

To: The Committee on the Judiciary
United States House of Representatives
The Subcommittee on Courts, the Internet, and Intellectual Property
From: Elizabeth Miles[†]
Re: Digital Copyright Regulation—A Public-Regarding Response to the *Sony* Debate and
Peer-to-Peer Technology
Date: May 9, 2005

Archeological sites in China with crane bone flutes dating back six millennia remind us that the impetus to make music does not depend on contemporary business models. Styles of music sharing and commodification have changed dramatically over the years, with a wide range of social customs, patronage, systems, performance spaces, folk communication, and travel, that, even without recordings, produced elaborate musical traditions around the world.¹

The debate about peer-to-peer filesharing has pitted two seemingly opposed interest groups against each other in a fruitless battle that threatens not just the future of innovation, as parties on both sides of the *Grokster* case propound, but more fundamental cultural values. Also at stake is the effectiveness of policymaking institutions that fail to see those values at work with a clear gaze.

As we move into the digital future, those who seek to craft intellectual property policy that resonates with the public and provides concrete guidance to courts must understand the limits to which voters wish to see or will even tolerate further restrictions on their use of cultural works.² A leading law professor has described the phenomenon in which sixty million

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¹ Ian Condry, *Cultures of Music Piracy: An Ethnographic Comparison of the U.S. and Japan*, 7 INT'L JRNL CULTURAL STUDIES 3 (2004), available at <http://web.mit.edu/condry/www/pubs/Condry-CultMusPiracy5-04.pdf>.

² Scholars describe the present trend toward such restrictions as "enclosure." E.g., James Boyle, *The Public Domain: The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW AND CONTEMP. PROB. 33 (2003). Though this paper embraces the high-level policy stance of the enclosure critique, it seeks to avoid academic terms in favor of those better suited to the legislative process.

Americans trade music files across the Internet as reflecting a “permissive social norm.”³ This characterization, however, begs the question of what sort of permission citizens believe they must acquire from the government to participate in music culture.

This paper advises that so long as legislators look to accounts of the P2P situation couched only in legal-economic terms, they will draft inapt laws at significant cost to individuals, cultural vitality, and society as a whole. Toward a more comprehensive solution tailored to digital distribution technology, the paper frames current legal proposals in theories advanced by ethnomusicologists, who study music not just as a commodity but as a cultural force with behavior-shaping powers of its own. The conclusion of this analysis is that Congress must develop digital copyright law in directions that do not further commodify creative work, but instead combine a restrained legislative approach to technologies capable of disseminating creative works with active agency engagement in emerging issues.

Specifically, Congress should:

- 1) Codify an elaborated version of the *Sony* safe harbor to promote technological innovation and prevent an undesirable allocation of enforcement responsibility to third parties.
- 2) Amend the § 1201 subpoena process in the Digital Millennium Copyright Act to facilitate direct enforcement efforts while also ensuring due process rights to Internet users.
- 3) Charge the Federal Trade Commission, as an expert body, with
 - a) certifying technologies as suitable for noninfringing use,

³ Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 Harvard J. Law & Tech. 1, 18 (2003).

- b) investigating and possibly regulating the use of technical protection measures on creative works to prevent practices that are unfair and deceptive to consumers, and
- c) analyzing the effects of P2P filesharing on the production and dissemination of cultural works.

I. The Normative Backdrop: Less Regulation Is More

Congress must first ask itself whether P2P filesharing is a problem it can solve. Legal and political commentators frequently focus on the “culture of piracy” as the core of the problem posed by digital technology in general and P2P networks in particular, then seek to solve this problem through a legal framework. Current research on the question by ethnomusicologists and other cultural scholars, however, suggests that this emphasis is misplaced.⁴ These inquiries propose that individuals are likely to copy music to a certain extent, which may be significantly broader in the digital age than before—but that in the right conditions, individuals will also participate in fan affinity groups where copyright infringement may coexist with vibrant markets. The proper legislative response to filesharing in view of actual, not presumed norms surrounding participation in music culture may well be that less is more.

Ethnomusicologist Ian Condry concludes from a recent study comparing supposed cultures of piracy in the U.S. and Japan that the U.S. runs the risk of losing its lead in the media market by insisting on overly restrictive copyright regulation:

Americans tend to assume that the U.S. is leading the world technologically, economically, and politically, towards some kind of global convergence, but there is increasing evidence that we are witnessing a proliferation of alternative national

⁴ See Condry, *supra* note 1 (noting that “it is surprising how little analysis has been devoted to the links between the presumed culture of piracy and the activities that create conditions of growth in the entertainment world in the first place,” and concluding that this focus on pirate culture leads to bad assumptions for crafting policy).

futures.... [O]ne potential danger of draconian copyright regimes is to turn the U.S. into a media backwater, while other nations, with more liberal practices towards non-commercial use, may find ways to compete more successfully in the global media market.⁵

Condry's comparison notes that while Japan is the world's second largest music market and user of the Internet, it ranks number seven in P2P music downloads, with just one-tenth the share of the United States.⁶ Is the reason for such restraint tighter laws, stricter enforcement, more law-abiding norms? No: Japanese copyright law could be characterized as looser (it permits the commercial rental of CDs), only two lawsuits have been filed against P2P users, and widespread illegal copying from rented CDs has been accompanied by an even sharper drop in record sales than in the U.S. The reason for lower P2P use appears to be that Internet connections are costly in Japan, so music fans wait three weeks after a CD's release to rent and copy it instead. This suggests that the Internet and P2P are not the magic ingredients in the "culture of piracy," but rather that a hunger for new music drives digital copying behavior.

Of greater interest, though, is the Japanese music industry's sanguine approach to copying. Interviews with record executives suggest that many of them accept that rental shops are now part of the business, and are ready to learn a lesson from two other segments of the Japanese content industry that benefit from lax copyright enforcement: comic books and anime (animated film).⁷ Japanese comics are subject to widespread infringement in fanzines, but the infringed originals nonetheless flourish. Animated film producers in Japan endure a similar phenomenon in "fansubbing," where fans add subtitles in other languages to animated films and distribute them online, sometimes within hours of broadcast. The market for anime originals

⁵ *Id.* at 26.

⁶ *Id.* at 13.

⁷ *Id.* at 14-15.

likewise prospers, apparently driven by fan loyalty gained in exchange for a relaxed approach to copyright enforcement.

These examples suggest that copyright infringement and legitimate purchase behaviors can go hand in hand where distributors of creative works make decisions with fans in mind, rather than treating their products as undifferentiated commodities to be sold like so many loaves of bread. This is the sort of future many commentators envision for music in the U.S., in which a broad array of diverse fan communities is served by numerous independent record labels via the seamless distribution that digital technology enables.⁸ Such a transformation would address one likely cause of the recent fall in record sales that is often overlooked in the alarm about P2P: the over-commodification of music and development of “corporate rock.”

The music industry has consolidated significantly over the past three decades. Apparently in response to this trend, newly conglomerated record companies facing Wall Street profit pressures have shifted their releases to genericized “product” in place of the eclectic genres offered by smaller labels in the past, and now by increasingly popular independent labels and performance festivals such as Coachella and Bonnaroo—and the wide world of music available on P2P networks.⁹

Digital technology is positioned to spur a musical renaissance based on a proliferation of small producers selling a wider variety of music than during the recent past. This is so not only because the technology facilitates recording and distribution, but because listeners can sample a vast array of artists and styles, whether from a P2P network, band websites, a streaming service, or the sound clips available at online music stores. Indeed, the Billboard charts show a marked diversification trend in record sales since the advent of Napster in 1999: While the top titles on

⁸ See Alec Hanley Bemis, *A Small New Future*, L.A. WEEKLY, Sept. 24, 2004.

⁹ *Id.*

1999 charts sold more than 10 million copies each, the 2004 charts show the highest entries selling less than 5 million copies apiece even as sales rise overall.¹⁰

The limitless inventory capacity of digital storage media has also combined with online distribution to give rise to the “long tail” phenomenon, in which the market for any given creative work extends further in time, and the total market shifts from current hits driven by promotion to back catalogue sales driven by more genuine demand.¹¹ In short, there is no evidence that the blockbuster hit business model on which the music industry has most recently relied correlates with listener desires. “Progress” in the arts can only take place in a legal and cultural landscape that corrects this commodifying trend.

P2P copying has provided an extreme correction, if it can be termed such, to the commodified music market. Most Americans acknowledge a strong social norm in favor of sharing music with friends and family that predates the Internet. File trading on the Internet has now fostered new norms of sharing, even among strangers, which directly contravene the corporate model of today’s music industry.¹² Accompanying the increased social value on sharing is a widespread sense of apathy or antipathy toward copyright. A year after Napster’s debut, the majority of Internet users surveyed did not think filesharing was wrong.¹³ These norms and the ability of software coders to write programs that appeal to them may render law and technological lockdowns useless in changing P2P users’ behavior.¹⁴

¹⁰ *Id.*

¹¹ Chris Anderson, *The Long Tail*, WIRED 12.10, Oct. 2004, at <http://www.wired.com/wired/archive/12.10/tail.html>.

¹² See Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks*, 89 Va. L. Rev. 505, 507-08 (2003).

¹³ THE PEW INTERNET & AMERICAN LIFE PROJECT, DOWNLOADING FREE MUSIC: INTERNET MUSIC LOVERS DON’T THINK IT’S STEALING 5-6 (2000) (finding that 78% of downloaders do not consider trading files to be stealing and 61% are indifferent to copyright law, and that 53% of Internet users and 40% of Americans believe it is not wrong to share music over the Internet).

¹⁴ *Id.* at 595.

Another ethnomusicologist, Anthony McCann, has proposed that we can better understand resistance to the commodification of creative works by focusing not on resources—in this case the musical works as embodied in electronic files—but on people’s behaviors relating to them.¹⁵ This approach reframes the problem from one of resource management to one of social dynamics—that is, not how to stop P2P copying, but how to promote a thriving music culture on the digital networked platform. Undue commodification of cultural works, McCann posits, can lead to “norm cascades,”¹⁶ a term that concisely describes the move among Americans from finding it acceptable to make occasional mixed tapes for friends to freely uploading and downloading music among millions of strangers. If McCann is right, the correct policy response to P2P copying will not be one that further commodifies music by enclosing it in more law.

II. Legislative Action

In considering legislation, Congress should formulate its aim not in terms of P2P filesharing—the activity or the software that enables it—but as how to best promote innovation overall. The reasons for this broader approach are both policy-based and practical: First, coherent policy seeks broad, principled answers to problem sets, not piecemeal responses to narrow disputes. Second, as a practical matter, Congress is not institutionally positioned to stop filesharing. The worldwide nature of the Internet, combined with coders’ ceaseless ability to design around existing law—as evidenced by the Grokster and Morpheus programs¹⁷—and/or

¹⁵ Anthony McCann, *Understanding Enclosure Without and Within the Commons*, paper presented at the International Association for the Study of Common Property Conference (2004), available at <http://www.beyondthecommons.org/>.

¹⁶ *Id.* at 12-13.

¹⁷ See Tim Wu, *When Code Isn’t Law*, 89 V.L. REV. 679, 734-46 (describing post-*Napster* P2P programs as designed to fall outside indirect liability rules).

around enforcement efforts (for instance, through the use of encryption, anonymizing protocols, and darknets)¹⁸ places jurisdictional and technological limits on any nation's ability to regulate the development and use of these networks. Finally, P2P is a highly valuable technology, crucial, among other things, to the original infrastructure of the Internet.¹⁹ The legislature's paramount concern must be to keep its regulatory hand far away from the innovative space in which important inventions such as P2P emerge.

Thus the meaningful questions presented to Congress by filesharing activity and the legal principles litigated in the *Grokster* case are 1) what to do about the *Sony* rule, with an aim to optimizing America's technological leadership, and 2) how to craft expertly informed, targeted regulatory responses to P2P filesharing that enable copyright holders to realize existing rights without misusing or abusing the limited monopoly granted by the Constitution.

A. Codify a Qualified *Sony* Safe Harbor

Numerous courts have called on Congress to speak to indirect copyright infringement, and this summons is rooted in sound principle: Copyright law is a federal regime arising from the U.S. Constitution and embodied in statute. The historical delegation of indirect liability rulemaking to the individual judgments of common law is a structural anomaly made all the stranger by the Patent Act's provision for indirect infringement. Regardless of the Court's ruling in *Grokster*, Congress should exercise its Article I powers to fill this gap in the Copyright Act, and thus provide clarity to courts and certainty to technology developers and others.

¹⁸ E.g., Paul Biddle et al., *The Darknet and the Future of Content Distribution*, PROCEEDINGS OF ACM WORKSHOP ON DIGITAL RIGHTS MANAGEMENT (2002), available at <http://crypto.stanford.edu/DRM2002/darknet5.doc>.

¹⁹ Nelson Minar and Marc Hedlund, Chapter 1: A Network of Peers, PEER-TO-PEER: HARNESSING THE POWER OF DISRUPTIVE TECHNOLOGIES (Andy Oram, ed. 2001) ("The Internet as originally conceived in the late 1960s was a peer-to-peer system.").

Since the *Sony* rule's advent, numerous valuable technologies have emerged under its safe harbor that their makers may well never have dared introduce in its absence. Recent striking innovations include TiVo, the iPod, and the Slingbox. The success of the *Sony* rule in promoting such progress calls for Congress to codify its principle. Enacting a corollary to the Patent Act's indirect liability provision will serve not only the constitutional mandate, but also whole-code coherence in the regulation of intellectual property.²⁰

In adopting the *Sony* rule, Congress should consider the filesharing question only as a rubric for the new realities of digital technology while focusing more broadly on what rule best serves all the nascent technologies awaiting development. Congress should also fix the flaws in the *Sony* rule as it stands at common law: The standard for noninfringing use is vague, courts differ on the rule's application to vicarious liability, and without further qualification, the rule allows technology developers to profit by encouraging widespread infringement.

The following proposed rule turns to both the Patent Act and the lessons learned from filesharing to solve these problems: Neither contributory nor vicarious liability for copyright infringement will lie to the provider of a product or service suitable for substantial noninfringing use, unless the provider actively induces infringement with overt acts and specific intent, and bases her business model upon infringing use.

This reformulated *Sony* rule improves the original in important ways. It provides coherence with the Patent Act and its accompanying body of interpretive principles, neutrality toward different technologies, predictability for innovators, and, with the addition of the business

²⁰ Amici to the *Grokster* Court have argued that copyright and patent law have fundamentally different goals regarding regulation of dual-use technologies—the creation and dissemination of expressive works versus technological innovation—and that hence importation of the Patent Act's “staple article of commerce” safe harbor was wrong from the start. See Brief of Professors Peter Menell, David Nimmer, Robert P. Merges, and Justin Hughes, as Amici Curiae in Support of the Petitioners, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 9-15 (No. 04-480). The success of the *Sony* rule in promoting technological innovation, however, reflects the merger in goals between patent and copyright law as the technologies that disseminate copyrighted works become increasingly multipurpose and interoperable.

model prong, a solution to the illicit incentives the bald substantial noninfringing use standard promotes. The rule applies equally to contributory and vicarious liability, which creates a comprehensive safe harbor for indirect liability, and corrects the *Napster* court's unconvincing conclusion that *Sony* does not encompass vicarious liability simply because that claim was not before the *Sony* Court.²¹ Overtly including services in the formulation will help future courts avoid the awkward gyrations seen in *Napster*, in which the court drew a dubious distinction between the software product and Napster's conduct, and *Aimster*, where the court made an unexplained leap to criminal aiding and abetting theory to condemn Aimster's ongoing enablement of infringement by users. The conversion of "capable of" to "suitable for" harmonizes the language of the rule with § 271(c) of the Patent Act and narrows the range of products that satisfy the criterion. This constriction answers Judge Posner's critique of the merely capable standard as "extreme"²²—or in plainer terms, essentially toothless.

The exception to the safe harbor requires both active inducement of infringement and a business model built upon it. These elements would impose liability on current versions of popular P2P filesharing programs but allow the unfettered development of products such as TiVo and the iPod, which enable fair use time and space-shifting and neither counsel nor rely on infringement for their utility. The knowledge and overt act criteria for active inducement are modeled on interpretations of § 271(b) of the Patent Act.²³ The business model prong accomplishes two goals: It allows developers latitude to develop and innocently distribute

²¹ The Court noted that "the lines between direct, contributory infringement, and vicarious liability are not clearly drawn." *Sony*, 464 U.S. 417, 434-35 (1984). In *Aimster*, Judge Posner asserted that the *Sony* decision did encompass vicarious liability: "The Court, treating vicarious and contributory infringement interchangeably, held that Sony was not a vicarious infringer either." *In re Aimster Copyright Litigation*, 334 F.3d 643, 654 (7th Cir. 2003).

²² *Aimster*, 334 F.3d at 650.

²³ *E.g.*, *Water Technologies Corp. v. Calco, Ltd.*, 850 F.2d 660, 669 (Fed. Cir. 1988); *see also* 4 DONALD S. CHISUM, PATENTS § 17.04[2], [3], [4] (1978 & Supp. 2001) (gathering cases finding active inducement).

multiple-use technology with reduced fear of liability, while assigning responsibility to those who seek to profit from the wrongdoing of users.

Where the *Sony* safe harbor does not apply, Congress should codify the traditional rules for contributory and vicarious liability as formulated before courts started to strain them to accommodate new technologies.²⁴

This rule rejects proposed intent, balancing, and cost-benefit tests for the safe harbor, and so accomplishes the predictability necessary to encourage investment in innovation, promote efficient litigation, and ensure due process to potential defendants. Indeed there is nothing “safe” about a safe harbor based on the counterfactual inquiries and judicial discretion that such tests invoke. It also rejects the notion of acceptable quantitative measures of noninfringing uses, as these are ever moving targets based on decisions by users, not technologists, and so are subject to similar predictability and due process concerns. Finally, the rule rejects the proposal that technology developers face an ongoing duty to redesign and upgrade their products as they “phone home” with usage information.²⁵ Such a requirement would be unacceptably burdensome to innovators and the use and privacy rights of consumers.

B. Extend the § 512(h) Subpoena

To balance the safe harbor afforded technology producers by the reformulated *Sony* rule, Congress should facilitate direct enforcement against illegal file traders²⁶ by extending the

²⁴ These efforts have not been not successful. For example, in what instance would technology providers ever have specific knowledge of infringement at a time in which they could do something to stop it in the Internet context of instantaneous transactions? *See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154, 1162 (9th Cir. 2004).

²⁵ *E.g.*, Randal C. Picker, *Rewinding Sony: The Evolving Product, Phoning Home and the Duty of Ongoing Design* (March 2005), U Chicago Law & Economics, Olin Working Paper No. 241, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=692746.

²⁶ This paper presumes that P2P copying infringes any valid copyright in a copied work, but notes that no court has yet so held.

expedited subpoena process provided in 17 U.S.C. § 512(h) to Internet service providers covered in § 512(a), with additional protections to address due process concerns and protect the privacy of innocent users. The *Verizon* opinion holding that § 512(h) does not apply to § 512(a) providers was well reasoned. Nonetheless, the pressing policy concern that copyright holders be able to enforce their rights against the biggest infringers—users of P2P networks via ISPs—requires amendment of the law.

In doing so, Congress should improve the subpoena process in several aspects to avoid constitutional questions²⁷ and prevent a chilling effect on Internet use stemming from privacy concerns and fear of false accusations. Following due process protections already imposed by one district court,²⁸ Congress should:

- 1) Require ISPs to notify subscribers and provide an adequate period to challenge the subpoena on jurisdictional, mistaken identity, or other grounds before disclosing identity. Not only are the cases of mistaken identity in RIAA lawsuits now legendary, but the law must not presume that the subscriber an ISP links to a given Internet address is the alleged illegal file trader, since multi-user computers and wireless networks render such a presumption untenable.
- 2) Require ISPs to provide information regarding legal resources—local and national bar associations and civil liberties groups—to the subscriber along with the initial notice.
- 3) Provide a procedural clause requiring that absent a clear relationship to the alleged infringement, only one defendant can be named in a lawsuit. Though filesharing has taken on the appearance of a mass phenomenon, each case may present different facts, defenses, and damages. It is a fundamental principle of due process that each defendant have her day in court.

²⁷ The *Verizon* court avoided addressing Verizon's constitutional claims (Article III and First Amendment) by deciding the case on other grounds. *RIAA v. Verizon Internet Servs.*, 351 F.3d 1229, 1231 (D.C. Cir. 2003).

²⁸ See *Elektra Entm't Group, Inc. v. Does 1-6*, No. 04-1241 (E.D. Pa. 2004); Katie Dean, *One File Swapper, One Lawsuit*, WIRED NEWS (March 8, 2004), at <http://www.wirednews.com/news/digiwood/0,1412,62576,00.html> (describing the same court's ruling that the RIAA could not sue 203 unrelated defendants in the same lawsuit).

As an important corollary of providing this expedited procedure for filing lawsuits against infringers, Congress should consider amending the statutory damages in the Copyright Act as levied against individual defendants making noncommercial copies.²⁹ Potential liability of \$30,000 to \$150,000 for copying or distributing a single song is unconscionable, and the limits to the application of this provision should not rest solely in the discretion of the courts. A lower damage cap can also serve judicial economy by reducing the need for appellate review of excessive awards.

C. Exercise Restraint

As regards filesharing itself, the counsel to Congress is simple: wait and see. There are increasing pressures against unauthorized filesharing and for legitimate music dissemination on the Internet. The likelihood that these countervailing pressures will converge within the realm of acceptable copyright compliance will be greatly increased if government acts with understanding of the norms surrounding creative works, and resists the call to legislate too fast, too bluntly, and in derogation of citizens' expectations.

Copyright holders have several remedies at hand to stem illegal filesharing and promote sales of their products. These include direct enforcement against illegal traders, interdiction on P2P networks, increased use of accessible and attractive digital distribution models, and voluntary collective licensing. The record industry is already deploying the first two against P2P copying, and the result is that procuring music from P2P networks is increasingly costly to users, both in the time required to sort through chaff on the network (damaged or imposter files) and the risk of a lawsuit. P2P software imposes additional costs in the form of spyware and advertising.

²⁹ See 17 U.S.C. § 504.

As to legitimate distribution, the burgeoning success of Apple Computer's iTunes shows that there is a market for paid download models where the catalog is sufficiently deep, the price in an acceptable range, and the degree of technical protection solicitous of fair use. It is very likely that by maintaining or increasing the cost of P2P copying and enhancing the value proposition of legitimate download sites, the record industry can migrate a substantial number of listeners to paid services solely through market forces. As an alternative, record companies may elect to change their revenue model by forming a voluntary licensing collective along the lines of ASCAP, and license the right to copy over P2P networks to individuals and/or ISPs in exchange for blanket fees.³⁰

Disintermediation, or more direct distribution of music by creators to consumers, will apply another point of pressure on the digital music marketplace. As previously noted, the future of music creation and distribution does not lie solely, or likely even largely with the corporations that currently control the music industry. Small niche producers will deploy targeted distribution based on contextual marketing, sophisticated search engines, and social networks to replace many of the industry's existing functions.³¹ This trend will provide the opportunity to add value to music fans at multiple points in the production and distribution chain, and so attract them away from illegal P2P networks and toward legitimate purchases—which will likely have far less of a commodified flavor than in the past, and will instead reinforce fan affinity.

If, after allocating the time necessary to allow market forces to work and study the situation in detail, Congress finds that filesharing poses an unacceptable threat to the nation's cultural and creative vitality, it may elect to craft legislation targeted specifically to the problem.

³⁰ See Electronic Frontier Foundation, *A BETTER WAY FORWARD: VOLUNTARY COLLECTIVE LICENSING OF MUSIC FILE SHARING* (2004), available at http://www.eff.org/share/collective_lic_wp.pdf.

³¹ E.g., Esther Dyson, *Intellectual Value*, 3.07 WIRE 12.10 (July 1995), available at <http://www.wired.com/wired/archive/3.07/dyson.html> (describing alternative business models for digital distribution of creative works).

Congress has seen a long history of implementing such narrowly tailored responses to disruptive technologies: compulsory licenses for piano rolls and cable television, media levies for digital audio tape, the Digital Millennium Copyright Act and Digital Performance Right in Sound Recordings Act for the Internet. These laws provide both models and some cautionary tales. The Audio Home Recording Act, for example, consumed extensive congressional and taxpayer resources in its enactment only to have digital audio tape languish in the marketplace as consumers resisted the mandatory anti-copying measures and the tax-like levy. The DMCA has posed challenges for stakeholders and courts alike, arguably because it embodies too many compromises hammered out in haste. The implementation of the DPRSA has been costly and controversial. Congress should approach P2P legislation with utmost caution and full, unbiased information, normative and empirical, about the interests at stake.

III. Delegation to the Federal Trade Commission

While the current situation calls for legislative restraint, digital distribution technology is a dynamic force in society requiring active engagement and study by the government to ensure that its promise is fully realized for the benefit of all. Accordingly, Congress should call upon the expertise and resources of the Federal Trade Commission to evaluate certain issues and regulate certain practices relating to P2P and other aspects of digital distribution of creative works.

It is proper for Congress to delegate authority to agency expertise where “the regulatory scheme is technical and complex ... and the decision involves reconciling conflicting policies.”³² Such is so for the P2P issue and related questions. To advance policy and practice in this area, Congress should authorize the FTC to institute a process to certify technologies as suitable for

³² *Chevron U.S.A., Inc. v. Nat'l Resource Defense Council*, 467 U.S. 837, 865 (1984).

noninfringing use; to regulate the deployment of technology protection measures on creative works based on the Commission's consumer protection jurisdiction; and to conduct sophisticated study of the effects of P2P copying on new music production and the emerging music marketplace.

To promote certainty for technology investors, incentives to design socially productive technology, and efficient litigation, Congress should authorize the FTC to create a voluntary examination process that certifies technologies as suitable for substantial noninfringing use. Based on examination of the technology's prototype and the applicant's sworn affidavits, FTC certification would create a rebuttable presumption of suitability in court. Failure to certify, however, would create no adverse inference (to avoid creating a new economic and bureaucratic barrier to entry). Producers could update certification as they release new versions of their products, as is the case with copyright registration for software; courts could consider certification of a previous version within their discretion. At the applicant's request, the Commission's examination and decision would remain sealed for a stipulated time to enable the applicant to bring the product to market without public disclosure. Furthermore, the examination would be based solely on functionality in order to avoid treading on trade secrets.

The advantages to the certification process would be both prospective and retrospective to applicants. Armed with certification, companies could attract the venture capital required to bring a product to market. In later litigation for indirect copyright infringement, certification would ameliorate the inefficiency, inconsistency, and unpredictability of individual inquiries into suitability for noninfringing use by myriad district court judges unschooled in technical details. Finally, certification would provide a normative reward to technologists who sincerely design with productive uses in mind.

Congress should also authorize the FTC to issue guidelines or regulations regarding the degree to which copyright holders may use technical protection measures (TPMs) to restrict use of creative works, under the Commission's jurisdiction to regulate deceptive or unfair business practices.³³ These guidelines or regulations should ensure that TPM deployment comports with 1) copyright law, including fair use, 2) fairness to consumers,³⁴ and 3) the interoperability that fosters a competitive marketplace. For instance, the FTC might determine that it is a deceptive trade practice³⁵ to deploy TPMs on music files or CDs without full and fair notice of the TPM's capabilities and the permitted uses. Certain TPMs, such as those that "phone home" with usage or personally identifying information, may be presumptively unfair.³⁶

Finally, Congress should charge the FTC with a more rigorous and longer term study of the effect of P2P copying on the creation and dissemination of musical works than researchers have yet produced. This effort should extend beyond the survey methods on which most reports so far rely,³⁷ and incorporate empirical research on actual P2P use and its relation to music sales. (One such study found the effect of downloads on record sales to be statistically indistinguishable from zero.³⁸) The FTC should also conduct empirical research regarding

³³ The D.C. Circuit's recent decision denying the FCC's jurisdiction to impose a broadcast flag on digital television points to the FTC as the more appropriate agency for investigation and rulemaking in this realm. *See American Library Ass'n v. Federal Communications Comm'n*, No. 04-1037 (D.C. Cir. May 6, 2005).

³⁴ For an articulation of consumer concerns that elaborates on the fair use standard, see the Consumer Technology Bill of Rights, <http://www.digitalconsumer.org/bill.html>.

³⁵ A material representation, omission, or practice, considered from the viewpoint of a reasonable consumer, that acts to the consumer's detriment. *See* 15 U.S.C. § 45(a)(1); FTC Policy Statement on Deception, *available at* <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>.

³⁶ Unfair trade practices 1) cause substantial, unjustified, and avoidable injury to the consumer, and 2) violate public policy. *See* 15 U.S.C. § 45(a)(1); FTC Policy Statement on Unfairness, *available at* <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>.

³⁷ *E.g.*, PEW INTERNET & AMERICAN LIFE PROJECT, SHARP DECLINE IN MUSIC FILE SWAPPERS: DATA MEMO FROM PIP AND COMSCORE MEDIA MATRIX (2004), *available at* http://www.pewinternet.org/pdfs/PIP_File_Swapping_Memo_0104.pdf. The Pew surveys have been useful in identifying the anti-commodification norms underlying P2P copying. *See supra* note 13. However, the reliability of more recent telephone survey data regarding illegal activity, in the wake of a highly publicized spate of lawsuits against illegal copiers, is quite questionable.

³⁸ Felix Oberholzer and Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, working paper, March 2004, *at* http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf.

creative production by musicians, along parameters such as number of new releases, new signings, total royalties paid to artists, and so forth. Distinguishing between major and independent labels would provide useful industry trend data from which to fashion any further policy. The FTC can conduct such research efficiently under its power to require certain kinds of reporting from businesses as part of wide-ranging economic studies.³⁹ The agency has recently completed an ambitious report and reform recommendation for the patent system.

In authorizing this regulatory authority, Congress must rest on the premise that the dissemination of creative works poses more than trade-related or economic issues. The FTC has the expertise to protect consumer interests in access to creative works and to gather information about trade in such works. Only Congress, however, has the institutional competence to balance commercial concerns with the strong mandate against overly restrictive intellectual property policy propounded by both the Constitution and cultural norms. No matter how successfully the FTC takes up these particular tasks, the legislature must keep high-level watch over the American culture that intellectual property law serves.

IV. Conclusion

Many of the proposed responses to the advent of copying over P2P networks arise from an incomplete view of current norms and future business models. As digital technology becomes the pervasive means of producing and distributing creative works, citizens will demand more, not less access to music. Furthermore, in marked contrast to trends of the recent past, the entities that produce and distribute music will simultaneously shrink and proliferate. To attempt to regulate this future based on faulty assumptions regarding “cultures of piracy” is to risk failed legislation and loss of America’s leadership position in the creative marketplace.

³⁹ FTC Act section 6(b), 15 U.S.C. § 46.

Congress can, however, make an important difference in the digital future by 1) clarifying and codifying the *Sony* rule, and 2) charging the FTC with key tasks designed to preserve the balance in copyright law and provide the information Congress needs to respond to copyright policy challenges ex ante. Whatever the Court may rule in the *Grokster* case, Congress should act on these items promptly.