

## A LEGAL APPROACH TO P2P FILE-SHARING

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Peer-to-peer file-sharing technologies (“P2P”) pose a significant challenge to copyright law. Tens of millions of people regularly violate copyright using P2P networks, a tide of infringement copyright holders have been unable to stop. Numerous commentators have proposed legal responses to the P2P phenomenon, but most of these proposals have one of two weaknesses: either they take a myopic view of the problem, proposing a quick fix that does not address the larger issues raised by P2P, or they propose a radical copyright overhaul, likely to take years, without any provision for current harms. This Essay takes a middle ground, arguing that a full response to P2P requires more time, information, and debate, but that several small steps should be taken to reduce immediate harms.

Part I provides an extended examination of the P2P problem, with the twin aims of defining its contours and providing guideposts toward its solution. It has three main conclusions. First, given the current lack of information regarding the incentive effects of P2P, any immediate legal response should be conservative. Second, the two clear P2P harms that should be addressed in the short term are harm to the rule of law and the related harm of high copyright enforcement costs. Third, the debate over P2P is in many way inseparable from the broader challenges facing copyright, and should be treated as such.

Working from the conclusions of Part I, Part II proposes a specific legal response to P2P. The main component of this response is a Congressionally-led effort to obtain

the information necessary to fully address the long-term challenges posed by P2P and related technologies. This process will take time, but this is seen as an advantage: more time is needed to see what direction DRM and new business models take, and to gauge the effect of selective copyright enforcement. In the meantime, several steps should be taken to reduce immediate P2P harms. These steps include an education campaign, adoption of a restrictive version of secondary liability, an expansion of the rights of copyright holders to obtain the names of infringers, and revitalization of the *de minimis* doctrine to privilege minor copyright infringements.

## I. A CLOSE LOOK AT THE P2P PROBLEM

The first step in resolving any problem is to clearly define the problem. This is especially important for P2P, which is viewed in so many radically different ways. This Part analyzes and classifies various conceptions of the P2P problem, broadly defined. The goal is to formulate a theoretical framework for the effects of P2P and thereby gain a clear understanding of what a legal response to it should accomplish.

### A. P2P's Effect on Creative Incentives

The best place to begin any discussion of harms to a copyright regime is the Constitution, which authorizes the creation of intellectual property rights to promote “the Progress of Science and Useful Arts.”<sup>1</sup> Without copyright, the theory goes, creative works suffer from an appropriability problem: they can be copied and sold by third parties at their marginal cost. Thus creators who cannot recoup their up-front creative

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<sup>1</sup> U.S. CONSTITUTION, article I, § 8, clause 8.

costs are dissuaded from creating more works, and the public loses the benefits that these new works might bring.<sup>2</sup> Copyright solves this problem by granting creators temporary monopoly rights that allow them to recover their fixed creative costs, thereby assuring a continued supply of new creative works.

If copyright's purpose is achieved by increasing creative incentives, then the first question that should be asked about a shock to the copyright system – such as P2P – is whether it has any effect on creative incentives. Put another way, one way to define the harm caused by P2P is to answer the following question: is P2P leading (or likely to lead) to a net reduction in creative incentives? If the answer to this question is yes, then P2P clearly presents a problem, and action to fix that problem is justified.<sup>3</sup> If the answer is no, policymakers must take care to ensure that any copyright reforms implemented in response to P2P address a real harm and do not significantly affect incentives.

So what is the effect of P2P on creative incentives? Reasonable arguments can be made on both sides. P2P opponents suggest that downloading copyrighted songs without payment inevitably reduces creative incentives because artists are not being paid for these copies. Further, they can reasonably argue that self-help measures – including poisoning the P2P system and various forms of legal action – have prevented P2P from becoming a more significant incentive problem. P2P proponents can counter with several arguments. First, it is possible that most downloaders are sampling music that they would not otherwise purchase, and therefore downloads do not represent lost sales. Second, the

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<sup>2</sup> See ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* (4<sup>th</sup> Ed., 2004), at 120-21; William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 *GEO. MASON LAW REV.* 1, 5 (2000).

<sup>3</sup> For the moment it is assumed that Congress has set incentives at an efficient level. This assumption is relaxed in Section I(C), *infra*.

sampling engendered by P2P may lead to more sales than would otherwise occur.

Finally, even if there is a reduction in creative incentives caused by lost sales, it may be outweighed by new incentives created by a widely-used, low-cost distribution system.

Empirical research has not been of much use in resolving this debate. Different studies point in different directions, some suggesting that P2P has had a significant effect on sales,<sup>4</sup> while others find no such effect.<sup>5</sup> More fundamentally, these studies ask the wrong question: whether P2P harms industry sales. Although it is possible that harm to the industry is directly correlated with harm to creative incentives, this is not necessarily so. As noted by P2P proponents, the independent distribution made possible by P2P may provide a greater boon to creative incentives than are lost by any damage done to the entertainment industry.<sup>6</sup> Thus even a clear empirical demonstration that P2P harms industry sales does not necessarily justify legal action to increase incentives.

The current lack of an answer to the incentives question tells us something important about how to approach copyright reform in response to P2P: cautiously. Until there is evidence that P2P affects creative incentives, lawmakers should avoid changes likely to fundamentally alter the access/incentives balance of current law. Further, even changes unlikely to have a significant affect on incentives should be approached warily

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<sup>4</sup> See, e.g., Stan Liebowitz, *Will MP3 Downloads Annihilate the Record Industry? The Evidence So Far* (June 2003), online at <http://www.utdallas.edu/~liebowit/intprop/records.pdf>

<sup>5</sup> See, e.g. Felix Oberholzer and Koleman Strumpf, *The Effect of File-sharing on Record Sales: An Empirical Analysis*, Working paper, March 2004.

<sup>6</sup> It should be noted however, that all creative incentives are not necessarily equal. Even if P2P increases incentives for certain types of creativity, such as mash-ups or home movies, this may not effectively counterbalance reduced incentives for capital-intensive creative projects.

until there is a better understanding of the effects of the incentive effects of P2P. More information is needed before a radical overhaul of copyright can be justified.

#### B. P2P's Effect on the Best Method for Obtaining Creative Incentives

The foregoing analysis may suggest to some that there is no P2P problem, or at least no provable problem. This is not the case. Incentives aside, P2P has wrought a number of important societal changes that can be classified as harms. It has also made possible a new class of benefits. The most prominent of these harms and benefits are explored below. First, however, it is important to understand why they may justify changes to copyright law despite the dearth of information on incentives.

There is more than one path to a given level of societal creativity. Considered broadly, the temporary monopoly design of copyright could be replaced, for example, with a patronage system or direct payments from the government to creators.<sup>7</sup> Given identical incentive effects, the way to choose among these options is to determine which is the least cost alternative. This same logic works on a smaller scale. Once a method of generating incentives is chosen, that method should be implemented in the manner most likely to maximize societal welfare. Thus, for example, it does not make sense to have a fifty-page copyright application form, as any benefits derived from the additional information would be outweighed by the costs of filling out the form.

Of course, there will always be argument over which method is best for creating incentives, and how that method should be implemented to maximize social welfare. This does not, however, undercut the main point: changes to the copyright system may be

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<sup>7</sup> Terry Fisher identifies five separate methods used by governments to induce production of public goods. TERRY FISHER, PROMISES TO KEEP at 200-01 (2004).

justified in response to P2P even without solid information regarding P2P's effect on incentives, so long as the changes are unlikely to significantly affect incentives. In order to determine whether the particular harms and benefits of P2P justify such change, a clear understanding of those harms and benefits is necessary.

Three P2P benefits are worthy of mention. First, and most obvious, is efficiency. When compared to the traditional store model, music distribution using a P2P network saves the producer cost of putting music on a CD and distributing that CD to stores, the retailer costs of handling and storage of the CD, and the consumer costs of physically going to a store and of buying songs she doesn't want along with the song she does want, among other costs. Collectively, these savings are quite significant.<sup>8</sup> A second, related P2P benefit is greater consumer satisfaction through increased access to creative works. P2P increases access by making almost any digitized creative work available at any time in any place with an Internet connection, and increased access means increased social utility, since more people will be able to use the creative work that gives them greatest utility at any given time. Finally, P2P increases the ability of ordinary citizens to engage in what Terry Fisher calls "semiotic democracy."<sup>9</sup> A citizen who is free to access and build upon the content of others is able to take an active role in shaping his culture, a role likely to further that individual's satisfaction and autonomy.

All else equal, it is clear that an incentive regime that incorporates these benefits is preferable to one that does not. Consideration of the benefits of P2P should play a prominent role in any long-term proposals. However, there are two reasons why the

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<sup>8</sup> *Id.*, at 18-24.

<sup>9</sup> *Id.*, at 28-31.

same is not true of the short term.<sup>10</sup> First, the efficiency benefit is closely tied to incentives: greater efficiency means lower costs, and lower costs means less of a need for incentives.<sup>11</sup> Second, each of the aforementioned benefits is more a function of new technologies generally than of P2P specifically. Accordingly, adjusting copyright in reaction to P2P benefits requires comprehensive consideration of new technologies.

First among the P2P harms is a harm touched on above: damage to the entertainment industry and its participants. As noted above, empirical evidence does not conclusively demonstrate that P2P harms industry sales, but clearly it has the potential to do so. Assuming for the moment that such harm is shown, would it justify reshaping copyright to protect these industries? Probably not. There are always some that benefit from the status quo, but their interests cannot be allowed to prevent the progress of society. So long as the damage done to the entertainment industry is more than offset by the benefits of P2P, protection of the old way of doing things is unjustified. Put another way, limiting P2P to protect the entertainment industry would be the modern-day equivalent of banning the automobile to protect the horse carriage industry.<sup>12</sup>

A more important P2P harm is harm to the rule of law. According to one estimate, 60 million people in the United States use P2P networks, and undoubtedly a

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<sup>10</sup> This is not the same as saying P2P benefits merit no consideration as short-term strategies are adopted. A short-term strategy that clearly eliminates many P2P benefits – such as outlawing P2P networks – should be disfavored, all else equal.

<sup>11</sup> This point is discussed in more detail in Part I(C), *infra*.

<sup>12</sup> This doesn't mean society can or should do nothing to help these businesses and individuals most affected by the change to P2P. Rather, any such assistance should not be direct, not copyright-based, and should be aimed at assisting these parties weather the P2P change, not at preventing that change. It should also be noted that solutions to other problems, including those listed in Part II, may have the ancillary effect of assisting the entertainment industry. This is not problematic. So long as the harm reduction more than offsets any costs, the solution makes sense. The point made here is simply that harm to the industry should not be an important part of that equation.

large percentage of these have violated copyright law on these networks.<sup>13</sup> This mass thumbing of noses at the law is damaging in at least two ways. First, it may reduce overall respect for the law, both within and outside of the copyright context.<sup>14</sup> Legal rules widely viewed as illegitimate can sow doubt about the legitimacy of other legal rules and can raise questions about the fairness of the rulemaking process.<sup>15</sup> In the worst case this can lead to more lawbreaking and reduced cooperation with law enforcement. Even in the best case it undercuts one of the most important attributes of a democratic legal system: the consent of the governed. Second, widespread infringement may have an important psychological effect on copyright owners. Copyright owners feel like victims, caught between a malicious group of thieves and a government unwilling or unable to protect them.<sup>16</sup> Viewed this way, a minimal law that is enforced is preferable to a more stringent law that isn't, even if the practical effect of the two is the same. At least in the former case nobody's rights are being violated.

A closely related harm is the increase in copyright enforcement costs engendered by P2P. By making mass copyright infringement cheaper and easier than ever before, P2P has exponentially increased the number of mass infringers. Thus to achieve the same level of copyright protection they had prior to P2P (that is, the same ratio of

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<sup>13</sup> Electronic Frontier Foundation, *File-sharing: It's Music to Our Ears*, online at <http://www.eff.org/share/>. See also Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 *Harvard J. Law & Tech.* 1 (2003) at note 65 (citing July 2003 survey by Forrester Research) (noting that 68% of the people between the ages of 12 and 22 has violated copyright law at one time or another using P2P networks.)

<sup>14</sup> See LAWRENCE LESSIG, *FREE CULTURE* at 199–205.

<sup>15</sup> Indeed, cynicism about the lawmaking process seems to be both high and increasing among those in the P2P file-sharing community.

<sup>16</sup> There may also be a moral rights component to this frustration, at least among individual creators. Illegal file-sharing causes creators to lose not only the profits they might make from paid sales, but control over the uses to which their creations are put.

legitimate copies to illegitimate copies), copyright owners must take legal action against a far larger number of people. This costs money. The difficulty of obtaining the identities of infringers, and the international aspect of the P2P phenomenon, further increase these costs.

Unlike harm to the entertainment industry, these latter two harms – harm to rule of law and increased enforcement costs – may justify short-term changes to copyright law. Both harms are undoubtedly real, and, as will be explored in Part II, can be reduced without either significantly affecting incentives or destroying the benefits of P2P.

### C. P2P's Place in the Broader Copyright Debate

So far this Essay has made two important assumptions. First, it was assumed that Congress chose an efficient level of creative incentives, and that this level need not be changed in response to P2P and related technologies. Second, P2P has been considered in isolation; other important developments, including non-P2P technologies and the increasing internationalization of the economy, were minimized. Neither of these assumptions makes much sense. As explained below, overhauling copyright to address P2P without addressing these broader issues is a little like fixing a flat tire on a car without an engine.<sup>17</sup>

Part I(A) explained that copyright's *raison d'être* is to provide the incentives necessary to ensure that creative works are not undersupplied, and that the value of these incentives must be balanced against their costs. Accordingly, in theory there exists an

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<sup>17</sup> Of course, the tire still needs to be fixed for the car to run. Section II(B) argues that minor changes designed to address specific, immediate harms may make sense as major copyright overhaul is considered.

ideal level of copyright protection where the marginal benefit of additional protection is equal to the marginal cost of providing that protection. In practice this ideal level is difficult to locate, and always subject to debate. Nevertheless, there is compelling evidence that Congress has tipped the balance too far in the direction of creative incentives.<sup>18</sup> While it is beyond the scope of this Essay to enumerate these arguments, the fact that the copyright system may have been unbalanced even before P2P suggests that a fundamental reconsideration of copyright may be overdue. If significant changes are made in response to P2P, it makes sense to address this incentives imbalance at the same time.

It may be argued that the P2P problem can and should be considered separately from the incentives question. Indeed, this is the implicit assumption in much of the P2P scholarship to date and in Part I(B) of this Essay. This might be a reasonable argument if the only incentives connection to P2P was the uncertainty about P2P's incentive effects. But there is another important connection to consider: by reducing the costs of distribution (and, to some extent, marketing) P2P may be reducing the need for creative incentives. This is one manifestation of a larger trend, in which technologies including computers, software, the Internet, and digitization of content combine to radically reduce the costs of making, marketing and distributing creative works. This cost reduction is especially significant for musical and audiovisual works, the works at the center of the P2P debate. Lower creative costs means there is less need for legal incentives to induce

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<sup>18</sup> See e.g., LAWRENCE LESSIG, *supra* note 14; James Boyle, *The Public Domain: The Second Enclosure Movement And The Construction Of The Public Domain*, 66 LAW & CONTEMP. PROB. 33, 37-44 (2003).

the optimal amount of creativity.<sup>19</sup> Put another way, P2P and related technologies would trigger a need to revisit the question of optimal incentives even if those incentives had previously been set correctly.

More broadly, the fact that P2P is merely one manifestation of a larger technological trend suggests that a P2P response that does not consider these larger issues is myopic. Even if the P2P problem is magically solved, there will remain numerous technologies for cheap duplication and distribution of copyrighted works, with more undoubtedly on the way. Copyright infringement will remain a problem until a comprehensive approach for addressing these issues is found.

Another, related copyright challenge of great relevance to P2P is the increasing permeability of national borders. The ease with which electronic information can move internationally, whether through a P2P system or otherwise, poses a clear challenge to the copyright regimes of individual countries. The reason: many rules can be avoided by taking advantage of more lenient rules in another country. Policymakers must address this challenge, either by working with the international community to develop consistent rules or by specifically designing rules to minimize legal leakage. P2P is one of the clearest manifestations of this problem, yet many scholars and policymakers ignore the

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<sup>19</sup> The careful reader may protest that the costs reduced by P2P alone – marketing and distribution costs – are not part of the fixed up-front creative costs copyright is designed to counter, but are marginal costs that even a copyist would incur. There is some truth to this assertion, but it is not a black-and-white issue. First, there is an “up front” aspect to marketing costs: they are incurred by the original creator to bring attention to the work, and are unlikely to be duplicated by the copyist. Second, at least for now, most creators who hope to make a profit cannot limit themselves to P2P distribution. Thus there is the “up front” aspect of distribution through normal channels (an activity that could be likened to marketing to raise the profile of the work) that the copyist would not incur. Finally, even to extent that P2P cost savings are marginal cost savings that are shared by creator and copyist alike, it remains true that other technologies are significantly reducing up-front creative costs.

international aspect of the P2P phenomenon when proposing legal reforms designed to deal with it.

In sum, the legal debate over P2P is inseparable from a larger debate over the direction of copyright. With the possible exception of minor, stopgap measures designed to reduce clear P2P harms, it makes little sense to reform copyright in response to P2P without simultaneously considering whether copyright is well-designed to fulfill its purpose and to meet the challenges posed by the information society.

## II. NEXT STEPS: AN ACTION PLAN FOR ADDRESSING P2P

Having explored the P2P problem in detail, it is time to find a solution. This Part II provides that solution. Section A takes up where Part I left off, arguing that P2P is one of several factors that necessitate careful study of society's overall approach to creative incentives. To further this process, Congress should devote resources to collecting empirical information and to fostering study and discussion of alternatives to the current system. Clearly, the need for further study of the P2P problem counsels against radical legal action in the short term. Nevertheless, a number of small steps can be taken to address current harms without either fundamentally altering creative incentives or destroying the value provided by P2P. These steps are detailed in Section B.

### A. Resources for Research, Dialogue and Debate.

Section I ended by describing how the problems associated with P2P are, at least in part, inseparable from some of the broad challenges facing copyright today. These challenges go to the very heart of copyright, raising questions about the best method for

achieving creative incentives and the level at which those incentives should be set. The fact that there is no easy answer to these questions suggests that neither is there a quick fix to the P2P problem. In order to fully address P2P it is necessary to start from square one: a fundamental rethinking of copyright. This does not mean that incremental legal changes cannot reduce some immediate P2P harms, or that copyright will eventually need to be jettisoned in favor of a radical change like the statutory license. Rather, a complete response to P2P requires careful analysis of the copyright system as a whole, a process that will require time and information. What policymakers need now is a clear understanding of the goals of the system, a full exploration of various alternatives, and recognition of the challenges posed by new circumstances.

Thus the first step in reacting to P2P should be a step back: a concerted effort should be made to gather all of the information necessary to ensure that any significant copyright reforms are made on an informed basis. To some extent this information collection process has already begun, both in the scholarly community and more generally in ad hoc responses to specific court cases or legislative proposals. This is a start, but Congress can do better. By devoting resources – primarily money and the efforts of the relevant government employees – to copyright-related information production, Congress can help to determine if fundamental copyright reform is needed and what form it should take. This Congressional effort should have three aims: empirical, theoretical and political. Each is explained in some detail below.

There is a surprising dearth of empirical data concerning copyright and its effects. Most fundamentally, there is little data demonstrating the practical effects of creative incentives, or the incentive effects of factors extraneous to the copyright system, such as

P2P and related technologies. These are significant gaps: empirical data is needed to justify the costs of an incentive creation system and to set incentives at the proper level. Empirical information is also needed to answer other important questions, such as how much the public understands about copyright, and the degree to which file sharers will react to selective copyright enforcement. Congress can do two things to help fill these gaps. First, instruct the Copyright Office to conduct a study of these issues, using outside resources if necessary. Second, devote the monetary resources necessary to ensure that the best independent empirical researchers devote time to this problem. Admittedly, these empirical questions are complex, and it may not be possible to obtain unimpeachable conclusions to all of them. Even so, it is essential that society collect as much empirical information as possible in order to maximize the chances of an informed decision.

Congress can also help to widen the current theoretical debate and move it toward the practical. The Copyright Office should be instructed to solicit proposals for copyright reform.<sup>20</sup> There should be no preconditions on the method of reform, only on the format: in addition to arguments for why certain changes are necessary, each proposal should contain suggested statutory language. This process will provide several benefits. First, it will help to flesh out some of the most intriguing theoretical proposals made to date, such as the statutory license suggested by Terry Fisher<sup>21</sup> and Neal Netanel,<sup>22</sup> among others, and the streamlined dispute resolution procedure suggested by Mark Lemley and R.

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<sup>20</sup> To keep submissions on point, the solicitation for proposals could list, in general terms, the problems that need to be solved and issues that need to be addressed.

<sup>21</sup> *See generally*, FISHER, *supra* note 7.

<sup>22</sup> *See generally*, Netanel, *supra* note 13.

Anthony Reese.<sup>23</sup> Second, it will provide impetus for the proposal of new theoretical solutions, and practical applications thereof. Third, it will incentivize non-academics to examine the copyright system as a whole and provide their insights into the best way to fix it.

This last point is closely related to the third aim of Congressional action in this area: an exploration of the political dimension of fundamental copyright reform. The process described above should be designed to obtain alternative viewpoints on the correct system for creative incentives. This will help to highlight key disagreements between the major players, thereby reducing the possibility of late-stage misunderstandings (such as that which occurred when the original INDUCE Act draft was introduced).

A full exploration of the political dimension of copyright reform also requires ongoing copyright conversations with representatives of other nations. The increasing irrelevance of national borders to the transfer and consumption of copyrighted works, as exemplified by P2P, suggests that international consensus will be essential to the long-term success of the incentive system, whatever its form. Congress should mandate that the Copyright Office engage in regular dialogue with its counterparts in other countries. Ideally this dialogue can take the form of an apolitical, technical exchange of ideas. Even if not, solicitation of an international perspective on how to address international challenges to copyright may yield new ideas, and will certainly increase domestic understanding of international priorities. This step should be a supplement to, rather than a replacement for, conversations already occurring on the formal diplomatic front

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<sup>23</sup> Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1410-25 (2004).

The resources required to implement this information-gathering process would be relatively small: political will and a few million dollars for the Copyright Office would be sufficient. Given the importance of creative works to the health of the economy and our cultural well-being, this seems a small price to pay for a well-considered incentive system. Further, time can be spared to collect this information; as described above, there is no clear evidence that P2P or any other technology is harming creative incentives, and lesser P2P harms may be reduced with minor adjustments.<sup>24</sup> Indeed, the fact that this process will take time may be advantageous. Time alone will yield important information on a variety of fronts, including the effectiveness of new business models, DRM solutions, and selective copyright enforcement against users.

#### B. Addressing Immediate Harms

Despite the need for time and information to fully address P2P, there are steps that can and should be taken to address immediate harms. To qualify, each such step must fit several criteria culled from the discussion above. First, since these are short-term steps designed to address immediate harms, conservatism should be the rule: this is not the time for radical changes. Second, each step should have no significant effect on creative incentives, with an emphasis on the word “significant.”<sup>25</sup> Third, each step should address one of the cognizable harms discussed in Part I(B): harm to the rule of law or harm to the costs of enforcement. Finally, and most obviously, the overall benefits of

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<sup>24</sup> See *infra* Part II(B).

<sup>25</sup> Clearly, any change could have some effect on creative incentives. However, a minor incentive effect can be outweighed by a significant harm reduction. Accordingly, “significant” in this context is intended to refer to a change that would be likely to reduce (or increase) the number of creative works being made.

the change should outweigh the costs. Four steps that meet these criteria are described below.

#### 1. Funds for Copyright Education

One simple step that Congress can undertake to reduce the immediate harms of P2P is to fund a copyright education campaign. Even if they know that trading copyrighted works over P2P networks is of questionable legality, most people don't understand why they should be constrained by copyright.<sup>26</sup> This ignorance is perfectly understandable: before digital technologies, most people could not easily engage in massive copyright infringement and thus had no real need to understand copyright. Now that copyright significantly constrains the actions of the average consumer (or at least the digitally-savvy consumer), the state should explain why it makes sense to abide by these restrictions. There is a tale to tell. Many artists are compensated through the existing copyright system, and P2P places some of this compensation at risk; greedy corporations are not the only ones that may be hurt by P2P. Further, the potential penalties for copyright violations are severe and the number of lawsuits is increasing. An education campaign emphasizing these facts might reduce copyright infringement using P2P without resort to the legal system.

Of course, the full copyright story is not quite as simple as the previous paragraph suggests. Much of the public might take a dim view, for example, of the length of copyright protection, and of the percentage of music sale proceeds that go to artists. These facts should not be hidden. While some simplification of the relevant issues is

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<sup>26</sup> See JESSICA LITMAN, *DIGITAL COPYRIGHT* at 72 (2000).

inevitable, the focus should be on education, not indoctrination.<sup>27</sup> Nevertheless, the combined rationale of paying artists and avoiding lawsuits may convince many file-sharers (or their parents) to start paying for their music. Further, an educational campaign has the ancillary benefit of involving a greater portion of the public in the copyright debate, a fact likely to be helpful in the search for a legitimate, long-term solution. The costs of such a campaign – which could be as little as a few million dollars well-spent – are likely to pale in comparison to these benefits.

## 2. Secondary Contributory Liability Only In Limited Circumstances

One of the most difficult P2P-related issues is the degree to which technologists should be held vicariously and/or contributorily liable for the P2P-based copyright infringements of those using their technologies. The main advantage of these secondary liability doctrines is to lower copyright enforcement costs by permitting copyright owners to stop numerous infringers at once.<sup>28</sup> There are two significant drawbacks, however. First, vicarious and contributory liability will often prevent legal activities as well as illegal activities. Thus, for example, when the Ninth Circuit effectively shut Napster down for the infringements of its users, it also prevented legal file-sharing on that network. Second, an overly aggressive approach could chill product innovation if it causes technologists to fear legal liability when introducing new products.

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<sup>27</sup> Many of the proposals made to date, such as that in §105 of H.R. 4077, are too one-sided.

<sup>28</sup> These benefits should not be overstated. Although aggressive application of secondary liability would probably reduce the total amount of illegal file-sharing, it would not eliminate it. Software makers could simply go offshore and/or post file-sharing software anonymously.

In theory, secondary liability should be imposed only when the marginal benefit equals or exceeds the marginal cost. However, calculating these values – especially the costs - is next to impossible, at least in the short term. This fact, combined with the conservatism principle outlined at the beginning of this section, counsel against aggressive use of secondary liability. Nevertheless, there is a limited class of cases in which the cost/benefit analysis clearly comes out in favor of liability. These are cases in which: (i) the vast majority (e.g., over 90%) of file-sharing is infringing activity; and (ii) there is a clear intention, including affirmative acts, on the part of the party supplying the technology that the technology be used for infringement. The first of these criteria ensures both that application of vicarious liability will significantly lower enforcement costs and that relatively few legal uses will be prohibited. The second criterion minimizes the possibility that legitimate technology development will be chilled, since a technologist lacking a clear intention that his technology be used for infringement will not have to worry about liability, and adds a rule of law benefit by punishing those that intend the law to be broken. Secondary liability should be imposed only when both of these criteria are met.

Admittedly, this solution is not perfect. P2P opponents may argue that future technologists will avoid liability by being careful not to manifest their intent to promote infringement. This may be true, but must be weighed against the danger of applying secondary liability where such intent is not clear. In any case, as aforementioned, this is a short-term solution, meant merely to reduce immediate costs as a long-term approach to creative incentives is considered. P2P proponents, on the other hand, will note that the percentage of infringing uses can change over time; a technology once used almost

entirely for infringing uses can later be used mostly for legitimate uses. True, but this is less likely with respect to technologies specifically intended for infringement. The costs of constraining the rare technology that is both intended for infringement and would later be used for many legitimate activities are almost certainly outweighed by the substantial enforcement cost and rule of law benefits of this limited form of secondary liability.

### 3. Make it Easier for Copyright Holders to Obtain File-Sharer Names.

One of the major costs of enforcing copyright against P2P users is discovering their identities. Under current law, ISPs, the most likely repositories of this information, need only provide it to copyright holders under a specified (and debated) set of circumstances.<sup>29</sup> One way to reduce enforcement costs is to make this information more readily discoverable by expanding the scope of the DMCA subpoena provision (17 USC §512(h)) to clearly apply to ISPs acting as conduits for P2P communications. In addition to directly reducing the enforcement costs in any particular case, this rule change could significantly reduce the number of cases that go to court, as copyright holders could send cease-and-desist letters rather than filing suit. Further, the ability to send cease-and-desist letters cheaply could help bring rule of law to P2P. Many more file-sharers would be contacted, and many of those contacted would undoubtedly cease their file-sharing activity.

There would be costs to expanding §512(h), but they can be kept to reasonable levels. First, the expanded provision would impose a burden on ISPs that have done nothing wrong. This is easily resolved by permitting ISPs to charge the requesting

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<sup>29</sup> See generally, *RIAA v. Verizon Internet Services*, 351 F.3d 1229 (D.C. App. 2003).

copyright holder the reasonable costs of complying with identity requests. Second, free reign to obtain user information could lead to a number of false positives; intentionally or not, copyright holders might obtain the names of individuals that did not violate copyright. This is a problem both for privacy reasons and because these individuals will then be forced to expend resources responding to a cease-and-desist letter or a lawsuit. To some extent this danger is already addressed by the statute, which requires a sworn declaration that the subpoena is sought for copyright protection purposes, and notice, under penalty of perjury, detailing the specific allegations. These measures can be strengthened by creating a statutory penalty (say \$1,000) for obtaining the name of any person who did not violate copyright, and by providing file-sharers with a notice of their legal rights and an opportunity to quash the subpoena before their names are divulged.<sup>30</sup>

#### 4. Revitalize De Minimis.

The easiest way to reduce the enforcement cost and rule of law harms associated with P2P is legalization. A legal activity does not harm the rule of law, and obviates the need for copyright holders to incur enforcement costs. However, blanket legalization is likely to violate the incentive effect criterion outlined at the beginning of this section. As noted above, there is no solid information on the current incentive effects of P2P. Nevertheless, it is clear that P2P holds the potential to reduce creative incentives under the right circumstances. Legalization would significantly reduce the expected cost of file-sharing, leading to an explosion in file-sharing activity. It is likely that much of this activity would replace sales of copyrighted works, and that this negative effect would

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<sup>30</sup> This notice could be modeled on that mandated by the Eastern District of Pennsylvania in *Electra Entertainment v. Does 1-6* (E.D. Penn. 2004).

overwhelm the positive incentive effects associated with P2P. Even if this weren't true, blanket legalization of P2P file-sharing would violate the conservatism principle outlined at the beginning of this section.

Nevertheless, legalization of one limited class of P2P file-sharing would violate neither the conservatism nor the incentive effect criterion. Small-scale file-sharing, in which an individual shares only a few copyrighted files over P2P networks, should be permitted. The harm that such file-sharing poses to creative incentives is minimal, comparable to the harm caused by friends sharing mixed tapes. The rule of law benefits of legalizing this activity are considerable however. A large proportion of those currently labeled "pirates" would no longer be lumped in with large-scale infringers. Further, the legalization of activities similar to those previously permitted – such as sharing songs with a few friends - would increase the perceived legitimacy of copyright law. Enforcement costs could also go down, though this effect is less clear since copyright holders have generally not taken action against small-scale file sharers.

This change should be made judicially, not in Congress. The judicial doctrine of *de minimis non curat lex* ("the law does not concern itself with trifles") should be used to throw out cases of small-scale infringement, roughly defined as those cases in which the damages to the copyright holder are outweighed by the costs of adjudication. This is not a legal stretch: *de minimis* is used this way in most areas of the law.<sup>31</sup> Admittedly, the *de minimis* standard is somewhat subjective, and courts would have considerable discretion in applying it, but this ambiguity could be advantageous. Unlike a clear Congressional standard, an ambiguous legal maxim would prevent strategic file-sharers from

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<sup>31</sup> See generally, Andrew Inesi, *De Minimis Non Curat Lex: An Old Solution for New Copyright Problems* (draft copy on file with author).

intentionally copying up to the de minimis limit. Further, de minimis is clearly preferable to fair use for this task. Though famously flexible, using fair use to privilege activity that is neither transformative nor private would stretch it beyond recognition.

#### CONCLUSION

The first step in responding to P2P should be a step back. To fully address P2P society must address some of the broader copyright challenges posed by new technologies and the internationalization of the economy. This will take time, and more information is needed before informed decisions can be made. Congress can help by devoting resources to copyright information production, and by fostering debate on the merits of various proposals.

Despite the need for restraint, several small steps should be taken to reduce immediate P2P harms while larger copyright issues are explored. These steps include implementation of a copyright education campaign, acceptance of a strictly limited form of secondary copyright liability, an easing of the barriers to obtaining information about file-sharers, and a revitalization of the de minimis doctrine to privilege minor copyright violations.