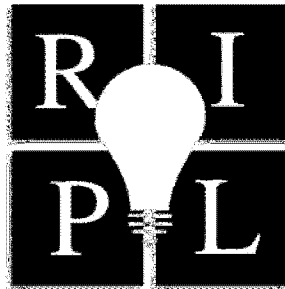


THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



COPYRIGHT & PRIVACY – THROUGH THE WIDE-ANGLE LENS

NOVEMBER 18, 2004

WILLIAM W. FISHER, III, HOWARD P. KNOPF, FRED VON LOHMANN,
WILLIAM B.T. MOCK, JR., HON. MARYBETH PETERS
AND R. ANTHONY REESE

ABSTRACT

Some have proposed “alternative compensation schemes” as a means of compensating copyright owners and creators for P2P activity while avoiding litigation. Some have proposed a streamlined dispute resolution system that would allow for enforcement in a manner analogous to the UDRP model. Others question whether private copying should necessarily be viewed as illegal and whether any alternative compensation scheme is viable. With all of these proposals, the question remains as to whether “alternative compensation” is really alternative.

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Cite as William W. Fisher, III, et al., *Copyright & Privacy – Through the Wide-Angle Lens*, 4 J. MARSHALL REV. INTELL. PROP. L. 285 (2005).

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I. INTRODUCTION BY WILLIAM B.T. MOCK, JR.

DEAN MOCK:¹ Welcome to our panel on alternative compensation through the wide angle lens. Is alternative compensation an alternative? Not only is peer-to-peer (“P2P”) a subject today but we are, I like to think, engaging in some peer-to-peer activity. We are peers exchanging views. Being a child of the 1950’s and 1960’s, I like to think that one alternative compensation scheme would be to create juke boxes out of our computers and simply drop a quarter in for every song. It would be the simplest way to do this, but it appears that there are other variations on a theme that will take us roughly the next hour to discuss. My idea is much simpler, but perhaps there is something more sophisticated in what we are about to hear.

II. WILLIAM W. FISHER, III

PROF. FISHER:² Prof. Knopf asked me to speak about the issue of alternative compensation systems, and that is what I plan to focus on. However, I think it is

* 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.

¹ William B.T. Mock, Jr. is Associate Dean for Academic Affairs at The John Marshall Law School in Chicago, Illinois. Prior to joining John Marshall’s faculty in 1983, Dean Mock practiced international trade, antitrust and securities law in Washington, D.C., and served with Baker & McKenzie as one of the nation’s first in-firm legal educators. At The John Marshall Law School, Dean Mock has served as an advisor to the Jessup and Niagara moot court teams, the International Law Society and the *Journal of Computer and Information Law*. Among Dean Mock’s overseas responsibilities are aspects of John Marshall’s relationships with law faculties in China, Italy and Lithuania. Prof. Mock publishes in the fields of information law and transparency, international law and international trade law, and is a securities and commodities arbitrator. Dean Mock recently was the scholar-in-residence at the law faculty of the University of Cagliari, Italy, and he has lectured in Belarus, China, the Czech Republic, Lithuania and Poland. Dean Mock founded and for nine years served as director of the Center for International and Comparative Studies, including its LL.M. programs, and teaches Corporations, Agency, International Environmental Law, International Trade Law and Public International Law.

² William “Terry” W. Fisher, III is the Hale and Dorr Professor of Intellectual Property Law and Director of the Berkman Center for Internet and Society at Harvard Law School in Cambridge, Massachusetts. Professor Fisher received his undergraduate degree (in American Studies) from

necessary to say a few words at the outset concerning the character of the problem that such systems attempt to solve.

Three technological innovations are transforming the entertainment industry: digital recording and storage systems, compression and decompression systems and, most importantly, the advent and rapid spread of the internet. These innovations create enormous opportunities for economic efficiency and cultural benefits in the manner in which we create, distribute and enjoy digital recordings.

More specifically, full deployment of the new technologies would enable us to save, roughly speaking, two-thirds of the cost of distributing audio and video recordings using the traditional business models. It would eliminate the problems of over and under-production that beset the current models in the music industries. It would enable much more convenient and precise delivery of recordings to consumers. It would increase the number of filmmakers and musicians who are able to make a living distributing their products to global audiences. For the same reason, it would enhance cultural diversity. Lastly, by blurring the boundary between creators and consumers, it would enhance what some scholars in this field refer to as “semiotic democracy”—deconcentration of the power of making cultural meanings.

In sum, the new technologies have great promise, but they also carry with them serious hazards. First, the opportunities for consumer creativity just mentioned threaten the moral rights of artists. Second, for reasons emphasized by Justin Hughes, the same consumer creativity that fosters semiotic democracy threatens to destabilize stable cultural reference points.³ Lastly, and most obvious to the present audience, the new technologies corrode the traditional mechanisms by which creators and intermediaries have been compensated: business models that depend upon selling objects embodying recordings or charging for access to performances of recordings.

Whether the new technologies have already eroded revenue streams in the music industry is unclear. Both economists and artists continue to debate the relative importance of network effects, opportunities for indirect appropriation, exposure effects and the more familiar demand-suppressing influence of promiscuous reproduction. Current trends, based on the data available to us, suggest that the corrosive forces are dominant. Both the unit sales and the revenue of the music industry in the United States peaked in 1999 and has been declining ever since.⁴ A similar trend has emerged in the global distribution of recordings.⁵ However, we cannot necessarily infer from this data that the new technologies are at fault. There

Amherst College and his graduate degrees (J.D. and Ph.D. in the History of American Civilization) from Harvard University. Between 1982 and 1984, Prof. Fisher served as a law clerk to Judge Harry T. Edwards of the United States Court of Appeals for the D.C. Circuit and then to Justice Thurgood Marshall of the United States Supreme Court. Prof. Fisher has taught at Harvard Law School since 1984. Prof. Fisher's academic honors include a Danforth Postbaccalaureate Fellowship (1978–1982) and a Postdoctoral Fellowship at the Center for Advanced Study in the Behavioral Sciences in Stanford, California (1992–1993).

³ See generally Justin Hughes, “Recoding” *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923 (1999).

⁴ Phil Kloer, *ANALYSIS: Say you want a revolution?: Sound and fury: It's war between record labels and downloading fans*, THE ATLANTA J. CONST., Aug. 3, 2003, at 1M.

⁵ Phil Hardy, *Trade losses of US copyright holders due to music piracy rose 5.5% to \$ 2.26bn in 2003, according to IIPA survey*, MUSIC & COPYRIGHT, July 21, 2004.

was a blip upward in the last quarter of 2003, and there is a growing set of competing empirical studies providing inconsistent explanations for the overall decline.

While the jury is still out on the question of whether the new technologies have already damaged revenue streams in the music industry, there is, in my view, no serious question that full realization of the economic and cultural opportunities that the new technologies present—through widespread distribution of unencrypted and, thus, manipulable digital files—would seriously destabilize the traditional business models.

Against that backdrop, one would imagine and hope that the principal aspiration of law-makers and law-interpreters would be to organize legal doctrines in a fashion that would facilitate the emergence of new business models that would simultaneously capitalize on the opportunities of the new technologies while avoiding and mitigating the accompanying hazards. To date, that has not occurred. Instead, what we have witnessed during the last fourteen years is a series of struggles. A little bit melodramatically, you can think of these as battles, each initiated by the emergence of a new technology, beneficial to consumers but threatening to copyright owners, who then fight to suppress it, either through interpretations and applications of existing legal doctrines or through legal reform. The most important battles have involved digital-audio tape recorders, music lockers, webcasting, centralized file-sharing, decentralized file-sharing and improved or enhanced video recorders. The next to the last of these battles, decentralized file-sharing, is still being fought. In each of the others, the copyright owners have succeeded in either stopping altogether or stunting the development of the new technologies.

How might we do better? There are four main families of proposals currently on the table. None is perfect. But any one of them would be better than our current state of affairs. In approximate order of increasing desirability and decreasing likelihood of adoption, here they are.

The first proposal would entail strengthening, in various ways, intellectual property rights. Such strengthening might include lowering the willfulness requirement for—or increasing the enforcement of—criminal copyright infringement systems. This is something that Register Peters just mentioned in her remarks.⁶ Another variation on this theme—streamlining civil enforcement systems—is something that Profs. Mark Lemley and Anthony Reese have explored in considerable detail.⁷ I expect Prof. Reese will also have something to say here about expanding third-party liability—either through judicial modification of the standard for contributory infringement or through legislative reform.⁸ Although it has not yet been passed, one source of such liability may be found in the Inducing Infringement of Copyrights Act of 2004.⁹

The second approach would involve reinforcing self-help strategies pursued by copyright owners. For example, we might modify the Consumer Fraud and Abuse

⁶ See Hon. Marybeth Peters, *Copyright & Privacy – Through the Legislative Lens*, 4 J. MARSHALL REV. INTELL. PROP. L. 266 (2005).

⁷ Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1350–1434 (2004).

⁸ See *infra* Part III.

⁹ S. 2560, 108th Cong., 2d Sess. (2004).

Act to liberalize the rules governing spoofing and interdiction.¹⁰ An even more ambitious initiative of this general sort was the Consumer Broadband and Digital Television Promotion Act, which Congress refused to adopt a few years ago but which might be revived at some point. More modest but still significant initiatives have already found expression in the FCC broadcast-flag rules as well as in the ongoing efforts of the sponsors of those rules to plug the associated “analog hole.”¹¹

The third proposal would temper the enhanced legal rights associated with proposals one and two with government regulations designed to minimize their abuse. Such regulations might include guaranteeing independent artists equal access to increasingly centralized internet distribution systems, establishing a most-favored-nation principle for licensing interactive webcasters, or limiting vertical and horizontal integration in the entertainment industries. An example of the last-mentioned limitation would be a rule forbidding record companies to own or operate webcasters or music download services. Another possible regulation in the same family would be a mandatory division of performance revenues between performers, producers and record companies. A tiny manifestation of this approach can be found in § 114(g) of the current statute;¹² much more extensive manifestations can be found in the legal systems of the countries in the European Union (“EU”). Finally, one might strive to limit copyright owners’ ability to engage in price discrimination—an activity that, in an environment characterized by legally reinforced digital-rights-management (“DRM”) systems, will likely become ubiquitous.

The fourth proposal, to which I’ll devote the remainder of my time, would imagine replacing the copyright system with respect to online distribution of audio and video recordings with an alternative compensation system. This is not a new idea. A long line of politicians, beginning with James Madison, and economists, terminating with Steve Shavell, have advocated regimes of this sort. Many governments have tried both small and large-scale versions of prize or reward systems with varying degrees of success. In addition, several legal scholars before me—most notably Neil Netanel, Jessica Litman and Raymond Ku—have explored the possible application of this general idea to digital recordings. What I will describe briefly here is my particular variant of this scheme.

The central idea is simple. The owner of the copyright in a recording who wishes to avail him or herself of this mechanism would register it with some organization (presumptively the Copyright Office) and would receive in return a unique file name. That name would then be used to track the distribution and, more importantly, the consumption of copies of the recording. The government would raise the money necessary to finance the system through taxes on the devices and services used to gain access to or enjoy the digital recordings. (In a minute, Mr. von Lohmann may speak about a non-compulsory version of the same general idea, which would depend upon subscriptions rather than taxes.¹³) The government would then distribute that money to artists in proportion to the frequency with which their creations are being

¹⁰ Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101–6108 (2000).

¹¹ FCC Broadcast Radio Services, 47 C.F.R. §§ 73.9000–9009 (2004).

¹² 17 U.S.C. § 114(g) (2000).

¹³ See *infra* Part VII.

consumed. Thus, the system would preserve in altered form the principle of consumer sovereignty that dominates the current regime.

Although the core idea is fairly straightforward, implementing it would not be at all simple. Putting it into action would entail myriad complications. I will mention one of them, because it bears directly on one of the central themes of this conference. Is it possible to develop counting systems that effectively reduce “ballot stuffing” by unscrupulous copyright owners without invading privacy? The answer suggested in my book on this subject is: yes by relying upon software widely distributed as plug-ins for playback programs, enabling the system to sample consumers’ consumption patterns, aggregating the data generated through such sampling mechanisms, and forbidding its usage for purposes other than calculating artist’s shares.¹⁴ That is a very shorthand response to a very difficult problem.

Many people have doubts concerning the practicability and the feasibility of these implementation choices. In the long run, those doubts can be resolved only by building a successful prototype. That is something that we at the Berkman Center, in partnership with some organizations both in the United States and Brazil, are currently trying to do.

Assume, for the moment, that the prototype is successful—in other words, that the system can be made to work. Would it be desirable? Would it be better than our current system?

It could be criticized on four grounds. First, it would give rise to cross-subsidies because of the imperfect alignment between the group of people who pay the taxes and the group of people who benefit from unlimited access to online entertainment. Second, it would threaten moral rights, because artists would be more exposed than they are currently to non-permissive modifications of their creations. Third, it would involve conferring upon government officials a significant amount of discretionary power. That, in turn, would both tempt the officials to reward aesthetically or morally deserving artists (always a dangerous business) and would encourage the major intermediaries (record companies and film studios) to engage in rent seeking. Fourth and finally, unless a system of this sort was adopted in multiple jurisdictions simultaneously, it would leak across national boundaries. Some of these problems can be mitigated. For example, as one commentator has suggested, Ramsey pricing¹⁵ can mitigate the cross-subsidies. In addition, as James Boyle has suggested, rights of integrity might be protected through the establishment of a separate track within the system for artists who wish to retain control over the preparation of derivative works.¹⁶ However, these problems cannot be eliminated altogether.

The advantages of the proposed regime, however, are more than enough to offset the disadvantages. First, there would be huge cost savings for consumers. The average American household now spends approximately four-hundred-seventy dollars each year for access to recorded entertainment. Under the proposed regime,

¹⁴ WILLIAM W. FISHER, PROMISES TO KEEP: TECHNOLOGY AND THE FUTURE OF ENTERTAINMENT 199–258 (Stanford University Press 2004), *available at* <http://cyber.law.harvard.edu/people/ffisher/PTKChapter6.pdf> (last visited Mar. 13, 2005).

¹⁵ “Ramsey pricing is a classical regulatory pricing system that assigns fixed costs in a way that helps maintain services for customers who cannot (or will not) pay higher prices.” *AT&T v. Iowa Util. Bd.*, 525 U.S. 366, 426 (1999) (Breyer, J., concurring in part and dissenting in part).

¹⁶ James Boyle, *The Public Domain: The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROB. 33 (2003).

each household would spend no more than half of that amount and would receive, in return, unlimited access to ad-free entertainment. In addition, there would be no price discrimination in this model and great opportunities for cultural and semiotic diversity. These are big benefits for consumers. For their part, artists would get a reliable source of income, the opportunity to distribute their works directly to consumers and expanded opportunities to create derivative works. The suppliers of devices and services would initially suffer because of the new taxes, but the increased value to consumers of their products and services would more than offset the resultant injury. The public at large would benefit from decreased litigation and decreased law breaking. Finally we would all avoid, under this model, a prolonged, un-winnable, culturally corrosive “war on piracy” closely analogous to our seemingly endless “war on drugs.”

For these reasons I suggest that, despite its significant imperfections, such a regime would be, if we had the courage to adopt it, the best of the alternatives. Thanks very much.

III. R. ANTHONY REESE

PROF. REESE:¹⁷ When Prof. Knopf invited me, I told him I did not have a particular stake in the privacy aspect of the debates over P2P systems. However, I was happy to talk about the paper that Prof. Lemley and I wrote focused on alternative ways of resolving disputes between copyright owners and users of P2P networks.¹⁸

¹⁷ R. Anthony Reese is the Thomas W. Gregory Professor of Law at The University of Texas at Austin. Prof. Reese specializes in copyright, trademark and other aspects of intellectual property law. Prof. Reese teaches Copyright, Introduction to Intellectual Property, Trademark, Intellectual Property in Cyberspace and Intellectual Property Theory. Prof. Reese is currently a visiting professor at Stanford Law School.

Prof. Reese received his B.A. degree in Russian Language and Literature from Yale University in 1986. Prof. Reese worked for several years in international educational exchange, including two years teaching in the People’s Republic of China for the Yale-China Association. Prof. Reese earned his J.D. degree *with distinction* from Stanford University in 1995 and is a member of the Order of the Coif, the national law honor society. Prof. Reese served as a law clerk to the Hon. Betty B. Fletcher of the United States Court of Appeals for the Ninth Circuit.

Before joining the faculty at the University of Texas at Austin, Prof. Reese practiced law in San Francisco for several years, and was a Research Fellow for the Program in Law, Science and Technology at Stanford Law School in the 1998–1999 academic year. Prof. Reese also practiced intellectual property law with the law firm of Morrison & Foerster LLP, where he remains Special Counsel.

Prof. Reese’s recent publications include: *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345 (2004); *The Future of the First-Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577 (2003); *Will Merging Access Controls and Rights Controls Undermine the Structure of Anticircumvention Law?*, 18 BERKELEY TECH. L.J. 619 (2003); *State Accountability for Violations of Intellectual Property Rights: How to “Fix” Florida Prepaid (And How Not To)*, 79 TEX. L. REV. 1037 (2001); *The Public Display Right: The Copyright Act’s Neglected Solution to the Controversy Over RAM “Copies”*, 2001 U. ILL. L. REV. 83 (2001); *Copyright and Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions*, 55 U. MIAMI L. REV. 237 (2001).

¹⁸ Lemley & Reese, *supra* note 7, at 1373–83.

We came at this question as a problem of what we call dual-use technologies. These are technologies that are capable of being used for both infringing and non-infringing purposes. We see P2P software and networks as one example of dual-use technology. Our concerns are about the use of copyright's secondary liability doctrines to go after those who develop or supply technologies for infringements that the users of those technologies commit. In particular, our concern is about the way, in the P2P context, courts seem to be retreating from or re-crafting the doctrine of the *Sony* case.¹⁹ I am sure most of you are familiar with the case, but just briefly, *Sony* involved the video cassette recorder (VCR), our prime example of a dual-use technology, which can be used for both infringing and non-infringing purposes. The Supreme Court said copyright's secondary liability doctrines do not allow the imposition of liability upon someone who designs and manufactures a video cassette recorder (or any other kind of copying equipment) as long as the equipment is at least capable of commercially significant non-infringing use. We can talk about what the exact holding is, but at least generally, if your product is capable of commercially significant non-infringing use, you are free to distribute it as a matter of copyright law.²⁰ The *Napster*²¹ and *Aimster*²² cases involve what have to be called creative reinterpretations of the Court's *Sony* test in applying it to P2P networks. Our concern is that those reinterpretations are retreats from *Sony* and create the problem of potentially impeding the development of dual-use technologies. Our task was to look at how we might achieve the balance that the court in *Sony* expressly said it was looking for: on the one hand, provide effective protection to copyright owners and on the other hand, not tie up the development of every technology that could possibly be useful in connection with works of authorship.²³

For years, copyright owners have sued technology suppliers and developers because, as we heard this morning, it is easier to go after the salmon at the narrow point in the river. It is much easier to go after the maker of the VCR than to go after all of the people who are using the VCR for infringing purposes. In our article, Prof. Lemley and I argue that making enforcement against egregious directly infringing users of a technology a viable alternative for copyright owners can offer them protection for their legitimate copyright rights without disabling important technologies that have substantial benefits because of their non-infringing uses.²⁴ We think non-infringing uses, both actual and potential, are clearly present in the P2P software case.

I need to stress here that our goal, in thinking about making enforcement against directly infringing egregious users practical, is to limit infringement by these end users but not eliminate it. We are not seeking to find a way to get copyright owners perfect control over all infringing uses of their work. Copyright owners have never had perfect control. In fact, they have never needed perfect control. Copyright has always been leaky, and I agree with Prof. Cohen that leakiness is in some ways

¹⁹ *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984).

²⁰ *Id.* at 442.

²¹ *See generally* *A&M Records v. Napster, Inc.* 239 F.3d 1004, 1019 (9th Cir. 2001).

²² *See generally In re Aimster Copyright Litig.*, 334 F.3d 643, 647–51 (7th Cir. 2003).

²³ *See Sony*, 464 U.S. 417.

²⁴ *See* Lemley & Reese, *supra* note 7, at 1380–82.

advantageous and partly at the core of the copyright system.²⁵ What we are trying to see is whether or not there is a way to give copyright owners sufficient control so that they can earn a reasonable return on their authorship and their dissemination activities. This will preserve for them the incentives for creation and dissemination, which is, after all, what the copyright act is supposed to be all about.

Our underlying approach is to look at the possibility of deterring infringing uses of P2P systems. (Although P2P is the specific example we focus on, the model also has applicability to other kinds of dual-use technologies.) Our argument is that it is better to go after end users than to go after the central technology developer. It is important to note that we do not need to enforce against all of the people who are using the technology for infringing purposes. What we need is enough enforcement against end users to deter many, again not all, of the users of the technology who use it for infringing purposes. In some ways, identifying a subset of people against whom to enforce is a little bit easier, at least in the current environment of P2P systems, because there are high-volume up-loaders. These are the people who make available large numbers of copyrighted works on P2P networks. If you can deter those users, you may in fact achieve a fairly significant reduction in the unauthorized availability of copyrighted works on the network.

The basic notions of deterrence suggest that a potential user of P2P software will consider the potential sanction that might be imposed upon her for her infringement, but discount that sanction by the likelihood that she will not be caught and will have no sanction imposed against her. In terms of achieving deterrence, one possibility would be to pursue just a few infringers and seek very large penalties against them. Those penalties are currently available under existing copyright law.²⁶ The recording industry suits have, by press reports, targeted people who have uploaded at least a thousand or more copyrighted works. Depending a bit on how those works are counted for statutory damage purposes, but assuming it is one-thousand, there are already extraordinarily large penalties for even non-willful copyright infringement.²⁷ At that level a sanction of up to thirty-thousand dollars per work infringed is available.²⁸ If you have uploaded one thousand distinct works, the potential penalties are quite large as are the existing criminal penalties, especially with the possible expansion of criminal liability which Register Peters and Prof. Fisher mentioned.²⁹

Our suggestion is that it seems somewhat unfair and disproportionate to impose thirty-million dollars of liability on a few people who happen to be the ones against whom the suits are brought. There is, however, another possibility under this deterrence model, which is to seek less severe sanctions but seek them against a much larger number of infringing users, particularly high-volume up-loaders. By doing this, the potential penalty for any one person against whom enforcement is brought is lower. However, the chance of being subject to that penalty is higher because more people are being penalized.

²⁵ See Julie Cohen et al., *Copyright & Privacy – Through the Privacy Lens*, 4 J. MARSHALL REV. INTEL. PROP. L. 273, Part II (2005).

²⁶ See 17 U.S.C. § 504 (2000).

²⁷ See *id.* § 504(c).

²⁸ *Id.* § 504(c)(1).

²⁹ See *id.* § 506; Peters, *supra* note 6.

I also want to emphasize that to a large extent the effectiveness of this deterrence depends on making legitimate alternatives available to people who are engaged in this conduct over P2P networks. If a rational P2P user calculates the possibility of these enforcement mechanisms, he can calculate the cost to him for his actions. However, he also has an alternative. Instead of engaging in this kind of conduct, he can acquire and use digital music in a legitimate way. I think success depends a great deal not only on content owners engaging in this kind of enforcement but also in providing legitimate alternatives to which the deterrence can encourage people to switch. I think it is also important to view this to some extent as a transitional measure—that is, in part, a way of getting through a transitional period in which we find ways for copyright owners to monetize P2P networks the same way that they have done with other technologies in the past. As Mr. von Lohmann pointed out this morning, in previous instances copyright owners eventually monetized technologies that they initially perceived as disruptive and potentially destructive of their copyright value.³⁰

Our position is that seeking to protect copyright owners against egregious direct infringement by going after the direct infringers is better than holding technology developers liable for the end user's infringement. This is because of the negative effects on technology developers, who will have to continually calculate what kind of technology they can put out and will, we think, be driven to put out disabled technology that is much less effective for non-infringing uses because of this need to respond to the copyright owners' desire for control.

For broader enforcement against more people at lower sanction levels to succeed requires that such enforcement be feasible. The traditional view has been that ordinary litigation is too costly and slow. In our article, Prof. Lemley and I propose an alternative dispute resolution system to try to make enforcement against end users cheaper and quicker than court litigation.³¹ A copyright owner could choose to pursue an administrative case against an infringer heard by an administrative law judge in the Copyright Office, but we would limit these to very straightforward claims of infringement against only voluminous up-loaders. We would reject claims that have plausible and evidentiarily supported factual disputes. Cases would be conducted electronically and on a written record; we would not allow the kind of discovery and argument that would be allowed in court. There would, however, be an administrative appeal and review in the district court if a party so chose. The remedies we suggest would be less draconian than under the current copyright statute. We talked about a penalty of two-hundred-fifty dollars per work infringed instead of a range between seven-hundred-fifty and thirty-thousand dollars in the present statute. We also proposed that someone who is adjudged to have done this conduct would be an officially designated infringer, which has important consequences for the internet service provider protections in § 512. We heard about the subpoena part of that regime this morning,³² but there are also important safe harbor provisions there. Those provisions require internet service providers to

³⁰ See Michael A. Geist et al., *Copyright & Privacy – Through the Technology Lens*, 4 J. MARSHALL REV. INTELL. PROP. L. 242, Part II (2005).

³¹ Lemley & Reese, *supra* note 7, at 1411–25.

³² See Sarah B. Deutsch et al., *Copyright & Privacy – Through the Copyright Lens*, 4 J. MARSHALL REV. INTELL. PROP. L. 212, Part III (2005).

terminate service to customers who are repeat infringers in order to enjoy the safe harbors, and the administrative proceedings we propose would help determine whether a customer is a repeat infringer.³³

Let me also say that we thought about this system initially as a substitute for going after technology developers and as a way to preserve the *Sony* rule. It also turns out that this could possibly be a useful enforcement mechanism in other alternatives, such as levy systems of the kind that Prof. Fisher described.³⁴ Some people, particularly Prof. Jessica Litman, have proposed an opt-in levy system which would still, I think, require enforcement against people who did not pay the levy and engaged in prohibited activity.³⁵ Mr. von Lohmann may talk a little bit about a collective licensing system that has been proposed which, again, depends to some extent on being able to enforce against end users.³⁶ To the extent such proposals depend on enforcement to deter violations being relatively inexpensive, our administrative system could be a way to achieve this.

In conclusion, the point I want to make here is that in talking at this symposium about trying to reconcile and find a balance between the privacy interests of users of P2P systems and the interests of copyright owners whose works are being used, it is important to think about protecting copyright not only with respect to the copyright owners of individual works, but also with respect to those who create new technologies useful in the exploitation of these works of authorship. We do not want those people to essentially go out of the business or provide only hobbled and less useful technologies because of the very significant threat of liability to copyright owners for their users' infringements under some revised version of the *Sony* standard such as we saw in *Napster* or *Aimster*. Thank you.

IV. COMMENT BY DEAN MOCK

DEAN MOCK:³⁷ Just to comment briefly on Prof. Reese's enforcement ideas, as an associate dean who has written on information law, but not copyright law, two images came to mind quickly. One was the current enforcement scheme which is a little bit like something out of the Crocodile Hunter. We have all of these animals crossing the river and the crocodile occasionally will come up and grab one of them and that one will pay an extremely high price. The other is the model that comes from the medical field which is a little bit more like what you are proposing. It is viewing the current rash of P2P copying as a bit more like a disease and you are trying to find an epidemiological approach to stopping the spread of the disease. If you can get rid of a few of the vectors and perhaps inoculate the rest of the population, you can solve the problem. It seems that is the approach you are talking about here.

³³ See 17 U.S.C. § 512(a)-(g), (i) (2000).

³⁴ See *supra* Part II.

³⁵ See Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1 (2004).

³⁶ See *infra* Part VII.

³⁷ See biographical information *supra* note 1.

V. HOWARD P. KNOPF

PROF. KNOPF:³⁸ I am going to talk about this issue from the standpoint of someone who has had some experience in Canada with some of these issues. I should also add that I have had involvement in litigation on various aspects of this. I am in the course of litigating and have just argued in the Federal Court of Appeals that the levy scheme in Canada, where we have a rather rich one, is unconstitutional because it is an illegal tax and has insufficient connection with the copyright law. I am glad that Prof. Fisher is forthright about calling his scheme a tax.³⁹ I am also arguing at the same time that there should not be disclosure orders with regard to subpoenas. We heard about that case this morning.⁴⁰ Interestingly enough, one of the main thrusts of that case depends on the privacy scheme. So in one case I am arguing it is unconstitutional, but in the other case I am relying on it. I hope nobody figures out that I am in a bit of a dilemma here. Actually, there is a way between them and I hope the court accepts it.

The conventional wisdom, in Canada, is that there is a problem from the standpoint of the music industry. However, there is no such problem in the United States at least in terms of the underlying law. That is the conventional wisdom. Interestingly enough, and I am not quite sure why, very few academics, if any in the United States, have attempted to drill down through that and see if it would actually hold up. There is some thought that through a strict reading of the Audio Home Recording Act and perhaps a creative approach to fair use, it might be possible to convince a court that some downloading, or even uploading for that matter, is legal in the United States. We will see what happens.

³⁸ 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.

³⁹ See *supra* Part II.

⁴⁰ *BMG Can. Inc. v. John Doe*, [2004] 239 D.L.R. (4th) 726.

I mention this because the thrust of my talk today is to suggest that we should make haste, and I say we, now speaking of the United States and Canada, slowly on this matter and not impose a drastic new law when we really do not know what is going on. We do not even really know what the law is right now. In order to amend the law, it is always a good idea to know what it is.

Problems should precede solutions. We are not really sure we have a P2P problem. At least not all people are sure. Prof. Fisher has said, and many others have pointed out, that there is conflicting evidence on this.⁴¹ Prof. Fisher has mentioned the evidence. The Supreme Court of Canada has noted itself in the recent *CAIP* case that Dr. Geist referred to this morning that some say *Napster* was a boom to the music recording industry.⁴² They are seized of that little dilemma.

We should look at industry facts from the record industry itself and Canadian figures. Sales and quantities are up over the last year and dollar amounts are more or less the same. In some key sectors of the industry, dollar amounts are actually up. Interestingly enough, if you look at the figures from the Canadian Recording Industry Association, which are in month-to-month figures, the Canadian outfits' sales are up if you track them before and after April 1st, which was when the decision from the court came down saying that Canada was a digital Sunni Triangle, according to the *Boston Globe*.⁴³ You might have thought these figures would go down because of all of the so-called rampant, egregious piracy that is going on in Canada. However, the industry is doing rather well in spite of that. The industry's own figures seem to suggest that there is not much of a problem. If you read the Harvard study, there are people, including Stan Liebowitz, who think that downloading and file-sharing is actually helpful to the industry.⁴⁴

If there is a problem it is not necessarily what is being pointed out by the industry. Using words like piracy and theft are not necessarily constructive. You will find on the Electronic Frontier Foundation ("EFF") site an audio transcript of the argument in the Ninth Circuit appeal case in *Grokster*.⁴⁵ You can hear, among other things, some brilliant advocacy by Mr. von Lohmann, and you will hear Judge Noonan come out and really lash into Carey Ramos and say that you do not solve this problem by calling it a theft, and ask him to address the issue at hand rather than use abusive language.⁴⁶ Some of these characterizations we are hearing are very conclusory, but it is not clear that it is theft. It is the old dilemma: if you steal a physical CD from the music store, you have taken a tangible good. It is rivalrous. You have one more CD, and they have one less CD. I am sorry, but it is not the same when downloading it from the internet. It may be economically harmful, possibly,

⁴¹ See *supra* Part II.

⁴² See *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, 478; Geist et al., *supra* note 30, Part VI.

⁴³ See Hiawatha Bray, *Canada Judge Crosses Line on File Sharing*, *BOSTON GLOBE*, Apr. 15, 2004, at C2.

⁴⁴ See generally Neil W. Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 *HARV. J. LAW & TEC* 1, 48 (2003); see also Lemley & Reese, *supra* note 7, at n.127.

⁴⁵ Oral Arguments before Ninth Circuit Court of Appeals in *MGM v. Grokster*, 380 F.3d 1154 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 686 (Dec. 10, 2004), available at http://www.eff.org/IP/P2P/MGM_v_Grokster/ (last visited Mar. 13, 2005).

⁴⁶ See *id.*

but it is not theft in the normal theft sense. That is something we all have to grapple with.

There are lessons that might have been learned from *Napster* and its prodigy but I am not sure that the industry has learned them. The main lesson is they are spawning new and more difficult enemies to deal with. *Grokster* has proven difficult, for obvious reasons, to deal with. Even so, there are more threatening things out there than *Grokster* and *Kazaa*. There is Earthstation 5,⁴⁷ which is located in Palestine. There are programs such as BitTorrent and BitComet that are going to be very elusive from a legal standpoint.⁴⁸ Calling ten and twelve-year-olds thieves and pirates and extracting significant financial settlements from their families, is not a good way to win friends and influence people. Four-thousand-dollars can be a lot of money, especially if the family is living in assisted housing. It could be that this search for “weapons of mass distribution” we are on here is back-firing.

There is also this interest in alternative compensation schemes being introduced into the United States by Neal Netanel and Prof. Fisher. Prof. Fisher has written a very, very elegant book. It is about as good of a case that can be made for alternative compensation schemes.⁴⁹ The trouble is we have an alternative compensation schemes in Canada—it is called the private copying levy—and it does not work. This scheme really does not work very well and has not been thought through nearly as well as Prof. Fisher’s scheme. Ironically enough, this scheme was put into place by the music industry itself as a sort of short-term grab. I think they have really profound regrets about this now. Nonetheless, they have got it. Like I keep saying to them, be careful what you wish for.

Prof. Fisher’s scheme, as he admits, would be rather difficult to put in place. For starters, it would require revision of the Berne convention, The Agreement on Trade Related Aspects of Intellectual Property Rights (“TRIPS”), all the recent trade agreements involving copyright and quite possibly the Fifth Amendment.⁵⁰ I am not an American Constitution lawyer, but I can think of some other constitutional issues that may be lurking.

I do not think the Copyright Office would be very thrilled by it, but Register Peters will speak for the Copyright Office. I do not think the content owners would ever go along with it because it would involve an enormous compulsory license and loss of control, beyond anything known to them in history. I think that even if it did get off the ground, there would be such battles between the sections of the music and film industry that, while it would be amusing to watch, would be gruesome to live through. We are starting to see this, by the way, in Canada where these various factions of the music industry essentially are suing each other and fighting each other before our Copyright Board over things like ring tones in an attempt to have some kind of a downloading tariff. As I said, I am glad that Prof. Fisher does call it a tax because that is precisely what it is.

⁴⁷ See <http://www.earthstation5.com/> (last visited Mar. 13 2005).

⁴⁸ See <http://www.bittorrent.com> (last visited Mar. 13 2005); <http://www.bitcomet.com> (last visited Mar. 13 2005).

⁴⁹ See generally FISHER, *supra* note 14.

⁵⁰ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 33 I.L.M. 81, available at http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm (last visited Mar. 13, 2005).

This is a great country. I always knew that and I am finding it out more now that I am here. The great Justice Marshall said that the power to tax involves the power to destroy, and that is the problem with levies.⁵¹ We are not talking about trivial amounts of money here. We are talking in Canada about something I suspect to be, officially, thirty-million dollars a year. I suspect it probably will go up to fifty-million; if we ratify WIPO, it will double to one-hundred-million per year, and if you want to translate this amount into American dollars, multiply by at least fifteen. The figures in Prof. Fisher's book are quite enormous. We are talking billions and billions and billions of dollars. There are also some structural problems that will just never go away. They are a great disincentive to the development of effective and acceptable technological protection measures ("TPM") and DRM. They are a drift-net that will catch everybody in it, from law professors to insurance agents. Anybody who uses computers basically will be caught in this whether they listen to music or not, even if they have no connection to copyright in any traditional sense.

The schemes are, some would say, almost anti-copyright. If we do this for music why not do it for films and then why not do it for photographers and the publishing industry and then why not have a tax on blank paper and then maybe on electricity because if you did not have electricity, you would not be able to do any of these things.

There would also be huge grey-market and black-market issues. We have already seen that in Canada. Why would somebody buy one-hundred CDs in Canada that cost over fifty dollars when they can buy them in the United States for twenty dollars? Almost half of our fifty-dollars is for a levy right now.

There is a huge national treatment issue for countries other than the United States on this that could involve hundreds of millions of dollars a year. There is a big distribution problem. Much of Prof. Fisher's book talks about the distribution issue, but I think the solution's discussion is somewhat idealistic. What we do know for sure is that in Canada over the last four or five years there has been at least one-hundred-twenty-million collected of which only twenty-seven million dollars has been distributed, and that only has been distributed mostly to other collectors. The collectors say that they are doing a good job on this. In fact, they are not. They will not spend a penny to try and figure out what to do with it.

Now, Prof. Reese's proposal incorporates as a part of this the idea of alternative compensation. I think their proposal frankly is anything but liberal to drop the statutory penalty down from seven-hundred-fifty dollars to a mere two-hundred-fifty dollars per song because it is still, frankly, absolutely outrageous. One-thousand songs is not egregious, but rather it is very, very normal. Apple® sells iPods® now that hold fifteen-thousand songs. I do not think anybody, even the RIAA, would seriously expect that some kid is going to go out there and spend fifteen-thousand times ninety-nine cents to fill up that thing legally so he can just accidentally forget it and leave it on the subway. No way. And Prof. Reese is talking about a two strikes regime. At least in California you get three strikes before they put you away forever. Therefore I am not sure that faster, cheaper, more effective legislation that is going to take away the college careers of thousands of young kids, who have to pay

⁵¹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819).

settlements in the substantial thousands of dollars, is an answer. It is just going to bring the law into disrepute.

I will probably try and squeeze some shots in later, but to conclude, I think that one should make haste very slowly on this in terms of increasing rights and remedies. Seriously consider decreasing these and getting rid of these statutory damages, which were never intended for this purpose. In addition, although I am not overly worried about Prof. Fisher's scheme coming into legislation quickly, I hope that I have a chance to work with some of the great American scholars like him on this. Finally, I think we should look long and hard at what has happened in Canada because there are some lessons to be learned there and we Canadians have had a lot of experience in this. Thanks very much.

VI. HON. MARYBETH PETERS

REGISTER PETERS:⁵² My comment really has to do with being a traditionalist. I think the United States and many other countries have copyright laws to encourage creativity so the law is focused on the creator. It is also focused on what we can do to make sure that people continue to create and can earn a living from that creation. The various schemes that we are talking about have that same goal. The question is how to get there.

Certainly in my forty years at the Copyright Office I have looked at various schemes and from my perspective, I like the system set forth in the Constitution.⁵³ Instead of public funding, it provides a regime of exclusive rights and leaves it to the marketplace. I prefer the marketplace to any government regulation. The Copyright Office oversees compulsory licenses. There was a proceeding on how much webcasters should pay for the use of sound recordings; and it was a nightmare. Getting evidence on the market value of the use of a sound recording was very, very difficult. Therefore, in my opinion, a scheme that actually promotes creativity and gives copyright owners control over their works is what we should aim for. I also

⁵² The Honorable Marybeth Peters has served since 1994 as the Register of Copyrights for the United States Copyright Office of the Library of Congress. From 1983–1994, Register Peters held the position of Policy Planning Advisor to the Register. Register Peters has also served as Acting General Counsel of the Copyright Office and as Chief of both the Examining and the Information and Reference divisions. A frequent speaker on copyright issues, Register Peters is the author of *The General Guide to the Copyright Act of 1976*. Register Peters received her undergraduate degree from Rhode Island College and her law degree, *with honors*, from The George Washington University Law Center. Register Peters is a member of the Bar of the District of Columbia. Register Peters is an active member of The Copyright Society of the U.S.A. Register Peters is also a member of the Intellectual Property Section of the American Bar Association, the District of Columbia Bar Association, including the Computer Law Section, the DC Computer Law Forum and the Computer Law Association, where she is a member of the board of directors. Register Peters has served as a lecturer in the Communications Law Institute of The Catholic University of America Columbus School of Law and as adjunct professor of copyright law at both the University of Miami School of Law and the Georgetown University Law Center. Register Peters served as a consultant on copyright law to the World Intellectual Property Organization in Geneva, Switzerland from 1989–1990.

⁵³ U.S. CONST. art. I, § 8, cl. 8.

agree with Prof. Knopf. You have to look at this in the international context.⁵⁴ How is the scheme going to work throughout the world? I am not a fan of levies per se, and as a member of the United States government's delegations, I can say that we actually have told the Europeans many times that we thought they were short sighted in adopting levy systems for private copying. In a digital environment, it is not the way to go. Works are being marketed over the internet and levy schemes are seen as taxes. The U.S. has one for digital audio recording equipment and media. If you look at that as an example, it covers only dedicated audio recording devices.⁵⁵ It does not cover music that is heard through a computer. I actually think that if the affected industries, such as the record industry and music industry, could go back and consider the issue anew, the present law would never have been enacted. Of course, one of the perceived benefits is that the manufacturers of the equipment and the media pay royalties. The money is sent to the Copyright Office, and two-thirds of the funds go to record companies and the other one-third goes to music publishers. However, not very much money is received, and in exchange, there is no liability against any individual for making copies of the copyrighted works for private use. So, I am not sure whether music publishers and record companies believe that this was a good deal.

I think they now know that they gave away far too much, and they would have been better off without this kind of a statute. I believe levies are not a solution. I initially thought the role the Copyright Office might play would be significant. However, I know from my own experience with registering claims, for example, that § 115 does not work. Section 115 provides that in order to receive money through the statutory license for making and distributing phonorecords, owners of musical compositions must register with the Copyright Office.⁵⁶ However, many do not register their claims and are therefore ineligible for royalties. In general, government is not the answer. The Copyright Office is involved in rate setting, but it is unbelievably difficult. I think the private sector could do it better. Yes, we need to figure out ways to look at these issues, and the four categories that Prof. Fisher mentioned would all play a role.⁵⁷ I agree with Prof. Knopf⁵⁸ and Prof. Netanel that we are in a transition period and are going to have to figure out the best way to move forward. Maybe some of these alternative proposals are good possibilities. We have to achieve the right balance. Good luck to those who seek changes in legislation. I volunteered to take on revision of the copyright law to deal with a worldwide-internet environment; there was not one person who said: "I think that is a good idea." What everybody did say is that "We need certainty"; "We run businesses"; "We have past practices"; "We have contracts"; "We really do not want any major changes." So, if we are to adopt an alternate scheme, I think it would be an uphill battle. My personal preference is to work out our problems within the current system. Thank you.

⁵⁴ See *supra* Part V.

⁵⁵ See, e.g., 17 U.S.C. §§ 1001–1010 (2000).

⁵⁶ 17 U.S.C. § 115(c)(1) (2000).

⁵⁷ See *supra* Part II.

⁵⁸ See *supra* Part V.

VII. FRED VON LOHMANN

MR. VON LOHMANN:⁵⁹ I too want to start with the four categories that Prof. Fisher helpfully laid out before you.⁶⁰ I thought that was a very good overview of the various options.

I would like to add an overlay from what we were discussing this morning. Namely, of those four approaches, which increase pressure on privacy, anonymity, and civil liberties? Which decrease pressure? We have seen that as more and more pressure mounts to “do something” about the copyright issues, there will be collateral damage to other important social priorities such as anonymity, privacy and civil liberties. To the extent they are viewed as impediments to the protection of copyright, they are imperiled.

It is striking to me that many of the recent debates surrounding online piracy have revolved around key privacy issues.⁶¹ Prof. Cohen’s presentation made this

⁵⁹ Fred von Lohmann is a senior staff attorney with the Electronic Frontier Foundation (“EFF”), specializing in intellectual property issues. In that role, Mr. von Lohmann has represented programmers, technology innovators, and individuals in litigation against every major record label, movie studio and television network (as well as several cable TV networks and music publishers) in the United States. In addition to litigation, Mr. von Lohmann is involved in EFF’s efforts to educate policy makers regarding the proper balance between intellectual property protection and the public interest in fair use, free expression and innovation.

The EFF matters in which he is involved include *MGM v. Grokster*, in which Mr. von Lohmann represents Streamcast Networks, developers of the Morpheus software application, in a lawsuit brought by twenty-eight entertainment companies alleging that Streamcast should be held liable for the activities of its end-users. Mr. von Lohmann argued this case on appeal before the Ninth Circuit Court of Appeals, leading to a groundbreaking ruling by the Court in August 2004 in favor of Streamcast and Grokster. Mr. von Lohmann was also involved in Broadcast Flag and Digital TV, working to represent the voice of consumers and innovators before the FCC and the BPDG in the debate over the “broadcast flag,” Hollywood’s scheme to sneak federally-mandated content protection technology into all digital television devices.

Mr. von Lohmann was named one 2004’s one hundred most influential lawyers in California by the *Daily Journal*, a leading newspaper, and received a 2003 CLAY award (California Lawyer of the Year) from *California Lawyer* magazine. Mr. von Lohmann was also named one of the fifty Agenda Setters for 2003 by UK publication *Silicon.com*. Mr. von Lohmann has appeared on CNN, CNBC, ABC’s *Good Morning America*, Fox News’s *The O’Reilly Factor* and TechTV’s *ScreenSavers*. Mr. von Lohmann has been widely quoted in a variety of publications, including *The New York Times*, *The Washington Post*, the *Los Angeles Times*, *Billboard*, *US News & World Report*, *CNET News*, *Wired News*, *TIME* magazine and a number of leading legal newspapers. Mr. von Lohmann’s opinion pieces have appeared in the *Los Angeles Times* and the *San Jose Mercury News*. In addition, Mr. von Lohmann has published numerous EFF-related and other scholarly articles.

Before joining the EFF, Mr. von Lohmann was a visiting researcher with the Berkeley Center for Law and Technology, where his research focused on the impact of peer-to-peer (“P2P”) technologies on the future of copyright. Prior to his research fellowship, Mr. von Lohmann was an attorney with the international law firm of Morrison & Foerster LLP, concentrating on transactions and counseling involving the internet and intellectual property. Mr. von Lohmann has also served as a law clerk to Chief Judge Thelton Henderson of the U.S. District Court for Northern California, and Judge Betty B. Fletcher, of the U.S. Ninth Circuit Court of Appeals. Mr. von Lohmann received both his undergraduate and law degrees from Stanford University.

⁶⁰ See *supra* Part II.

⁶¹ See, e.g., Amicus Curiae Brief of Consumer and Privacy Groups in Support of Appellant Charter Communications, Inc., *In re* Charter Communications, Inc. Subpoena Enforcement Matter,

clear.⁶² The question of privacy seems to be expressing itself through copyright issues. I think that would have surprised many people even ten years ago.

Returning to Prof. Fisher's four categories, the fourth category is the category of alternative compensation. It is the only one of the four approaches that actually holds any promise of reducing the pressure on privacy, anonymity and civil liberties.

We at the EFF share some of Register Peter's skepticism regarding the government's positioning as the ideal entity to administer a collective alternate licensing system. Instead, I believe collective licensing approaches are the right place to start. EFF has endorsed voluntary collective licensing as a superior alternative to government-administered compulsory licenses, and that approach is one that has been used very successfully in this country in the context of broadcast radio. It is a private ordering solution. It is the solution that arose after song-writers concluded that the best way to respond to the new broadcast radio technologies was to create collecting societies. Again, there was a period of transition, litigation and dispute. However, ultimately they found that administering their exclusive rights through voluntarily organized collecting societies offered a profitable way to guarantee compensation for radio play without having to insist on control over what radio stations played. We now have three major performing rights organizations ("PROs") in the United States, providing some amount of marketplace competition in the servicing of this collecting function. They grant blanket licenses to radio stations that in exchange for periodic payment. In return, radio stations are entitled to play whatever they want, whenever they want, however often they want, on whatever equipment suits their needs.

So, in the broadcast radio context in the middle of the twentieth century, we found a way through private ordering to achieve many of the benefits that Prof. Fisher mentioned⁶³ while eliminating many of the problems associated with government intervention that both Register Peters⁶⁴ and Prof. Knopf⁶⁵ highlighted. I think there is a lot of hope in that direction for a potential solution of the so-called "digital dilemma" that faces copyright owners today. I hope copyright owners explore collective licensing aggressively and find ways that they can make legal the file-sharing that frankly, is here to stay regardless.

I will briefly respond to Prof. Reese's view. First, I think it is a very plausible story to tell as a theoretical matter.⁶⁶ However, empirically there is mounting evidence that the expansion and streamlining of civil enforcement will not be an effective solution. In fact, many of the improvements that Profs. Lemley and Reese recommend in their paper are things that have already come to pass in the P2P file sharing context. So, for example, I am told that today the recording industry lawsuits against individual file-sharers are profitable, with the settlements from prior rounds of suits covering the costs of bringing the next round.⁶⁷ So it is not the

393 F.3d 771 (8th Cir. 2005) (No. 03-3802), *available at* http://www.eff.org/IP/P2P/Charter/20040126_amicus.pdf (last visited Mar. 13, 2005).

⁶² See Cohen et al., *supra* note 25, Part II.

⁶³ See *supra* Part II.

⁶⁴ See *supra* Part VI.

⁶⁵ See *supra* Part V.

⁶⁶ See *supra* Part III.

⁶⁷ As of February 2005, the recording industry has filed 8,423 lawsuits against individual file-sharers. According to reports, the average settlement obtained in these suits is approximately

case that pursuing civil enforcement in the current legal regime imposes onerous costs that leave the copyright owner without a remedy.

Direct TV is probably the clearest example of this.⁶⁸ In its efforts to curtail piracy of its satellite television service, Direct TV has brought over twenty-four thousand federal lawsuits and has sent over one-hundred-fifty-thousand demand letters seeking settlements.⁶⁹ This effort has proven to be a profitable venture for DirecTV, with the enforcement efforts becoming a substantial independent profit-center for the company. I do not think the problem here is that the civil justice system is too burdensome and inefficient for copyright owners.

Profs. Lemley and Reese also emphasize the importance of having so-called legitimate alternatives in the market. The copyright owners have made much of their recent efforts on that front. Apple's iTunes[®] Music Store, for example, has sold more than two hundred million downloads.⁷⁰ The claim is that authorized alternatives are available. Yet in the face of efficient enforcement mechanisms through civil courts, as well as the availability of authorized alternatives, P2P file-sharing continues to be enormously popular.⁷¹ In other words, both an efficient system of civil penalties (in the form of the lawsuits that have been brought against more than eight-thousand individuals thus far) and array of authorized alternatives are already part of the digital music marketplace today. And yet the conjunction of these two mechanisms, the same ones proposed by Profs. Reese and Lemley, have shown no success in reducing the incidence of P2P file sharing.

Moreover, the various file-sharing technologies are likely to begin to change in order to make it more difficult to enforce and monitor. This is the beginning of what in essence will be something of an arms race that frankly will be very hard for copyright owners to win unless we are all willing to make substantial legal and technical changes that may sacrifice other social values, such as privacy, anonymity and innovation.

So, in conclusion, I think we should look carefully at the fourth of Prof. Fisher's categories. Only the solutions in that category appear to hold out the promise of both securing adequate incentives for authors and rights-holders, while safeguarding our commitments to other social values, such as privacy, anonymity, civil liberties and innovation. Thank You.

\$3,000, which suggests that the recording industry stands to collect upwards of \$25 million in settlements from its campaign thus far. See Andrew Tran, *Woman Silenced by Music Mafia*, DAILY TEXAN, Feb. 4, 2005, available at <http://www.dailytexanonline.com/news/2005/02/04/Opinion/Woman.Silenced.By.Music.Mafia:852298.shtml> (last visited Mar. 13, 2005).

⁶⁸ See generally *Will DirecTV Sue You Next?*, CBSNEWS.COM, Oct. 10, 2003, at <http://www.cbsnews.com/stories/2003/10/10/eviningnews/consumer/printable577599.shtml/>.

⁶⁹ See generally <http://www.directvdefense.org> (last visited Mar. 13, 2005) (providing details on the DirecTV campaign).

⁷⁰ *iTunes Hits 250 Million Downloads*, CNET, Jan. 24, 2005, at http://news.com.com/iTunes+hits+250+million+downloads/2110-1027_3-5547939.html.

⁷¹ See T. Karagiannis et al., *Is P2P Dying or Just Hiding?*, in PROCEEDINGS OF THE INST. OF ELEC. & ELECS. ENGR'S GLOBAL TELECOMMUNICATIONS CONFERENCE 2004 (Dallas, TX, Nov. 29–Dec. 3, 2004), available at <http://www.caida.org/outreach/papers/2004/p2p-dying/p2p-dying.pdf> (last visited Mar. 13, 2005) (research indicating that P2P traffic has, if anything, increased since the recording industry began its lawsuit campaign).

VIII. QUESTIONS FROM THE FLOOR

QUESTION: Just one thing, I disagree that this is voluntary private licensing by saying it is enforced by massive amounts of lawsuits against individuals like ASCAP and BMI. Look at the *Buck v. LaSalle* case, where Justice Brandeis allowed not just public performance but multiple performances, thus creating the multiple performance doctrine.⁷² This case was brought against radio stations with massive resistance in the beginning. If you look two or three years after that happened, you would say there was no compliance and it was hopeless. However, now there is almost complete compliance and the difference is that the culture now is that you should comply. In terms of changing a point of view in which music should be on free airwaves or played in a bar, ultimately the legal regime that countered that point of view with enforcement succeeded. If you took just a snapshot of certain years you would say it is a failure and it is never going to work. To the present issue, it is way too early now to say things like this. You look at life in general, Jay-walking for example. In New York you Jay-walk. If you do it in California you are arrested. There is no Jay-walking in Venice. There is complete Jay-walking in New York. If I go to Venice, I stop Jay-walking. I go to Germany I stop Jay-walking. So it is a question of what is the regime imposed and what is going to happen to you. It is way too early to make judgments as to the success of it. You may be right and you may be wrong, but it is way too early to make these judgments.

REGISTER PETERS (responding):⁷³ BMI will tell you that nobody wants to pay, so BMI must continue to sue—they are always involved in litigation.

MR. VON LOHMANN (responding):⁷⁴ That is right. When I say voluntary collective licensing, I mean to say voluntary on the part of the copyright owners. This approach contrasts with compulsory licensing where the government takes a subset of exclusive rights from the right-holder's bundle. So when I say *voluntary* collective licensing, it is the copyright owners I am talking about.

I agree with you that enforcement will be necessary. The question in my view is what kind of enforcement. I actually view it as a debate between Profs. Lemley and Reese's view and my view, in the sense of which sort of enforcement is more likely to succeed.⁷⁵ I would suggest considering public transportation as an example. In Berlin and San Francisco, for example, we have systems of public transportation that do not require patrons to show a ticket to get on the subway. Instead, there are spot checks from time to time, and if you are caught without a ticket, there is a fine. It is a low fine, less than one hundred dollars, not a punitive fine of thousands of dollars meant to "send a message" to others. Rather, it is a lower fine that creates a kind of a moral hazard and a very small penalty.

I think that is essentially what the BMI and ASCAP enforcement has amounted to. If you are caught as a bar or restaurant owner playing music without a license, there is a fine, it stings, and you feel it, but it is not intended to put you out of

⁷² *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 198 (1931).

⁷³ See biographical information *supra* note 52.

⁷⁴ See biographical information *supra* note 59.

⁷⁵ Compare Lemley & Reese, *supra* note 7, with von Lohmann, *supra* Part VII.

business. In a voluntary collective licensing environment, no collective licensing organization should want to drive their customers permanently away. Instead, the rational, economically-motivated collecting society would want to make people understand there is a consequence if you fail to obtain a license, but theirs would be a very different set of incentives from the regime that Profs. Lemley and Reese suggest where the main goal is sending a message to others.⁷⁶

So I agree with you. Enforcement will be a challenge. To echo Prof. Fisher, the question here is “compared to what”? We will have to have enforcement. I would say we would be better off in a world where it was handled by collecting societies trying to maximize a real business rather than by enforcement agents trying to create some kind of general deterrence.

IX. CONCLUDING REMARKS BY DEAN MOCK

DEAN MOCK:⁷⁷ If I can go back to epidemiology, there is both a mandatory vaccination and a voluntary vaccination. But if you know there is a real disease out there, you get vaccinated anyway. Then there is this year where you cannot even get the flu shot. Thank you very much.

⁷⁶ Lemley & Reese, *supra* note 7, at 1418–34.

⁷⁷ See biographical information *supra* note 1.