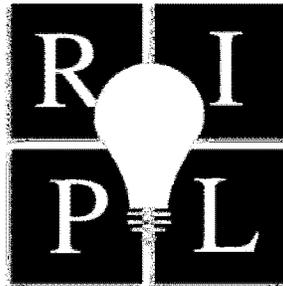


# THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



COPYRIGHT & PRIVACY – THROUGH THE POLITICAL LENS

NOVEMBER 18, 2004

WILLIAM W. FISHER, III, HUGH C. HANSEN, CHRISTOPHER JAY  
HOOFNAGLE, HOWARD P. KNOPF, DECLAN MCCULLAGH,  
RALPH OMAN AND MATTHEW J. OPPENHEIM

ABSTRACT

Veteran beltway players discuss the politics of P2P technology and Privacy. How far can or should Congress go? Can the United States export its values or its laws in this area? Are content owners in a losing Luddite struggle? What is the role of litigators, lobbyists and legislators in this war?

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## I. CHRISTOPHER JAY HOOFNAGLE

MR. HOOFNAGLE:<sup>1</sup> I grew up in the Washington, D.C. area. My grandparents used to go to Ocean City, Maryland for vacation. They once got me a T-shirt that said: “My grandparents got to go to the beach, and all I got was this lousy T-shirt.” When it comes to privacy, consumers have been given a version of that shirt. Copyright interests went to Congress and got the Digital Millennium Copyright Act (“DMCA”).<sup>2</sup> Big companies went to Congress and got protections against domain-name squatting.<sup>3</sup> And the big ISPs went to Washington and got immunity under the Communications Decency Act and assurances that there will be no internet taxes.<sup>4</sup> Meanwhile, the consumer is in his corner with a T-shirt that says: “Businesses went to Congress and got everything they wanted, and all I got was lousy self-regulation.” It is very difficult to sketch the landscape of privacy in just a short amount of time. I am grateful to follow Prof. Swire’s talk<sup>5</sup> because he sketched out some of the best privacy protections in the United States: substantive privacy laws that follow fair information practices.<sup>6</sup> Indeed, in the 1970’s, 1980’s and early 1990’s, Congress

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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> Christopher Jay Hoofnagle is Associate Director of the Electronic Privacy Information Center. Mr. Hoofnagle has testified before Congress on privacy and Social Security Numbers, identity theft and the Fair Credit Reporting Act, and before the Judicial Conference of the U.S. on public records and privacy. Mr. Hoofnagle participated in the Boyer case, where the New Hampshire Supreme Court held that information brokers and private investigators can be liable for the harms cause by selling personal information. Mr. Hoofnagle’s writings on the First Amendment and privacy have been published in the San Francisco Chronicle, the Knight Ridder News Service, and in law journals at Columbia Law School, the University of Notre Dame Law School and the University of North Carolina Law School of Law at Chapel Hill.

<sup>2</sup> Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17, 28 U.S.C.).

<sup>3</sup> Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d) (2000).

<sup>4</sup> Communications Decency Act, Pub. L. 104-104, 110 Stat. 56 (1996) (codified as amended in 47 U.S.C. 223 (2000)).

<sup>5</sup> See Julie E. Cohen et al., *Copyright & Privacy – Through the Privacy Lens*, 4 J. MARSHALL REV. INTELL. PROP. L. 273, Part I (2005).

<sup>6</sup> See also Marc Rotenberg, *Fair Information Practices and the Architecture of Privacy: (What Larry Doesn’t Get)*, 2001 STAN TECH. REV. 1 (2001).

passed substantive privacy legislation that was much stronger than the legislation we see today.<sup>7</sup> It used to be that privacy laws introduced a full set of fair-information practices: responsibilities in data handling that gave individuals rights of access, rights to correct personal information held by others, use limitations and opt-in protections against the use of personal information for marketing. Today, Congress has been more reluctant to create these protections. So, for instance, the law that allows banks, insurance companies and brokerage houses to merge and create mega-financial-service companies basically provides only a notice-and-choice framework. Once they have given you an unreadable notice, they can share your personal information without limit with their affiliates.<sup>8</sup> Even if you choose to opt-out, they can share your information with telemarketers, or basically anyone they want, so long as they create something known as a joint-marketing agreement.

The second trend worth noting is recently we have seen Congress ‘punt’ the tough privacy questions to federal agencies. For example, the critical issue in the CAN-SPAM Act that passed in December 2003 was the definition of “spam.”<sup>9</sup> Congress outsourced that determination to the Federal Trade Commission. While agencies can give excellent expert advice on difficult issues, it seems excessive for Congress to delegate such a broad issue to an agency.

Today I want to focus on what is going on in Congress. I want to discuss a particular hearing that was held in February 2003 by the House Judiciary Subcommittee on Intellectual Property.<sup>10</sup> This hearing was the first for the new chairman, Lamar Smith, a Republican from Texas. Chairman Smith has been instrumental in making it easier for law enforcement to get access to data from ISPs, and was also the sponsor of a bill called the Cyber Security Enhancement Act, which Congress passed last year.<sup>11</sup>

At the hearing, after the panel members testified and gave their statements, the questioning period began and things got very interesting. Representative Weiner, who is a Democrat from New York, said peer-to-peer (“P2P”) file sharing is a rare issue because there is virtual consensus on the panel, and probably in Congress as

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<sup>7</sup> See, e.g., Fair Credit Reporting Act of 1970, Pub. L. 91-508, 82 Stat. 146 (codified as amended in 15 U.S.C. § 1601 (2000)).

<sup>8</sup> In hearings before Congress on amendments to the Fair Credit Reporting Act, Senator Barbara Boxer noted that Citigroup has 1,630 affiliates, Bank of America has 1,323 affiliates, JP Morgan has 967 affiliates, and Wachovia Corporation has 886 affiliates. 149 CONG. REC. S13863-02 (daily ed. Nov. 4, 2003) (statement of Sen. Boxer).

<sup>9</sup> Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act of 2003), S. 887, 108th Cong. (2004) (enacted). The CAN-SPAM Act requires unsolicited commercial e-mail messages to be labeled (though not by a standard method) and include both opt-out instructions and the sender’s physical address. The Act prohibits the use of deceptive subject lines and false headers in such messages. The FTC is authorized (but not required) to establish a “do-not-email” registry. State laws that require labels on unsolicited commercial e-mail or prohibit such messages entirely are pre-empted, although provisions merely addressing falsity and deception would remain in place.

<sup>10</sup> *Capital Hill Hearing Testimony: Hearing Before the Subcomm. on the Courts, the Internet, and Intell. Prop.*, 108th Cong. (2003) (statement of Rep. Smith, Member, House Comm. on the Judiciary).

<sup>11</sup> Cyber Security Enhancement Act, Pub. L. 107-296, 16 Stat. 2156 (codified in 6 U.S.C. § 145 (Supp. 2002)).

well, that something needs to be done to address the problems created by P2P.<sup>12</sup> Representative Jenkins, a Republican from Tennessee, asked the president of Penn State University, who was testifying at this hearing, “Mr. College president, has your legal staff gone down to the U.S. Attorney’s Office in an effort to prosecute cases of P2P trading that you know of?”<sup>13</sup> The representative from the University of North Carolina at Chapel Hill, who is a chief information officer, then stated: “When we catch people P2P trading, we reeducate them by requiring that they take a mandatory course. After this course, only about one percent engages in the prohibited activity again.”<sup>14</sup> Representative Jenkins responded by saying: “If one percent of your students at UNC were repeat offenders in assault and battery, would you give them the same consideration?”<sup>15</sup> Representative Maxine Waters then asked: “Have you ever expelled anyone for P2P or file trading?”<sup>16</sup> My point in reading these quotes is to illustrate that there is a strong bi-partisan will to do something about P2P even at the college and university level, fora usually insulated from this type of regulation. Members of the subcommittee are suggesting draconian approaches: expelling these students or bringing criminal charges against them. Members are confusing property crimes with violent crimes, and frequently they are using analogies or metaphors that correlate to violent crimes rather than simply property crimes when referring to P2P file sharing. Representative Conyers imparted the best advice at the hearing: “Let’s all gather around the table with the electronics industry and the content industry, let’s begin to fashion a solution that we can all live with or you’ll probably all get a solution that you will all be very unhappy with.”<sup>17</sup>

There are a lot of challenges with going forward in protecting privacy in the P2P context. The first challenge is to find industry allies for consumers. There are too many technology companies that both make media players and sell content. As a result, their interests in making consumer friendly players conflict with a desire to lock down content. I think that is one of the reasons why we are seeing so many devices with digital rights management (“DRM”), a feature that no consumer wants in a product.<sup>18</sup> DRM alters the balance of power between content owners and individuals, allowing the former to interfere with the latter in arbitrary ways. DRM enables companies to monitor individuals ubiquitously. There is an absence of market forces to check this monitoring. And so we are beginning to see products like Microsoft’s Reader for e-books, which actually identifies the user and ties the user’s identity to all of the e-books the user buys.

The second challenge is to explain to the public how their personal information is traded and how DRM can erode personal privacy. Is everyone familiar with

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<sup>12</sup> *P2P Piracy on University Campuses: Hearing Before the Subcomm. on the Courts, the Internet and Intellectual Property*, 108th Cong. 25 (2003) (statement of Rep. Weiner).

<sup>13</sup> *Id.* at 37 (statement of Rep. Jenkins directed to Graham Spanier, President, Penn State University and Co-Chair, Committee of Higher Education and Content Communities).

<sup>14</sup> *Id.* at 79 (statement of Robyn Render, Vice President for Information Resources and CIO, University of North Carolina).

<sup>15</sup> *Id.* at 80 (statement of Rep. Jenkins).

<sup>16</sup> *Id.* at 81 (statement of Rep. Waters).

<sup>17</sup> *Id.* at 181 (statement of Rep. Conyers).

<sup>18</sup> Chris Jay Hoofnagle, *Digital Rights Management: Many Technical Controls on Digital Content Distribution Can Create a Surveillance Society*, 5 COLUM. SCI. & TECH. L. REV. (2003), at <http://www.stlr.org/html/volume5/hoofnagle.pdf>.

Columbia House? Columbia House is the company where you sign up for ten dollars and they give you ten CDs, and then you have this endless subscription that you can never cancel. Did you know that Columbia House sells a list of all of its members, segmented by music-listening interests? If you are buying CDs, they note that. If you buy cassettes, they note that. They note if you send in a change-of-address form so that it can be sold to others. They also segment the list by the type of music you listen to. With DRM, it is likely that advertisers will obtain granular detail about what you listen to and for how long, your e-mail address and all sorts of contact information; all without privacy protection. This is what DRM providers and people in the content industry are going to do with our personal information if we let them. Thank you.

## II. DECLAN MCCULLAGH

MR. MCCULLAGH:<sup>19</sup> It is a pleasure to be here today with so many folks who have spoken clearly and thought deeply about these issues. I had planned to give a descriptive talk from my perspective as a legal and political writer. I am going to do a bit of thinking aloud. I hope my colleagues up here will forgive me for saying things that people disagree with.

I should preface these thoughts by saying that after spending over a decade writing about the technology and policy landscape in Washington, D.C., I have turned into a professional cynic. It is a myth that members of Congress act with the best interest of America or its citizens in mind. They have their personal, typically financial, interests in mind. So, if you want to talk about changing the law, it is not a question of us putting forward a reasonable or rational argument. Thus, some of the proposed solutions do not take into account what economists call the public-choice problems. Some in academia like to speculate about market failures; instead, I would

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<sup>19</sup> Declan McCullagh is Chief Political Correspondent for CNET's News.com. An award-winning journalist, Mr. McCullagh writes and speaks frequently about technology, law and politics. From 1998–2002, Mr. McCullagh was the Washington bureau chief for Wired News. Previously, Mr. McCullagh was a reporter for TIME magazine, Time Digital Daily and The Netly News, as well as a correspondent for HotWired.

Mr. McCullagh's articles have appeared in scores of publications including Playboy magazine, George magazine, The New Republic, The Wall Street Journal, Communications of the ACM and the Harvard Journal of Law and Public Policy. Mr. McCullagh has appeared on NPR's All Things Considered, ABC News's Good Morning America, NBC's Evening News, Court TV, and CNN. Since 2002, Mr. McCullagh has been an Adjunct Professor of Law at Case Western Reserve University in Cleveland, Ohio. Mr. McCullagh is also an adjunct professor at American University in Washington, D.C.

Mr. McCullagh moderates "Politech" (<http://www.politechbot.com>), a well-known mailing list looking broadly at politics and technology that he founded in 1994 and has been online since 1988. Mr. McCullagh was the first online reporter to join the National Press Club; he participated in the first White House dot-com press pool; and was one of the first online journalists to receive credentials from the press gallery of the U.S. Congress. Mr. McCullagh has spoken at schools including Stanford University, MIT, Harvard University, Georgetown University, the University of Chicago and Duke University, and has testified before the Federal Trade Commission.

rather talk about government failure. We have, as examples, laws like the Communications Decency Act<sup>20</sup> or the Tax Code<sup>21</sup> for that matter.

So far at the conference, we have not seen that much recognition of government failure, just this idea that we need to try harder, get more allies or spend more money on lobbying. On the one hand, academia and non-profit groups complain of reduced privacy and the overbroad reach of copyright law. On the other hand, you have industry groups that believe copyright infringers should enjoy scant privacy and that copyright law is not broad enough.

Mr. Hoofnagle talked about trends,<sup>22</sup> and one trend I would like to discuss is the politics of copyright technology, which is the subject of the P2P debate. It has become fashionable in some circles to complain that copy-protection technology threatens socially desirable notions like privacy and the ability to make fair use of portions of digital works. The typical responses involve enacting new laws that would curb, regulate and limit technology to which these critics object. We have seen three bills in the 108th Congress. Senator Sam Brownback from Kansas, has a bill, S. 1621, which would ban the sale or importation of DRM technology, including DRM-protected media, unless it follows government regulations on whether the media could be resold or donated.<sup>23</sup>

Representative Rick Boucher and Senator Wyden have two bills that would empower the Federal Trade Commission to create a complex web of regulations that would govern CDs,<sup>24</sup> or digital media<sup>25</sup> in general, depending on which bill you are looking at. Law review articles tend to be even more far-reaching when it comes to envisioning new ideas. Some include extending firearm-style rules to DRM and the compulsory licensing schemes that we have already heard about.

On the other hand, you have influential copyright holders seeking to use DRM turning to Congress for aid. They won an early victory with the DMCA. We have seen proposals to ban computer technology without DRM imbedded in it, and the Federal Communications Commission (“FCC”) has declared that it will be illegal to sell non-DRM compliant hardware beginning as early as next year. The Motion Picture Association of America (“MPAA”) and the National Football League unsuccessfully lobbied the FCC to extend its broadcasting rule to TiVO. The Walt Disney Company, which owns over seventy radio stations and four record labels, has proposed that the FCC should consider extending these rules to radio.

The problem is that all of these schemes transform one of the least regulated U.S. industries into one of the most regulated ones, requiring inventors to seek permission from the government before creating new products. But even more alarmingly—and I have a technology background so perhaps I am a bit alarmed by the first point—both camps also seem to want to create a permanent regulatory infrastructure that would become an even more tempting target than it is now for

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<sup>20</sup> See generally 47 U.S.C § 223(a), (d) (1996), *held unconstitutional by* Reno v. UCLU, 521 U.S. 844 (1997).

<sup>21</sup> See generally I.R.C. §§ 1–9799 (2000).

<sup>22</sup> See *supra* Part I.

<sup>23</sup> Consumers, Schools, and Libraries Digital Rights Management Awareness Act of 2003, S. 1621, 108th Cong. (2003).

<sup>24</sup> Digital Media Consumers’ Rights Act of 2003, H.R. 107, 108th Cong. (2003)

<sup>25</sup> Digital Consumer Right to Know Act, S. 692, 108th Cong. (2003).

lobbying and special-interest pressure. Is copyright law a feature right now? Of course, but recognizing this flawed situation is not an argument for making it worse.

In going beyond DRM technology, we see spill-over into P2P-related areas as well. Eight bills have become glued together to become the Intellectual Property Protection Act (“IPPA”).<sup>26</sup> This is a mammoth IP bill that could be enacted between now and the time Congress leaves town for Thanksgiving. I highlight one or two sections. H.R. 4077 is imbedded in the bill and makes it easier to file criminal lawsuits against P2P users.<sup>27</sup> S. 2237, which authorizes federal prosecutors to file civil actions against copyright infringers, is also included.<sup>28</sup> H.R. 4586, depending on its interpretation, could restrict consumer rights to fast-forward through commercials or promotional ads.<sup>29</sup> An earlier version of the bill allowed consumers to fast-forward through commercials, but now this language is gone. One reason this is a distressing list of bills is because it continues this trend of placing increasing importance on Congress, which is a group of professional politicians, exceptionally ill-prepared to do the right thing for copyright. These are not individuals with any technical background. They tend to be octogenarians who are learning to check their e-mail. Remember Orrin Hatch? He is the outgoing chairman of the Senate committee in charge of overseeing copyright law and talks about how it is actually just dandy to destroy people’s computers if they are using them to destroy copyrights. This is not someone with a balanced view of copyright law.

A few other points in response to other speakers: my friend, Mr. Hoofnagle, talks about privacy as if it is something we would not have without congressional action. I would like to challenge that notion. First, the states can provide privacy protections without any action by the federal government. Second, contract law can place limits on disclosure; people do not have to do something unless they actually get the privacy rights they want. Eventually, there can be a standard ‘privacy contract.’ Third, some of the requirements that Mr. Hoofnagle and groups such as the Electronic Privacy Information Center push for are harmful and anti-consumer because they will impose additional costs on businesses and raise the prices that consumers would have to pay. Fourth, even some of the so-called successes of the government are not successful. For example, Prof. Swire<sup>30</sup> highlighted the Video Protection Act,<sup>31</sup> which excludes video games. The Video Protection Act covers videotapes and perhaps DVD’s (I will grant him that), but it is ambiguous; it says simply “similar media.”

We have also heard about compulsory licensing and tax proposals. I am skeptical because it seems that these proposals will distort the normal market process by isolating buyers from sellers, thereby causing the removal of the necessary price signals that make the market work. Furthermore, only the best-connected digital-content holders are going to be able to benefit. I am not a photographer, but I

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<sup>26</sup> Intellectual Property Protection Act of 2004, H.R. 2391, 108th Cong., 2d Sess. (2004). This act incorporates eight different bills: (1) H.R. 2391; (2) H.R. 4077; (3) S. 2237; (4) S. 1932; (5) H.R. 4586; (6) H.R. 3632; (7) H.R. 5136; and (8) S. 1933.

<sup>27</sup> Piracy Deterrence and Education Act of 2004, H.R. 4077, 108th Cong., 2d Sess. (2004).

<sup>28</sup> Protecting Intellectual Rights Against Theft and Expropriation Act of 2004, S. 2237, 108th Cong., 2d Sess. (2004).

<sup>29</sup> Family Movie Act of 2004, H.R. 4586, 108th Cong., 2d Sess. (2004).

<sup>30</sup> See Cohen et al., *supra* note 5, Part I.

<sup>31</sup> Video Privacy Protection Act, Pub. L. 100-618, 102 Stat. 3195 (1988) (codified as amended in 18 U.S.C. § 2710 (2000)).

have been published in *The New York Times*, the *Los Angeles Times*, *Scientific American* and I have about thirty-five-hundred photographs online; they get pirated all the time, and I do not get compensated. Should I get compensated? How can we limit my loss? More to the point, if I am not compensated, why am I somehow less deserving than people who can hire influential lawyers and lobbyists. Now, I am not naïve; I know that copyright law is a creature of Congress—at least largely—and we cannot just say “no more new laws.” But I have to question the advisability of focusing more and more on this emotionally charged political process when, out there in the real world, P2P technology is advancing so rapidly. Mr. von Lohmann’s earlier point about fighting this losing battle against the world’s masses of undergraduate computer-science majors is true.<sup>32</sup> Now, if I had to offer some advice as a relative outsider, instead of fighting it out in Congress, I would recommend expanding that existing pseudo-law that some of the software companies and the recording industry signed in January 2004 for the purpose of focusing on technology and maintaining competition in the marketplace. It may not be a great solution, but I think it is a bit better than what we have now. Thank you.

### III. HUGH C. HANSON

PROF. HANSEN: [Declined]

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<sup>32</sup> See Michael A. Geist et al., *Copyright & Privacy – Through the Technology Lens*, 4 J. MARSHALL REV. INTELL. PROP. L. 242, Part II (2005).

## IV. RALPH OMAN

MR. OMAN:<sup>33</sup> I thought I would go back to my ten years working on Capitol Hill to give you a general frame of reference for the legislative process and its strengths and weaknesses. I would agree that there is not a high level of technical expertise on Capitol Hill. I think they are all brilliant people, and they are all very committed to doing the best job they can. However, they have problems, especially in technical areas when people are talking about sharing liability, secondary liability and other issues that they are not familiar with in their normal business. Congress does hold hearings and have witnesses come in and everyone says: “The sky is falling if you do this, or, if you don’t do that, civilization as we know it is going to come to an end.” Howard Coball of North Carolina said “I hear the sky is falling so often it’s making my coffee taste bad—please stop!” That is what he faced as chairman, and that is what the current chairman is facing. There are some very technical areas, and members of Congress are the most general of generalists. Congress tends to invoke—to use a phrase that was coined by a former colleague of mine—the “iron law of consensus” when dealing with intellectual property legislation.

Number one, Congress does not like to make people unnecessarily angry. They like to make everybody feel warm and fuzzy and happy. They are also aware that the chairman of the committee knows that the leadership cannot afford to allot three or four days of debate on the floor to resolve these controversial issues. It is just never going to happen. Things happen by unanimous consent and that really does decrease the amount of room for maneuvering. The committees cannot put off these controversies to be resolved by members on the floor.

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<sup>33</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 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.

In the Senate, we also have the added problem that one member of Congress can put a hold on any piece of legislation, effectively blocking that legislation forever.<sup>34</sup> If someone does not like it, they have to be dealt with by compromise, but if they feel strongly about something, they have tremendous power to affect the outcome. That, again, colors the approach taken by the committee chairman and by the leadership. So Congress recognizes that for all of these reasons we need consensus. What they are doing more and more is getting the private parties around a table and directing them to “work this out” because otherwise those parties might not like the solutions that are imposed on them. I wonder whether or not a solution would be imposed; more likely, nothing would happen. But when those private parties do gather around this table to work things out, who is there representing the public interest? There are contending parties: the record industry, the motion picture industry and the technical people from the consumer-electronics industry. It is very important to get their inputs because these are the difficult issues that Congress must wrestle with, but we also have to make sure that, at some point, someone does represent the public interest. That is the ultimate job of the legislature, and I have confidence that will ultimately be done. Even in an area like privacy, accepting for the moment that there is a reasonable expectation of privacy on the internet, these issues will be considered by the generalists on the judiciary committees in both houses, and any legislation that does pass will be sensitive to those requirements. So here we are trying to get legislation passed that would help the internet reach its full potential, and we encounter these technical difficulties.

Earlier, Register Peters mentioned how thick the amendment was that Congress was about to adopt.<sup>35</sup> How thick? It is a quarter-inch thick. In the end, this will probably add another ten to twenty pages to the Copyright Act.<sup>36</sup> This is another symptom of the problems that Congress faces. When I was the Register of Copyrights, I had the same problem when we passed the Audio Home Recording Act (“AHRA”).<sup>37</sup> The chairman resorted to the usual strategy. He said, “Okay, record companies and equipment manufacturers, you go out and work out a deal.” We wound up with a piece of legislation that was forty-eight pages long and which gets down to the nitty-gritty details of accounting. I was testifying, and the chairman asked me, “Is this a good trend? Is it going to mean that the copyright statute looks like the IRS code in 20 years? Would it make it more likely that litigation will result in trying to sort out all of these various provisions?” I was a good soldier and said “No,” explaining that it was a technical area that required a technical solution, and Congress was doing the right thing. I wish I had told him what I really thought, which was that all of this technical mumbo-jumbo does not belong in the copyright law. Just make it clear that the copyright owners own the works in this new digital environment and can license their works one way or the other, or can choose not to do

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<sup>34</sup> A senator may use a filibuster as a delaying tactic to prevent a vote on a legislative matter that would pass if a vote were allowed. 2 THE ENCYCLOPEDIA OF THE UNITED STATES CONGRESS 833 (Donald C. Bacon et al. eds., Simon & Schuster 1995).

<sup>35</sup> See Hon. Marybeth Peters, *Copyright & Privacy – Through the Legislative Lens*, 4 J. MARSHALL REV. INTEL. PROP. L. 266 (2005).

<sup>36</sup> 17 U.S.C. §§ 101–1332 (2000).

<sup>37</sup> *Id.* §§ 1001–1010.

so if they wish. It is not the end of the world if a particular song or album cannot be taped on digital tape recorder; the parties will be able to work it out. But I did not say that, of course, and now we have an extra twenty pages in the copyright code.

Another reason these kinds of legislation can be difficult is some judges, Justice Scalia among them, find no value in the legislative history. Thus, all of this technical rubbish that we used to put in a report is now dumped into the legislation itself, making the job of legislating much more difficult. I have no expectation of that changing any time in the near future.

The best part of the current system, of course, is that the chairmen of both the House and Senate have had the wisdom to consult with the Register of Copyrights. This helps move the process forward; it gives Congress an unbiased expert opinion, and we can count on the Register to take the balanced view and represent the public interest—that is a good trend. I know from personal experience that has happened in a case I was working on. We met with Lamar Smith in San Antonio, Texas, his hometown; he said, “You are wasting your time talking with me. Go talk to the Register of Copyrights.” We took that message to heart.

The question that was raised earlier—whether or not it is wrong to equate file sharing with physical crimes like stealing a CD from the store—I think was well taken, but there are other examples that people would not be quite so willing to accept. Any computer hacker could break into the telephone system and make free long-distance calls. This occurs with some frequency, and I do not think as a society we condone that behavior: those hackers are getting a free ride, and it is not fair to the rest of us or to the telephone companies. It is the same thing when people steal cable by tapping into a cable line near their home, which can be easily done with technology and is very difficult to detect. Again, we frown upon that as something that is not acceptable behavior. I think we will reach a time, at some point in the near future, where file sharing and free-riding on the efforts of the creators and free-loading on the legitimate purchases of fellow citizens will also become frowned upon. In that type of moral environment, the issue should become easy to work legislatively—at least I hope that is the case.

So the legislative approach is often uncertain; it often results in an unsatisfactory result for both sides. It really is a compromise in the true sense. We do not have the giants that we had in the 1960’s and 1970’s who worked on the copyright-reform legislation. John McClellan, a Senator from Arkansas, and Bob Kastenmeier, a Representative from Wisconsin, had spent their entire careers handling copyright issues, and their colleagues deferred to them on most copyright issues, especially the technical ones. With their thirty-year track records, they could navigate the shoals, and they earned the confidence of their fellow members. When they made a decision, it stuck because they had the judgment to do what was right, and we do not have that now. Members and staff are now cycling through these positions. We have term limits. Senator Hatch is reaching the point of great expertise, and it would be a terrible shame to lose that strong voice on the important issues of the day.

But I think Congress’ heart is in the right place. They are perhaps more pro-property rights today than they were twenty years ago. They all are interested in putting the bad guys out of business—“the bad actors,” as they call them. I think Congress is moving in that direction. But the outcome is never certain.

To close, when my old boss, Senator Mathias, was a legislator in the Maryland House of Delegates, he heard one of his colleagues stand up to explain his vote on a very controversial measure. This legislator said: "Some of my friends are for this legislation, some of my friends are against this legislation, I'm going to stick with my friends." Welcome to the dance of Legislation. Thank you very much.

#### V. MATTHEW J. OPPENHEIM

MR. OPPENHEIM:<sup>38</sup> Let me provide these comments as my own comments and not comments that I have in any way discussed with the Recording Industry Association of America ("RIAA") or the MPAA, or any of my other clients.

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<sup>38</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 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.

This has been an interesting discussion. I listened to the first two speakers, Mr. Hoofnagle<sup>39</sup> and Mr. McCullagh,<sup>40</sup> and what I heard from them was “Congress is out of it, they don’t understand these issues, they are not into details enough and so they should get out of the business altogether.” I find that to be a great irony having just read the opposition brief in the *Grokster* case, which has as its first, second, third and fourth arguments, respectively, “leave it to Congress,” “leave it to Congress,” “leave it to Congress” and “leave it to Congress.”<sup>41</sup> So there is a lack of consistency one might say on the copy-left side of things. But I suppose that is fair since one could easily accuse the copyright owners of also being inconsistent on this issue.

Let us think about this for a minute. *Is* Congress out of it? I would suggest they are not. Those of us who spend a lot of time on these issues have a lot of details at our fingertips about what is happening right now and what we think is going to happen tomorrow—from a technology perspective, from a copyright perspective and from a media perspective. And from those perspectives, Congress does not seem to be as smart on these issues as we are. But indeed, Congress may, in fact, have done something that we all need to do, and that is to step up a level, focusing less on the details and more on the big picture.

I will just suggest two very basic questions that I think Congress is contemplating in regard to this issue. First, should we do something about people downloading copyrighted materials for which they do not have authorization? I think the majority of people in this country would say “Yes.” All of us very well may disagree as to what should be done; however, some critics may say that relying on lawsuits is too onerous, invades privacy, restricts speech, costs too much money and overburdens the courts. The lawsuits, however, are really the only mechanism that is left to deal with this since the DMCA has been a failure in that respect. Congress recognizes that something needs to be done. When we see proposed legislation that would put the ability to educate or the ability to bring civil actions into the hands of the Department of Justice, it is obvious that Congress is trying to do something. Now, it may not be the things that we want them to do, but they are trying to do something.

Second, should P2P operators be allowed to profit from the distribution of copyrighted material when they have the ability to stop the distribution of the copyrighted material while still permitting the distribution of the non-copyrighted material? I think any reasonable person will say that the answer is “Yes” if P2P operators can stop the infringement and allow only for the non-infringement to continue. Why in the world would you ever want to go down any other path? Thus, Congress is trying to deal with that.

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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.

<sup>39</sup> See *supra* Part I.

<sup>40</sup> See *supra* Part II.

<sup>41</sup> Brief in Opposition, *MGM Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004) (No. 04-480), *cert. granted*, 125 S. Ct. 686 (Dec. 10, 2004).

Now, many in this room might suggest that inducement legislation is a horrible way to deal with this second issue. But to be fair, there were so many versions of the inducement legislation that any one of us could scream that it is not going to work and point to parts of one of the proposals as unfair.<sup>42</sup> But let me suggest—and this is really my own personal view—that if we look at what Congress has done in the copyright arena in two major examples over the last fifteen years, they failed. The examples are the AHRA<sup>43</sup> and the DMCA.<sup>44</sup> In both instances, Congress brought the various interested parties together to work out legislation.

The AHRA was intended to address this problem, and now is close to worthless. It provides that if the recording process has anything to do with a computer, then the AHRA does not apply.<sup>45</sup> Well, in this day and age, as Mr. von Lohmann will argue, everything is on a computer and thus the AHRA cannot impact anything. This is evidenced by the fact that there have been a total of two cases involving the AHRA over the last decade; the amount of royalties collected under the AHRA could not pay for this conference.

The DMCA took an enormous amount of effort to enact. Leaving aside § 1201<sup>46</sup> for the time-being and looking to § 512 of the DMCA,<sup>47</sup> which is supposed to deal with the transmission of copyrighted works over networks, the DMCA is essentially worthless at this point due to the *Verizon* decision,<sup>48</sup> the *eBay* decision,<sup>49</sup> the *Loop Net* decision,<sup>50</sup> and I can go on and on and on. These holdings have basically hollowed out this piece of legislation so the only thing it protects is internet service providers (“ISPs”). It does not do anything for copyright owners.

It would be nice to see Congress do what I think they are capable of doing: enunciate some basic principle in legislation that we can then go and fight over. Let the courts focus on the details. Over the years, this has worked. It is this type of legislation that has really withstood the test of time. For example, look at the principles in the Sherman Act, which are so basic in both concept and words.<sup>51</sup> However, the Sherman Act has really functioned for an enormous number of years because parties can argue in court over what it should and should not affect. Judges can then look at particular situations and apply the principles articulated in the law to a particular set of facts. This is what needs to be done here.

We have issues. We have individuals rampantly downloading copyrighted material that they do not own. This rampant downloading is having a horrendous impact on copyright owners and it should not be happening. There needs to be some way of addressing this problem. Let’s have Congress pass legislation that enunciates

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<sup>42</sup> See, e.g., *Inducing Infringements of Copyrights Act of 2004*, S. 2560, 108th Cong., 2d Sess. (2004).

<sup>43</sup> See generally 17 U.S.C. § 1001–1010 (2000).

<sup>44</sup> See generally *Digital Millennium Copyright Act*, Pub. L. No. 105-304, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17, 28 U.S.C.).

<sup>45</sup> *RIAA v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999).

<sup>46</sup> 17 U.S.C. § 1201 (2000).

<sup>47</sup> *Id.* § 512.

<sup>48</sup> See *RIAA v. Verizon Internet Servs.*, 351 F.3d 1229 (D.C. Cir. 2003), *cert. denied*, 125 S. Ct. 347 (2004).

<sup>49</sup> *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082 (C.D. Cal. 2001).

<sup>50</sup> *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004).

<sup>51</sup> See generally *Sherman Anti-Trust Act*, 15 U.S.C. §§ 1–7 (2000).

basic principles. Similarly, with P2P networks, we have a problem. There is a technical solution out there, but there are all kinds of reasons that people do not want to implement that technical solution. Two days ago, in the *San Jose Mercury News*, the operator of eDonkey was quoted as saying that the only reason he does not want to implement filtering in any way is because, if he started to do that, he would be acknowledging that he *could* do so, and then he could be held liable by a court.<sup>52</sup> Well, think about that. He is basically saying, “Yeah, it can be done.” And, in fact, the chief technology officer of Streamcast Networks has said that of course it can be done. I believe he even published an article on CNet saying that this can be done.<sup>53</sup> Congress knows that there is a problem, and they want to try and address it. It would be nice to try addressing the problem by asking for general principles, rather than asking for very specific, detailed legislation. Thank you.

## VI. WILLIAM W. FISHER, III

PROF. FISHER:<sup>54</sup> The first issue I would like to address is the combination of the data mining that Mr. Hoofnagle nicely described,<sup>55</sup> the DRM systems that Prof. Knopf championed<sup>56</sup> and the technology regulations that Mr. McCullagh lamented we will likely have in the near future,<sup>57</sup> and not just possible encroachments upon privacy. Also, in addition to what was discussed today, I would like to add a discussion of the ever-more extensive use of price discrimination—how the information gathered through data-mining will be used to separate consumers being charged different prices.

First, minor amounts of price discrimination have existed in the entertainment system for a long time. But we will soon see price discrimination on a vastly expanded scale; thus, it is worth paying attention to this trend and thinking about which aspects of it we want and those we do not want. Price discrimination is profitable, and so if one is solely concerned with providing added incentives for creative activity, then arguably we should not be troubled. However, it is a concept that points out the overall impact of social welfare discrimination and depends on the

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<sup>52</sup> See generally Dawn C. Chmielewski, *File-Swap Firm Gets License to Sell Music, Universal Deals with Fanning's Snocap Service*, SAN JOSE MERCURY NEWS, Feb. 16, 2004.

<sup>53</sup> See Darrell Smith, *The File-Sharing Dilemma*, CNET, Feb. 3, 2004, at <http://news.com.com/2010-1027-5152265.html>.

<sup>54</sup> 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 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).

<sup>55</sup> See *supra* Part I.

<sup>56</sup> See William W. Fisher, III, et al., *Copyright & Privacy – Through the Wide-Angle Lens*, 4 J. MARSHALL REV. INTELL. PROP. L. 285, Part V (2005).

<sup>57</sup> See *supra* Part II.

shape of the markets in question. In addition, there are some troubling cultural effects of rampant price discrimination. Do we really want the situation where, when you buy a lobster in an up scale grocery store, the price you pay for a film goes up the next day? Although price discrimination is hidden, it is an important issue that we should pay more attention to.

Second, it has been suggested today that the courts commonly reshape copyright law in ways that are inconsistent with the intent of the congressman who adopted a particular provision. Also, Congress has been described as functioning not as a strong force for IP policy, but rather as a passive observer of the processes and debates that ultimately shape IP policy. This seems correct in some contexts, and one could add the fair-use doctrine to the list of classic instances of judicial control. On the other hand, it is also true that Congress frequently—for better and for worse—intervenes at the behest of particular interest groups and produces highly detailed legislation, such as the Judicial Performance and Sound Recordings Act,<sup>58</sup> the DMCA and the myriad compulsory licenses. Congress intervenes because a great level of detail is not easily susceptible to revision or modification by the courts.

Two other points follow from this observation. First, as Mr. Oppenheim points out,<sup>59</sup> many of these highly detailed interventions have not worked well because they have been rendered obsolete quite quickly. He correctly points out that the AHRA and the DMCA mask works, and suggests in response maybe we ought to return to a legislative practice in which Congress gives general principles that it leaves to the courts to implement. Certainly it would be a lot more fun to teach copyright law in this environment.

So there is much to welcome in the recommendation, but before jumping into this alternative too quickly, I think it is worth bearing in mind there is yet another major model of government that might be employed instead: the administrative-law model, in which Congress delegates certain powers to an expert administrative agency; most plausible in this particular context is the Copyright Office. On its face, it would seem inconsistent that we want Congress to take a more active role in defining the substance of rules; however, this is not necessarily true if, for example, in the case of the FCC, through which Congress implements telecommunications regulations, the rules might be less susceptible to quick obsolescence.

The fourth point also grows out of the observation of the myriad congressional interventions; several speakers in the last two panels have objected to levy systems—particularly mandatory levy systems—in part because they involve government intervention into a private market for the development and distribution of entertainment. To some extent it is right, but to some extent it is wrong. The industries involved in production and distribution of entertainment are already very heavily regulated in the United States. Copyright law altogether is a massive intervention in otherwise voluntary activities, in particular its compulsory licenses. This means that government is already heavily involved here. So, a shift from the current regime to an alternative compensation system would involve a different kind

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<sup>58</sup> Sound Recordings Act of 1995, Pub. L. 104-39, 109 Stat. 336, *amended by* Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17, 28 U.S.C.).

<sup>59</sup> *See supra* Part V.

of government involvement, but it should not be characterized as a step from private to public management.

The last point relates to Mr. Oman's hopes for a shift in consciousness in the foreseeable future, which would recognize non-permissive uses of copyrighted materials on a moral par with stealing CDs or cable television.<sup>60</sup> Certainly the enforcement challenges of the sort on which Prof. Reese focuses<sup>61</sup> would be reduced if we could take advantage of a popular condemnation of this behavior. But it should be remembered that there is a fundamental distinction between CDs and cable television on the one hand and digital recordings on the other. The latter are non-rivalrous and the former are rivalrous. That distinction helps explain why copyright law, in some respects, does not parallel real property law. Even to the moral being, non-rivalrous goods may not be shielded by our common intuitions about the immorality of theft as rivalrous groups. I hope that distinction figures in and survives the Justice Department's new educational issues in this area. Thank you.

## VII. HOWARD P. KNOPF

PROF. KNOPF:<sup>62</sup> Following up on this eternal point of rivalrous and non-rivalrous goods and Thomas Jefferson talking about passing ideas around like a flame from taper to taper and to pick up on what Mr. Oman<sup>63</sup> said, I am not suggesting that because a file is downloaded one time or millions and billions of times that it should not somehow be dealt with because nothing tangible has been taken. Somehow or

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<sup>60</sup> See *supra* Part IV.

<sup>61</sup> See Fisher, III, et al., *supra* note 56, Part III.

<sup>62</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>63</sup> See *supra* Part IV.

another there is an issue here. What I am suggesting is that the punishment should fit the crime. I believe it is not an overstatement to say that in the United States or Canada if a fifteen- or sixteen-year-old kid gets drunk, steals a car, goes out and causes mayhem and, God forbid, injures or kills somebody, he will probably be haled into juvenile court, slapped on the wrist, yelled at by everybody concerned, sent home and asked not to do it again. However, if he is caught downloading some egregious amount of songs, he is going to have to settle with the RIAA for at least four-thousand dollars, which may make the difference in whether or not he goes to college. I think the punishment has to fit the crime and here it does not, even under the current system. I shudder to think what will happen if it gets worse.

I am surprised nobody has yet mentioned today how “the VCR is to the American film producer and the American public as the Boston Strangler is to the woman home alone,” as Jack Valenti famously told Congress in 1982.<sup>64</sup> I think we should be very careful before we do anything that would kill off or retard P2P file sharing. In fact, if people are thinking that this is too civilized a discussion today, I would like to nominate Sean Fanning for a MacArthur Foundation Grant—a so-called ‘genius award.’ I think the idea of P2P file sharing is simply marvelous; it recreates in a certain way, the burned out library of Alexandria. We all know how well it works. We can find out anything instantly through that technology.

I am concerned that we are headed towards a total dystopia, rather than a utopia, where we have overly strong copyright, trademark, DRM and enforcement—all at once. No, Prof. Fisher, I am not enamored of DRM. I think we may need it, and it may be helpful, but we need as much protection from DRM as we need legal encouragement for it.

Another point is that there was recently an interesting article on legalaffairs.org about Prof. Lawrence Lessig and the invective language that is used against him.<sup>65</sup> Critics of Prof. Lessig’s approach call him a Communist and worse, and that term is certainly used a lot. But what about copyright collectives? There is a certain irony here in that we have a lot of them in Canada—probably more than anywhere else in the world—that take in well over three-hundred-million dollars a year. Canada is heavily reliant on collectives, and we have collectives, of course, in the United States, too—very powerful ones. Prof. Fisher and others are advocating more of a move toward collectives. Some might find an ironic association between collectives and Communism.

IP is not born from natural law, but is created by statutory monopolies. Without those monopolies, there would be no IP law. I really urge everybody to go back and reread Justice Breyer’s paper, written when he was a young professor at Harvard, called *The Uneasy Case for Copyright*.<sup>66</sup> I think with all due respect, Prof. Fisher—

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<sup>64</sup> *Home Recording of Copyrighted Works: Hearing Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982) (statement of Jack Valenti President, Motion Picture Ass’n of Am., Inc.), available at <http://cryptome.org/hrcw-hear.htm> (last visited Mar. 13, 2005).

<sup>65</sup> Dan Hunter, *Marxist-Lessigism*, LEGALAFFAIRS, Nov.–Dec. 2004, available at [http://www.legalaffairs.org/issues/November-December-2004/feature\\_hunter\\_novdec04.msp](http://www.legalaffairs.org/issues/November-December-2004/feature_hunter_novdec04.msp) (last visited Mar. 13, 2005).

<sup>66</sup> Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970) (discussing authorities’ ambivalence regarding justifications for the protections offered by patents and copyrights).

and I do not mean this in a bad way because I come from Canada—but there is something inherently socialist about too much reliance on collectives and government intervention in favor of copyright owners.

There are some encouraging signs. Sony, which is a very creative company, as we all know, is also a highly converged company that owns all aspects of hardware and software, and now seems to be hedging its bets. Sony is now coming out with its own version of a portable player that supports mp3 files in order to catch up with the iPod®.

What should Congress and the Supreme Court of the United States do in my view? The Supreme Court should refuse certiorari in the *Grokster* case<sup>67</sup> for the simple reason that there is no conflict between the Seventh and Ninth Circuits, if you read Judge Posner's dicta carefully—or at least in the way I think he should be read. There is some trepidation though if the Supreme Court refuses certiorari. It would mean that Congress could go wild, and who knows what they will do. So, it is kind of a rock-and-a-hard-place conundrum. Maybe someone should establish a commission like the National Commission on New Technological Uses of Copyrighted Works ("CONTU") to look at some of these issues. There was some good work that came out of CONTU, particularly in the dissenting opinion, which discusses the only thing anyone seems interested in anymore.<sup>68</sup>

I think that overreaching by copyright owners will result in judicial reaction. This always seems to be the case. In the long run, the courts in this country, Canada and other Anglo-American countries have created a common-law pattern, which shows that courts have always hated monopolies and restraints on trade. Something happens when somebody gets appointed to the bench, and all of a sudden they become very conscientious about monopolies and react. They will eviscerate a statute that seems to be clear. They will find loopholes where nobody thought they existed. That is sort of what happened in the *BMG* case in Canada, and maybe it is no accident that the judge happened to be the former Commissioner of Competition Policy in Canada, which is the top antitrust position in Canada.<sup>69</sup>

We have been talking about simpler laws. I commend you to read the preface to recent editions of Sir Hugh Laddie's terrific book on English copyright law.<sup>70</sup> Sir Laddie says it is too bad we got rid of the Copyright Act of 1911,<sup>71</sup> which was only fifteen to twenty pages long. It was really an elegant thing that survived a long time in England and remnants are still in Canada and Australia. The current English Act,<sup>72</sup> in his view, is now a monster that is incapable of being understood by anybody.

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<sup>67</sup> See *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 Prof. Knopf delivered these remarks. *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>68</sup> See *Final Report of the National Commission on New Technology Uses of Copyrighted Works*, ch. 3 (dissent of Commissioner Hersey) available at <http://digital-law-online.info/CONTU/contu4.html> (last visited Mar. 13, 2005).

<sup>69</sup> *BMG Can. Inc. v. Doe*, [2004] 239 D.L.R. (4th) 726. Judge Konrad von Finckenstein presided over this case and was previously the Commissioner of Competition for Canada from 1997–2003.

<sup>70</sup> HUGH LADDIE ET AL., *THE MODERN LAW OF COPYRIGHT* v–vi (London Butterworths 1980).

<sup>71</sup> Copyright Act, 1911, 1 & 2 Geo. 5, c. 49 (Eng.), *in* LADDIE ET AL., *supra* note 70, app. 1.

<sup>72</sup> See Copyright Act, 1956 c. 16 (Eng.), *in* LADDIE ET AL., *supra* note 70, app. 1.

So, in conclusion, let's try and recreate this library of Alexandria, and let's not worry too much about falling skies. Remember the real creators, because, after all, that is what this is all about. The record companies do not necessarily speak for the creators and neither do consumers. But the record companies should always remember that consumers are their customers, not criminals. Thank you.

#### VIII. QUESTIONS FROM THE FLOOR

QUESTION: I have been listening to this panel, which I found very edifying, and it struck me that there are three really nice quick fixes to this problem that are so obvious to me, and I am amazed that we have not done them. So, here they are, and they go to Prof. Hansen's, Mr. Oman's and Mr. Oppenheim's comments.

Number one, we should repeal the DMCA because one of its main proponents has acknowledged that it is not working. Number two, in alignment with comments about sort of rolling back the complexity and sticking with broad principles, we really ought to repeal the mechanical license because the music publishers and composers have been laboring under its yoke for a century, while the recording labels have been getting a free ride from it. If we roll back the mechanical license, then we free the publishers and the composers who, after all, are the primary creators to negotiate in a free market with the recording labels which would be a bold stroke towards simplicity. Third, the point concerning ASCAP and BMI is great; let's apply those models on a broader scale to the recording industry and the big five labels, but then let's subject those entities to the equivalent massive antitrust consent decree that has governed ASCAP and BMI for the better part of half a century. Without a similar consent decree, it is fair to say we might not all be such fans of the eventual success of that process. So there are you are. Repeal the DMCA, repeal the mechanical license, support the publishers on an equal footing with the labels and let's recognize that the ASCAP and BMI models work the way they do because of antitrust supervision.

MR. OPPENHEIM (Responding):<sup>73</sup> Just so my comments are clear, my comments on the DMCA were exclusive to § 512; I think § 1201 is functioning. Second, before you and Prof. Knopf hang the record companies for antitrust violations, I suggest maybe they should get due process and a fair trial. It is a concept in law school that is not always taught these days, but I feel that it is a good one. Finally, to respond to Prof. Knopf's last point, consumers are only customers when they are buying. When they are not buying and they are downloading, they are neither customers nor consumers.

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<sup>73</sup> See biographical information *supra* note 38.