usic copyright owners may have only a relatively short window of opportunity in which to establish legitimate models for Internet music dissemination before users become accustomed to obtaining unauthorized Internet music access with no remuneration to artists or copyright owners.”).

41. See Samantha Chang, *Labels Integrate New Web Initiatives into Marketing Plans*, BILLBOARD, Apr. 3, 2004, at 15 (describing the record labels as “initially resisting” the Internet); Lisa Takeuchi Cullen, *How to Go Legit: Pay for Music Online?*, TIME, Sept. 22, 2003, at 44 (describing the creation of a fee-based online music market as being initially “hampered . . . by uncooperative record labels [R]ecord labels tripped up the progress toward a legal Internet music market by quibbling over rights and hoarding their artists.”).

42. See Evangelista, *supra* note 21, at E1.

43. Lee Gomes, *Music Downloaders Overstate Their Case for Free Song Access*, ASIAN WALL ST. J., Sept. 16, 2003, at A7; see also Erika Morphy, *FBI Ratchets Up Fight Against Music Piracy*, NEWSFACTOR NETWORK (Feb. 20, 2004), at http://www.newsfactor.com/story.xhtml?story_id=23216 (“[T]he music industry missed the boat. It should have been there to offer a viable alternative to the P2P sites when people began flocking to them.”).

44. Cullen, *supra* note 41, at 44.

45. See *id.*

46. See Kenneth Terrell & Seth Rosen, *A Nation of Pirates*, U.S. NEWS & WORLD REP., July 14, 2003, at 40; Jay Evensen, *No Straight Lines in the Digital Age*, DESERET MORNING NEWS (Salt Lake City), Sept. 14, 2003, at AA01.

47. See Yasiejko, *supra* note 6, at A4.

48. Terrell & Rosen, *supra* note 46, at 40 (quoting songwriter Lamont Dozier).

while commentators described the industry as “terrorized” by file-sharing.⁴⁹

The severe drop in sales that the recording industry was experiencing, combined with the industry’s belief that Napster and its offspring were to blame,⁵⁰ meant that the record companies had to take some action against file-sharing. The industry launched a two-pronged attack against music downloading: (1) using the courts to shut down P2P networks; and (2) arousing the moral values of the American public to convince file-sharers to turn away from their computers and back to the record stores.

A. Attacking P2P Vendors

As the first major P2P file-sharing network, Napster was the first online music service to gain the attention of the recording industry. The record companies brought a lawsuit against Napster alleging contributory and vicarious copyright infringement.⁵¹ The record companies argued that Napster’s users were infringing the record companies’ copyrights when they exchanged and downloaded MP3 files,⁵² and that Napster itself was liable for its users’ activities because its executives not only knew that copyright infringement was occurring, but also “sought to protect use of the service to transfer illegal MP3 files.”⁵³ In August 2000, a judge enjoined Napster from “engaging in, or facilitating others in copying, downloading, uploading, transmitting, or distributing plaintiffs’ copyrighted musical compositions and sound recordings, protected by either federal or state law, without express permission of the rights owner.”⁵⁴ Napster was further ordered to ensure that “no work owned by plaintiffs which neither defendant nor Napster users have permission to use or distribute is uploaded or downloaded on Napster.”⁵⁵

The ruling was seen as an effective death knell for Napster.⁵⁶ Unfortunately for the recording industry, it did not sound the death knell for file-sharing.⁵⁷ When the RIAA brought suit against other file-

49. Lange, *supra* note 2, at 14.

50. See, e.g., Bulkley & Sexton, *supra* note 37, at 13; Chris Nelson, *Music Sales Rise, But Executives Fret: Despite Turnaround, Much of Industry Is “Still Suffering”*, INT’L HERALD TRIB., Feb. 23, 2004, at 11.

51. See *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 900 (N.D. Cal. 2000).

52. See *id.* at 911.

53. *Id.* at 918.

54. *Id.* at 927.

55. *Id.*

56. Napster was later relaunched as a fee-based service. See Napster.com, What Is Napster?, at http://www.napster.com/what_is_napster.html (last visited Dec. 5, 2004).

57. See Amanda Groover, *New Programs Allow Continued MP3 File Sharing*, U. WIRE (Gainesville), Aug. 7, 2001 (“When Napster was shut down earlier this year, some people thought their file-sharing days were over. But more and more students now are taking ad-

sharing networks it met with little success.⁵⁸ Many of these networks, having learned from Napster's mistakes, were structured to elude the avenue of liability that throttled Napster. Grokster, another popular P2P network, was protected by the fact that (unlike Napster) it did not operate a centralized server, meaning that when Grokster users searched for MP3s, none of the information was "transmitted to or through any computers owned or controlled by Grokster."⁵⁹ Similar decentralization protected StreamCast, another Napster descendant.⁶⁰

B. Appealing to Morals

In addition to suing Napster and other P2P vendors, the recording industry launched a campaign to attach a moral stigma to file-sharing, believing that this would help them to end the practice.⁶¹ In so doing, the recording industry attempted to use guilt, as well as the fear of legal sanctions, to deter copyright infringement.⁶² As the legal attack against P2P vendors faltered,⁶³ it became even more vital for the recording industry to convince the public that file-sharing was a morally reprehensible act. This task did not succeed as well as the recording industry had hoped.

IV. THE FAILURE OF THE RECORDING INDUSTRY'S APPEAL TO AMERICAN MORALS

A. Shrugging Off the Moral Argument

The recording industry's assertion that downloading music is immoral failed to persuade the vast majority of file-sharers to stop trading music over the Internet. The RIAA has argued that download-

vantage of new technology available to give people more options to share MP3s and other files.").

58. *See* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 259 F. Supp. 2d 1029 (C.D. Cal. 2003), *aff'd* 380 F.3d 1154 (9th Cir. 2004); Evangelista, *supra* note 21, at E1.

59. *Grokster*, 259 F. Supp. 2d at 1040.

60. *Id.* at 1041 ("[S]earch requests on the . . . network are passed from user to user until a match is found or the search request expires. . . . When a user selects a file, the transfer is initiated directly between the two users [rather than through an intermediary network]." (citation omitted)).

61. Pollack, *supra* note 28, at 2470; *see also* Creamer, *supra* note 36, at 9 ("[O]rganizations like the RIAA and the Motion Picture Association of America have made several coherent attempts to appeal to customers' sense of right and wrong when it comes to copyright issues."); Greg Thom, *Going for a Song*, CAIRNS POST, Jan. 20, 2004, at 28 ("[The recording industry] used threats, the courts and an appeal to users' moral integrity to stop [file-sharing] . . ."); RIAA, Issues: Anti-Piracy, at <http://www.riaa.com/issues/piracy> (last visited Dec. 5, 2004) (arguing that pirating music is "unethical" as well as illegal).

62. *See id.*

63. *See, e.g., Grokster*, 259 F. Supp. 2d 1029.

ing an MP3 is the equivalent of stealing a CD from a record store.⁶⁴ Many Americans, however, do not accept the analogy.⁶⁵ On the contrary, many simply have “no moral objections to the practice [of file-sharing].”⁶⁶

According to a 2003 Gallup poll, a staggering eighty-three percent of thirteen to seventeen-year-olds think that file-sharing is morally acceptable.⁶⁷ A New York Times / CBS News poll conducted the same year found that twenty-nine percent of Americans under the age of thirty believe that file-sharing is always acceptable,⁶⁸ and that sixty-four percent of Americans believe that downloading music is at least sometimes acceptable.⁶⁹ Moreover, those surveyed were not moral delinquents, but rather normal people with healthily developed senses of morality.⁷⁰ “It’s not a looter’s mind-set,” says Jonathan Zittrain, Co-Director of the Berkman Center for Internet & Society at Harvard Law School.⁷¹ For most people, downloading music is a more nuanced issue than it is to the recording industry.⁷² In such a

64. See, e.g., Eben Moglen, *Pay Artists, Not “Owners,”* NATION, Oct. 27, 2003, at 32.

65. See Froma Harrop, *Entertainment Firms Change Tune on Morality to Help Profits*, PROVIDENCE J.-BULL., Sept. 17, 2003, at B05; Charles Honey, *Morality Suffers for a Song: Sharing Music Was Less Complicated in a Simpler Time*, GRAND RAPIDS PRESS, Aug. 9, 2003, at B1; Moglen, *supra* note 64, at 32; Kate Zernike, *Moral Boundaries Hazy for Internet Generation*, DESERET MORNING NEWS (Salt Lake City), Sept. 21, 2003, at A09. Many file-sharers believe that downloading music is less like stealing a CD and more like taping a song off the radio, see Harmon & Schwartz, *supra* note 22, at 13, or making a compilation tape for a friend. See Honey, *supra*, at B1. While these practices are still illegal, neither is criminal like stealing a CD.

66. Yasiejko, *supra* note 6, at A4; see also John Hale, Testimony Before the Subcommittee on Courts, the Internet, & Intellectual Property, Committee on House Judiciary, Feb. 26, 2003 (noting, in testimony focused on the practices of student downloaders, that “[s]ome do not even seem to see any real moral . . . [or] ethical . . . dilemma with media piracy over the Internet”); Zernike, *supra* note 65, at A09 (quoting a junior at Pennsylvania State University: “It’s not something you feel guilty about doing.”).

67. See Scott Mervis, *Downloading Goes Legit: Record Industry Crackdown Steers Music Fans to Pay-Per-Song Online Services*, PITTSBURGH POST-GAZETTE, Nov. 12, 2003, at E1.

68. See Harmon & Schwartz, *supra* note 22, at 13.

69. See *id.*

70. See *Record Company Lawsuits Against Downloaders Seem to Be Having Some Effect* (Minnesota Public Radio: Marketplace Morning Report, Sept. 30, 2003) (quoting University of Virginia ethicist Jonathan Moreno: “Normal people, especially normal kids with otherwise . . . healthy, developing moral intuitions, don’t associate this kind of activity with theft.”). Further complicating matters for the RIAA is that the more popular P2P becomes, the more difficult it is to see file-sharing as wrong, and the more people then engage in it. See Healey & Leeds, *supra* note 6, at A1 (quoting a teenage downloader: “It’s hard for me to see [file-sharing] as wrong when so many people are doing it.”); see also Michael Wolff, *Stop, Thief!*, N.Y., Mar. 3, 2003, at *2, http://www.newyorkmetro.com/nymetro/news/media/columns/medialife/n_8384/ (“[E]verybody can’t be an outlaw.”).

71. Healey & Leeds, *supra* note 6, at A1.

72. See Harrop, *supra* note 65, at B05 (“Like most of the downloading public, [some musicians] see thou-shalt-not [download] as a land of gray.”).

situation, calling upon the ethics of music downloaders failed the recording industry for a number of reasons.

1. High CD Prices

Many music downloaders feel no sense of guilt about file-sharing because they believe that CD prices are “unjustifiably” high.⁷³ These opinions result from the perception that CDs do not cost much to make,⁷⁴ and that the prices would be more reasonable if the recording industry, composed of millionaires, took less.⁷⁵ Instead, both the recording industry and the musicians themselves take sizeable chunks of the pie, driving up the price of CDs. While consumers seem willing to compensate musicians for their creative efforts, they resent the amount of money taken by the recording industry, even if the recording industry claims it is necessary for marketing and promotion. The high price of CDs has led to a “lingering resentment” of the recording industry⁷⁶ that in turn has made downloading “irresistible.”⁷⁷ Again and again, music downloaders argue that many of the recording industry’s woes could be solved by pricing “fairly and logically.”⁷⁸ They refuse to feel guilty about compensating for what they characterize as unreasonable behavior on the part of the recording industry.

Several downloaders have stated that they have no problem with supporting musicians, but they do have a problem with supporting the

73. *Letter to the Editor*, TENNESSEAN, Dec. 8, 2003, at 8A; see also Zernike, *supra* note 65, at A09; Chris Collins, *The RIAA Is Right*, BALT. SUN, Nov. 14, 2003, at 17A; Evensen, *supra* note 46, at AA01.

74. See *Music Industry Blind to Its Own Faults over Falling Sales*, S. CHINA MORNING POST, Jan. 13, 2004 [hereinafter *Blind*], at 2 (“The cost of product development is miniscule, the cost of production is in constant free-fall . . .”). Interestingly, the rise of CD burners may also have contributed to the belief that CD prices are too high, because “[o]n the same record store shelf, stacks of 30 cent blank CDs sit next to the record companies’ \$16 jewel cases. And if it costs a regular person 30 cents to make a perfect copy on their home computer, imagine how little it costs when you own a factory.” *Civil Disobedience*, *supra* note 32.

75. See *Blind*, *supra* note 74, at 2 (noting that “about 60 per cent [sic] of the sales price goes directly to the label”); Love, *supra* note 38, at *2 (asserting that the successful music group TLC “received less than 2 percent of the \$175 million earned by their CD sales[,] . . . about 40 times less than the profit that was divided among their management, production and record companies”); *Civil Disobedience*, *supra* note 32 (“[N]ot much of the \$16 [CD price] ends up in musician’s [sic] hands.”); Evangelista, *supra* note 14, at E1 (quoting a consumer saying that CDs “support . . . too many layers of bureaucracy and promotion”).

76. Yasiejko, *supra* note 6, at A4; see also *Blind*, *supra* note 74, at 2 (“If you know full well that a company is overcharging you for a product, it is only natural that you should resent paying them.”).

77. *Letter to the Editor*, *supra* note 73, at 8A.

78. Evangelista, *supra* note 14, at E1; see also Yasiejko, *supra* note 6, at A4 (“Reduced prices enticed [a teenage downloader] to [buy CDs] rather than download [them].”); Honey, *supra* note 65, at B1 (“[I]f the \$14 billion recording industry would charge reasonable prices, it could solve a lot of its problem.”).

record labels, which is where they feel their CD money is going.⁷⁹ Concert attendance has risen in recent years,⁸⁰ supporting the argument made by many file-sharers that downloading music is acceptable because they use their access to free music to discover new artists, and then they support those artists by going to their concerts.⁸¹ To savvy consumers who know that many artists make more money from their concerts than from their CD sales⁸² and who are still smarting from the high price of CDs, buying concert tickets eases any guilt they might otherwise feel over the money lost to the artists.

2. Perceived Hypocrisy

Another reason that the recording industry's appeal to the morals of music downloaders has failed is that many downloaders perceive the appeal as a form of hypocrisy. To much of the American public, the recording industry is greedy and rapacious.⁸³ It is hard for many Americans to feel guilty about "stealing" music by downloading free MP3s when they consider the recording industry to have been stealing from its artists for decades.⁸⁴ As one consumer lamented, "How can you lean on morality when it benefits you and ignore it when it doesn't?"⁸⁵ Even many of those who believe that music downloading is wrong still feel that it is hypocritical of the record companies to attempt to take the moral high ground.⁸⁶ For this reason, the recording

79. See Sam McManis, *Sharing Music Files Is Apt Topic for Debate by Trio of UPS Students*, NEWS TRIB. (Tacoma), Nov. 2, 2003, at D03 (quoting a student: "If you send a \$5 check to the artist after burning a CD and avoid the recording industry entirely, I'm cool with that."); Evangelista, *supra* note 14, at E1 ("[A consumer] said he believed the record companies — not the artists — would profit from the industry's crackdown on illegal downloading. 'Where I draw the line is people making a living at the cost of other people's efforts,' he said."); see also note 75 and accompanying text.

80. See Honey, *supra* note 65, at B1.

81. See *id.*; Zernike, *supra* note 65, at A09.

82. See Harrop, *supra* note 65, at B05.

83. Wolff, *supra* note 70, at *1 ("[I]t is very strange to have entertainment executives — generally regarded as among the most amoral, conniving, and venal of all businessmen — taking the high ground.").

84. See Harrop, *supra* note 65, at B05 ("Having promoted an elastic reading of the Commandment [not to steal] over the years, the entertainment industry now demands strict interpretation of scripture . . . [N]o cultural force has worked so diligently over recent decades to fuzz up the rule about not stealing."); Moglen, *supra* note 64, at 32 ("The recording industry . . . has done no small amount of stealing from musicians in its brief history . . ."); Yednak, *supra* note 24, at 6 (quoting a consumer: "Who are you really hurting? The big businesses that are ripping off artists themselves?").

85. Benny Evangelista, *Novato Man Sues RIAA Over Amnesty Program: Suit Says Music Industry's Plan Misleading*, SAN FRANCISCO CHRON., Sept. 11, 2003, at B1.

86. See Harrop, *supra* note 65, at B05.

[W]e have these odd scenes of guys who make money challenging the old morality demanding that the morality be restored for the narrow purposes of defending their profits. The entertainment industry has the right, of course, to protect its intellectual property. But when mo-

industry would have been wise to heed the old adage about people in glass houses — appealing to morals was not the best strategy for the industry to take in addressing the problems created by file-sharing.

3. Public Apathy

Many music downloaders simply fail to sympathize with the victims of their actions. Americans do not feel badly about “stealing” from artists and record companies whom they view as being rich enough already.⁸⁷ Even many of those who support the record companies’ efforts to curb file-sharing admit that it’s “hard to feel sorry” for them.⁸⁸ Failing to see or to really care about the harm caused by their actions, many Americans see no reason to stop downloading music.

4. The Mores of the Internet

A further problem with depicting music downloading as an immoral practice is the fact that it takes place over the Internet, a relatively new space which has developed its own peculiar mores. The Internet grew up with few rules,⁸⁹ making it an “inherently anarchistic place.”⁹⁰ To the generation coming of age now, which has always had the Internet and considers it “theirs for the taking,”⁹¹ fellow Internet-

guls warn against coveting thy neighbor’s ox only when their own ox is being gored, they somehow lose authority on the subject.

Id.

87. See Yasiejko, *supra* note 6, at A4 (quoting a teenage downloader: “If it’s a big artist, it’s not much of a concern . . . The ones that you really want to support, you buy their albums.”); Honey, *supra* note 65, at B1 (“All these kids are stealing from Eminem, who I’m told barely ekes out a living, as well as his record company, whose executives can barely afford second vacation homes.”); *Record Company Lawsuits Against Downloaders Seem to Be Having Some Effect*, *supra* note 70 (“[K]ids . . . have a hard time sympathizing with those [whom downloading] hurts, especially . . . when record companies have put rock stars and high-paid lobbyists out in front of this fight.”); Healey & Leeds, *supra* note 6, at A1 (“[S]he offered no sympathy for the record labels or well-known artists. ‘They’re big. They’re rich. They can deal with it . . .’”).

88. *Online Theft Still Is Wrong*, STATESMAN J., Sept. 13, 2003, at 6C (“It is hard to feel sorry for any industry that is suing adolescents but still has healthy CD sales, despite a three-year decline.”); see also Evangelista, *supra* note 85, at B1 (“Parke said he doesn’t download songs himself and thinks file sharing is wrong, but said he also believes someone needs to stand up to the ‘heavy-handed’ RIAA.”). Even some recording artists admit, “How can a 14-year-old who has an allowance of \$5 a week feel bad about downloading music produced by multimillionaire musicians and greedy record companies?” Harrop, *supra* note 65, at B05 (quoting Moby).

89. See Adam P. Segal, Comment, *Dissemination of Digitized Music on the Internet: A Challenge to the Copyright Act*, 12 SANTA CLARA COMPUTER & HIGH TECH. L.J. 97, 99 (1996).

90. Pauline Tam, *An On-line Link to Top Tunes Is Soon to Boom: On-line*, VANCOUVER SUN, Aug. 2, 1994 (quoting Rob Lord of the Independent Underground Music Archive).

91. Zernike, *supra* note 65, at A09.

users are just a “huge network of friends,”⁹² and everything they share on the Internet should be free.⁹³ Because these individuals view MP3s as simply a part of the vast compendium of information that is “shared” over the Internet, they do not see downloading music as the equivalent of physically stealing a CD.⁹⁴

B. Copyright and Moral Rights in the United States

Appealing to the morality of American consumers to deter copyright infringement fails because, in the United States, copyright infringement is not a question of morals. Rather, copyright infringement is a *malum prohibitum*⁹⁵ — an action that is “not [considered] wrongful or ‘immoral’ independent of its being illegal”⁹⁶ In other words, downloading an MP3 might be illegal, but most people do not think it is immoral independent of copyright law.

The *malum prohibitum* nature of U.S. copyright is rooted in the traditional bases of the law; the firm grounding of U.S. copyright in pecuniary rights has resulted in a general antipathy toward perceiving file-sharing as illegal. This feeling stems from the deep-rooted, traditional understanding of the purposes of U.S. copyright law. Traditionally, American copyright law focuses on the public interest,⁹⁷ and dividing proprietary interests in the copyrighted material such that the public interest is best served.⁹⁸

U.S. copyright stems from the so-called Copyright Clause of the Constitution: “The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings

92. See McManis, *supra* note 79, at D03 (quoting a college student).

93. See Segal, *supra* note 89, at 99; Graham B. Spanier, *School Should Play Role in Protecting Artists' Work*, PATRIOT-NEWS, Nov. 16, 2003, at D01; Trice, *supra* note 3, at B1; Harrop, *supra* note 65, at B05.

94. See Albert Z. Kovacs, Note, *Quieting the Virtual Prison Riot: Why the Internet's Spirit of "Sharing" Must Be Broken*, 51 DUKE L.J. 753, 762-64 (2001).

95. See Patti Waldmeir, *There Is No Nobility in Music Theft*, FIN. TIMES (London), Sept. 29, 2003, at 14 (“[C]opyright law is not a commandment of God or nature, like the prohibition against murder, or the theft of an ox or an ass or a wife.”).

96. Stuart P. Green, *Why It's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1557 (1997).

97. See Michael P. Gunlicks, *A Balance of Interests: The Concordance of Copyright Law and Moral Rights in the Worldwide Economy*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 601, 602 (2001) (“The United States maintains that the reason for copyright law is to serve the public interest.”).

98. See Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 815 (2001) (“[T]he American copyright scheme continues to focus on the division of proprietary interests stemming from created works.”). The focus on the proprietary interests means that the focus is more on the copyright owner than on the creator of the works. See Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 37 (1985).

and Discoveries”⁹⁹ To many, the stated goal of the Copyright Clause indicates that the “ultimate purpose of copyright law is to benefit the public.”¹⁰⁰ Members of the general American public, in defending music downloading, seem to instinctively grasp upon this interpretation of the copyright system.¹⁰¹ Assigning copyright requires an intricate balance between the rights of the author to the fruits of his labor and the public interest in sharing information and art.¹⁰²

In order to provide as many works as possible to the public, artists must be encouraged to create.¹⁰³ U.S. copyright fulfills that purpose by placing a heavy emphasis on financial reward.¹⁰⁴ The general understanding of copyright among the American public is that it “helps artists pay their bills.”¹⁰⁵ To many Americans, copyright law is clearly a money issue,¹⁰⁶ not a moral issue. The American public understands the law to revolve around the public interest, and therefore around the money needed to encourage works for the benefit of the public.

99. U.S. CONST. art. I, § 8.

100. Stuart K. Kauffman, *Motion Pictures, Moral Rights, and the Incentive Theory of Copyright: The Independent Film Producer as “Author,”* 17 CARDOZO ARTS & ENT. L.J. 749, 767 (1999); see also *id.* at 768 (“[T]he purpose of copyright law is to make works available to the public.”); Gunlicks, *supra* note 97, at 602 (“The United States maintains that the reason for copyright law is to serve the public interest.”).

101. See McManis, *supra* note 79, at D03 (quoting a college student lamenting that her access to music can be restricted by the copyright holder); Evangelista, *supra* note 14, at E1 (quoting an individual as saying that copyright was not put in place to protect publishers from consumers).

102. See Lange, *supra* note 2, at 14 (“Copyright law seeks to strike a balance between the rights of owners and the interests of society.”); Waldmeir, *supra* note 95, at 14 (“Copyright . . . must balance the interests of consumers and creators.”); Sony Corp. v. Universal City Studios, 464 U.S. 417, 429 (1984).

103. See Lange, *supra* note 2, at 14–15 (discussing solutions to ensure that copyright “continue[s] to drive creative development”); Kauffman, *supra* note 100, at 760 (noting that the Copyright Clause of the Constitution wished “to ensure that creators are adequately encouraged to create works”).

104. See Kerry, *supra* note 3, at 986–87 (noting “the financial incentive to create”); Nancy A. Bloom, *Protecting Copyright Owners of Digital Music: No More Free Access to Cyber Tunes*, 45 J. OF THE COPYRIGHT SOC’Y OF THE U.S. 179, 181 (1997) (“[C]ompensation for creating musical works is their livelihood.”); Love, *supra* note 38, at *6 (“Take away the incentive for major or minor financial reward and you dilute the pool of musicians Less good music is recorded if we remove the incentive to create it.”).

105. P.J. Huffstutter, *Music Wants to be Free on the Cyberspace Frontier*, SAN DIEGO UNION-TRIB., May 14, 1995 (quoting music attorney Don Passman); McManis, *supra* note 79, at D03 (quoting a student who believed that sending money directly to the artist would solve the copyright problem of free downloading).

106. See Gilliam v. Am. Broad. Cos., 538 F.2d 14, 24 (2d Cir. 1976); Kauffman, *supra* note 100, at 750 (remarking on the American “tradition of placing the economic over the personal”); Lee, *supra* note 98, at 798 (“Traditionally, the focus of American copyright law has been on the distribution and allocation of the pecuniary or property rights that flow from a created work.”); Laura A. Pitta, *Economic and Moral Rights Under U.S. Copyright Law*, 12 ENT. & SPORTS LAW. 3, 5 (1995) (noting “the deeply rooted philosophy in U.S. copyright law emphasizing economic rights”).

V. LAWSUITS AGAINST INDIVIDUALS

A. *The Decision to Bring the Lawsuits*

At first, record companies were reluctant to sue individual file-sharers for copyright infringement. Not only did most file-sharers not have deep pockets, but also such lawsuits were sure to be a “public relations nightmare”¹⁰⁷ for an industry already disfavored by consumers.¹⁰⁸ Moreover, many believed that tracking down individual file-sharers would be extremely difficult, if not “impossible.”¹⁰⁹ For these reasons, the recording industry’s initial approach to music downloading was to attack the legality of the P2P networks while condemning file-sharing as immoral, hoping that a sense of guilt would deter Americans from flocking to free music.¹¹⁰ At that time, bringing suit against individual file-sharers seemed so unlikely that many consumers declared it would never happen.¹¹¹

However, as courts began to uphold the validity of the P2P networks that succeeded Napster,¹¹² and as the recording industry’s attempts to condemn file-sharing as an immoral activity fell flat on a large scale,¹¹³ the RIAA felt it had no choice but to take legal action against individual file-sharers. By 2003, the recording industry had launched another “two-pronged attack” against music downloading, consisting of establishing legal file-sharing alternatives and bringing lawsuits against individual file-sharers.¹¹⁴ On September 8, 2003, the RIAA “[took] off the gloves”¹¹⁵ and “launch[ed] a new offensive” against music downloading,¹¹⁶ its “strongest attack to date.”¹¹⁷ The RIAA has promised to continue bringing such lawsuits until consumers “get the message”¹¹⁸ and has so far made good on that promise, recently filing lawsuits against 531 more individuals.¹¹⁹ To date, the

107. Lange, *supra* note 2, at 29.

108. *See supra* Parts IV.A.2–3.

109. Lange, *supra* note 2, at 29; *accord* Kerry, *supra* note 3, at 975; *see also* Segal, *supra* note 89, at 138 (“Clearly it is impractical for a copyright holder to track down every individual on-line subscriber that has made an unauthorized transfer of digitized music.”).

110. *See supra* Part III.B.

111. *See* Gomes, *supra* note 43, at A7.

112. *See, e.g.,* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 259 F. Supp. 2d 1029 (C.D. Cal. 2003), *aff’d* 380 F.3d 1154 (9th Cir. 2004).

113. *See supra* Part IV.A.

114. Evangelista, *supra* note 21, at E1.

115. *See* Dan Thanh Dang, *Recording Industry Sues 261 for Piracy: Association Also Offering Music-Swapping Amnesty*, BALTIMORE SUN, Sept. 9, 2003, at 1A.

116. Terrell & Rosen, *supra* note 46, at 40.

117. Evangelista, *supra* note 14, at E1.

118. Terrell & Rosen, *supra* note 46, at 40 (quoting Cary Sherman, president of the RIAA).

119. *See, e.g.,* Press Release, RIAA, 531 More File Sharers Targeted in Latest RIAA Legal Efforts (Feb. 17, 2004), available at <http://www.riaa.com/news/newsletter/021704.asp>.

RIAA has brought lawsuits against nearly two thousand individual file-sharers. About four hundred of these suits have settled out-of-court for two to ten thousand dollars each.¹²⁰

B. The Impact of the Lawsuits

The lawsuits have not made the RIAA any more popular with the American public. Many have criticized them as “excessive,”¹²¹ “heavy-handed,”¹²² and “horrible.”¹²³ Some even claim that the lawsuits are “counterproductive,”¹²⁴ arguing that the suits will just win “new converts to the cause of disobedience”¹²⁵ and provide them with an ideal “nemesis: a rich, institutional enemy who resolves its business-model problems by suing teenaged girls.”¹²⁶ Indeed, one downloader stated he would “download more out of spite,”¹²⁷ and the suits generated “more anger than worry” in one parent.¹²⁸ Others have called the lawsuits “great fun,” reveling in the embarrassment that the suits have caused the RIAA.¹²⁹

So far as one can tell from their recent behavior, the recording companies believe that the survival of civilization depends on terrorizing [twelve]-year-olds. Among the 261 lawsuits filed by the Recording Industry Association of America on September 8, the preteen set has figured prominently, along with college students and (to the industry’s embarrassment) a teenaged recent immigrant from Poland, whose stash of online music turned out to include mostly recordings of Polish folk songs and Hungarian hip-hop — two genres of music not controlled by the five companies that “own” [ninety] percent of the nation’s music.¹³⁰

120. See, e.g., Jefferson Graham, *College Students Sued over Music Downloads*, USA TODAY, Mar. 23, 2004, http://www.usatoday.com/tech/news/2004-03-23-riaa-suits_x.htm.

121. Yasjejko, *supra* note 6, at A4.

122. Evangelista, *supra* note 21, at E1; *Online Theft Still Is Wrong*, *supra* note 88, at 6.

123. Evangelista, *supra* note 14, at E1.

124. *Online Theft Still Is Wrong*, *supra* note 88, at 6.

125. Waldmeir, *supra* note 95, at 14.

126. Creamer, *supra* note 36, at 9.

127. Evangelista, *supra* note 21, at E1.

128. Healey & Leeds, *supra* note 6, at A1.

129. Gomes, *supra* note 43, at A7.

130. Moglen, *supra* note 64, at 32.

While the first round of lawsuits attracted a lot of attention, subsequent suits have generated “little public outcry.”¹³¹ Regardless of public opinion, however, these lawsuits are crucial to the RIAA’s objective of stopping illegal file-sharing. The RIAA has persuaded many more people that downloading music is illegal than they have persuaded that it is immoral.¹³² While seventy-nine percent of Americans age twelve to twenty-two believe that downloading music should be free, sixty-nine percent of that same age group admitted they would stop downloading if there was a “serious risk of jail or a fine.”¹³³ Many either ceased downloading music or forbade their children from doing so after the lawsuits were filed.¹³⁴ Even though the odds of being sued are extremely low,¹³⁵ for many the free MP3 is not worth the risk.¹³⁶ Even those who have stood behind P2P admitted that, in the wake of the lawsuits, they were made to “feel[] like criminals.”¹³⁷ By attacking the issue from a legal standpoint instead of a moral stand-

131. Nelson, *supra* note 50, at 11.

132. See Evangelista, *supra* note 14, at E1; *Record Company Lawsuits Against Downloaders Seem to Be Having Some Effect*, *supra* note 70 (“[Before the filing of the lawsuits], 37 percent of downloaders admitting [sic] knowing what they were doing was illegal; since [the lawsuits], the number has nearly doubled.”); RIAA, *supra* note 61 (“According to a March survey by Peter D. Hart Research Associates, those who say it is illegal to make music from the computer available for others to download for free over the Internet, stands at 63 percent, with only 15 percent saying they think it’s legal.”); Yasiejko, *supra* note 6, at A4; Zernike, *supra* note 65, at A09.

133. Yasiejko, *supra* note 6, at A4; see also Healey & Leeds, *supra* note 6, at A1.

134. See Kathy Haight, *Downside of Downloading Starts to Click: A Leadership Retreat Helps a Group of Teens Realize Copying Music from Web Is Wrong, Though Most Peers Still Disagree*, CHARLOTTE OBSERVER, Nov. 18, 2003, at 1E (“Olympic junior Ben Glover, 16, used to download tunes on the music-swapping sites iMesh and KaZaA. But he stopped when people started getting sued.”); Yasiejko, *supra* note 6, at A4 (“Ed and Angelia Johnson of New Castle . . . once allowed their children to download ‘anything they wanted’ — until the recording industry filed 261 lawsuits on Sept. 8. Since then, they have forbidden their 17-year-old son Marcus from downloading.”). According to one commentator:

The future of digital-music sales may rest in the hands of those who, to borrow from the Talking Heads, have developed a healthy fear of music — free music. Says Kyu-Heong Kim, a junior majoring in biology at the University of Texas in Austin: “Who wants to be put in jail or pay some huge fine because you downloaded Justin Timberlake’s newest song? It’s just too big of a risk.”

Cullen, *supra* note 41, at 44.

135. See Evensen, *supra* note 46, at AA01 (quoting one file-sharer as saying, “They don’t plan on suing everyone,” and another file-sharer as “speculat[ing that] it would take over [two thousand] years to do that”); Mervis, *supra* note 67, at E1 (“The reality is that ‘your odds of being struck by lightning are greater than your odds of being sued for file-sharing,’ says Fred von Lohman, an attorney for the Electronic Frontier Foundation, an advocacy group that successfully defended [P2P networks].”).

136. See *File-Sharing Rightly Becomes File-Buying*, POST-CRESCENT, Oct. 11, 2003, at 6B (“Fifty-four percent of the people polled by Newsweek recently said they were less likely to download free music [after the filing of the lawsuits].”).

137. Press Release, Electronic Frontier Foundation, Electronic Frontier Foundation Releases File Sharing Recommendations (Feb. 24, 2004), at http://www.eff.org/share/20040224_eff_pr.php.

point, the recording industry has finally begun to speak the same language as consumers. Even those who continue to download now feel they must do so in secret.¹³⁸

Whether the lawsuits are ultimately the solution that the recording industry has been hoping for remains to be seen. Initial statistics indicated that file-sharing dropped drastically after the lawsuits were filed.¹³⁹ There have been recent indications of steady growth in the recording industry,¹⁴⁰ suggesting that the industry may finally be stabilizing after its long, plummeting decline.¹⁴¹ However, while the record companies are claiming victory,¹⁴² there is no actual “hard data” that demonstrates a causal relationship between the lawsuits and the industry’s economic recovery.¹⁴³ Although traffic at legal, fee-based downloading sites is brisker than ever,¹⁴⁴ free downloads over P2P networks still outnumber paid downloads by “more than a hundred-fold.”¹⁴⁵ On a recent weekday afternoon, 3,506,036 users could still be found on KaZaA, sharing 634,580,929 files.¹⁴⁶ As one commentator observed:

The legal campaign appears to be educating some file swappers who did not think they were breaking the law and scaring some of those who did. But the barrage of lawsuits has also highlighted a stark disparity between the legal status of file sharing in the

138. See Graham, *supra* note 120 (quoting the CEO of BigChampagne).

139. See, e.g., Evangelista, *supra* note 21, at E1 (stating that the number of KaZaA users had dropped forty-six percent between the week before the lawsuits were filed in September 2003 and the middle of December 2003); Mervis, *supra* note 67, at E1 (noting that users of P2P network KaZaA fell forty-one percent between June 2003 and the end of September 2003, after the lawsuits were filed). *But see* Creamer, *supra* note 36, at 9 (citing, in January 2004, BigChampagne, which tracks P2P use, as saying that “downloading is as popular as it ever was”); Harmon & Schwartz, *supra* note 22, at 13 (noting that users of KaZaA the week after the lawsuits were only five percent fewer than the week before, and that a smaller P2P service actually had more users).

140. See Nelson, *supra* note 50, at 11

141. See RIAA, *supra* note 61.

142. See Mervis, *supra* note 67, at E1 (quoting an RIAA spokesperson who described the lawsuits as being “very successful”); Nelson, *supra* note 50, at 11 (“[M]usic labels and retailers say legal action taken against computer users accused of illegal song swapping has helped drive people back into stores for music.”); Press Release, RIAA, New Wave of Record Industry Lawsuits Brought Against 532 Illegal File Sharers (Jan. 21, 2004) (quoting the president of the RIAA: “Awareness and legal downloads are up, while many analysts are finding that file sharing is down.”), available at <http://www.riaa.com/news/012104.asp>.

143. Nelson, *supra* note 50, at 11.

144. See Collins, *supra* note 73, at 17A; Nelson, *supra* note 50, at 11.

145. Nelson, *supra* note 50, at 11.

146. The files being shared include other forms of media, not just MP3s (e.g., movies). However, one must also consider that KaZaA is only one of many P2P networks on which file-sharing is still popular.

United States and the apparent cultural consensus on its use.¹⁴⁷

VI. THE FUTURE OF MUSIC DOWNLOADING

All indications are that online-music downloading is not merely a fad. Despite the recording industry's lawsuits, the number of P2P users continues to rise,¹⁴⁸ with over two hundred fifty million songs traded every week.¹⁴⁹ There are those who characterize the continued popularity of P2P as a "massive rebellion."¹⁵⁰ Even the major record companies have admitted that it would be impossible to eradicate P2P forever, hoping simply that they can reduce the activity to much lower levels.¹⁵¹

Aside from lawsuits against file-sharers and P2P vendors, the recording industry has hoped to curb file-sharing by offering legitimate online music services. In the past, consumers rejected these services as too difficult to use, preferring the ease of P2P.¹⁵² While the recording industry was finally able to rival the usability of file-sharing programs with the launch of iTunes,¹⁵³ the ninety-nine cents charged per song is considered to be too much by consumers,¹⁵⁴ and too little by those running the iTunes site.¹⁵⁵

147. Harmon & Schwartz, *supra* note 22, at 13.

148. See Graham, *supra* note 120 ("According to BigChampagne, a Beverly Hills, Calif., company that tracks traffic on file-sharing networks, unauthorized song swapping is more popular than ever. Use is up 24% since the third quarter of 2003, when RIAA filed its first wave of lawsuits, says BigChampagne CEO Eric Garland."); Nelson, *supra* note 50, at 11 ("At the end of 2003, the most popular services for unauthorized file sharing had 5.6 million users, compared with 3.93 million a year earlier, a spokesman for BigChampagne said.")

149. See Nelson, *supra* note 50, at 11; see also Graham, *supra* note 120. This figure does not include downloads from fee-based music services like iTunes. See Nelson, *supra* note 50, at 11.

150. Civil Disobedience, *supra* note 32.

151. See Harmon & Schwartz, *supra* note 22, at 13.

Mitch Bainwol, the new chairman of the Recording Industry Association of America, said in an interview that the group had succeeded in communicating that file sharing was illegal and would have consequences. But he acknowledged that shifting attitudes would be the next battle in what he conceded was more an effort to contain file swapping than to wipe it out.

Id.

152. See *supra* Part II.B.1.

153. See Evangelista, *supra* note 21, at E1.

154. See, e.g., Yasiejko, *supra* note 6, at A4.

155. See Damien Cave, *Napster Troubles Grow: Music Site Struggles to Compete with iTunes and Rhapsody*, ROLLING STONE, Mar. 8, 2004, at http://www.rollingstone.com/news/story/_/id/5937258 ("The . . . problem is the same at all legal download sites: how to make a profit selling songs when the record industry gobbles up about fifty cents on every dollar sale, and overhead eats into the rest."); Cullen, *supra* note 41, at 44 (noting the "the problem . . . with the pay-per-song model . . . is profits [sic] — or the lack thereof"); Evan-

Nevertheless, the recording industry has no choice but to continue trying to develop an online distribution system for MP3s and other music files that is acceptable to everyone. Digital distribution is the “wave of the future.”¹⁵⁶ Society is “eager” for the medium,¹⁵⁷ and the recording industry will have to deal with the demand for online music¹⁵⁸ or it will continue to lose business to P2P. Music is “moving online faster than anyone expected,”¹⁵⁹ and some estimate that, within a few years, thirty percent of music distribution will take place online.¹⁶⁰ The online medium is so promising that some have even predicted that the CD will “go the way of the LP.”¹⁶¹ The recording industry must develop a viable online business plan if it hopes to be successful in this new market.¹⁶²

The RIAA seems convinced that iTunes and other fee-based music services, such as the revamped Napster, are the solution to all their problems.¹⁶³ However, downloading from P2P networks remains popular,¹⁶⁴ and, while iTunes has become profitable, fee-based downloading services are not considered surefire windfalls.¹⁶⁵ Many believe that the recording industry’s role in the world is irreversibly changing,¹⁶⁶ and that its commitment to fee-based sites is mis-

gelistas, *supra* note 21, at E1 (quoting Apple officials as saying “that the profit margin from selling songs for [ninety-nine] cents is ‘razor thin’”).

156. Segal, *supra* note 89, at 101.

157. Kerry, *supra* note 3, at 992.

158. *Id.* at 993.

159. Cave, *supra* note 155 (quoting the president of Napster).

160. See Breznick, *supra* note 39 (citing the prediction of the senior vice president of marketing for RealNetworks, a company that owns fee-based downloading site Rhapsody).

161. Mervis, *supra* note 67, at E1 (quoting a report by Forrester Research); see also Kerry, *supra* note 3, at 985; Emily E. Larocque, Note, *No Free Music: Effect of A&M Records, Inc. v. Napster, Inc. on the Music Industry and Internet Copyright Law*, 23 U. HAW. L. REV. 767, 776 (2001); Segal, *supra* note 89, at 100–01. Many people continue to believe, however, that CDs and MP3s will be able to peacefully co-exist. See Mervis, *supra* note 67, at E1 (citing a spokesperson for the RIAA); Quill & McCabe-Lokos, *supra* note 34, at D10 (citing the president of music retailer HMV North America).

162. See Lange, *supra* note 2, at 31; Kerry, *supra* note 3, at 992.

163. See RIAA, *supra* note 119 (quoting the president of the RIAA: “Legal online music services are delivering a high-quality, consumer-friendly experience, and they’re attracting new fans.”); Press Release, RIAA, RIAA Brings New Round of Cases Against Illegal File Sharers (Mar. 23, 2004) (quoting the president of the RIAA: “There is an exciting array of legal music services where fans can get high-quality online music.”), available at <http://www.riaa.com/news/032304.asp>.

164. See *supra* note 146 and accompanying text.

165. See Tom Foremski, Sony Online Music Shop Opens in Apple’s Shadow: Rival iTunes Leads Market, FIN. TIMES (London), May 6, 2004.

166. See Gomes, *supra* note 43, at A7 (“Critics of the record industry may be right in saying that it’s too late in the game to do anything about music piracy, and that the industry will simply have to come up with a new business model.”); Love, *supra* note 38, at *4 (“We don’t have to work with major labels anymore, because the digital economy is creating new ways to distribute and market music.”); Moglen, *supra* note 64, at 32 (“Audiences and artists don’t need the middlemen [i.e., the record labels] anymore.”); Terrell & Rosen, *supra* note 46, at 40 (“But ultimately, the [record labels] may have to adapt to a new role in which

placed.¹⁶⁷ Alternative business proposals abound,¹⁶⁸ such as compulsory licensing.¹⁶⁹ Organizations like the Distributed Computing Industry Association (“DCIA”) assert that they are seeking “a middle ground” in the ongoing debate.¹⁷⁰ The DCIA has suggested that the record companies license their music to be distributed over P2P networks utilizing a new protected technology, with consumers having to pay a fee to listen to music online. Internet service providers would then have to monitor which songs were being listened to.¹⁷¹ The DCIA has also proposed a similar plan in which copyrighted music would be protected and accessible for a fee over P2P networks; under this plan, those who share music files would be given a share of the revenues earned from the plan in exchange for having converted their MP3s to the protected technology.¹⁷² An alternative plan involves allowing broadband subscribers access to copyrighted music files for a flat fee.¹⁷³ The Electronic Frontier Foundation has also offered a plan revolving around voluntary collective licensing,¹⁷⁴ and one record company has even tried lowering CD prices in the hope of removing some of the allure of file-sharing.¹⁷⁵ Pennsylvania State University, meanwhile, has established its own plan to eradicate P2P use on its campus: the university will pay the fees for its students to have legal access to MP3s available on the new fee-based Napster.¹⁷⁶

All of these proposals, including the recording industry’s preferred solution of pay-per-download websites, can succeed only if they take account of the fact that the Internet has spurred a shift in American cultural attitudes. The generation now coming of age has grown used to the idea that everything accessed on the Internet is

they act more as publicists and less as distributors, perhaps earning a percentage of the artists’ revenues.”)

167. See Cave, *supra* note 155 (“The press, the entertainment industry and consumers all made the mistake of thinking it would be easy to build the kind of legitimate business that could rival the pirate services,” says Eric Garland, CEO of the Internet research firm Big-Champagne. ‘Increasingly, that is not the case.’”).

168. See generally Reese, *supra* note 40; Kerry, *supra* note 3; Bloom, *supra* note 104; Morphy, *supra* note 43.

169. See Natalie Koss, *The Digital Music Dilemma: Protecting Copyright in the Age of Peer-to-Peer File Sharing*, 5 VAND. J. ENT. L. & PRAC. 94, 96 (2003).

170. Creamer, *supra* note 36, at 9.

171. See Frank Ahrens, *File-Sharing Services Have Plan to Pay: Group Says It Can Protect Music Industry*, WASH. POST, Oct. 9, 2003, at E01.

172. See Andy Sullivan, *Music-Sharing Group Proposes Pay-to-Play Plan*, REUTERS, Feb. 5, 2004, available at http://www.dcia.info/News/reuters_article.html.

173. See Breznick, *supra* note 39.

174. See Electronic Frontier Foundation, *supra* note 137.

175. See Quill & McCabe-Lokos, *supra* note 34, at D10 (quoting the president of Universal Music Canada: “We have tons of evidence from surveys and market tests that have convinced us people believe CDs are too expensive. If we reduce the retail price by 25 or 30 per cent [sic], we expect to see a corresponding increase in music consumption.”).

176. See, e.g., Spanier, *supra* note 93, at D01.

free.¹⁷⁷ The recording industry must convince this generation that music should not be considered one of the Internet's "free goodies." It has its work cut out for it. Seventy-nine percent of children think that P2P downloading should be legal.¹⁷⁸ One commentator writes that students view denial of free MP3s as practically akin to "a denial of [a] basic right."¹⁷⁹ "[A] culture of piracy already has solidified."¹⁸⁰ The country is now in a position where sixty million Americans have effectively shrugged their shoulders at being told that file-sharing is wrong.¹⁸¹ There is a "stark disparity"¹⁸² between the general acceptance of file-sharing and the recording industry's stance against it, a "fractur[ing]" of "the moral consensus."¹⁸³ As one commentator explained:

The thing that I always try to say to the movie and music executives frothing at the mouth about this stealing issue (accusing my children and, one might fairly suspect, their own) is that *everybody* can't be an outlaw. If everybody does it, it's normal rather than aberrant behavior. It's not so much the consumer who is on the wrong side of the law, but the entertainment industry that's on the wrong side of economic laws.¹⁸⁴

A dissatisfaction with copyright law has been manifesting itself for some time. While copyright may once have served primarily to encourage artistic creation, there is a growing feeling among the American public that this purpose is no longer being served by the copyright laws.¹⁸⁵ With the advent of MP3s, there is some feeling among both legal commentators and the general public that copyright law needs to be changed to address the new cultural mores that have

177. See Segal, *supra* note 89, at 99; Trice, *supra* note 3, at B1; Harrop, *supra* note 65, at B05.

178. See Yasiejko, *supra* note 6, at A4.

179. Zernike, *supra* note 65, at A09.

180. Healey & Leeds, *supra* note 6, at A1 (noting that such a conclusion is suggested from the fact that half of Internet users in the United States engage in what is called piracy).

181. Collins, *supra* note 73, at 17A ("The Recording Industry Association of America's official moralists: Illegally downloading copyrighted material off the Internet for free is wrong. The collective opinion of 60 million Americans: Whatever.").

182. Harmon & Schwartz, *supra* note 22, at 13.

183. Moglen, *supra* note 64, at 32.

184. Wolff, *supra* note 70, at 2.

185. See Civil Disobedience, *supra* note 32 ("People want a fair deal when they buy music and they want to know that they're supporting artists, not executive salaries.").

developed in the file-sharing world.¹⁸⁶ “Our belief in the legitimacy of the legal system is a function of the extent to which we feel it reflects our values”¹⁸⁷ Perhaps it is time to align copyright law more closely with the values of the American public.

VII. CONCLUSION

File-sharing is not going to die quietly. In the span of a few short years, Americans have developed “an entirely new way of thinking” about music.¹⁸⁸ Even while some members of the recording industry have declared victory in their battle with P2P,¹⁸⁹ the widespread sustained popularity of file-sharing suggests otherwise.¹⁹⁰ The war over digital music is not going to be won or lost on the field of morality. The copyright issues implicated by file-sharing have too long resisted moral dimensions. The RIAA will have a difficult time attaching a moral stigma to a field of law that seems so firmly *malum prohibitum*,

186. See Harmon & Schwartz, *supra* note 22, at 13.

[The] objective [of the Copyright Clause] is accomplished by balancing the need to encourage individual creativity against the need to optimize society’s use of resources A reexamination of this balancing scale is now required due to the exploding growth of Internet use for the purpose of downloading music.

Id. (footnotes omitted); see also Bulkley & Sexton, *supra* note 37, at 13 (quoting Lawrence Lessig: “We should be changing [copyright] law to fit the changing technology”); Evangelista, *supra* note 14, at E1 (quoting the parent of a file-sharer: “[The copyright law is] one of those laws that’s unfair, and in this country, when enough people believe a law is unfair, that law gets changed.”); Harmon & Schwartz, *supra* note 22, at 13 (“When efforts to ban behavior fail, like with Prohibition, they may need to be changed,” said Jeffrey Rosen, a law professor at George Washington University in Washington.”); Kerry, *supra* note 3, at 971; Waldmeir, *supra* note 95, at 14 (quoting Jonathan Zittrain, the director of Harvard Law School’s Berkman Center for Internet and Society: “[It is time for us to wise up and to redraw copyright’s boundaries so that the law and reasonable public expectations fall into better alignment with one another.”).

187. Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1391 (1985).

188. Creamer, *supra* note 36, at 9; see also Civil Disobedience, *supra* note 32 (“[T]he public just doesn’t think about music the same way anymore.”).

189. See Nelson, *supra* note 50, at 11 (“People are over this ‘I should get my music free,’” said David Munns, chairman and chief executive of EMI Recorded Music North America. ‘I think there’s a tide turn in the American psyche on that.’”).

190. The resilience of P2P is also evident in the painless, almost effortless way in which an attacked network, like Napster, can be replaced by another vendor, like KaZaA. Likewise, the blocking of KaZaA by some universities so as to render it inaccessible to students only led to the students’ discovery of alternate, “Kazaa-ish” networks. McManis, *supra* note 79, at D03. According to a file-sharing medical-school student, the recording industry may try to “keep on crashing in on the users . . . but they’ll just find new ways.” Yednak, *supra* note 24, at 6. “Right now, young geniuses are working on new programs to make it harder for record companies to find people sharing music.” Harrop, *supra* note 65, at B05. Madonna got a taste of this firsthand when she tried to thwart file-sharing by attempting to pass off “an obscenity-laced tirade” as MP3s from her latest CD. In retaliation, hackers managed to access Madonna’s personal website and made the songs available for sale there free. Terrell & Rosen, *supra* note 46, at 40.

especially now that cultural attitudes have shifted to not only accept the new technology but arguably to embrace it. To succeed in curbing file-sharing, the RIAA must focus its message on legal penalties, not on the rhetoric of moral condemnation.

However, while the RIAA must rely on the legal system to have a chance of influencing society's values, the ability of the legal system to provide an ultimately effective means of eradicating file-sharing is questionable. The lawsuits, while a step in the right direction, will probably not solve the problem. They have succeeded in educating some members of the public, but they have failed to deter the millions of Americans who still use P2P. At worst, all they have accomplished is to drive the movement a little more underground, leading to "closet downloaders."¹⁹¹

The Internet is a phenomenon unlike any other. Copyright law must adapt to better suit this new technology in order to continue to fulfill the objectives for which it was created.¹⁹² Until copyright law adapts to the complex problems created by P2P file-sharing, the RIAA would do better to move away from moral lectures, to study some alternative solutions, and to rethink its business model, if it wishes to be a major force in music for upcoming generations. The traditional model, it appears, is rapidly becoming a thing of the past.

191. Graham, *supra* note 120 (quoting the CEO of BigChampagne).

192. See Lange, *supra* note 2, at 14–15:

[S]ome legal experts argue that a new balance must be struck between copyright holders and the users of their works. The argument is that traditional content holders, such as the recording and motion picture industry, have attempted to hide behind copyright law in an attempt to discourage or stifle online technological changes that, if embraced, could lead to important social and economic advantages to consumers and creators alike. Some argue that if copyright is to continue to drive creative development, and the businesses that exploit these creations, it must be changed, by statute and/or judicial interpretation.

Id. (footnote omitted).