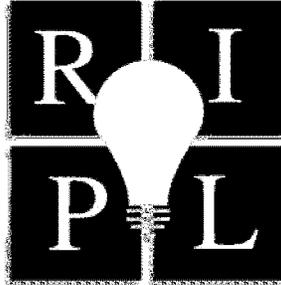


# THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



COPYRIGHT & PRIVACY – THROUGH THE COPYRIGHT LENS

NOVEMBER 18, 2004

SARAH B. DEUTSCH, RODERICK G. DORMAN, MICHAEL A. GEIST,  
HUGH C. HANSEN, HOWARD P. KNOFF, RALPH OMAN,  
MATTHEW J. OPPENHEIM AND JOHN G. PALFREY

## ABSTRACT

This panel examines the recent litigation by the recording industry against peer-to-peer (“P2P”) users in the U.S. and Canada. How are users’ identities being obtained? Is the process working well enough or too well? What are the technical, evidentiary, procedural, privacy and substantive copyright issues in play?

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## I. INTRODUCTION BY HOWARD P. KNOPF

PROF. KNOPF:<sup>1</sup> I just want to say a few words about The John Marshall Law School (“JMLS”),<sup>2</sup> where I am honored to be right now. As many of you know, I am from Canada. This school has been the first to do a lot of things in this country and in the world. It is one of the first schools to admit women into law and one of the first schools to admit African-Americans into law. It was a pioneer in those things. The school has been around for 105 years. If you walk across the street and walk into the entrance foyer, you will see a very long corridor of pictures of judges and senior public servants that have gone through our school. It is a very special school, a very family-like school. In fact, one of the predecessors in my position was

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\* Adapted from presentations delivered on November 18, 2004 at the Standard Club in Chicago, Illinois as part of a conference entitled *Copyright & Privacy: Collision or Coexistence?* and hosted by The John Marshall Law School Center for Intellectual Property Law. Please note that the statements made in this article are based upon a transcript of the aforementioned conference and are not necessarily verbatim. In addition, while efforts have been made to ensure accuracy, the nature of the transcription process is such that the statements made in this article are subject to errors and omissions.

<sup>1</sup> Howard P. Knopf, M.S., LL.M is Counsel to Macera & Jarzyna, LLP in Ottawa, Canada in the areas of copyright and trademark litigation. Prof. Knopf was recently Professor of Law, Director of the Center for Intellectual Property Law and Chair of the Intellectual Property Law and Information Technology and Privacy Law Group at The John Marshall Law School in Chicago, Illinois. Prof. Knopf was also recently an advisor to the Law Commission of Canada on security interests in intellectual property. Prof. Knopf is also a World Intellectual Property Organization (“WIPO”) domain name dispute-arbitration panelist. He is currently Chair of the Copyright Policy Committee of the National Intellectual Property Section of the Canadian Bar Association.

In 1993, Prof. Knopf was the founding Executive Director of the Canadian Intellectual Property Institute (“CIPI”) at the University of Ottawa. Prior to the establishment of CIPI, Prof. Knopf was a senior advisor to the Canadian Government on intellectual property and competition matters and was head of the Canadian delegation to numerous WIPO meetings relating to both copyright and industrial property. Prof. Knopf was instrumental in establishing and lecturing in a pioneer educational program on intellectual property law under the auspices of the National Judicial Institute for the Senior Canadian Judiciary; Prof. Knopf established a similar program for the lawyers in the Federal Department of Justice. Prof. Knopf was the Managing Editor for and a major contributor to a series of three leading reference texts on Canadian patent, trademark and copyright law. Prof. Knopf has served on the board of arts organizations in Toronto and Ottawa, and the Council of the Faculty of Music at the University of Toronto.

Prof. Knopf is a graduate of Osgoode Hall Law School (1978) and holds an LL.M. degree from the University of Ottawa (1993). In 1997, Prof. Knopf was called to the bar of Ontario to obtain a WIPO Arbitration Training Certificate. Prior to his legal career, Mr. Knopf was a professional clarinetist active as a soloist, chamber and recording musician.

<sup>2</sup> See <http://www.jmls.edu> (last visited Mar. 13, 2005).

commissioner of patents. He was a very illustrious speaker and is still very active on our advisory board in many ways. He sent his two sons to this school, which is a very common thing; father-son or father-daughter. All kinds of families go through this school. It is a very special place.

We have the 65th anniversary of our Intellectual Property Center coming up this year. Ours is one of the oldest intellectual property programs in the world. We are going to have a very big splash in our 65th year. We hope to see all of you in some way or another in some capacity for one or more of those special events.

Today's program is very timely, and I see that the world has done its best to accommodate our timing as well. The Motion Picture Association of America ("MPAA") kindly launched several dozen or several hundred law suits earlier in the week just in time for our conference.<sup>3</sup> I am pleased to see that. Congress is, as we speak, considering H.R. 2391,<sup>4</sup> which will render many of you in this room common criminals if it gets passed this afternoon. So, a lot of exciting things are happening in time for our conference. There are some changes in the program as a result of these events. Mitch Glazier is not able to join us because he is back in Washington, D.C. trying to get H.R. 2391 passed. We are going to play some musical chairs in terms of the program. Prof. Hansen will speak last on the first panel. He always goes on long anyway, so I thought I would make it official. He and Fred von Lohmann are going to switch places in the afternoon. Mr. von Lohmann will comment on the alternative compensation program and he will speak on the political panel at the end. Mr. Oppenheim is going to do double duty. He is going to take Mr. Glazier's place. Nobody can replace Mr. Glazier, but Mr. Oppenheim will speak for the Recording Industry Association of America ("RIAA") at the end of the day and will start us off this morning.

## II. MATTHEW J. OPPENHEIM

MR. OPPENHEIM:<sup>5</sup> I always like being first on a panel because it allows me to say what I want to say without having to respond to everything that has been said before

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<sup>3</sup> See, e.g., *Twentieth Century Fox Film Corp. v. Does 1–9*, No. 04CV02006 (D.D.C. filed Nov. 16, 2004); *New Line Prods., Inc. v. Does 1–18*, No. 04CV01578CAS (E.D. Mo. filed Nov. 16, 2004); *Twentieth Century Fox Film Corp. v. Does 1–12*, No. C04-4862 (N.D. Cal. filed Nov. 15, 2004); *Metro-Goldwyn-Mayer Pictures Inc. v. Does 1–10*, No. 04CV2005 (D.D.C. filed Nov. 15, 2004); *Universal City Studios Prods. LLLP v. Does 1–8*, No. 04CV3343 (N.D. Ga. filed Nov. 15, 2004); *Disney Enters., Inc. v. Does 1–19*, No. 04CV3344 (N.D. Ga. filed Nov. 15, 2004); *Paramount Pictures Corp. v. Does 1–19*, No. 04CV3345 (N.D. Ga. filed Nov. 15, 2004); *Universal City Studios Prods. LLLP v. Does 1–53*, No. 04CV9000 (S.D.N.Y. filed Nov. 15, 2004) [hereinafter MPAA Lawsuits]; see also *Colum. Pictures Indus., Inc. v. Does 1–10*, No. 04CV2697-T-17TBM (M.D. Fla. filed Dec. 14, 2004); *Twentieth Century Fox Film Corp. v. Does 1–12*, No. C04-4862 (N.D. Cal. filed Nov. 16, 2004) (granting defense motion to dismiss charges for all defendants except Doe 1 as improperly joined).

<sup>4</sup> H.R. 2391, 108th Cong., 2d Sess. (2004) (proposing amendments to 17 U.S.C. § 506 to treat copyright infringement as a crime committed by either willful infringement or knowing distribution and punishable by either incarceration or fines).

<sup>5</sup> Matthew J. Oppenheim is a partner in Jenner & Block's Washington, D.C. office. He is Co-Chair of the Firm's Entertainment and New Media Law Practice and a member of the Firm's Intellectual Property and Technology Law and Litigation Practices. Prior to joining Jenner & Block, Mr. Oppenheim was Senior Vice President, Business and Legal Affairs for the Recording Industry

me. So, I am going to take that luxury this morning and try to set a tone. I would like to start by reminding people that this is a conference that is titled 'copyright' and privacy, not just 'privacy.'

I have spent the better part of the last five years focusing on internet and copyright issues. In that respect, I think it is useful to think about what lies behind copyright because we talk about copyright, but we often forget what it is all about: it is about creativity; it is about expression; it is about people putting their emotions down on paper or film; it is about ideas being put into debate; and it is about society creating discourse. Copyright requires work and enormous effort. People spend their entire lifetimes sometimes creating a single work. They sweat to create it and, often for them, it is one of their greatest pains to create that thing which will later become

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Association of American ("RIAA"). The RIAA is an association in Washington, D.C. that represents the United States recording industry. The RIAA's members include BMG Music Group, EMI Recorded Music, Sony Music Entertainment, Universal Music Group and Warner Music Group.

During the six years that Mr. Oppenheim worked for the RIAA (1998–2004), he oversaw a wide range of legal, strategic and technology matters. Among his key responsibilities was to develop and implement the industry's response to internet piracy. In 1998, the RIAA brought the first internet copyright cases against music pirates who used file transfer protocol ("FTP") sites to distribute music online. Those cases confirmed the bedrock principle that the copyright laws applied on the internet in the same manner as they apply to physical media. Applying that principle, Mr. Oppenheim then became active as one of the lead litigators representing the record industry in the landmark "file sharing" cases against peer-to-peer ("P2P") networks such as Napster, Aimster, AudioGalaxy, Morpheus, Grokster and Kazaa.

Mr. Oppenheim has also been actively applying the copyright laws to individuals engaging in copyright infringement on the internet. He was one of the attorneys responsible for designing and implementing the record industry's current enforcement efforts against individual infringers. In that campaign, he was the in-house lawyer responsible for handling the *RIAA v. Verizon* case. In 2003, Mr. Oppenheim testified before the California Senate about the growing problem of copyright infringement on P2P networks and the impact it was having on the entertainment industry.

Outside of internet cases, Mr. Oppenheim was also critical in formulating the record industry's response to physical piracy. He led the industry in its CD manufacturing plant litigations against a host of large manufacturing companies, including: (1) Media Group (obtained a \$136 million judgment for willful infringement against the company and its president); (2) Cinram (negotiated a \$10.1 million settlement); (3) Pioneer Video Manufacturing (negotiated a \$9.1 million settlement); (4) Americ Disc (negotiated a \$9 million settlement); (5) Technicolor (negotiated a \$2.3 million settlement); and (6) KAO (negotiated a \$2.25 million settlement).

Mr. Oppenheim has also been actively involved in overseeing a nationwide litigation program against rogue retailers. The Retail Blitz program has successfully addressed the problem of pirated music being distributed out of small- and medium-size retailers. Also, on the litigation front, Mr. Oppenheim has coordinated the record industry's response to international piracy rings that appear in multiple jurisdictions. In one case, Mr. Oppenheim obtained a \$13.7 million judgment against Global Arts, Inc., which fraudulently sold music licenses.

Mr. Oppenheim was also active on non-litigation, non-piracy strategic issues facing the recording industry and acted as a spokesperson in the Secure Digital Music Initiative, a multi-industry effort that sought to develop an open framework for playing, storing and distributing digital music and helping to negotiate the standard for the new DVD-Audio format.

Before joining the RIAA in 1998, Mr. Oppenheim was an attorney with Proskauer Rose's Washington, D.C. office. While at Proskauer Rose, he represented book publishers in libel and defamation cases, represented large technology companies in trade secret disputes, defended directors and officers from regulatory and civil suits and represented the National Basketball Association and retailers from suits under the Americans with Disabilities Act. Mr. Oppenheim graduated from the University of Wisconsin in 1989 and Cornell Law School in 1993. He is admitted as a member of the Bars of Maryland and the District of Columbia.

either a piece of music, a movie, a picture, a book or even, these days, a game. These things that require all this effort create and define our culture. Sometimes we think the effort was for the better and sometimes for the worse, but that is how we define ourselves. And when we think about different eras in time, we think about works, copyrighted works, to help define the culture at that time.

It requires money to create copyrighted works. Sometimes individuals have savings; maybe retirement savings or maybe family savings that they can invest to create the work. Others, they go into debt to create it—they are the starving artists. Some commit their future earnings. Others develop partners or have the track record to entice investors. At the end of the day, the only thing they have left is this thing called intellectual property. Many would say intellectual property is different than other property. If you go and talk to those artists, they will tell you that the time, effort and investment that they put into creating that work of art, that piece of culture, required the same amount of investment as a carpenter who builds a chair or a table. Only they are going to be subject to rejection, criticism and ridicule for what they create, and a lucky few are subject to validation, adulation and stardom. Every artist goes in with a certain expectation: they hope and they seek reward. That is why they do it.

When you speak to a musician, a movie director, a painter or any other kind of artist, they will tell you they are prepared to lose their investment—their financial investment, their time investment, and their emotional investment—if their creative work fails in the marketplace. What they are not prepared to do is lose that investment when the creative work is succeeding in the marketplace. That is the key issue we are dealing with regarding copyright and the internet these days. The internet is new, relatively speaking. It is cool. It allows things to happen very quickly. It creates new communities in a way we did not understand previously. It is the people you chat with on a blog and it is the e-mails you send back and forth to the people you rarely see. It has great and enormous potential.

On the copyright front, the internet allows for great possibility; it allows people to sample copyrighted works; it allows people to disaggregate that which was previously aggregated; it makes things more portable; it decreases transaction costs; and it has the great ability to expose new people to new copyrighted works. And for that, the internet is a huge opportunity.

P2P, unfortunately, right now, is not realizing that opportunity. P2P, right now, is an environment where people who do not own copyrighted works download copyrighted works that they do not pay for, and they deny the copyright owner the just product of his labor. There is a great debate when a copyright defender gets up and calls it theft. Is it really theft? When I say it is piracy, there are other people who say it is not piracy. That is not the question.

It does not matter what you call it. The question is: is it wrong? And on that score, there is no question. It has resulted in massive losses. The record industry saw more than a thirty percent decline in CD shipments. Some would say, “Well, the music was just not popular.” Well, if it was not popular, why were songs being downloaded by the billions on the P2P networks? Some would say, “Well, the movie industry is doing great.” Yes. But when everyone has big internet pipes to their homes, let’s ask that question again and see where the movie industry is. Some say they had it coming because they improperly priced their products. Well, that does not mean that theft is the answer. Let the free market address that. As it is, we are

now seeing huge differentiation in pricing in the various copyrighted works markets. The impact is substantial. We are not talking about just major rock 'n' roll stars having to trade in their stretch Hummer® for a stretch Town Car. We are talking about tens of thousands of employees at any given company over the last couple of years being laid off. We are talking about musicians not being able to get partners and investors. We are talking about young musicians asking the question: "Should I go and take that accounting class or should I drop out of school and play in the band?" Their answer is "I better take that accounting class because music is not something where I necessarily am going to be able to make a living anymore." It is having an impact, a substantial impact.

So, there has been a three-prong response by much of the copyright community: first, education—getting the message out, telling people this is wrong; second creating legitimate markets; we *are* seeing it. Is it happening more slowly than some would like?—of course. It is probably happening slower than everyone would like. Anyone who uses Apple iTunes®, Musicmatch® or mp3.com and loves them says they want more. I think that is right, but it takes time. Third and finally, enforcement, which is what I will spend some time discussing in more detail here. The RIAA lawsuits, which are the focus of this panel, have been ongoing for over a year now. There have been over 7,500 suits filed, and the number is growing. It has been a consistent program nationwide, focused on the most egregious infringers. The MPAA just filed their lawsuits,<sup>6</sup> and they intend to continue to file them. As their trailers would say: "Stay tuned"; these suits will come to a theater near you soon.

So the "copy-left" community has responded to this user enforcement by saying that this is wrong: it restricts speech and it invades privacy. Let's examine the issue of whether or not this is really speech. Theoretically, one can well imagine speech on a P2P network. But, the reality is that it is not happening. One does not know to go onto a P2P system and search for Mr. Oppenheim's presentation on copyright and the internet. One does not know to go onto a P2P network to search for the punch line of a new political joke. P2P networks are an ineffective way of communicating speech. At the end of the day, these lawsuits are focused on the downloading and uploading of copyrighted works. And everyone in this room knows—I am certain—that infringement is never speech.

I have difficulty understanding why we are even discussing the issue of privacy. Millions of people go onto the same network and invite all of the other users on the network to come into their computer and take what they have. When I think of privacy in the sense of what we traditionally teach in law school as privacy, I think of one retreating to the confines of one's home and engaging in behavior that is behind closed doors. This is not such an instance. One has no expectation of privacy when one is on a network where millions of other people are invited into their computer and they are not anonymous. The internet service providers ("ISPs") are well aware of who these individuals are and who is engaging in this activity.

There is no privacy right when it comes to infringement. One cannot rob a bank with a mask on, run out of the bank, and when the guard catches them and goes to tear off the ski mask say, "No, no, I have a right of privacy, you cannot take that mask off of me!" When you engage in infringement on a P2P network and you are

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<sup>6</sup> See generally MPAA Lawsuits, *supra* note 3.

caught doing it, you cannot go to a court and say, “No, I have a right to keep private my identity!” No; what you have is a right to be held responsible for your actions.

The truth be told, there is not a court in the country that has said that when individuals copy copyrighted works that they do not own, that it is legal. Every court that has spoken to this issue has said that it is wrong. And even those in the copy-left community who have been honest on this issue have agreed that it is infringement and that it is wrong.

So, what is the impact? The impact of the enforcement effort has been very positive. There are significantly less users on these networks than anticipated. There is generally an increased recognition of copyright in the community.

Before the RIAA began their enforcement efforts, they polled individuals to ask whether or not they knew that engaging in downloading of copyrighted works on a P2P network was wrong, and they asked whether or not they thought it should be wrong. Unfortunately, the majority of people did not know that it was wrong and did not think it should be wrong.

Six months after the launch of the enforcement effort by the RIAA, the results of that poll flip-flopped dramatically. More than three quarters of the individuals asked said “yes, it is wrong” and “it should be wrong.” As a result of enforcement efforts, what we are seeing is a dramatically improving marketplace. So, the ultimate question is, should we be protecting this conduct that is a species of privacy under the argument of speech, or should we be preventing this conduct? I suspect that, after this presentation, everyone knows where I stand on that issue. We should be protecting innovation, protecting creativity, protecting culture and ultimately protecting copyrights. Thank you.

### III. SARAH B. DEUTSCH

MS. DEUTSCH:<sup>7</sup> The title of this conference is *Copyright & Privacy – Collision or Coexistence?*—I think this is a great first panel because the *RIAA v. Verizon* case is actually an excellent case study of both collision and coexistence.<sup>8</sup> Of course, we had a lengthy collision through two years of litigation all the way to the Supreme Court.<sup>9</sup> As Mr. Oppenheim said, it involved work, sweat and pain to get to the coexistence

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<sup>7</sup> Sarah B. Deutsch is Vice President and Associate General Counsel for Verizon Communications. Ms. Deutsch’s practice involves legal issues in the area of global internet policy, including liability, privacy, intellectual property policy and internet jurisdiction. Ms. Deutsch currently represents Verizon on a host of domestic and international internet issues ranging from Digital Rights Management (“DRM”), the *RIAA v. Verizon* litigation, Europe’s IPR Enforcement Directive, ICANN and legal issues arising from other internet-related legislation and litigation.

Ms. Deutsch served as Private Sector Advisor to the U.S. Delegation to the WIPO 1996 Conference on the WIPO Copyright Treaties. Ms. Deutsch was one of five negotiators for the U.S. telecommunications industry in the negotiations that resulted in the passage of the Digital Millennium Copyright Act (“DMCA”).

Ms. Deutsch was formerly Vice President & Chief Intellectual Property Counsel for Bell Atlantic (now Verizon Communications), managing a large intellectual property practice, including the worldwide registration and enforcement of patents, trademarks and copyrights.

<sup>8</sup> *RIAA v. Verizon Internet Servs.*, 351 F.3d 1229 (D.C. Cir. 2003), *cert. denied*, 125 S. Ct. 347 (2004).

<sup>9</sup> *Id.*

part,<sup>10</sup> where I think we are today. However, to reach that tentative coexistence, the ISPs and copyright owners had to take an unpleasant journey into the depths of § 512(h) of the Digital Millennium Copyright Act (“DMCA”).<sup>11</sup> That case was all about the collision between privacy and copyright.

Only two short summers ago, Verizon and a select few other ISPs received a call from the RIAA giving us a heads-up that we would be receiving a brand new type of subpoena seeking the identity of just one of our subscribers who was allegedly using P2P software and allegedly infringing their members’ copyrights. We fought the case, not because we are anti copyright, condone infringement or do not believe that the RIAA does not have property rights or the right to enforce those rights; rather, we fought the case because we disputed the manner in which the RIAA was enforcing those rights. The case, to us, was not just about the issue of unauthorized uses of P2P software, but raised important privacy, safety and due-process implications related to how one can obtain other peoples’ identities. The case went to the heart of how society protects conduit communications—whether you are surfing the internet, visiting a website or sending an e-mail with an attachment. The case had huge implications (and illustrated potential abuses) that raised privacy concerns, due-process concerns and safety concerns.

Just to tell you about some of those issues, the RIAA was arguing in the case that the § 512(h)-subpoena power granted copyright holders, their bounty hunters or their agents the right to discover the name, address and telephone number of any internet user in this country without first filing a lawsuit and without having any review by a federal judge.<sup>12</sup> All one needed to do was assert a good faith belief that *someone* was infringing their copyright and they could obtain personal, identifying information about anyone using the internet.<sup>13</sup> There was no lawsuit required and no judge involved—not even a magistrate.<sup>14</sup> A person could simply pay a thirty-five-dollar fee, fill out a one-page form with the date and time that someone was online along with their internet protocol (“IP”) address, and the clerk at the court’s office would rubber-stamp the subpoena in a ministerial fashion.<sup>15</sup> The privacy concern was this: your IP address is visible every time you use the internet. If you log on to e-mail, you visit a chat room or a webpage, your IP address is visible and readily available. The service provider holds the key to link this IP address to a subscriber’s identity. So, filling out this form, in our view, created a powerful new tool to link particular content on the internet (and know what the user was doing on the internet) with users’ identities. I would also add that, although Mr. Oppenheim noted that ISPs have the key to the identity,<sup>16</sup> which is correct, we do not know what the user is doing on their home computer. We also should not be engaged in such monitoring. The DMCA, Electronic Communications Privacy Act and other privacy laws are quite clear that ISPs should not and must not be monitoring private communications. The § 512(h)-subpoena power could have been used not only by

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<sup>10</sup> See *supra* Part II.

<sup>11</sup> *RIAA*, 351 F.3d at 1232; see also Digital Millennium Copyright Act § 202, 17 U.S.C. § 512(h) (2000).

<sup>12</sup> *RIAA*, 351 F.3d at 1236.

<sup>13</sup> See 17 U.S.C. § 512(h).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See *supra* Part II.

large copyright owners, but by anyone claiming to own a copyright.<sup>17</sup> Since everything is copyrightable, it could have applied to virtually everyone.

So, this subpoena power was actually used and abused during a two-year period by parties far less responsible than the recording industry. For example, there were groups like the National Coalition Against Domestic Violence that were very worried that the victims of spousal abuse who were hiding in their shelters for women and children would have an abusive spouse track them down through an IP address, because many of these shelters offered free internet access. There were groups like WiredSafety that counseled people on protecting their safety online. There were victims of stalkers and pedophiles who were worried, too.

SBC was forced to file suit in California both against the RIAA and a copyright owner called Titan Media Group.<sup>18</sup> Titan is a purveyor of hard-core pornography. Titan actually sent SBC a § 512(h) subpoena seeking the identity of nearly sixty internet users who they claimed were infringing their copyrights in pornographic videos by exchanging them on P2P systems.<sup>19</sup> Titan actually imitated the RIAA amnesty program and announced its own amnesty program.<sup>20</sup> The deal was this: if the user wanted amnesty, it would have to give its identity to Titan and actually agree to purchase a copy of the hard-core pornographic material. Otherwise, Titan threatened to use the subpoena process to expose their identity.<sup>21</sup> We are still receiving threats and lots of notices today from Titan and other pornographic providers who are using and abusing all of the powers of the copyright law. Also, as a result of this case, everyone heard about these bounty hunter enterprises that have emerged which search the internet based on economic incentives. They use automatic robots called ‘bots’ or ‘spiders’ that operate much like the spiders in the movie *Minority Report*. They are crawling all over the internet matching file names to the names of copyrighted works. Many of you have heard about some of the mistakes that have occurred both under the DMCA and the § 512(h) process. One involved a letter from Warner Brothers’s copyright bounty hunter to Unet, claiming that a customer’s account should be terminated because they were illegally downloading the Harry Potter® movie. What was attached was a one-kilobyte file entitled “Harry Potter Book Report.rtf.” This was clearly a child’s book report.<sup>22</sup> Also, in another case, the recording industry sent a notice to Penn State claiming that they were infringing the artist, Usher’s works. The “infringer” turned out to be Professor Usher, not the pop star.<sup>23</sup> The RIAA nearly took down Penn State’s astronomy server during finals week. Many of these errors and mistakes are documented on [chillingeffects.org](http://chillingeffects.org).<sup>24</sup> I would recommend that site for examples of other common abuses regularly occurring under the DMCA.

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<sup>17</sup> 17 U.S.C. § 512(h)(1) (allowing *any* copyright owner to petition a court for a subpoena).

<sup>18</sup> *Pac. Bell Internet Servs. v. RIAA*, No. C03-3560SI, 2003 U.S. Dist. LEXIS 21659, at \*1 (N.D. Cal. Nov. 26, 2003).

<sup>19</sup> *Id.* at \*4-5.

<sup>20</sup> Tom Musbach, *File Sharing Crackdown Reaches Gay Porn Industry*, at <http://uk.gay.com/printit/headlines/7091> (Nov. 8, 2004).

<sup>21</sup> *Id.*

<sup>22</sup> *See RIAA v. Verizon Internet Servs.*, 257 F. Supp. 2d 244, 264 n.23 (D.D.C. 2003).

<sup>23</sup> *See Declan McCullagh, RIAA Apologizes for Threatening Letter*, NEWS.COM, at [http://news.com.com/2100-1025\\_3-1001095.html](http://news.com.com/2100-1025_3-1001095.html) (May 12, 2003).

<sup>24</sup> *See* <http://www.chillingeffects.org> (last visited Mar. 13, 2005).

The RIAA's interpretation of § 512(h) actually threatened to unravel—from a privacy point of view—a carefully crafted safety net of privacy laws that were enacted for the protection of the public. In the context of video rentals or cable-television viewing habits or even law enforcement, copyright owners were, in the RIAA's view, granted more power than people given protection to gain access to confidential data associated with confidential communications.

For example, there are many laws protecting privacy in the context of intercepting electronic communications, employing pen registers, trap-and-trace devices, the Foreign Intelligence Surveillance Act,<sup>25</sup> the Video Privacy Protection Act<sup>26</sup> and the Cable Protection Act.<sup>27</sup> It was amazing how many more privacy protections were built into those laws. For example, unlike the powers the RIAA was seeking, even law enforcement cannot easily find out what video you rented from Blockbuster®. The disclosure of these video rental records is available only pursuant to a court order, not a form subpoena. However, in the § 512(h) process that the RIAA was seeking, anyone, either a copyright owner or an agent, could have easily discovered your identity. The § 512(h) process the RIAA was seeking only required someone to fill out a one-page form, automatically stamped by a clerk. In contrast, in the video context, the court has to find that there is a compelling need for the information which cannot be accommodated by other means. There is no such judicial balancing with the § 512(h) process. There has to be notice to the customer whose video records are sought. There is no such notice requirement in the § 512(h) process.<sup>28</sup> And the court must impose appropriate safeguards against unauthorized disclosure of the information; and again, with the § 512(h) process, there are no such safeguards. That is just one example of all of the checks and balances that we are missing here.

As a result of Verizon's victory in the Court of Appeals and the Supreme Court's recent denial of certiorari,<sup>29</sup> the RIAA has been forced—and I think wisely—to shift tactics and file *John Doe* suits.<sup>30</sup> And you have heard they have filed over 7,500 of these suits to obtain identities. The MPAA is doing the same.<sup>31</sup> The RIAA has

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<sup>25</sup> Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801–1811, 1821–1829, 1841–1846, 1861–1863 (2000).

<sup>26</sup> 18 U.S.C. § 2710 (2000).

<sup>27</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460; *see also* 47 U.S.C. § 534 (2000).

<sup>28</sup> 17 U.S.C. § 512(h) (2000).

<sup>29</sup> *RIAA v. Verizon Internet Servs.*, 351 F.3d 1229 (D.C. Cir. 2003), *cert. denied*, 125 S. Ct. 347 (2004).

<sup>30</sup> *See generally id.* (holding that § 512(h) does not authorize the issuance of a subpoena to an ISP acting solely as a conduit for communications containing information determined by others). The result of the *Verizon* holding is that the RIAA can only subpoena the ISPs for the identity of the user as part of discovery after filing a lawsuit in federal court. *See, e.g.*, *Elektra Entm't Group Inc. v. Does 1–6*, No. 04-1241, 2004 U.S. Dist. LEXIS 22673 (E.D. Pa. Oct. 12, 2004) (granting discovery); *Sony Music Entm't Inc. v. Does 1–40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004) (denying defendants' motions to quash subpoena and request by amici curiae that plaintiffs be ordered to return subpoenaed information); *BMG Music v. Does 1–203*, No. 04-650, 2004 U.S. Dist. LEXIS 8457 (E.D. Pa. Apr. 2, 2004) (upholding prior order that 202 defendants were improperly joined and refusing plaintiffs request that the propriety of each defendant's joinder be considered only after discovery had taken place).

<sup>31</sup> *See* MPAA Lawsuits, *supra* note 3.

mechanized the process, and they also claim it is successful. It may not be the perfect solution for everyone, and it has some problems, but, in my view, it allows for that delicate coexistence of privacy and copyright. And again, the *John Doe* process is much more protective from our point of view than the form-subpoena process. The *John Doe* process requires that the copyright owner file a claim in federal court, investigate the facts and have a factual basis for the infringement claims they are asserting. A judge or magistrate reviews the *John Doe* suits, and the copyright owner must prove it owns a *federal* copyright registration (as opposed to § 512(h), in which you merely state that you—or you through your agent or bounty hunter—are the owner of *any* copyright, federally registered or not). Importantly, copyright owners are subject to sanctions under Rule 11 if they file a frivolous claim.<sup>32</sup> The *John Doe* process also provides for notice to the subscriber, the opportunity for the subscriber to be heard and the opportunity to raise defenses. The judicial process clearly deters abuses. Again, with the old RIAA form-subpoena process, there was no lawsuit and there was no judge. There was only a statement of a good-faith belief that some use was unauthorized;<sup>33</sup> it applied to all copyrights, not just those under federal protection. The agents and bounty hunters could use it. There was no protection under the DMCA if someone abused this subpoena process. It only applied when an ISP took down material. There were certain penalties for abuses. There was no notice, no opportunity for a subscriber to try to quash a subpoena, and no opportunity to raise defenses. So, in our view, the collective lack of judicial oversight and protections raised the possibility for abuses.

I have just one final example of how well this new *John Doe* process is working. A couple weeks ago, a judge in Pennsylvania issued an order that related to several *John Doe* defendants in the RIAA suit against the University of Pennsylvania.<sup>34</sup> The judge gave an excellent order that allows the recording industry to proceed with discovery and says it can only use the information to protect its rights.<sup>35</sup> Most importantly, the order warns and educates subscribers on what to do as a result of the suit.<sup>36</sup> For instance, the order also provides notice and information on how to challenge a subpoena.<sup>37</sup> It also tells the defendants that, if they do not live within the jurisdiction of Pennsylvania, they can seek to remove themselves from the suit by moving to dismiss.<sup>38</sup> It also tells them how they can settle with the RIAA—yet still protect their identity through anonymity—and it instructs defendants about how best to seek counsel.<sup>39</sup> Verizon provides much of this information for its subscribers today, but not every ISP follows these procedures. This one order is an excellent example of how the *John Doe* process is working to preserve that delicate coexistence of copyright and privacy. Thank You.

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<sup>32</sup> FED. R. CIV. P. 11.

<sup>33</sup> See 17 U.S.C. § 512(c)(3)(A)(v) (2000) (requiring only a statement of good faith belief that the activity is without the copyright owner's permission in order for a subpoena to be issued).

<sup>34</sup> *Elektra*, 2004 U.S. Dist. LEXIS 22673.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

## IV. RODERICK G. DORMAN

MR. DORMAN:<sup>40</sup> I was asked to sign a disclaimer as we arrived, and I want everyone to be clear that the opinions expressed by me today are my own and not the opinions of my law firm or any client that I represent.

I have come to talk about the important issues of this conference with a unique perspective. I did not think it would be useful for me to sit here as an advocate. I am the lead trial lawyer for Kazaa in connection with all of these post-*Napster* copyright and antitrust wars surrounding the recording industry and the movie industry. I have also been involved as Sharman Network's counsel (owner of the Kazaa Media Desktop) in related litigation in the Netherlands, tangentially in Canada and in Australia.<sup>41</sup>

Prior to being a lawyer, I was a public-policy undergraduate student at the Woodrow Wilson School of Public and International Affairs at Princeton University. Issues of public policy and how public policies are fashioned are of interest to me. In the next ten or fifteen minutes, I wish to share my observations and concerns regarding the manner in which new rules of secondary copyright infringement are being developed. The best policy of the type that this symposium is addressing—and that the Supreme Court is looking at in the context of the *Grokster* petition<sup>42</sup> and that Congress is examining in connection with the so-called 'Induce Act'<sup>43</sup>—is developed through very careful, thorough and intellectually honest review of all of

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<sup>40</sup> Roderick G. Dorman is a partner at Hennigan, Bennett & Dorman LLP, a litigation and bankruptcy boutique firm of approximately fifty lawyers. Mr. Dorman's practice concentrates on technology litigation. Mr. Dorman has extensive patent trial and appellate experience, having been lead counsel in over one hundred patent cases in the Federal District Courts and twelve Federal Circuit appeals. While Mr. Dorman has handled litigation matters in all major technical disciplines, his most recent Federal District Court cases have involved computer, electronic display, P2P file sharing software, hard-disk-drive circuitry and digital-media transmission technology over the internet.

Prior to joining Hennigan, Bennett & Dorman, Mr. Dorman was partner in the Los Angeles office of O'Melveny & Myers LLP, where he co-chaired the firm's worldwide Patent and Technology Practice Group. Prior to joining O'Melveny & Myers, Mr. Dorman practiced for many years as an attorney at the patent firm of Christie, Parker & Hale, LLP. Prior to that time, Mr. Dorman was the principal of a commercial litigation boutique firm, a trial attorney with the United States Department of Justice, Antitrust Division, and an in-house trial attorney with Conoco, Inc.

Mr. Dorman currently represents a number of Fortune 500 companies in connection with technology and patent disputes; such companies include NEC, Seagate Technology and Avery Dennison Corporation. Mr. Dorman is lead counsel for Sharman Networks, Inc., owner of Kazaa, in the post-*Napster* copyright infringement litigation involving the music and movie industries.

Mr. Dorman earned his B.A., *cum laude* from Princeton University in 1973, and his J.D. from the University of Miami in 1976. Mr. Dorman is active in Bar activities; having been a member of the Executive Committee for six years, Mr. Dorman is the Chair of the Litigation Section of the Los Angeles County Bar for 2004–2005.

<sup>41</sup> See *Vereniging Buma, Stichting Stemra/KaZaA BV*, HR 19 Dec. 2003, [2004] E.C.D.R. 16 (Neth.); *BMG Can. Inc. v. Doe*, [2004] 239 D.L.R. (4th) 726; *Universal Music Austl. P.T.Y. Ltd. v. Sharman License Holdings, Ltd.* (2000) 59 I.P.R. 299.

<sup>42</sup> *MGM Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 686 (Dec. 10, 2004). The Supreme Court granted certiorari in the *Grokster* case less than one month after Mr. Dorman delivered these remarks. See *MGM Studios, Inc., v. Grokster, Ltd.*, 125 S. Ct. 686 (Dec. 10, 2004). The oral arguments before the Supreme Court are scheduled for March 29, 2005.

<sup>43</sup> *Inducing Infringement of Copyright Act of 2004*, S. 2560, 180th Cong., 2d Sess. (2004).

the constituent issues involved. For the purpose of our inquiry here, these issues are principally copyright and privacy, but also technological innovation and change.

I personally fear for the future from a policy and legislative perspective. The reason I fear for the future is that the forces at work have combined, in my judgment, to form a veritable perfect storm for bad policy development and implementation. In the few minutes remaining, I want to talk about the three factors that, as an observer, I see contributing to that unhappy prognostication.

First, the spokespersons leading the fight for copyright protection in the digital world are the major record and motion picture companies. Like the narrator, Nick Caraway, in F. Scott Fitzgerald's novel, *The Great Gatsby*, they are unreliable reporters.

One would hope from a policy perspective that the RIAA and the MPAA would be champions of developing policy and rules by which copyright content can be most efficiently distributed digitally, worldwide, while protecting the legitimate rights and concerns of the copyright holders of whom Mr. Oppenheim eloquently spoke a bit ago.<sup>44</sup> That is not their agenda and has little to do with their mission. Their primary interest is in preserving their legacy businesses, which are their brick-and-mortar businesses of pressing and selling CDs and DVDs. They are not much interested in digital distribution; it is something they have to deal with, but they wish it was not here. Sadly, rather than promote digital distribution and, from a policy perspective, creatively work to capture the infinitely scalable economies of P2P technology, they want to frustrate, forestall and entirely retard that new paradigm.

So, the first of the three problems that I see in effective policy development in this area is that we have a policy on important issues being overwhelmingly shaped by an industry that is not committed and, indeed, is antithetical to the appropriate policy ends.

The second factor, in my judgment, that contributes to this process being a policy disaster is the manner in which the movie and record industries are shaping policy. Ladies and gentlemen, these industries are scared to death. I think they have reason to be scared, because whenever there is a technological change that causes the fundamental economics of a legacy business to be undermined, the holders of that legacy business are always afraid. But the fear of losing their legacy business has caused these industries, in my judgment, to lose any modicum of common sense and critical evaluation in connection with their own conduct as well as shaping and implementing future policy.

These industries do not think, so much as emote. They have launched a religious war—their own *Jihad*—where the ends justify the means. It is really quite troubling because the very companies that claim to be hurt by piracy and people not respecting the intellectual property rights of others are engaging in conduct that violates the copyrights of others. Allegations exist that violations of end-user-license agreements for P2P software are occurring by these companies and their agents to engage in spoofing and creating dummy files. There are allegations regarding the making of unauthorized copies of these protected P2P software programs in violation of the federal copyright and patent laws in order to effectuate these results. The

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<sup>44</sup> See *supra* Part II.

movie and record companies are suing their own customers, and they are spying into individuals' computers to learn the content of shared files.

There is, in my judgment, a lack of intellectual integrity and honesty concerning certain legal filings and factual descriptions in those legal filings in the ongoing litigation. I think we can agree that there is a fair debate as to whether or not it should be lawful for a company that distributes content-agnostic P2P software to receive revenue from advertisers based upon use of that software which is overwhelmingly misused for infringing purposes by consumers. We can debate whether or not there should be a rule of law one way or the other as to the distribution of a software product violating the copyright laws. But, what I find troubling is that, in the context of the legal briefs, for example, we still cannot agree as to non-controversial facts.

I am still fighting with the RIAA over whether there exist substantial non-infringing uses of P2P software. The district court in the *Grokster* case found the fact that there are substantial non-infringing uses to the technology to be established and without substantial controversy. Yet, the record and motion picture companies still will not agree to that fact. They will not agree to the fact that the software provided by my client, for example, is a product and not a service. Of course, P2P software loaded on a computer that utilizes the internet operates as a "system," but the provider of the P2P software does not "operate a service" merely by distributing software. Even so, we are still arguing about—and ought not to be arguing about—the factual underpinnings of the debate. So, the second concern that I have with respect to this debate is that public policy results are frustrated when we cannot be fair and honest with respect to the underlying facts that form the foundation of the policy debate in the first place.

Next, I am troubled that the complex public policy issues surrounding the competing interests of technological innovation, privacy and the rights of copyright holders are being addressed and may be determined by the courts and not Congress. The motion-picture and record-company Petitioners in the *Grokster* case before the Supreme Court seek to alter the *Sony v. Betamax* rule.<sup>45</sup> If that is to be done, it is the job of Congress not the courts. Adjudicative information is inadequate to determine proper policy involving new technologies and to assess unforeseen consequences of adjudicating decisions. Further, from a policy standpoint, information presented to courts during litigation is partial in "the dual sense it is both incomplete and biased."<sup>46</sup> Such information is incomplete and fragmented because the judicial focus tends to be delineated by the issues that the litigants choose to raise. Since judges must resolve concrete issues and reach decisions one case at a time, "they cannot devise a coherent program or policy."<sup>47</sup>

Finally, sound comprehensive policies and solutions in this area, I fear, are doomed to fail because the solutions proposed are makeshift and local, while the

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<sup>45</sup> See *Sony Corp. of Am. V. Universal City Studios, Inc.*, 464 U.S. 417, 454–55 (1984) (holding time-shifting in one's home to be fair use).

<sup>46</sup> U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION, OTA-CIT-302, at 279 (U.S. Gov't Printing Office, Apr. 1986), available at [http://www.wws.princeton.edu/~ota/disk2/1986/8610\\_n.html](http://www.wws.princeton.edu/~ota/disk2/1986/8610_n.html) (last visited Mar. 13, 2005).

<sup>47</sup> *Id.* at 280.

conduct involved is global. In Australia, Margaret Mitchell's 1936 novel *Gone With The Wind* was free of copyright restrictions in 1999, fifty years after Mitchell's death.<sup>48</sup> In the United States, with the extension of the copyright law, *Gone With The Wind* will not enter the public domain until 2031.<sup>49</sup> Now, with existing technology, we can access works anywhere on earth at any time. It is difficult to fashion and implement a holistic copyright policy when we are dealing with disparate rules that globally are quite extraordinary. The Netherlands Supreme Court has adjudged the distribution of Kazaa's software legal.<sup>50</sup> The RIAA is asking the United States Supreme Court to accept certiorari and find otherwise.<sup>51</sup> In two weeks, my client that distributes the Kazaa Media Desktop, Sharman Networks, begins trial in Sydney Australia.<sup>52</sup> We will be defending a copyright infringement action based on Australian law for merely distributing content-agnostic P2P software over the internet.<sup>53</sup> Now, the Australian version of the RIAA in that case contends that the mere distribution of that software constitutes copyright infringement<sup>54</sup> by violating the Australian copyright statute, which holds liable a person who "authorizes" infringement.<sup>55</sup>

So, the last factor is that it will be impossible to develop a comprehensive global solution to effect sound public policy in this area. I am really disappointed that the level of the public policy debate and discourse is not richer and more intellectually honest. Thank you.

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<sup>48</sup> See generally Victoria Shannon, *A battle over copyright infringement on the internet heats up. No, not over music. Over the classic 'Gone With the Wind'*, N.Y. TIMES, Nov. 8, 2004, at C4 (commenting that the removal of a free version of the book from the internet after pressure by the late author's estate was a good example of the effect of the inconsistency of the copyright laws between national boundaries).

<sup>49</sup> *Id.* (due to an extension of the copyright law, the expiration of the copyright to the work does not occur until ninety-five years after the date on which the work was published).

<sup>50</sup> Vereniging Buma, Stichting Stemra/KaZaA BV, HR 19 Dec. 2003, [2004] E.C.D.R. 16 (Neth.).

<sup>51</sup> MGM Studios, Inc. v. Grokster, Ltd., 380 F.3d 1154 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 686 (Dec. 10, 2004).

<sup>52</sup> See, e.g., Universal Music Austl. P.T.Y. Ltd. v. Sharman License Holdings, Ltd. (2000) 59 I.P.R. 299 (dismissing respondents' application for the court to set aside *Anton Piller* orders).

<sup>53</sup> See *id.* ¶¶ 5, 10.

<sup>54</sup> See *id.*

<sup>55</sup> Copyright Act, 1968, Pt. III, Div. 2, § 36(1) (Austl.) ("Subject to this Act, the copyright in a literary, dramatic, musical or artistic work is infringed by a person who, not being the owner of the copyright, and without the license of the owner of the copyright, does in Australia, or *authorizes* the doing in Australia of, any act comprised in the copyright." (emphasis added)).

## V. JOHN G. PALFREY

PROF. PALFREY:<sup>56</sup> I am the executive director of the Berkman Center at the Harvard Law School. I am delighted to be here and grateful to be invited and to be able to respond to what some of you who have been in the trenches have been working on so extensively. At the Berkman Center, our mission in this process has been to seek to be an honest broker, to some extent, in a debate in which it is hard to hear above the din of lawsuits and heated rhetoric. It is sort of an odd posture to be in, in some cases, and it is hard, of course, to manage any form of objectivity—but at least that is the attempt.

Our interest, in some respects, in the topic this morning and the lawsuits that have been filed—the 7,500 or so lawsuits filed by the recording industry against individual file uploaders and then, of course, the MPAA round of suits filed yesterday, including twenty-three in the Federal District Court for the Northern District of Illinois, here in Chicago<sup>57</sup>—has been to think about it on two levels. One, of course, is the public policy level and the extent to which, on a macro level, this affects the debate, but also on a micro level. We need to look at the impacts of these lawsuits on the individuals who are involved and, in the marginal sense, whether or what harm is done.

It is hard to ask the question of whether there is inherently something bad about these lawsuits. On the one hand, there is some sort of a conflict between the ability and effort to enforce copyrights through lawsuits and the individual privacy interests

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<sup>56</sup> John G. Palfrey is Executive Director of the Berkman Center at the Harvard Law School. Prof. Palfrey is responsible for working with the faculty directors to set and carry out the Center's ambitions, public-spirited agenda and overseeing the work of its team of staff, fellows and students. As Lecturer on Law at Harvard Law School, Prof. Palfrey teaches Cyberlaw and the Global Economy, Digital Democracy and Internet Law Colloquium. Prof. Palfrey also teaches Internet & Society: the Technologies and Policies of Control at the Harvard Extension School. In the Spring of 2003, Prof. Palfrey co-lead a Study Group at the Institute of Politics at the Kennedy School of Government.

A long-time affiliate of the Berkman Center, Prof. Palfrey comes to the Berkman Center from the law firm Ropes & Gray, where he works on intellectual property, internet law and private equity transactions. Prof. Palfrey is a co-founder and a former officer of a venture-backed technology company. Prof. Palfrey also served as a Special Assistant at the U.S. Environmental Protection Agency during the Clinton administration and he serves on the Board of Directors of the Charles River Watershed Association. While attending Harvard Law School, Prof. Palfrey was a Teaching Fellow in Internet Law and served as an editor of the Harvard Environmental Law Review.

Prof. Palfrey's research interests include the internet and democracy, intellectual property and technology law as it relates to commercial transactions. Prof. Palfrey's recent work includes: *The End of the Experiment: How ICANN's Foray into Global Internet Democracy Failed*, 17 HARV. J. L. & TECH. 409 (2004); *The Accountable Net*, 9 VA. J.L. & TECH. 9 (2004); *Public Participation in ICANN: The Digital Media Project and The Open Net Initiative*.

Prof. Palfrey's recent travels have taken him to Geneva for the ITU's Workshop on Net Governance; the Aspen Institute's Internet Policy Project; MIT for the Global ICT Education Program Workshop; Yale Law School for a meeting of the Information Society Project to talk about the Digital Media crisis; and the Oxford Internet Institute.

Prof. Palfrey graduated from Harvard College, the University of Cambridge and Harvard Law School. Prof. Palfrey's awards include the Rotary Foundation Ambassadorial Scholar to the University of Cambridge and the U.S. EPA Gold Medal (highest national award). Prof. Palfrey is admitted to the New York and Massachusetts Bars.

<sup>57</sup> See MPAA Lawsuits, *supra* note 3.

or rights of the people against whom the lawsuits are filed. There is no question that conflict exists in the first instance. I think the question is how do you balance the various harms and whether or not, in the marginal case, that lawsuit ought to be filed?

I think a few things are plain. At least under United States law, it is pretty clear that most of the acts of the people who are on the other side of these lawsuits, in fact, are against United States law. I think we may hear from Dr. Geist that this is somewhat to the contrary in other jurisdictions.<sup>58</sup> But, in most cases, the people who have been accused have, in fact, done something that is against the law. I think that is relatively plain—and most of the judges' findings and courts where these have been filed reflect that fact.

Second, to be clear, I do not think that, at this point in the history of this process, many of us have all that much sympathy for people who, in fact, do—for whatever reason—try to make available, with some intent, huge amounts of copyrighted files for other people by file sharing. There may be some disagreement in the room on that score, but just for this purpose, pause at that. I think the question has more to do with the emphasis. Where do we go from here? What are the tactics that we use in order to emerge from this crisis? Is the right tactic to file more lawsuits against the software providers and the individuals? Or is the right tactic to focus on some of the other aspects of the strategy that might help us emerge from this crisis such that we are actually, genuinely focused on innovation and taking advantage of the creative opportunities involved with this new technology?

So, to further the context here, the way in which the Berkman Center got involved most directly in these lawsuits was in response to an inquiry from a judge in this matter. Of the 7,500 lawsuits, one of the first rounds—one of the first volleys of lawsuits—was filed in the Federal District Court in Massachusetts.<sup>59</sup> Our experience there, I think, is in a tiny sense instructive on this question of public policy and privacy. The story of the amicus brief that we filed in that case is somewhat curious.<sup>60</sup> In talking to the federal judge, a woman named Nancy Gertner, it appeared that most of these lawsuits do not have a lawyer on the other side. This may not surprise you all that much. Of the fifty or so people accused of uploading music files, very few of them had counsel of any sort; most were *pro se*; most had no idea about the law of copyright. This may be either a good or a bad thing and there may be educational responses to it. However, what was plain was that this was an unfair fight. So, just as Mr. Oppenheim suggests that the infringements are not victimless and that there are record companies and artists affected by it,<sup>61</sup> neither are these lawsuits victimless; there are people on the other side of these lawsuits who are scared and who do not have counsel.

The effort that we undertook was one of trying to be truly a friend of the court, which is a tricky posture. We tried to introduce the literal questions of fact and law that ought to be engaged by the court. The reason we took this perspective was that, when the judge asked the 'counsel' to file counterclaims in this matter, she got a

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<sup>58</sup> See *infra* Part VI.

<sup>59</sup> Capitol Records, Inc. v. Alaujan, No. 1:03-CV-11661-NG (D. Mass. filed June 2, 2004).

<sup>60</sup> Brief of Amicus Curiae Berkman Center for Internet & Society at Harvard Law School, Capitol Records, Inc. v. Alaujan, No. 1:03-CV-11661-NG (D. Mass. filed June 2, 2004).

<sup>61</sup> See *supra* Part II.

smattering of counterclaims, each of which she had to dismiss. They were filed by real estate lawyers who did closings on the South Shore or people who were friends of the people who were accused in these lawsuits. So, I think that it is important to consider the potential privacy impacts in each of these lawsuits, particularly in an environment in which it is not exactly a fair fight.

There are graduates of this fine law school and others on the one side of the dispute and people who do not ordinarily defend copyright matters on the other. At a minimum, of course, in order to bring the lawsuit, there has to be some access to information about activities on a file-sharing network, linked to the off-line identity of someone who actually was involved in infringement. On a very simple level that might be the extent of the invasion of privacy. That invasion of privacy may be something that we are completely willing to live with in order to restore, in some sense, order. I think of the maximum privacy implications that one of the 7,500 lawsuits has against someone who may or may not have been responsible for illegal file sharing.

Imagine a situation in which the full force of the law—full-fledged discovery—is used to look into the computer-related activities of someone who may or may not have been involved in file sharing and who is just defending himself. Now, it is an interesting question. Ms. Deutsch makes the point that it is better to go through full fledged discovery—or at least to invoke the full process of the law—in order to get to the facts of the case, rather than doing it through the short-circuited process that brought them to the Supreme Court.<sup>62</sup> This may be a very good point: in fact, it is hard to imagine something worse than a short-circuited process that has no due process associated with it. It is interesting what the effects are of full-fledged discovery on someone who does not have a lawyer—much less someone who does not understand the implications of the law.

The other aspect that I wanted to raise was, not just compared to what, but in light of what should we see these marginal infringements on someone's privacy? I think it is important to realize that this all happens in a context in which the privacy of individuals and their activities online is one in which we are constantly shifting our reasonable expectations of privacy. One very simple example of this is, of course, dealing with digital rights management ("DRM") and what, even in the most benign form, DRM allows.<sup>63</sup> DRM allows for the capture of a great deal of information about what we do online. We may be willing to make this tradeoff. It may be that, instead of buying a CD at Tower Records and sticking it in my car, I want to use a digital form; I buy it from iTunes®, and I am willing then for Apple® or others to know how I use and interact with this information. It is actually a little bit trickier than just that immediate tradeoff. I do not know if anyone has read the user agreements that you have to read when you download the iTunes® software. I read them again last night. When you download iTunes® software, the initial user agreements do not mention privacy.<sup>64</sup> It is an entire agreement that incorporates the privacy policy.<sup>65</sup>

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<sup>62</sup> See *supra* Part III.

<sup>63</sup> See generally C.J. Alice Chen & Aaron Burstein, *Symposium: The Law and Technology of Digital Rights Management*, 18 BERKLEY TECH. L.J. 487 (2003).

<sup>64</sup> See Apple Computer, Inc., Apple Customer Privacy Policy, at <http://www.apple.com/legal/privacy> (last visited Mar. 13, 2005); Apple Computer, Inc., iTunes Music Store Terms of Service, at <http://www.apple.com/support/itunes/legal/terms.html> (last visited Mar. 13, 2005).

It is awfully hard—even if you do this for a living—to know what people are doing with the information that you give them through your use and reuse of these materials. Again, this may be a tradeoff that we are willing to make in order to take advantage of the full effects of digital technologies, but I think it is important to realize that these infringements on someone’s privacy interest take place in a context in which our expectation of privacy is diminishing to some extent. So, without coming down strongly on the side of saying, “Do not file that marginal lawsuit,” I think the privacy issue has to be one that is at least in the mix when considering whether these suits are a good idea.

I have four lingering worries that lead me to believe that it probably is not the best idea to continue to file more of these lawsuits, particularly when there is some collateral damage in the works; someone else may draw a different conclusion. The first is that the discovery process in litigation is an unfair fight, which you would realize if you talked to the defendants in these cases as I did in the District Court in Massachusetts; these are scared people who are the parents, brother or sister of the person who has actually been doing the file sharing; these are scared people who are seeing the full force of the law come at them, and they realize that it is a high cost to pay.

Second, in most of these cases, people are settling the lawsuits for \$3,000 or whatever it is. That is probably a good thing; most people are probably infringing a copyright. It may be that people are settling these lawsuits in lieu of going through a process in which their privacy may be infringed—we also have to take into account that cost.

Third, I am concerned about the collateral damage caused by opening the doors into households, because obviously it is impossible in a *John Doe* lawsuit to identify the specific person. You are identifying a household and possibly opening it up to certain exposure of all members of that household.

Fourth, the costs of filing these suits are calculated in a context in which we realize that our privacy in an online environment is being cut back broadly and without particularly strong safeguards—at least in the U.S.—to protect that privacy. I think the key thing that I wanted to raise was that a thumb should be put on the scale in favor of the privacy interest when considering these lawsuits. When I became a lawyer, someone gave me a tie that had little sharks on it. They told me to remember how much it means to be a lawyer and how much power there is in being able to file a lawsuit. I think the shark notion is very important here. People are scared when a lawsuit is filed against them. If there is a better way to move on throughout this crisis, I think we should avail ourselves of it. Thank you.

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<sup>65</sup> See sources cited *supra* note 64.

## VI. MICHAEL A. GEIST

DR. GEIST:<sup>66</sup> This is actually going to be part one of two. Prof. Knopf has also put me on the next panel.<sup>67</sup> I am going to talk mainly about a file-sharing case in Canada. I will use this opportunity to provide you the background on the case, and I will talk about the privacy side of it in the next panel. We heard from Mr. Oppenheim at the very beginning that every court says this is an infringement.<sup>68</sup> As you will see, not every court says that—at least once you look outside the U.S. There is this interesting case in Canada that does not necessarily share the same view that I guess all the U.S. courts apparently do.<sup>69</sup> I feel awkward talking about the case here, in part because Prof. Knopf, who is counsel to the clinic that got involved in this, is here, as is Philippa Lawson, who is director of the clinic. While I play a role in the clinic, they played a far more important role in this case than I did.

Let me provide you with a two-minute background on Canadian copyright law so you can get a feel for why the court moved in the direction it did. First of all, we do not have a DMCA in Canada, which is a good starting point to understand why the courts in Canada start looking at some of these issues somewhat differently than they do in the U.S. We also have yet to ratify the World Intellectual Property Organization (“WIPO”) copyright treaties.<sup>70</sup> We have signed them, but there is a debate that has been going on for eight years—and one suspects that the debate will continue for some time—as to whether or not we ought to go ahead and ratify. In Canada, we also have private copying legislation.<sup>71</sup> I will talk more about that in just a moment. Private copying is found in many jurisdictions. There is very limited private copying here in the United States.<sup>72</sup> There is more extensive private copying in Europe. In Canada, the private copying laws had quite a significant impact on the outcome in this particular case.

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<sup>67</sup> See Michael A. Geist et al., *Copyright & Privacy – Through the Technology Lens*, 4 J. MARSHALL REV. INTELL. PROP. L. 242, Part IV (2005).

<sup>68</sup> See *supra* Part II.

<sup>69</sup> *BMG Can., Inc. v. Doe*, [2004] 239 D.L.R. (4th) 726, 738 (holding that “downloading a song for personal use does not amount to infringement”).

<sup>70</sup> WIPO Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65, available at <http://www.wipo.int/documents/en/diplconf/distrib/94dc.htm> (last visited Mar. 13, 2005).

<sup>71</sup> See generally Copyright Act, R.S.C., ch. C-42 §§ 79–88 (1985) (Can.).

<sup>72</sup> See, e.g., The Audio Home Recording Act of 1992, 17 U.S.C. § 1001–10 (2000) (pre-P2P legislation dealing primarily with manufacturing, importation and distribution of digital recording devices).

We have had a very active Supreme Court of Canada looking at the issue of copyright. That is an unusual or somewhat new thing to be able to say. Had we talked just a few years ago, we would have said that the Supreme Court of Canada rarely hears copyright cases. However, in the last two years, the Canadian Supreme Court has heard three cases dealing with copyright.<sup>73</sup> I think that when we look back at these cases five to ten years from now, we will really see them as a trilogy: three cases that have come together to reformulate the approach that Canada has with respect to copyright law. About ten years ago, the approach on Canadian copyright—as articulated by the Supreme Court—was that it was largely about compensating the artists; they create and thus they need protection. The Supreme Court has now shifted its approach. We do not have a copyright provision within our Constitution, so it is judge-made law and statutes that matter. The court has said that copyright is really more about a balance between the interests of the creators and the interests of users.

The first of these cases, a case known as *Theberge*, was seen by some potentially as an anomaly.<sup>74</sup> It was a neat case involving a piece of art that was literally transferred (picked up off a poster) and put on a canvas.<sup>75</sup> There were questions as to whether it constituted an infringement.<sup>76</sup> The court was split four-three.<sup>77</sup> We have judges—both from common-law as well as civil-law backgrounds—and they were split along those lines with the common-law judges talking about this balance and the civilists in the dissent. So, there were some people that were of the view that the court perhaps was split along those lines.

In the subsequent cases—most particularly a case from earlier this year known as *CCH v. The Law Society of Upper Canada*, which involved legal publishers against the bar association in the province of Ontario—it has become clear that there really is no split in the court.<sup>78</sup> In fact, one of the judges at a talk just a few months ago said that, in his view, balance had been established by the court beyond a doubt. There was little doubt that the Canadian Supreme Court has seized this balance as an integral consideration in analyzing copyright law.

So that is where the court is coming from. I will talk a bit more about a case that some people may know more about, which is the *Tariff 22* case.<sup>79</sup> It deals with online music and issues surrounding downloading or streaming.<sup>80</sup> Now, the private copying levy raises some interesting issues in Canada because, in December 2003, the Copyright Board of Canada issued its latest ruling with respect to private copying.<sup>81</sup> The way private copying works in Canada is that you have a levy on blank

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<sup>73</sup> See *Galerie d'Art du Petit Champlain inc. v. Theberge*, [2004] 210 D.L.R. (4th) 385 (Can.); *CCH Can. Ltd. v. Law Soc'y of Upper Can.*, [2004] 236 D.L.R. (4th) 395; *Soc'y of Composers, Authors and Music Publishers of Can. v. Can. Assn. of Internet Providers*, [2004] 240 D.L.R. (4th) 193.

<sup>74</sup> *Galerie d'Art du Petit Champlain*, [2004] 210 D.L.R. (4th) 385.

<sup>75</sup> *Id.* at 392.

<sup>76</sup> *Id.* at 421, 427–37.

<sup>77</sup> *Id.*

<sup>78</sup> *CCH*, [2004] 236 D.L.R. (4th) 395.

<sup>79</sup> *Soc'y of Composers, Authors and Music Publishers v. Can. Ass'n of Internet Providers*, [2004] 240 D.L.R. (4th) 193.

<sup>80</sup> *Id.* at 203.

<sup>81</sup> *Private Copying 2003-2004*, [2003] 28 C.P.R. (4th) 417, available at <http://www.cb-cda.gc.ca/decisions/c12122003-b.pdf> (last visited Mar. 13, 2005).

media, such as blank CD's, as well as new, blank iPods® and devices of that nature. In return, the compensation that is generated, which runs between twenty-five and thirty million dollars a year, can be used to compensate artists, record labels and others. In Canada, the beneficiaries are actually disproportionately Canadian artists. We do not extend national treatment for everything that we collect, so Canadian artists actually stand to get a substantial part of those payouts within the Canadian policy framework. This may make a fair amount of sense when you are looking to encourage Canadian artists and you want to adequately compensate them. In the December 2003 decision from the Copyright Board,<sup>82</sup> they set the levy, but what they also did was start to discuss the issue of P2P file sharing and, in particular, downloading.<sup>83</sup> They noted that the Canadian statute<sup>84</sup> really did not distinguish in any significant way between P2P and other kinds of old-style copying where you might take a CD and make a copy of it. Someone might argue that, for purposes of downloading—I'm not speaking of uploading, but for purposes of downloading—the private copying levy would cover that sort of activity.

The Board also noted that the source of the copy—what you are using to make the copy—was irrelevant for the purposes of Canadian copyright law.<sup>85</sup> It did not matter if it was a legitimate source or an illegitimate source. Private copying was focused on the copy, not on the source of the material itself, and thus, as long as the person copying it fell within the exemption, what they were doing would be lawful because there would essentially be compensation paid.<sup>86</sup> A month later, the Canadian Private Copying Collective (“CPCC”) approached Canadian policy makers and said what is needed is an amendment to explicitly exclude hard drives from the levy. This is a somewhat curious position to take because, in theory, you could apply the levy to computer hard drives and increase the amount of compensation received, thereby ensuring that labels and artists obtain more compensation. That is not the position that the CPCC took. They preferred an amendment that would explicitly exclude computer hard drives, in part, I think, because there was recognition that once Canada joined the United States in experiencing the file sharing lawsuits against alleged file sharers, this private copyright exemption would be a thorny issue. That is, in fact, precisely what happened.

Within two months of the private copying decision, the Canadian Recording Industry Association (“CRIA”) or their member companies filed suit against twenty-nine alleged file sharers.<sup>87</sup> Because we do not have a DMCA,<sup>88</sup> and we do not have the kinds of provisions that Ms. Deutsch was referring to,<sup>89</sup> what the labels needed to do was to go to a Canadian court and get permission to identify the file

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Copyright Act, R.S.C., ch. C-42, § 2.4(1)(b) (1985) (Can.).

<sup>85</sup> *Private Copying 2003-2004*, [2003] 28 C.P.R. (4th) 417.

<sup>86</sup> *Id.*

<sup>87</sup> CRIA File-Sharing Lawsuits, at <http://www.cippic.ca/en/projects-cases/file-sharing-lawsuits/> (last visited Mar. 13, 2005).

<sup>88</sup> Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17, 28 U.S.C.).

<sup>89</sup> See *supra* Part III.

sharers to proceed with the suit.<sup>90</sup> The suit name is *BMG v. Doe*.<sup>91</sup> The position of the ISPs in the case was, I think, quite interesting. I should note that the CRIA made the decision—and perhaps it was not the best strategic decision—to sue file sharers who used the five largest ISPs.<sup>92</sup> The idea was that this was part of an education campaign: let's educate widely and sue users from the five biggest ISPs in Canada.<sup>93</sup> The initial thought, I think, was that the ISPs would take a position that they are sort of at arm's length from this; they will not get involved, and CRIA will be able to make the case before a court. The court will provide the necessary order, and the ISPs would respond to the court order as they do in other instances. There were some ISPs—or at least one—which took that position throughout the case. I think one of the real changes that occurred which had a significant impact was that one ISP, Shaw Communications, broke from the pack and indicated that they were concerned about their subscribers' privacy and would, in fact, get involved in the case by raising certain concerns to ensure that due process was properly respected.

Once one ISP did that, a number of other ISPs found themselves in a difficult situation. Their competitor was saying that it was concerned about its customers' privacy, forcing the other ISPs to get involved in this case as well. The other party that got in the case is the party that I alluded to just a moment ago, which is the Canadian Internet Policy and Public Interest Clinic (“CIPPIC”) that we started at the University of Ottawa just over a year ago. The CIPPIC was granted leave to intervene, initially thinking that it would largely focus on the privacy-related issues, but ultimately focusing not only on the privacy issues, but also on the copyright-related concerns.<sup>94</sup> That sort of sets the stage for the case. I think many people—certainly CRIA, one would think—expected this to be a slam dunk and that they would get the information and proceed forward. Ultimately, that is not what happened. The focus on the key issues that were being addressed stemmed from evidentiary concerns, the evidence that the recording industry provided to make out their prima facie case of infringement, as well as questions around copyright, and ultimately about privacy concerns as well.<sup>95</sup>

Now, as I mentioned, I will speak to the privacy-related issues in a moment; I think they provide an interesting illustration of how privacy legislation or privacy provisions (even if not contained within the copyright legislation itself but outside of it) governing the legal culture of the entire legal framework within a country, has an impact. Privacy clearly had an impact here. We will talk a little bit about that soon. On both the evidentiary and the copyright grounds, the judge had problems, as well. He ultimately denied the motion to identify the alleged file sharers.<sup>96</sup> On the evidentiary grounds, he pointed to a number of different things. For instance, he characterized much of the evidence that was provided by the recording industry that

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<sup>90</sup> Canadian Recording Industry Association, *The Canadian recording industry condemns government inaction on copyright: Canadian recording industry takes next step in lawsuits against music pirates*, at [http://www.cria.ca/news/130204\\_n.php](http://www.cria.ca/news/130204_n.php) (last visited Mar. 13, 2005) [hereinafter CRIA Article].

<sup>91</sup> *BMG Can., Inc. v. Doe*, [2004] 239 D.L.R. (4th) 726.

<sup>92</sup> *Id.* at 730.

<sup>93</sup> See CRIA Article, *supra* note 90.

<sup>94</sup> *BMG*, 239 D.L.R. (4th) at 731.

<sup>95</sup> *Id.* at 738, 742.

<sup>96</sup> *Id.* at 745.

was used to tie a pseudonym, a Kazaa user, with a particular IP address, as being mere hearsay.<sup>97</sup> He further identified a number of significant problems within the evidence itself.<sup>98</sup> There are many people who have noted that the judge could have stopped there: with the evidence being insufficient, the judge really could have simply said “there is not enough evidence, so I am not granting the motion,” and that would have been the end of the story. The reason that the case is interesting is because the judge did not stop there, but instead, proceeded to talk about copyright and privacy.

On the copyright grounds, what the judge told CRIA was that they had not made out a case that there was in fact copyright infringement taking place, which is why it is not every court that has reached this conclusion.<sup>99</sup> We have at least one court that has said otherwise. This court had little difficulty with the downloading issue. In fact, they dealt with it in about one sentence.

The Copyright Board has said that downloading is lawful. Private copying applies and downloading from a Canadian perspective is covered by the Copyright Act and thus is lawful. It was on the issue of uploading, though, that I think people were a bit more surprised. The judge looked to one of the recent Supreme Court cases I referred to in this trilogy—the *CCH* case.<sup>100</sup> The *CCH* case dealt with the issue of authorization.<sup>101</sup> The authorization in that case was whether or not the Law Society of Upper Canada, who maintains a very large law library in Toronto, had authorized copying of legal publishers’ materials by virtue of the fact that they had provided photocopiers and a photocopy service.<sup>102</sup> The court established a pretty high standard for authorization and found that the Law Society had not authorized copyright infringement, arguing that it did not rise to that level.<sup>103</sup> There had to be proactive activity on the part of the Law Society.<sup>104</sup> The judge in this case adopted that reasoning and analogized it to file sharing.<sup>105</sup> The judge argued that a person who places materials on their hard drive is much like a library,<sup>106</sup> since the materials may be there, but the person has not done anything further to actually rise to the level of actively authorizing or actively encouraging. There are those who expressed some surprise with respect to that decision. Nevertheless, that is one court’s view and the impact was rather immediate. The file sharing lawsuits were always described as part of an education campaign—you can educate through lawsuits. In this instance, it was the recording industry that was taken to school. What you literally had were headlines on the front page of every paper in the country and the lead story on the national news talking about the decision that, in Canada, file sharing is lawful. That case is now under appeal leading to some important copyright policy issues.

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<sup>97</sup> *Id.* at 735.

<sup>98</sup> *Id.* at 735–36.

<sup>99</sup> *Id.* at 738.

<sup>100</sup> *CCH Can. Ltd. v. Law Soc’y of Upper Can.*, [2004] 236 D.L.R. (4th) 395.

<sup>101</sup> *Id.* at 405.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 405–06.

<sup>104</sup> *Id.*

<sup>105</sup> *See* *BMG Can., Inc. v. Doe*, [2004] 239 D.L.R. (4th) 726, 734.

<sup>106</sup> *Id.*

Initially, the recording industry indicated that there was a national emergency in Canada. They actually got face time with the Prime Minister soon after to say there was a need for immediate reform. What was also needed, they argued, was an immediate move to appeal this particular decision. The court has moved somewhat slower and there is an expectation that the case will be heard sometime early next year. Many of the same parties are involved and the CIPPIC is once again an intervener. There were attempts by a number of other associations to intervene such as the Business Software Alliance and the MPAA in the U.S., and the Canadian Motion Pictures Distributors Association in Canada, which were all unsuccessful. They did not really bring anything new to the table and their attempts to intervene were denied.

That is the appeal side, but I think one thing that the recording industry has found is that perhaps it is not all that bad to have this decision out there. When the CIPPIC was thinking about taking on this case and intervening, there was someone who mentioned to me that we ought to be careful what we wished for. This person said that we might win this battle, but lose the war. In fact, I think we did indeed win the battle, at least the first skirmish. The question then becomes what happens with the larger war and, in particular, copyright reform. No one knows for sure, but certainly there has been an increased impetus in Canada on the issue of copyright reform due, in large measure I think, to this particular decision.

In balancing some of the issues that we are talking about on this panel, I think it is also important to balance the fact that P2P is a global phenomenon. We heard about a case that started in Australia.<sup>107</sup> We heard about the case from the Netherlands dealing with Kazaa.<sup>108</sup> We have to think about what many courts in many countries are doing. In fact, not every court is taking the approach that we have heard about in the United States. With that, I will stop and pick up with some of the privacy issues after the break. Thank you.

## VII. HUGH C. HANSEN

PROF. HANSEN: [Declined]

## VIII. RALPH OMAN

MR. OMAN:<sup>109</sup> The privacy sides of the dilemma we face in terms of finding a balance in this very difficult area of law and politics are often lost in the debate in

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<sup>107</sup> See *Universal Music Austl. P.T.Y. Ltd. v. Sharman License Holdings, Ltd.* (2000) 59 I.P.R. 299.

<sup>108</sup> See *Vereniging Buma, Stichting Stemra/KaZaA BV*, HR 19 Dec. 2003, [2004] E.C.D.R. 16 (Neth.).

<sup>109</sup> Ralph Oman served as Register of Copyrights of the United States from 1985–1993. As Register of Copyrights, the chief government official charged with administering the national copyright law, Mr. Oman testified frequently before Congress, represented the U.S. Government at international conferences, managed the Copyright Office and its 550 employees and helped shape U.S. copyright policy. Mr. Oman acted as copyright advisor to the congressional oversight committees, the Department of State, the U.S. Patent and Trademark Office, the U.S. Trade

Washington. We will get into this a little bit more this afternoon in the Political panel.<sup>110</sup> I do want to commend the panel for having laid an excellent foundation for what will follow. The following speakers will build on the debates we have had so far today.

Mr. Oppenheim was very impassioned. He set the scene by telling us what was at stake, how important the creative process is, and how important incentives to that creativity are in moving culture and learning forward.<sup>111</sup> I will not lose site of that in the ongoing discussions.

We also learned from Ms. Deutsch that we have to be very careful in considering privacy issues; abuses do creep in.<sup>112</sup> We have to be on guard against the pornographers, the wife beaters and the pedophiles. It is wonderful that the courts are stepping in and ensuring that there is some supervision to the issuance of the subpoenas that are being sought by the RIAA and now by the MPAA. It is, however, a false comfort if the file sharers think that this will eventually be a shield against their ultimate liability. I think the wheels of justice will eventually turn, the bad guys will be brought to justice, and penalties will be assessed. That is the way the system works, but we would be careful in making sure that we did not run rough-shod over the interests of individuals who might not be guilty and would not want to be falsely charged or be issued a subpoena without justification and without court supervision.

Mr. Dorman took the RIAA to task for refusing to recognize that the software of the ISPs makes possible substantial amounts of legitimate, non-infringing file sharing.<sup>113</sup> That is a factual issue that will be further explored in the ongoing litigation, but I can understand why the RIAA would not make that admission. It is like asking President Bush to confess error and admit mistakes that he has made over the past four years. The RIAA is in this hostile environment that was referenced earlier. The RIAA is involved in litigation and any admission along those lines could be used against them in the ongoing controversies.

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Representative and the Library of Congress. During his tenure as Register, Mr. Oman helped move the United States into the Berne Convention for the Protection of Literary and Artistic Works, the world's oldest and most prestigious copyright treaty, a goal sought by U.S. Registers for the last one hundred years.

Prior to his tenure at the Copyright Office, Mr. Oman served as Chief Counsel to the Chairman, Senator Charles Mathias (R-MD), on the Senate Subcommittee on Patents, Copyrights and Trademarks. Before joining the subcommittee, Mr. Oman served as senior legislative counsel to the Republican Leader, Senator Hugh Scott (R-PA), on the Senate Judiciary Committee, and in that capacity Mr. Oman helped draft the language and negotiate the compromises that resulted in the passage of the landmark Copyright Act of 1976. In 1977–78, Mr. Oman served as Special Counsel to Senator Jacob K. Javits (R-NY) on the U.S. Antitrust Study Commission.

A native of New York, Mr. Oman graduated from Hamilton College with an A.B. in 1962 and from Georgetown University Law Center with a J.D. in 1973, where he served as Executive Editor of *Law and Policy in International Business*. Mr. Oman also studied for a year at the Sorbonne in Paris. A former Foreign Service Officer and Naval Flight Officer, Mr. Oman has written extensively on copyright and international trade matters. In 1973–1974, Mr. Oman served as law clerk to the Honorable C. Stanley Blair in the U.S. District Court for the District of Maryland.

<sup>110</sup> See William W. Fisher, III, et al., *Copyright & Privacy – Through the Political Lens*, 4 J. MARSHALL REV. INTELL. PROP. L. 306, Part IV (2005).

<sup>111</sup> See *supra* Part II.

<sup>112</sup> See *supra* Part III.

<sup>113</sup> See *supra* Part IV.

The bricks-and-mortar issue that Mr. Dorman raised, I think, was a good one because it calls up a lot of the former battles we have had about new technology and the interests of the copyright owner.<sup>114</sup> The movie companies saw television as a great threat in the early 1950s. They had invested millions of dollars in theaters and parking lots and distribution systems and they thought television was going to strip away their audience; they were very defensive; they refused to allow any of their movies to be licensed on television; and they maintained that solid front for quite some time. Eventually, they began to change their views and they started exploiting the new medium in a way that did not adversely affect their interests. In fact, they are making a great deal of money on television as we speak and that is not a surprise to anyone. There was never any question about them losing control of their copyrights or their products in this new environment. That is why they were able to find their way themselves. It was a soft landing. They recognize that there is value in both markets and that, I think, is a good example of showing how strong copyright protection does ultimately work to the benefit of not only the creators, but the public as well.

The internet needs to become a secure medium of distribution, but it is not exactly water tight in all copyright regimes. There is always some leakage. If we do not have the basic security for the product that is being distributed, we will not attract the really valuable product to that medium. We will not get first-run movies, we will not get the recent issues of sound recordings, it will become a back-water, and it will never reach its full potential as a broad avenue for scholarly discourse, mass entertainment and e-commerce. It will remain a haven for hackers, pornography creeps and Viagra<sup>®</sup> salesmen. That is why security is so important on the internet and why everyone should be working—in the words of Ms. Deutsch—in a cooperative spirit, a coexistence spirit, all living together and recognizing that they all have a stake in the ultimate success of the internet in the years going forward.<sup>115</sup>

The grizzly bears in Alaska, to catch the salmon migrating upstream, position themselves in the narrow point of the river. They cannot catch the salmon in the wide portion of the river or in the lake, so they position themselves at a waterfall or narrow point where all of the salmon have to transit to in order to get to the breeding grounds. That is an effective way to catch salmon. It is also a great way to catch infringers. The ISPs and the internet-access providers really are positioned at that narrow point in the stream and they should be active participants in trying to build security so they can catch the infringers rather than taking a willful blindness approach: putting their hands over their eyes, holding their nose and letting whatever happens happen. They are like the piano player in the bordello. They tinker away at their thing and do not have the slightest idea of what the customers are doing upstairs. I think that is a destructive approach to not only their own interests but to the creators' interests. I hope we can build on that spirit of cooperation and work cooperatively to build a system that is essentially water tight to allow the internet to reach its full potential.

If it were technologically possible for the ISPs' software to prevent unauthorized redistributions over the internet of primarily copyrighted materials and encoded copyright materials, and to, at the same time, allow a robust distribution of P2P file

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<sup>114</sup> See *supra* Part IV.

<sup>115</sup> See *supra* Part III.

sharing and public domain materials, which would be terrific. The problem is that I am not sure it would be of any interest to the ISPs. They make a great deal of money out of the massive piracy that takes place on the internet and what they have to recognize is that, if they eye into the system and help legitimize it, they will have a much brighter future down the road. I think Napster® made that decision. They are now involved in legitimate activities trying to promote the legitimate distribution of products over the internet and that is a step in the right direction. I think it has to be recognized that, when the mass of piracy continues, it is almost impossible for a legitimate system to develop. Some of the motion picture companies and the record companies really are eager to get into selling product over the internet without the hassles of distribution, without the returns of unsold CD's, without the security problems and the shipping problems, and all of the rest. The internet provides a wonderful way to distribute product, but unless the distributors can get the security that I mentioned earlier, it will never happen. That is the reality we face.

It would be terrific if Kazaa, for instance, were to join forces with the record industry to work out a system that would allow legitimate file sharing in a way that lets people find out what other people are listening to and watching, but pay a small fee for the privilege. I think that would be a wonderful development and maybe the key to the future. It might also help solve the piracy problem. If there is no illegal activity on the internet, there is no need to issue subpoenas—there is no need to pry into the private personal information of the people who are using the service because it is all legitimate, and there is no legal action necessary. That, I suppose, is a pie in the sky approach, though I do think that technology has a greater role to play than it has been given credit. My old boss, Senator Mathias of Maryland, used to say—and this sounds almost quaint—that “the technology that creates the problems will solve the problems.” I think for that to happen we have to have cooperation amongst all of the parties involved. I am struck by the degree of cooperation we have encountered thus far. Congress continues to build on that recognition of the importance of making the internet work. The DMCA itself was in many ways a compromise that gave strong protections to creators, but also gave important rights to the internet-access providers. Those people had to attract investment to make the internet come to life.

I hope that we will be able to reach that point in history where, as Tennyson told us, “all men's good be each man's rule, and universal peace lie like a shaft of light across the land.”<sup>116</sup> I also think that the tensions that we are experiencing today—the tensions between the creators and the online service providers, and the telephone companies—are nothing new. They should not surprise us. The tensions between copyright and technology go all the way back to the printing press, and they go through motion pictures, the radio, sound recording technology, tape recording, the recordable DVDs, the VCR and now the internet. It is all part of the process and the tension between the creators and the technology companies has driven the debate over copyright for the past one-hundred years. This is nothing new. But, I do hope that ultimately we do not think that by protecting the technologies we are somehow protecting authors' rights. They have to be carefully safeguarded and without that, we will lose a great deal in terms of advanced culture and advanced learning, not

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<sup>116</sup> Lord Alfred Tennyson, *The Golden Year*, in ALFRED LORD TENNYSON SELECTED POEMS 120, 121 (1991).

only in the United States, but around the world. It is this tension that we should be mindful of. But, it is that tension that makes us all realize that copyright is socially important, historically unique, historically revolutionary and worth fighting for. Thank you very much.

PROF. KNOPF:<sup>117</sup> Thank you. I will bend another one of my rules to allow Mr. Oppenheim, an illustrious litigator, two minutes of reply. One of his friends who signed the *Grokster* brief on behalf of him in support of the position of his client has said that some people think his client is worse than the Taliban. So, I think he needs a little time to reply. Then I will open the floor to questions.

#### IX. RESPONSE BY MR. OPPENHEIM

MR. OPPENHEIM:<sup>118</sup> Given the things the RIAA has been called today, I am pleased to have decided to leave the RIAA and go into private practice. I did not get the full list, but apparently the RIAA is on a “Jihad”, a “religious war.” They are like the “Taliban,” like “grizzly bears at the top of a stream catching helpless salmon” and like “President George Bush refusing to acknowledge mistakes.” So, I guess moving to private practice makes sense given the image that the record industry has.

Let me suggest that I think that everybody on this panel recognizes that there is great opportunity ahead, and the question is: can we get beyond the hard-line positions that we easily retreat to and try to find the opportunity? I would like to address quickly just three things. One is that Ms. Deutsch and I have had the debate over the DMCA process and the *John Doe* process all too many times.<sup>119</sup> I do not want to repeat that debate. It is, I think, fair to say that there is an interesting balancing to be done as to whether or not the DMCA process for identifying infringers is a better process for individuals than a *John Doe* process. The DMCA process has built in safeguards, it allows individuals to avoid being sued in the first instance, and it puts a higher burden on the attorney who goes through it than the Rule 11 process or the *John Doe* process.<sup>120</sup> It is an interesting debate and we could put up a chart of the pros and the cons for each and have that discussion. That, however, was not what the court in *Verizon* did at all.<sup>121</sup> It was entirely a statutory construction opinion—one that, unless you are really interested in the copyright law when you read it, will make your head spin if you have not already fallen asleep. It is a very difficult issue.

Second, Prof. Palfrey talked about the lawsuits, talked about the victims and, I think—if I understood him right—he was saying that the victims are the people being sued.<sup>122</sup> I do not know what they are teaching at Harvard these days because the victims are usually the people whose things have been taken and the victims are

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<sup>117</sup> See biographical information *supra* note 1.

<sup>118</sup> See biographical information *supra* note 5.

<sup>119</sup> See *generally supra* Part III.

<sup>120</sup> Compare 17 U.S.C. § 512(h) (2000) with FED. R. CIV. P. 11 and *supra* Part III (explaining the logistics of the *John Doe* process).

<sup>121</sup> See *RIAA v. Verizon Internet Servs.*, 351 F.3d 1229 (D.C. Cir. 2003), *cert. denied*, 125 S. Ct. 347 (2004).

<sup>122</sup> See *supra* Part V.

the plaintiffs who are going to be redressed, not the people who have stolen and tried to get away with it. I think we need to think about how we use terms like “victims” and where the ownership should lie. Truth be told, the record companies have repeatedly advised these defendants to get counsel; they have repeatedly suggested where these defendants can go to get counsel; and they have done everything they can to provide notice to these defendants. So, there really is not the kind of abuse that is being described.

Finally, but not last—because I am sure that the dialog will continue when we talk about the issues of privacy and P2P—we should not assume that there should be a right of privacy. Let’s have a dialog as to whether there should be a right of privacy when it comes to P2P behavior. I am not hearing that. I want to put forth a case that says that there really is not a right of privacy, and I have yet to hear anybody put forth a case for why there should be; that when somebody is engaged in infringing behavior on a P2P network, why should there be a right of privacy, why should there be such an expectation? That is a discussion I think we ought to have.

PROF. KNOPF:<sup>123</sup> To conclude, I think that is why we are here today—to have that discussion. I think I could maybe pick up some questions here. It is interesting that, of course, Canada, which despite its having been called the digital Sunni Triangle by the Boston Globe,<sup>124</sup> is a civilized country that enjoys very high levels of intellectual property protection and a flourishing record industry. There is a furious debate about privacy in the U.S., as well as in many other countries.

#### X. QUESTIONS FROM THE FLOOR

QUESTION: I think I heard someone suggest that we were on the horns of an either-or kind of dilemma: either the copyright be adequately protected or it would be the end of copyright. I think I also heard Mr. Oman similarly call for security as a prerequisite to the functioning of copyrights.<sup>125</sup> I guess I am struck by the historical precedents we have. Similar either-or arguments were made upon the introduction of the player piano, upon the introduction of broadcast radio, upon the introduction of cable television and upon the introduction of the VCR.<sup>126</sup> It is not to say that in those cases no accommodation was reached. In fact, in each of those cases, an accommodation was reached. But, at least on my reading of the history, in none of those cases was that accommodation reached by granting complete security and control to the copyright owner. What was done, at least in three of the cases, was guaranteeing adequate compensation; and in the VCR case, in fact, no authority over that new technology was granted to right holders at all, and the free market appears to have addressed much of the trouble there.<sup>127</sup> So, I wonder what you have to say to

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<sup>123</sup> See biographical information *supra* note 1.

<sup>124</sup> Hiawatha Bray, *Canada Judge Crosses Line On File Sharing*, BOSTON GLOBE, Apr. 5, 2004, at C2.

<sup>125</sup> See *supra* Part VIII.

<sup>126</sup> See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.* 464 U.S. 417 (1984).

<sup>127</sup> *Id.*

the notion that there may be answers in compensation that are not answers about just control or no control.

PROF. HANSEN (responding): [Declined]