

**Please Remember to Stay Calm:
Responding to the Challenge of P2P**

Ryan Shaw
IS296A-2 Final Paper
May 9th, 2005

In recent years the effective bandwidth for distributing content over the Internet has increased dramatically, due to greater network capacity and new protocols and formats for using this capacity more efficiently. Millions of people around the world have taken advantage of easy-to-use software tools for exploiting this increased bandwidth to exchange music, movies, and other creative works, infringing on the copyright of the creators of those works. As a result, many of our assumptions about copyright and the balance it maintains between the rights of creators and the rights of the public have been called into question. Policymakers have been forced to consider legislation in response to what is perceived by some as a “copyright crisis.”

When people believe they are in a crisis situation, they tend to act quickly, without carefully investigating the courses of action available to them. As this can be dangerous, emergency response professionals are trained to remind us to stay calm. I would like to offer similar advice to our policymakers.

In Part 1 of this essay, I will consider the question of whether there is, in fact, a copyright crisis, and what the nature of that crisis might be. In Part 2, I will examine some proposed policy solutions which I think should be avoided. Finally, in Part 3, I will make some suggestions about what legislative reforms should be made. Specifically, I outline a plan to ensure a diversity of approaches to and attitudes toward intellectual and cultural products, including approaches and attitudes that do not consider these products to be “property.” I believe that encouraging a world where a number of different regimes exist side by side will provide the best chances for finding an optimum solution to the puzzles posed by new communications technologies.

Part 1: Is there a crisis?

Those who argue that there is a crisis suggest that there are four kinds of harm caused by

widespread copyright infringement: the destruction of incentives for creators to create, the economic harm to the content industry of lost sales, the costs to copyright holders and to society of enforcing copyright, and the costs to society of widespread flouting of the law. I will consider these harms one at a time.

Harm to incentives for creators

The belief that giving creators property rights in their creations will motivate more creation is at the very heart of copyright law. If this belief is correct, then new technologies that make those rights difficult to enforce legally will tend to demotivate creators, resulting in fewer creative works. While this would certainly be a loss for society, it is not clear that we are actually seeing this effect. To the contrary, there seems to be an explosion in the number and kinds of creative works being produced.¹ Why?

I see two possibilities. First, while there is good evidence that market economies spur greater creative productivity,² it may be that strong property rights in the works created are not as critical as is commonly assumed. Many creators are finding that the affordances of digital media allow them to make a more comfortable living by selling ancillary services and products, using the content created as a marketing tool.³

The second possibility is that new technologies have lowered costs to the point that creative production in which monetary gain is not an important motivating factor is becoming a powerful force. Thus while we may be losing some creators who are primarily motivated by money, we could be gaining even more creators who are *not* primarily motivated by money, and who did not have the time or opportunities to create prior to the advent of these new technologies.

1 While I do not have any hard numbers to support this, I can say that as a daily user of the Internet since 1993, I have never enjoyed such an amount and diversity of content as I do currently.

2 See for example Tyler Cowen, *In Praise of Commercial Culture* (1998).

3 For example, comic strip creator Chis Onstad publishes his strip for free on the web, and lives off the proceeds of T-shirts, mugs, shotglasses, and limited-edition artworks sold through his site and on eBay. As Mr. Onstad points out, "It's easier to send the link to my strip to your friend than a cut-out clipping" (as quoted in Brad Mackay, "Cartoons Go Online" (2005), <http://www.cbc.ca/arts/media/cartoonsgonline.html>).

Law professor and free software advocate Eben Moglen has suggested that creative production is an emergent effect of connecting human minds with a low-cost, high-bandwidth communications network. He suggests that communications technologies amplify the natural tendency of humans to “create things for one another's pleasure.”⁴ Law professor Yochai Benkler has developed this notion further, arguing that we are seeing the rise of “commons-based peer production” as an alternative to market-driven production.⁵ Some are skeptical that this mode of production can produce more than trivial works, but in recent years it has produced everything from operating systems⁶ to encyclopedias⁷ to full-length, high-production quality movies laden with special effects.⁸

My point here is not to suggest that copyright is no longer needed, or that new forms of production will necessarily eclipse property- and contract-driven forms. I merely want to point out that if there is a decline in creative production we are concerned about, then we are not currently at a crisis point, and thus should “wait and see” before legislating. Given the evidence that the very tools which it is feared will precipitate a crisis may be catalyzing *greater* creative production, by lowering the costs of collaboration and dissemination and providing superior forms of remuneration for creators, we should be especially hesitant to legislate in ways that may adversely affect the development of these tools.

Harm due to lost sales

The questions of whether and how file-sharing has impacted content industry sales are hotly contested, but largely irrelevant. Lost sales are a concern only to the extent that they result in artists losing the incentive to create. As I argued above, it is not clear that artists are losing that incentive. More to the

4 Eben Moglen, *Anarchism Triumphant: Free Software and the Death of Copyright* (1999), <http://emoglen.law.columbia.edu/publications/anarchism.html>.

5 Yochai Benkler, *Coase's Penguin, or, Linux and The Nature of the Firm* (2002), <http://www.benkler.org/CoasesPenguin.html>.

6 The Linux Operating System, <http://www.linux.org/>.

7 *Wikipedia*, <http://www.wikipedia.org/>.

8 *Star Wars Revelations*, <http://www.panicstruckpro.com/revelations/>.

point, it seems doubtful that there is a link between industry sales and that incentive. Oberholzer and Strumpf, in their study of the effects of file-sharing on record sales, point out that “the financial incentives for creating recorded music are quite weak,” since only a vanishingly small minority of albums are profitable.⁹ Musician David Byrne has supported this view, saying, “Most artists see nothing from record sales—it's not an evil conspiracy, it's just the way the accounting works. That's the way major record labels are set up, from a purely pragmatic point of view. So as far as the artist goes—who cares?”¹⁰

If industry sales are not strong motivating factors for creators, then policymakers ought not be concerned with them. The question of how to remedy falling sales is an issue for the content industry to work out as it figures out how to compete in a changed technological landscape. It may be a difficult transition for them, but that is a fact of life in a capitalist system.

Harm due to costs of enforcing copyright

The third kind of harm policymakers are concerned with is the rising cost of enforcing copyright. These costs come in two forms: the costs of developing and deploying technological protections like digital rights management (DRM), and the costs of lawsuits against technology developers and individual infringers. To the extent that resources that could otherwise be spent productively are invested in fighting copyright infringement, society is being harmed.

The first kind of cost, resources invested in technological protections, should not concern us. Content owners would be investing in these technologies regardless of whether they had a problem with copyright infringement. As Professor Samuelson has pointed out, the content industry is interested in DRM not because it will stop piracy (it won't), but because it promises a way to change and control

9 Felix Oberholzer and Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis* (2004), http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf, 25.

10 As quoted in an interview for National Public Radio conducted by Xenia Jardin. Transcript excerpt at http://www.boingboing.net/2005/03/28/david_byrne_launches.html.

consumers' expectations about what they can do with content.¹¹ DRM offers content owners powerful new tools for determining how their content is used and how they charge for these uses, and they would be exploring the possibilities and new business models enabled by these tools even in the absence of widespread copyright infringement.

The second cost is more worrisome. As long as the U.S. government has laws against copyright infringement, it is obligated to enforce those laws. This costs money and resources that could be used elsewhere (homeland security, for example, or public schools, depending on your political predilections). These costs are not easily dismissed. I will suggest some ways they might be minimized in Part 3.

Harm to respect for the law

Finally, there is the issue of respect for the law. When the law proscribes activities that large proportions of the population consider socially acceptable, people are likely to ignore the law. This makes enforcement of the law more difficult not only because there are more lawbreakers, but also because those lawbreakers are likely to help one another evade the law. Consider speed limits. Most drivers consider posted speed limits to be unreasonably low, and the majority of traffic on our highways commonly exceeds the speed limit. As a result, drivers will often alert one another to the existence of law enforcement or share tips on how to evade the law.¹² Instead of social norms supporting the law, they are undermining the law. Drug laws, especially laws prescribing massive penalties for possessing small amounts of “soft drugs” like marijuana, are another good example of this phenomenon.

Conflict between social norms and the law should be avoided, as disdain for “unreasonable” laws can lead to more general disdain for the law and law enforcement as a whole. To bring the two back

11 Pamela Samuelson, *DRM {and, or, vs.} the Law* (2003), http://www.sims.berkeley.edu/~pam/papers/acm_v46_p41.pdf.

12 See for example “How to Avoid Speed Traps: Tips From eHow Users,” http://www.ehow.com/tips_16963.html.

into harmony requires either changing the law or changing social norms through education. In Part 3 I suggest how a hybrid approach may help in the case of copyright law.

Part 2: What not to do

In Part 1 I argued that if we are to worry about the “copyright crisis,” we should focus on the two problems of enforcement costs and respect for the law. What can be done to address these two problems?

My first suggestion to policymakers is: do nothing, at least not immediately. This is a rapidly evolving area, and there are still far too many unknowns (the relationship of intellectual property rights to creator incentives, the effects of commons-based peer production, the real impact of file sharing on content sales) to legislate wisely. Bad legislation is hard to undo and will likely have unforeseen consequences, given the unpredictable and disruptive nature of technological development.

Since “do nothing” is rather vague, I will specify in more detail three proposed legislative solutions that I think are particularly harmful and should be avoided: a “balancing test” for potentially infringement-enabling technologies, mandatory DRM, and compulsory licensing.

A balancing test

In the *Aimster* case, the Seventh Circuit suggested that a new balancing test was needed above and beyond the “substantial non-infringing uses” test established by the *Sony Betamax* case: “Even when there are noninfringing uses of an Internet file-sharing service, moreover, if the infringing uses are substantial then to avoid liability as a contributory infringer the provider of the service must show that it would have been disproportionately costly for him to eliminate or at least reduce substantially the

infringing uses.”¹³

Presumably this approach would lower the costs of legal enforcement by putting the focus on contributory infringement rather than direct infringement: instead of going after tens of thousands of individual file sharers, enforcers could concentrate on software developers. Unfortunately, the ease with which software with infringing uses can be developed these days¹⁴ means that that is unlikely to lower costs much. Instead of tens of thousands of directly infringing file sharers, there will be thousands of contributorily infringing developers. Nor does this solution really address the problem of respect for the law, any more than banning radar detectors addresses the problem of respect for speed limits.

Furthermore, a balancing test would create new kinds of harm to the economy and to society by inhibiting technological development. Technology developers would have to guess how their technology might be used to infringe, and design their technologies to disallow such infringements. Incorrect guesses would be penalized by potentially massive liability. Even if developers determined that it would be too costly to eliminate certain infringing uses that they could foresee, they would likely have to defend those determinations in court. As the IEEE-USA wrote in its *amicus curiae* brief in the Grokster case, faced with such a test, “reasonable technology manufacturers may well choose not to produce products with infringement potential, regardless of the noninfringing benefits that such technologies might bring to society.”¹⁵ Legislation to codify such a test would be a mistake.

Randal Picker has suggested a more nuanced version of the balancing test which takes into consideration the fact that many modern technology products can be designed to “phone home” for

13 *In re Aimster*, 334 F.3d 643 (7th Cir. 2003), 7.

14 See for example TinyP2P, a fully-functional peer-to-peer file sharing application implemented with 15 lines of Python code (<http://www.freedom-to-tinker.com/tinyp2p.html>). As its author Ed Felten points out, “Peer-to-peer apps can be very simple, and any moderately skilled programmer can write one, so attempts to ban their creation would be fruitless.”

15 Brief of IEEE-USA as *Amicus Curiae* in Support of Neither Party, *MGM v. Grokster* (2005), http://pam-p2p.notlong.com/grokster/20050124_IEEE_Amicus.pdf.

software updates.¹⁶ He argues for an approach where a balancing test like the one described above would only be applied to products which were not designed to have their software remotely updated. Products which could be remotely updated, on the other hand, would not face this test and could be released immediately provided they had substantial noninfringing uses; however, the developers of these products would be required to exercise ongoing control over their products and update their software to prevent infringing uses as they arose.

At first blush, this seems like a sensible proposal, but it has a number of problems. As we have already established that reasonable developers are unlikely to want to have to predict all future uses of their products at design time, this conditional test would result in a world in which virtually all software products would have to “phone home.” Privacy concerns aside, this raises a number of difficult implementation questions.

While manufacturers may tightly control proprietary hardware devices like the TiVo and the iPod,¹⁷ exercising control over software running on general-purpose computers is much more difficult, particularly if that software is open-source. Users can always recompile the software so that it doesn't “phone home,” or so that it ignores updates they don't want. If the software interacts with some kind of service (like the iTunes Music Store), the service providers can deny access to non-updated clients, but what about software that doesn't come bundled with a service? What if the manufacturer goes out of business, and an infringing use of their product is subsequently discovered? And what happens if the manufacturer wants to stop supporting a legacy product? Most vendors today do not issue security updates indefinitely for every product they have ever released; will they be required to do so for anti-infringement updates? Picker's solution creates more problems than it solves.

16 Randal Picker, *Rewinding Sony: The Evolving Product, Phoning Home and the Duty of Ongoing Design* (2005), http://ssrn.com/abstract_id=692746.

17 Although even this is questionable; see for example the successful project to put the Linux operating system on Microsoft's XBox, perhaps the most tightly controlled hardware platform in history (<http://www.xbox-linux.org/>).

Mandatory DRM

The idea that new technologies will solve the problems created by slightly less new technologies is always an appealing one. Some commentators have proposed that DRM represents just such a solution, offering a way to replace the outmoded and difficult to enforce property rights created by copyright law with technological protections. These advocates argue that the total proprietization of intellectual works and the rights to use them through DRM is a desirable goal, as it will allow users to signal via the market how they want to use these works, rather than relying on legislatures to design suboptimal compromises.¹⁸

DRM certainly has the potential to lower legal enforcement costs, since it is essentially a way of moving enforcement out of the legal realm and into the technological one. (Of course, this assumes that the DRM technologies are well-engineered: if companies employ weak or poorly implemented DRM and rely on the anti-circumvention provisions of laws like the DMCA for enforcement, it is just legal enforcement by different means.) But it does nothing to address respect for law: just because I'm prevented from doing X doesn't mean I will accept that X is wrong.

In fact, DRM has the potential to even further undermine respect for the law if it is seen as unreasonably preventing traditional rights. DRM opponents have argued that the replacement of copyright law by DRM protections would destroy the quid pro quo of property rights for public access that copyright law was intended to sustain, would privatize even uncopyrightable facts and information, and would thus raise transaction costs to the point that creative production is stymied.¹⁹

While I sympathize with this view, I am not yet ready to dismiss the claim that allowing different DRMed content offerings to compete in the open market is the best way to find an optimal compromise between the rights of users and the rights of content owners. After all, years of consumer

18 See for example Tom W. Bell, *Fair Use Vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine* (1998), <http://www.tomwbell.com/writings/FullFared.html>.

19 See for example Margaret Jane Radin, *Regulation by Contract, Regulation by Machine* (2004), http://ssrn.com/abstract_id=534042.

rejection of its overly-restrictive DRM pushed Sony to decide to allow more open formats on its new Play Station Portable.²⁰ If DRM standards can be defined which enshrine not only the wishes of content owners, but also the traditional rights and usages of end-users,²¹ and users are educated about the choices available to them, then DRM might indeed be a good solution.

But the market cannot find an optimum solution if a single form of DRM is mandated by law. This is the approach that the FCC tried to take with the Broadcast Flag, its attempt to mandate that all HDTV tuners must implement DRM measures developed by a small consortium of Hollywood studios and electronics manufacturers. The Broadcast Flag offered all the disadvantages of a “one size fits all” suboptimal legislative solution, with none of the flexibility of existing copyright law. Fortunately, it was recently struck down by a federal appeals court which ruled that the FCC had overstepped its authority. Policymakers should avoid making this mistake again, and allow various DRM and non-DRM business models and technologies to compete in the market without government intervention.

Compulsory licensing

Finally, Congress could force copyright owners to license their creations for distribution over the Internet, create an organization to monitor what is being distributed, and compensate copyright owners accordingly, perhaps through taxes on broadband usage or technologies like hard drives or CD/DVD burners. This is known as “compulsory licensing,” and it seems to offer an ideal solution. Since file sharing becomes a legal, licensed activity, the costs of legal enforcement are eliminated. And since this would change the law to bring it into harmony with social norms (no restrictions on sharing and artists get paid), respect for law is rescued.

Unfortunately, compulsory licensing also has some serious implementation issues. In particular,

20 “Sony Video Chief Admits Strategic Mistakes” (2005), <http://abcnews.go.com/Business/wireStory?id=427719>.

21 For an example of one such effort, see the Digital Media Project at <http://www.dmpf.org/>.

there is the question of how to properly balance consumer privacy, accurate record keeping, and data security.²² While the desire of people to keep their media habits private may be overstated,²³ there are certainly some kinds of content (pornography, for example, or corporate research materials) which people would be loath to have their consumption of monitored. This problem could be ameliorated by looking at consumption only in aggregate through sampling techniques or anonymized records, but these approaches have problems as well. The importance of “long tail” business models to the online economy is increasingly being recognized,²⁴ and random sampling will miss the long tail of niche content for which there is only a very small audience. Anonymous records, on the other hand, raise the possibility of widespread “gaming” of the compulsory licensing system. Given the problems that have been encountered creating secure electronic systems for voting anonymously, it seems unlikely that these problems would be solved in the context of a compulsory licensing system.

Furthermore, a government-run compulsory licensing scheme financed through taxes ignores the fact that media consumption crosses national boundaries. Users of American music and movies in other countries would not pay into the system, resulting in a situation where American taxpayers would be subsidizing the world's media habit. Trying to extend the system internationally would only exacerbate the problems discussed above: can we trust the Chinese government to pay Falun Gong musicians for the use of their music, rather than jailing the people who are sharing their files?

Note that I am not arguing against *voluntary* collective licensing of copyrighted content, as proposed by the EFF and others.²⁵ While the problems with privacy, accuracy and security apply to

22 Aaron Swartz, “Privacy, Accuracy, Security: Pick Two” (2003), <http://www.aaronsw.com/weblog/001016>.

23 See for example the popularity of Audioscrobbler (<http://www.audioscrobbler.com/>) and Last.fm (<http://www.last.fm/>), two online services offering plug-ins for media players that will upload the details of every song listened to to a publicly accessible web page.

24 Chris Anderson, “The Long Tail” (2004), <http://www.wired.com/wired/archive/12.10/tail.html>.

25 “A Better Way Forward: Voluntary Collective Licensing of Music File Sharing,” http://www.eff.org/share/collective_lic_wp.php.

voluntary systems as well, I find it far more likely that a good balance will be found through the competition of several alternative voluntary systems, with different approaches to privacy, accuracy, and security, than that Congress will find such a balance through legislation.

Part 3: What to do

In Part 2 I suggested that policymakers should move slowly to enact legislation, and I discussed some particularly problematic legislative solutions that should be avoided. But its easy to say what shouldn't be done. If we accept that the spiraling costs of copyright law enforcement and the undermining of respect for the law are problems, what can be done legislatively to address them? In this section I will discuss some reforms that I believe would help bolster respect for the law by bringing social norms and the law closer together, and then I will discuss a way to lower the costs of law enforcement.

Harmonizing social norms and the law

As I mentioned in Part 1, harmonizing social norms and the law requires either changing the law or changing social norms through education. Policymakers should try to do both, first by changing copyright law to bring it into line with people's expectations, and second by funding efforts to educate people about the pros and cons of IP ownership, so that they can make intelligent decisions about how they spend their money and how they choose to treat the products of their own intellectual labor. The approach I suggest involves changing copyright law to encourage the development of different “zones” for intellectual and cultural works, and requiring labeling of works to make it clear which zone they belong to.

Common sense copyright

One of the primary problems with copyright law as it currently stands is the fact that any

copyrightable expression of an idea is automatically copyrighted as soon as it is fixed in a tangible medium. Many “ordinary” people are surprised to hear that every email written or phone message recorded is copyrighted. It does seem bizarre: does it really make sense to give some notes jotted on a napkin the same protection as the new Radiohead album? Since the law doesn't make a sharp distinction between an email and a U2 song, ordinary people don't either. I forward one to my friend, why not the other?

To remedy this, copyright law should return to the pre-1974 practice of requiring creators who want copyright protection to mark their content as copyrighted and distribute copies to the public. Works which are not copyrighted in this way would immediately enter the public domain. Jessica Litman refers to this approach as “resetting the default rule.”²⁶ This would clearly distinguish “stuff you can use” from “stuff you can't,” as well as encouraging the growth of a robust public domain which the public can draw on as “raw materials” for new works.

Another gray area involves works for which the creator or owner can no longer be identified. Whose rights are being protected in the case of orphan works? This area too can be clarified by initially granting copyright for a period of fourteen years, after which it has to be renewed regularly (every ten years) to keep protection. This way, works that continue to be highly valued can receive protection, while the vast majority of works that are no longer valued can fall into the public domain.

In exchange for the added hassle of having to follow a few simple rules to get and keep copyright protection, limits on the length of copyright protection should be eliminated. As long as they are willing to keep renewing their copyright, Disney should be allowed to keep Mickey Mouse out of the public domain forever. While this may rankle some, I think it is a reasonable trade-off for changing the default rules of copyright.

26 Jessica Litman, *Sharing and Stealing* (2004), http://ssrn.com/abstract_id=472141.

Establishing the three zones

The strategy here is to clearly divide activity around intellectual and cultural works into three zones. The first zone would revolve around highly-valued works produced and owned by for-profit firms who have elected to receive copyright protection in exchange for distributing their works to the public. The second zone would be populated with works owned by people or institutions who have decided to forgo copyright protection in favor of technological protection through DRM. These owners could put either more or less restrictions on uses of their works than copyright would. The third zone would be the public domain, in which intellectual and cultural works would not be considered property.

A key to the establishment of these three zones would be educating people about how they worked. I believe this would be best handled by devising standard human- and machine-readable labels for intellectual property which explain what uses of that property are allowed by its owners. These labels would be similar to the nutritional labels required on food products, in that they would be designed to educate consumers rather than to promote particular products. Any works without these labels could be safely assumed to be “third zone” products: not owned, and thus available for any use at all.

One might ask why creators would ever elect to put their works in the third zone. I believe that, were these zones to be established and clearly labeled, we would in fact see many creators choosing the third zone, even in the absence of a compulsory licensing scheme guaranteeing that they will be compensated. For example, companies with business models that rely on people using their communication networks, rather than paying for content, might choose to create third zone works in order to encourage networked collaboration and conversation around those works.²⁷ Furthermore, placing works in the third zone and maximizing their use may enable new kinds of businesses that currently have

²⁷ For some examples of how these networks might function, see CC Mixer (<http://ccmixter.org>) or RemixFight (<http://remixfight.org>). While these are not for-profit ventures, I see no reason why they couldn't be.

intractable problems, such as multimedia search.²⁸ Finally, consumers prefer simplicity, and the third zone certainly presents the simplest interface.

Regardless of which zone creators ultimately end up choosing, I believe that in a system like the one I have described, consumers will understand that there is a choice being made, and will respect that choice.²⁹ Of course, there will still be those bad apples who don't respect that choice. I discuss how to deal with them in the next section.

Dealing with bad apples: streamlined legal enforcement

As long as it is still possible for owners to insist that their works be treated as protected property, there will be people who insist on breaking those protections and doing as they wish with that property. Short of compulsory licensing, I see no way around this. I do think that the “three zones” approach will lower the number of lawbreakers to a manageable number. For the remaining bad actors, I think a streamlined system for resolving infringement cases like the one proposed by Mark Lemley and Anthony Reese is the best way to lower the costs of enforcement.³⁰

The current approach favored by the RIAA involves slapping extraordinarily large penalties on a relatively small number of infringers. But I don't believe that penalties have to be very severe to deter people from infringing copyright. A \$1000 fine would be more than enough to stop most people, *if* they actually thought they would get caught. The problem with the current system is that so few people are punished relative to the total number of infringers that people feel “it won't happen to them.” A “quick and cheap” dispute resolution system could allow more infringers to be punished, albeit with less severe

28 See for example John Battelle's recent comments on video search: “[V]ideo search - and its attendant economies... will only work if we have millions of people informing our collective knowledge of what is worth our individual attention, and that can only happen if we can annotate, share, and remix video.” “The State of Video Search” (2005), <http://battellemedia.com/archives/001471.php>.

29 Jessica Litman makes a similar point about her compulsory licensing proposal. *Sharing and Stealing*, 47.

30 Mark Lemley and Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation* (2004), <http://www.utexas.edu/law/faculty/treese/digitalcopyright.pdf>.

penalties. If everyone knew someone in their neighborhood, at their school, or at their company who got fined \$1000 for infringing copyright, the feeling of safety in numbers would disappear and behavior would change quickly.

This approach would lower the costs of enforcement, by lowering the overhead of pursuing individual cases, and by deterring infringement effectively enough that the number of cases would decline over time. Finally, it would lower the costs to society of enforcement by fining infringers enough to sting but not so much that they spend the rest of their lives paying off debt.

Toward a world of more choices

In Part 1 I tried to argue that the copyright crisis is not really a crisis, though there are some problems with law enforcement costs and respect for the law. But in general, things are pretty good. There is an increasing amount of copyrighted content available through paid music download and “video on demand” services. There are people thinking creatively about ways to use DRM to enable new business models. There is a lot of “free as in beer” music being distributed via blogs with the blessing of marketing-savvy independent labels. And there is a growing amount of “free as in speech” content online thanks to the Creative Commons movement. Except for the major music labels, content producers and distributors seem to be getting paid, and creative production on the whole doesn't seem to have dropped noticeably.

My proposal is an attempt to get policymakers to calm down, recognize these positive trends, and create a clarified legal and social world to encourage them. This is a world in which ordinary people can understand the difference between the intellectual property and the intellectual common, be clearly informed about their rights and responsibilities, and make informed choices about what they choose to consume and what they choose to allow others to do. I believe this world of choices is ultimately preferable to a “planned intellectual economy” of balancing tests, mandatory DRM or compulsory licensing, no matter how enticing those solutions may seem in a time of crisis.