The Escalating Copyright Wars

Peter K. Yu
peter_yu@msn.com

Follow this and additional works at: https://scholarship.law.tamu.edu/facscholar

Part of the Entertainment, Arts, and Sports Law Commons, and the Intellectual Property Law Commons

Recommended Citation
Available at: https://scholarship.law.tamu.edu/facscholar/542

This Article is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Texas A&M Law Scholarship. For more information, please contact areteen@law.tamu.edu.
THE ESCALATING COPYRIGHT WARS

Peter K. Yu*

INTRODUCTION

Piracy is one of the biggest threats confronting the entertainment industry today. Every year, the industry loses billions of dollars in revenue and faces the potential loss of hundreds of thousands of jobs. In 2002 alone, it is estimated that the United States lost more than ten billion dollars due to copyright piracy abroad, not to mention the significant losses caused by piracy on American soil, notably via the Internet. As a result of these losses, piracy disrupts not only the entertainment industry, but also the United States economy.

* Assistant Professor of Law & Director, Intellectual Property & Communications Law Program, Michigan State University College of Law; Adjunct Professor of Telecommunication, Information Studies and Media & Faculty Associate, James H. and Mary B. Quello Center for Telecommunication Management & Law, College of Communication Arts & Sciences, Michigan State University; Research Associate, Programme in Comparative Media Law and Policy, Centre for Socio-Legal Studies, University of Oxford. This Article was delivered on April 16, 2003, as part of the Frontiers in Information and Communications Policy Lectures Series sponsored by the James H. and Mary B. Quello Center for Telecommunication Management & Law at Michigan State University. The Article expands on and offers an in-depth analysis of ideas the author articulated in an earlier column for FindLaw, How the Motion Picture and Recording Industries Are Losing the Copyright War by Fighting Misdirected Battles, FINDLAW'S WRIT (Aug. 15, 2002), at http://writ.news.findlaw.com/commentary/20020815_yu.html. The Author would like to thank Steve Wildman and Johannes Bauer for their kind invitation and hospitality.

1. In a recent music conference, the head of the International Federation of the Phonographic Industry (IFPI) indicated that music piracy had threatened 600,000 jobs in the European music industry. See Simon Beavis, Record Firms Threaten Big Employers with Action to Combat Piracy, INDEPENDENT (London) (foreign ed.), Jan. 21, 2003, Business Sec., at 19. If piracy continued at the current level, it would not be surprising to find a similar number of American jobs jeopardized, if not more.


In July 2002, Congressman Howard Berman introduced the Peer to Peer Piracy Prevention Act, targeting the piracy problem created by peer-to-peer networks. This statute, if enacted, would have allowed movie studios and record companies to hack into personal computers and peer-to-peer networks when they suspected infringing materials were being circulated. The Berman bill was subsequently abandoned.

Congressman Berman’s sense of urgency—and perhaps frustration—was recently picked up by Senator Orrin Hatch, the chairman of the Senate Judiciary Committee. During a recent congressional hearing on copyright abuses, Senator Hatch remarked that “he favor[ed] developing new technology to remotely destroy the computers of people who illegally download music from the Internet.” As he reasoned, damaging someone’s computer “may be the only way you can teach somebody about copyrights.”

Although the Berman bill and Senator Hatch’s remarks were controversial, they were hardly surprising to those who followed the entertainment industry closely; rather, they captured well the tone of the latest copyright war. So far, the industry has been winning. Among its trophies are the enactment of the Digital Millennium Copyright Act (“DMCA”), Vivendi Universal’s defeat and purchase of MP3.com, the

5. See H.R. 5211.
8. Id. (quoting Sen. Hatch); see also Dwight Silverman, Senator’s ‘Extreme’ Cure for Piracy Is Unconstitutional, HOUS. CHRON., June 21, 2003, at 1C.
movie studios’ victory in the DeCSS litigation,\textsuperscript{11} the bankruptcy and subsequent sale of Napster and its recent relaunch as a legitimate subscription-based music service,\textsuperscript{12} the Supreme Court’s rejection of the copyright bargain theory in \textit{Eldred v. Ashcroft},\textsuperscript{13} and the recording industry’s relative success in its mass litigation campaign.\textsuperscript{14}

Notwithstanding these victories, the war is expanding and has become even more difficult for the industry to fight than it was a year ago. Today, copyright law is no longer a complicated issue that is only of interest and concern to copyright lawyers, legal scholars, technology developers, and copyright holders.\textsuperscript{15} Rather, it is a matter of public significance, affecting all of us in our daily lives. The ground has shifted. If the entertainment industry does not pay attention to the public and if it continues to use ill-advised battle strategies, it eventually might lose the war.

Part I of this Article examines the five strategies used by the entertainment industry to fight the copyright wars: lobbying, litigation, self-help, education, and licensing. Part II examines the impact of \textit{Eldred v. Ashcroft} on these strategies and examines the decision’s ramifications on future constitutional challenges to copyright laws, in particular the DMCA. Part III traces recent developments in the international copyright arena. This Part highlights the substantial differences between United States and foreign copyright laws. Part IV describes the changing tone of the ongoing copyright war. This Part suggests that the proliferation of peer-to-peer networks and the increased public consciousness of copyright issues have made the war more difficult for the industry to fight than it was a year ago. Part V concludes by discussing what the industry should do to stem digital piracy.

\textsuperscript{11} See Universal City Studios, Inc. v. Corley, 273 F.3d 429, 435-36 (2d Cir. 2001). DeCSS is a decryption program that circumvents the Content Scramble System ("CSS") used by the motion picture industry to protect against the unauthorized reproduction of DVD movies. See \textit{id}.


\textsuperscript{13} See 537 U.S. 186, 214-17 (2003); see also infra Part II.

\textsuperscript{14} See infra Part I.D.

\textsuperscript{15} See infra Part IV.
I. INDUSTRY STRATEGIES

A. Battle Strategy #1: Lobbying

Since the turn of the twentieth century, the entertainment industry has been battling a large array of "new" technologies. As Professor Litman pointed out,

[T]he contours of [the dispute about intellectual property rights in the digital environment] don't look very different from the shape of very similar disputes that arose in the 1980s, when the gods invented personal computers; or the 1970s, when they invented videocassette recorders; or the 1960s, when they invented cable television; or the 1920s, when they invented commercial broadcasting and talkies.16

Nonetheless, digital technology is different. Unlike analog technology, digital technology enables consumers to make exact replicas of the copyrighted work without losing any quality.17 Rather than dealing with low-quality, amateurish cassette tape recordings, copyright infringers can now produce exactly what CD stores offer.18 Copyright holders, therefore, are understandably concerned about their continued ability to control and exploit creative works.

To protect itself, the entertainment industry lobbied Congress heavily for special protection for works disseminated on the Internet. In


17. See, e.g., I. Trotter Hardy, The Proper Legal Regime for "Cyberspace," 55 U. PITT. L. REV. 993, 1005 (1994) (noting that "[p]hotocopy machines at one time threatened to turn every individual into a mass publisher, but cyberspace seems actually to have achieved that distinction in a way that photocopying never really did"); Raymond Shih Ray Ku, The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology, 69 U. CHI. L. REV. 263, 264 (2002) (noting that "digital technology makes it possible to make an unlimited number of perfect copies of music, books, or videos in digital form, and through the Internet individuals may distribute those digital works around the world at the speed of light"); Eugene Volokh, Cheap Speech and What It Will Do, 104 YALE L.J. 1805, 1808-33 (1995) (arguing that the Internet has greatly reduced the production and reproduction costs of information).

1998, Congress enacted the DMCA, which strengthens copyright protection in the digital medium. The statute prohibits the circumvention of copy-protection technologies and the dissemination of information concerning how to defeat those technologies. The DMCA also provides a "safe harbor" for Internet service providers to remove any hosted content that allegedly infringes upon the work of a copyright holder. In addition, the statute protects the integrity of copyright management systems and revised the performance right regime in light of changes in the digital environment.

Since the statute's enactment, the industry has used the DMCA to prevent the dissemination of information concerning the circumvention...
of encryption technologies. For example, the publisher of hacker magazine 2600 was enjoined from posting on his website the computer code that cracked the encryption technology used in protecting DVDs.\(^\text{24}\) Professor Edward Felten of Princeton University was asked to withdraw his paper from a scholarly conference, lest he be prosecuted under the DMCA.\(^\text{25}\) And a Russian cryptographer was arrested after giving a presentation on his company's software that removed security protection from Adobe e-books.\(^\text{26}\)

Even worse, the DMCA has upset the balance between the interests of copyright holders and the need for public access to protected materials. Through its anti-circumvention provision, the statute prevents people from engaging in actions that traditionally have been considered fair use.\(^\text{27}\) The DMCA also creates a chilling effect by requiring Internet
service providers to remove content even if the reproduction of such materials is permissible under existing copyright law. The statute, therefore, has raised serious concerns about free speech, privacy, academic freedom, learning, culture, democratic discourse, competition, and innovation.

In light of these weaknesses and problems, legal scholars, college researchers, cryptographers, technology developers, and civil libertarians have widely criticized the DMCA. Even some in the technology industry who originally supported the legislation expressed regret and disappointment over the development and interpretation of the statute. In short, the law seems to satisfy no one except the entertainment industry.

B. Battle Strategy #2: Litigation

Apart from lobbying, the entertainment industry has been actively taking—or threatening to take—legal action against those who allegedly infringe upon its rights granted under existing copyright law. Although it is difficult and expensive to go after individual pirates, the industry has had phenomenal success in lawsuits against companies operating file-sharing networks, forcing most of them into shutdown, sale, or bankruptcy.

In January 2000, MP3.com launched its My.MP3.com service, which allowed subscribers to play music over the Internet as long as they owned, borrowed, or purchased the CDs that contain the requested recordings. To facilitate this service, MP3.com purchased tens of use; Litman, supra note 19, at 145 (arguing that the DMCA would impose liability for noncommercial and noninfringing behavior).

28. See, e.g., 17 U.S.C. § 512(c) (requiring Internet service providers to remove material on the mere allegation of infringement to obtain safe harbor protection).


30. See the sources cited supra note 19 for examples of such criticism.


thousands of popular CDs and copied them onto computer servers.\textsuperscript{34} Although MP3.com purchased licenses to perform the music, it did not own any licenses to reproduce the recordings.\textsuperscript{35} As a result, the major record companies and their artists brought suits against MP3.com, alleging copyright infringement.\textsuperscript{36}

In its defense, MP3.com claimed that its service constituted fair use,\textsuperscript{37} contending that its service provided a transformative "space shift" by allowing subscribers to enjoy the sound recordings they owned without carrying physical CDs around.\textsuperscript{38} The defendant also argued that the My.MP3.com service benefited, rather than harmed, the plaintiffs by enhancing sales, since the service required subscribers to demonstrate that they owned, borrowed, or purchased the CDs containing the requested recordings.\textsuperscript{39} In addition, MP3.com noted that its service did not compete directly with the plaintiffs in the digital downloading market and, instead, "provide[d] a useful service to consumers that, in its absence, will be served by 'pirates.'"\textsuperscript{40}

At trial, the court rejected all of the defendant's arguments. The Copyright Act lists four criteria that a court can apply to determine whether the defendant's use is "fair." These criteria include:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.\textsuperscript{41}

\textsuperscript{34} See id.
\textsuperscript{35} See Litman, supra note 10, at 346.
\textsuperscript{36} See TeeVee Toons v. MP3.com, 134 F. Supp. 2d 546, 546 (S.D.N.Y. 2001); UMG Recordings, 92 F. Supp. 2d at 349.
\textsuperscript{39} See UMG Recordings, 92 F. Supp. 2d at 352.
\textsuperscript{40} Id.
The court began by rejecting the defendant’s “space shifting” argument, maintaining that such a service was neither transformative nor productive. As the court explained, the defendant’s argument was “simply another way of saying that the unauthorized copies are being retransmitted in another medium—an insufficient basis for any legitimate claim of transformation.” The court also found that the second and third factors weighed against fair use because the recordings the defendant copied were “close[ ] to the core of intended copyright protection” and that the defendant had copied and replayed “the entirety of the copyrighted works.” Finally, the court rejected the defendant’s market enhancement argument by noting that “[a]ny allegedly positive impact of defendant’s activities on plaintiffs’ prior market in no way frees defendant to usurp a further market that directly derives from reproduction of the plaintiffs’ copyrighted works.” The court also maintained that a copyright “is not designed to afford consumer protection or convenience but, rather, to protect the copyright holders’ property interests.” MP3.com lost the lawsuits badly and was sold shortly afterwards to Vivendi Universal, which incorporated MP3.com into its subscription service and then sold the service to Roxio.

In another well-known lawsuit, the recording industry sued Napster for contributory and vicarious copyright infringement. Napster

42. See UMG Recordings, 92 F. Supp. 2d at 351; see also Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (“[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright . . . .”) (citation omitted).
43. UMG Recordings, 92 F. Supp. 2d at 351; see also Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 108 (2d Cir. 1998) (rejecting the fair use defense by the operator of a service that retransmitted copyrighted radio broadcasts over telephone lines); L.A. News Serv. v. Reuters Television Int’l Ltd., 149 F.3d 987, 994-95 (9th Cir. 1998) (rejecting the fair use defense by television news agencies that copied copyrighted news footage and retransmitted it to news organizations).
44. UMG Recordings, 92 F. Supp. 2d at 351 (quoting Campbell, 510 U.S. at 586) (alteration in original).
45. Id. at 352.
46. Id.
47. Id.
48. See the sources cited supra note 10 for further discussion of Vivendi’s acquisition of MP3.com and incorporation of the company into its music service.
counterargued that the users' "file sharing" constituted fair use. The Napster case is more complicated than the MP3.com cases because Napster did not reproduce copyrighted works itself; rather, the service facilitated unauthorized copying, downloading, transmission, and distribution of copyrighted works by others.

Napster was started as a project by a college student, Shawn Fanning, who was frustrated by the difficulty in finding MP3 files on traditional Internet servers. To alleviate this difficulty, Napster allowed users to search for music on the hard drives of other users and share music files with them while the users were on the network. As a result of this peer-to-peer network, Napster successfully transformed faraway computers into a large file-sharing network—or some would say piracy network.

At trial, the district court concluded that the record companies had established a prima facie case of direct copyright infringement by Napster users. As the court explained, "virtually all Napster users engage in the unauthorized downloading or uploading of copyrighted music."

The court then moved on to address the four fair use factors specified in the Copyright Act. The court noted that the first factor weighed against fair use, because Napster's users were neither using the copyrighted works in a transformative way nor did they attempt to use the songs for parody or for research. Rather, users were merely copying and listening to the music. Likewise, the second and third factors weighed against fair use, because music is creative in nature and because users downloaded entire songs. Finally, although the court concluded that the use was not "paradigmatic commercial activity," the "vast scale" of file-sharing facilitated by Napster could not be considered private use or


51. See Napster, 114 F. Supp. 2d at 900-01.
52. See id. at 911.
53. See id. at 901-02.
54. See id. at 905-08.
55. See Susan Stellin, Napster Use Quadrupled in 5 Months, N.Y. TIMES, Sept. 12, 2000, at C6 (indicating that 4.9 million Americans accessed the network in July 2000).
57. See id. at 912.
58. See id. at 914.
59. See id. at 913.
personal use “in the traditional sense.” As the court explained, “the fact that Napster users get for free something they would ordinarily have to buy suggests that they reap economic advantages from Napster use.”

Even though the activity was not for profit, it was certainly economic in nature.

To boost its case, the record companies presented evidence of a decline in CD sales at highly wired college campuses and campuses that had banned Napster use. According to the study, sales near these college campuses dropped by twelve to thirteen percent from 1997 to 2000, although CD sales nationwide had risen by eighteen percent, thus implying that the decline in sales resulted from MP3 downloads that replaced CD purchases. The recording industry also argued that the availability of free downloading reduced the market for competing commercial downloading, and that free downloading deprived copyright holders of royalties for downloading even if it enhanced CD sales. Based on this evidence, the court found that the effect of the use upon the value of the work and potential markets for the work weighed against fair use. According to the court, Napster harmed the market for copyrighted music by reducing CD sales among college students and by raising barriers to entry in the market for digital downloading.

The district court ordered Napster to shut down. On appeal, the Ninth Circuit was more sympathetic to Napster and found that Napster was capable of commercially significant noninfringing uses. Nonetheless, the appellate court concluded that “sufficient knowledge exist[ed] to impose contributory liability when linked to demonstrated infringing use of the Napster system.” As the Ninth Circuit reasoned, “[t]he record supports the district court’s finding that Napster has actual knowledge that specific infringing material is available using its system, that it could block access to the system by suppliers of the infringing material, and that it failed to remove the material.”

60. Id. at 912.
61. Id.
62. See id. at 909-10.
64. See Napster, 114 F. Supp. 2d at 915.
65. See id.
66. See id. at 913.
67. See id. at 927.
68. See Napster, 239 F.3d at 1021.
69. Id.
70. Id. at 1022.
The Ninth Circuit remanded the case to the lower court, which subsequently ordered Napster to police its system and to block access to infringing material after it was notified of such material’s location.\footnote{See A&M Records, Inc. v. Napster, Inc., No. C 99-05183 MHP, 2001 U.S. Dist. LEXIS 2186, at *5-*7 (N.D. Cal. Mar. 5, 2001).} Unable to do so, Napster shut down its service in July 2001 and has since filed for bankruptcy protection.\footnote{See Richtel, \textit{supra} note 12.}


\textbf{C. Battle Strategy #3: Self-Help}

The third strategy the entertainment industry uses concerns the deployment of copy-protection technology, such as encryption,\footnote{As the recent National Research Council study explained:

Cryptography is a crucial enabling technology for IP management. The goal of encryption is to scramble objects so that they are not understandable or usable until they are unscrambled. The technical terms for scrambling and unscrambling are “encrypting” and “decrypting.” Encryption facilitates IP management by protecting content against disclosure or modification both during transmission and while it is stored. If content is encrypted effectively, copying the files is nearly useless because there is no access to the content without the decryption key. Software available off the shelf provides encryption that is for all practical purposes unbreakable, although much of the encrypting software in use today is somewhat less robust. \textit{Digital Dilemma, supra} note 18, at 156.}\footnote{\textit{Id.} at 83.} digital watermarking,\footnote{While [digital watermarking] does not prevent the content from being copied and redistributed, this technique can at least make evident who owns the material and possibly aid in tracking the source of the redistribution. \textit{Id.} at 83.} and the use of trusted systems.\footnote{See \textit{id.} at 167-71. See generally Jonathan Weinberg, \textit{Hardware-Based ID, Rights Management, and Trusted Systems}, 52 \textit{Stan. L. Rev.} 1251 (2000) (discussing hardware-based identifiers and trusted systems).} Consider encryption, for example. By encrypting copyrighted works, the industry successfully prevents the general public from reproducing its products without authorization. After all, it takes a tremendous amount of skill and time for an ordinary user to crack copy-protection technology.
Notwithstanding these technologies, however, the entertainment industry remains vulnerable. Although copy-protection technologies allow copyright holders to lock up their creative works, these technologies lose their protective function when they are decrypted. Thus, once hackers defeat the technology, the general public can take advantage of the hackers’ breakthrough and make copies without the copyright holders’ permission. They also can share illegal copies freely with others via websites, file-swapping software, and peer-to-peer networks.

To prevent the public from doing so, the industry must constantly upgrade its encryption technologies. Unfortunately, such upgrading would attract more attention from hackers, who are just too eager to crack the latest encryption technology available. Ultimately, the repeated encryption and decryption will create a vicious cycle in which the entertainment industry and the hacker community engage in an endless copy-protection arms race.

---

79. Although the industry might remain vulnerable, copy-protection technology does not necessarily need to be perfectly robust:

Most people are not technically knowledgeable enough to defeat even moderately sophisticated systems and, in any case, are law-abiding citizens rather than determined adversaries. TPSs [Technical protection services] with what might be called “curb-high deterrence”—systems that can be circumvented by a knowledgeable person—are sufficient in many instances. They can deter the average user from engaging in illegal behavior and may deter those who may be ignorant about some aspects of the law by causing them to think carefully about the appropriateness of their copying. Simply put, TPSs can help to keep honest people honest.

80. The hacker’s breakthrough need not necessarily take the form of a computer program, to which the general public might not have ready access even if it is made available on the Internet. For example, a Princeton University computer science graduate student recently posted a paper on his website explaining how to disarm SunnComm’s copy-protection technology by pushing the shift key when loading a CD into a computer. See John Borland, Student Faces Suit Over Key to CD Locks, CNET NEWS.COM (Oct. 9, 2003), at http://news.com.com/2100-1025-5089168.html.


82. As Professor Ku explained:

[C]opy protection for digital content necessitates an expensive technological arms race . . . . Given the difficulty of protecting digital works from copying, copyright holders will be forced constantly to spend significant resources developing technology just to keep the cat in the bag. These costs will in turn be passed on to the public, not to provide the public with access to new works, but for the sole purpose of limiting access. Given that hackers appear to be as adept, if not more so, at picking the locks of copyright
developing artists and improving products, the industry would have to invest these rare resources in encryption technology and in preventing consumers from accessing copyrighted works. This strategy would hurt artists, the industry, and ultimately consumers.

Moreover, the increased use of encryption technologies to protect copyright has sparked concerns among consumer advocates and civil libertarians. An encrypted CD may not function the same way as a conventional CD. Previously available functions, including those to which consumers may have a legal right—under the “fair use” privilege in copyright law perhaps—may no longer exist. Even worse, an encrypted CD might not be playable on car stereos, computers, and old CD players, forcing consumers to buy new ones they do not otherwise need or cannot afford. Thus, it is not surprising that the recording industry has encountered highly negative responses—including a lawsuit by two California consumers—when Sony released Celine Dion’s album in encrypted format. As some consumer advocates demanded, record companies should label their CDs carefully to avoid confusion and to allow consumers to choose whether they want to purchase those CDs.

### D. Battle Strategy #4: Education

The fourth strategy the entertainment industry uses is education. In recent years, the industry has been very active in educating the consuming public. For example, the recording industry set up the “Byte

---

Ku, supra note 17, at 319-20 (footnotes omitted); see also Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 251 (discussing the “wasteful ‘arms race’ of technological-protection schemes, with each side increasing its spending to outperform the other’s technology”).


84. For example, consumers may no longer be able to make archival backups or analog compilations of copyrighted songs for personal use.


86. See Jon Healey & Jeff Leeds, *Record Labels Grapple with CD Protection*, L.A. TIMES, Nov. 29, 2002, at C1 (reporting that “[t]wo California consumers already have filed a class-action lawsuit against the five major record companies, alleging that copy-protected CDs are defective products that shouldn’t be allowed on the market”).

Me” website to stem the distribution of illegal copies of popular music in MP3 format.88 “Entertainment groups [also] have sent thousands of letters to colleges and corporations, alerting them to infringements,” while celebrities like the Dixie Chicks and Missy Elliott have appeared on MTV and BET to relay artists’ concerns.89 Even Madonna chastised her fans for downloading an illegal copy of her new single, American Life.90 And most recently, during the 2004 Annual GRAMMY Awards Ceremony, the Recording Academy unveiled a major public education campaign, which includes the new website whatsthedownload.com, print and radio public service announcements, grassroots initiatives, and retail activities.91

Since September 2003, the entertainment industry has tried another education strategy—mass litigation. So far, the recording industry has filed more than two thousand lawsuits against individuals suspected of swapping music illegally via peer-to-peer networks. As Cary Sherman, president of the Recording Industry Association of America, declared, “‘lawsuits are a very potent form of education.’”92 Although CD sales have increased since the filing of lawsuits and some studies have shown that illegal file sharing has declined,93 it remains unclear as to whether the lawsuits have the proclaimed educational value.94

88. See DIGITAL DILEMMA, supra note 18, at 308 n.3.
89. Entertainment Industry Widens War, USA TODAY, Feb. 13, 2003, at 9D.
93. See, e.g., PEW INTERNET & AMP. LIFE PROJECT, SHARP DECLINE IN MUSIC FILE SWAPPERS: DATA MEMO FROM PIP AND COMSCORE MEDIA METRIX (2004) (reporting a survey that showed that the percentage of music file downloaders had fallen to fourteen percent (about eighteen million users) from twenty-nine percent (about thirty-five million) in spring 2003), available at http://www.pewinternet.org/reports/pdfs/IP File_Swapping_Memo_0104.pdf. But see Marguerite Reardon, Oops! They’re Swapping Again, CNET NEWS.COM (Jan. 16, 2004), at http://news.com.com/2100-1027-5142382.html (reporting survey by The NPD Group, an independent market research firm, that “peer-to-peer usage was up 14 percent in November 2003 from September”).
94. Commentators have attributed the recent increase in record sales to such other factors as an improving economy, a better selection of artists and albums, and an increasing tendency to deny downloading activities. See, e.g., Chris Nelson, CD Sales Rise, but Industry Is Too Wary to Party, N.Y. TIMES, Feb. 23, 2004, at C1 (noting the recent improvement in selection of artists and albums); see also COMM. FOR ECON. DEV., PROMOTING INNOVATION AND ECONOMIC GROWTH: THE SPECIAL PROBLEM OF DIGITAL INTELLECTUAL PROPERTY 29 (2004) (noting that factors other than file sharing appear to have played a part in recent revenue declines experienced by the music industry), available at http://www.ced.org/docs/report/report_dcc.pdf; FELIX OBERHOLZER &
E. Battle Strategy #5: Licensing

The final strategy the entertainment industry has used—recently and reluctantly—is licensing. In April 2003, Apple Computer unveiled a new online music service, the iTunes Music Store, offering low-priced music downloads from the five major record labels. In October, a few months after Apple introduced iTunes, Roxio relaunched Napster as a subscription-based music service. Napster has since announced deals with the Pennsylvania State University and the University of Rochester to provide students with campus-wide subscriptions to its service.

From the industry's standpoint, both iTunes and Napster provide an exciting opportunity. While these services offer legal alternatives to KaZaA, Grokster, Morpheus, and other allegedly illegal file-sharing networks, they also help students and computer users develop habits that the industry hopes will continue. As Napster's former President Michael Bebel proclaimed, "[t]his deal encourages a new generation to try a legitimate service, enjoy and adopt it, and later when they have more time and money, continue it." By using legitimate services, customers also save time and avoid those decoy files, spywares, viruses, and computer crashes that often come with illegal downloads. Nevertheless, there

---


96. See John Borland, Napster Launches, Mims the Revolution, CNET NEWS.COM (Oct. 9, 2003), at http://news.com.com/2100-1027_3-5088838.html. The service offers ninety-nine cent downloads of single songs to anyone who downloads the free software. It also provides monthly subscribers with access to an unlimited number of music streams and "tethered" downloads that expire when the users stop subscribing to the service.


98. Borland, Napster to Give Students Music, supra note 97.


100. See Peter K. Yu, The Copyright Divide, 25 CARDOZO L. REV. 331, 432-33 (2003) (discussing the frustration in locating what one wants in illegal websites); see also DIGITAL DILEMMA, supra note 18, at 80-81.
remain questions as to whether the purchased songs are resaleable, 101 whether the delivery format is secure, 102 and whether consumers will receive the needed support service for the playback devices. 103

II. ELDRED V. ASHCROFT

While the entertainment industry was busy fighting the copyright war, the Supreme Court was considering what many industry analysts believed to be one of the most important copyright cases in United States history. On January 15, 2003, the United States Supreme Court announced its decision in Eldred v. Ashcroft, 104 upholding the constitutionality of the Sonny Bono Copyright Term Extension Act 105 ("Bono Act"). Dubbed the "Mickey Mouse Protection Act" by its opponents, 106 the statute extended the copyright term for twenty years. 107 As with prior copyright term extension legislation, the Bono Act applies


102. See, e.g., John Borland, Program Points Way to iTunes DRM Hack, CNET NEWS.COM (Nov. 24, 2003), at http://news.com.com/2100-1027-5111426.html (discussing a program that "served as a demonstration of how to evade, if not exactly break, the anticopying technology wrapped around the songs sold by Apple in its iTunes store").

103. See, e.g., Chris Ayres, Apple Acts After Battery of iPod Complaints, TIMES (London), Jan. 12, 2004, at 9 (discussing iPods' battery problems); Rene A. Guzman, Apple's Portable iPod Rotten to Some, SAN ANTONIO EXPRESS-NEWS, Feb. 20, 2004, at 1 F (discussing the class action lawsuits filed against Apple Computer alleging that the company misrepresented the battery life of its iPod).


to both future and existing works. Works that are supposed to fall into the public domain, like Disney's Mickey Mouse, therefore will remain "locked up" for another twenty years.

In 1999, several publishers and users of public domain works challenged the Bono Act before the United States District Court for the District of Columbia. The case turned on the meaning of the Copyright Clause, which provides that "Congress shall have Power . . . To promote the Progress of Science . . . , by securing for limited Times to Authors . . . the exclusive Right to their respective Writings." The plaintiffs argued that Congress exceeded its enumerated power by disregarding the "limited Times" requirement under the Copyright Clause and that the retroactive extension violated the public trust doctrine. They also contended that the Bono Act violated their free speech rights by preventing dissemination of copyrighted works that otherwise would have entered the public domain.

The district court rejected the plaintiffs' First Amendment argument by observing that "there are no First Amendment rights to use the copyrighted works of others." In addition, it maintained that Congress had not violated the "limited Times" provision because the life-plus-seventy term conferred by the Bono Act is limited and within Congress's discretion. The court also noted that the retroactive extension did not violate the public trust doctrine, which "applies to navigable waters and not copyrights."

On appeal, the United States Court of Appeals for the District of Columbia affirmed the lower court's decision. Like the lower court, the appellate court found the Bono Act constitutional, maintaining that the plaintiffs' First Amendment argument was foreclosed by *Harper & Row Publishers, Inc. v. Nation Enterprises*, a 1985 case involving the unauthorized publication of President Ford's memoirs. In that case, the United States Supreme Court declared that the idea-expression...
dichotomy in copyright law struck "a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts [and ideas] while still protecting an author's expression."

Based on Harper & Row, the court maintained that copyrights are "categorically immune" from First Amendment challenges.

The appellate court also found irrelevant the plaintiffs' originality argument. As the court explained, "here we ask not whether any work is copyrightable—indeed, the relevant works are already copyrighted—but only whether a copyright may by statute be continued in force beyond the renewal term specified by law when the copyright was first granted." Finally, the appellate court rejected the plaintiffs' argument that the term "limited Times" should be interpreted in light of the Copyright Clause's preceding phrase "To promote the Progress of Science and useful Arts." As the court reasoned, the plaintiffs' argument was inconsistent with prior case law holding that the introductory language of the Copyright Clause did not constitute a limit on congressional power.

The plaintiffs petitioned for a rehearing en banc, but the D.C. Circuit denied their petition. In February 2002, the Supreme Court granted certiorari to hear the case. A year later, the Court found, in a 7-2 decision, that Congress had made a rational judgment to extend the copyright term for both existing and future works. Writing for the majority, Justice Ruth Bader Ginsburg noted that the Court was not in a position to "second-guess" the legislature's "policy judgment... however debatable or arguably unwise [it] may be."

Justices John Paul Stevens and Stephen Breyer dissented. Justice Stevens found that ex post facto extension of the copyright term frustrated the goal of the Copyright Clause by transferring wealth from

---

119. Id. at 556 (quoting with approval, and reversing on other grounds, 723 F.2d 195, 203 (2d Cir. 1983)); see also 17 U.S.C. § 102(b) (2000) (stipulating that copyright does not protect "any idea").
120. Eldred, 239 F.3d at 375 (citing United Video, Inc. v. FCC, 890 F.2d 1173, 1176-78 (D.C. Cir. 1989)).
121. See id. at 377.
122. Id.
123. Id. at 377-78.
124. See id. at 378 (citing Schnapper v. Foley, 667 F.2d 102, 112 (D.C. Cir. 1981)).
127. See Eldred, 533 U.S. at 206-07.
128. Id. at 208.
the public to copyright holders. Similarly, Justice Breyer declared that “[n]o potential author can reasonably believe that he has more than a tiny chance of writing a classic that will survive commercially long enough for the copyright extension to matter.” In addition, as Justice Breyer noted, the Bono Act will pose serious harm to society: “It will likely restrict traditional dissemination of copyrighted works. It will likely inhibit new forms of dissemination through the use of new technology. It threatens to interfere with efforts to preserve our Nation’s historical and cultural heritage and efforts to use that heritage, say, to educate our Nation’s children.”

Although the public domain activists found the ruling disappointing, the decision was neither groundbreaking nor different from prior Supreme Court precedents in the field of copyright law. In fact, the Court found it significant “that early Congresses extended the duration of numerous individual patents as well as copyrights.” As Justice Ginsburg pointed out, Congress’s action was strongly supported by the text of the Constitution, the country’s history, and precedents in the fields of both copyright and patent law.

Prior case law also revealed that the Court has always shown substantial deference to Congress in copyright matters. For example, in *Stewart v. Abend*, a 1990 case concerning the renewal provisions and the right to use a short story in Alfred Hitchcock’s *Rear Window*, the Court stated: “Th[is] evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces . . . . [I]t is not our role to alter the delicate balance Congress has labored to achieve.” In the famous 1984 Betamax case, *Sony Corp. of America v. Universal City Studios, Inc.*, the Court maintained that “it is Congress that has been assigned the task of defining the scope of [rights] that should be granted to authors or to inventors in order to give the public appropriate access to their work product.” And in *Graham v. John Deere Co.*, a case

129. See id. at 226-27 (Stevens, J., dissenting).
130. Id. at 254 (Breyer, J., dissenting).
131. Id. at 266.
132. See Yu, *Four Remaining Questions*, supra note 104.
133. *Eldred*, 537 U.S. at 201.
134. See id. at 199-201 & nn.5-6.
137. Id. at 230.
139. Id. at 429.
upon which the *Eldred* Court relied heavily, the Court stated: "Within the limits of the constitutional grant, the Congress may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim."\(^{141}\)

The only recent case that seeks to limit Congress’s enumerated power in the copyright field is *Feist Publications, Inc. v. Rural Telephone Service Co.*,\(^{142}\) a 1991 case involving the copyrightability of telephone white pages.\(^{143}\) However, the Court carefully distinguished the present case from *Feist*. As the Court explained, *Feist* "did not touch on the duration of copyright protection. Rather, the decision addressed the core question of copyrightability . . . . The decision did not construe the 'limited Times' for which a work may be protected, and the originality requirement has no bearing on that prescription."\(^{144}\)

Notwithstanding the Court’s “traditional” copyright analysis in *Eldred*, the Court rejected emphatically the petitioners’ First Amendment argument and reminded us of the various “built-in First Amendment accommodations” in existing copyright law.\(^{145}\) For example, the idea-expression dichotomy prevents copyright holders from monopolizing ideas, theories, facts, and concepts.\(^{146}\) The fair use

141. Id. at 6.
143. See id. at 342.
146. See *Eldred*, 537 U.S. at 219; see also 17 U.S.C. § 102(b) (2000) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”). The *idea-expression dichotomy* “is the term of art used in copyright law to indicate the elements in a copyrighted work which the grant
provision allows the general public to use copyrighted materials under certain circumstances without the copyright holder’s authorization. In fact, the Bono Act contains an exception for libraries, archives, and similar institutions to reproduce, distribute, display, or perform certain copyrighted works in facsimile or digital form for preservation, scholarship, and research purposes during the last twenty years of the copyright term.

Much to the disappointment of public domain activists, the Court also rejected the petitioners’ “copyright bargain” theory, the originality argument, and the allegation that Congress sought to achieve a perpetual term on an “installment plan.” As the Court explained, “[t]he First Amendment securely protects the freedom to make—or decline to make—one’s own speech; it bears less heavily when speakers assert the right to make other people’s speeches.”


147. See 17 U.S.C. § 107; see also Eldred, 537 U.S. at 219-20; Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901) (articulating for the first time the concepts that evolved into the fair use doctrine). For comprehensive discussions of fair use, see generally the sources cited supra note 37.


149. See Eldred, 537 U.S. at 214-17.

150. See id. at 211.


152. Eldred, 537 U.S. at 221; see also Symposium, The Constitutionality of Copyright Term Extension: How Long Is Too Long, 18 CARDOZO ARTS & ENT. L.J. 651, 701 (2000) [hereinafter Constitutionality of Copyright Term Extension] (remarks of Prof. Jane Ginsburg) (expressing doubt about whether the First Amendment “is about the freedom to make other people’s speeches again for them”).
Bono Act "does not oblige anyone to reproduce another's speech against
the carrier's will. Instead, it protects authors' original expression[s] from
unrestricted exploitation."\(^{153}\) Although the Court ultimately
"recognize[d] that the D.C. Circuit spoke too broadly when it declared
copyrights 'categorically immune from challenges under the First
Amendment,'"\(^{154}\) its *Eldred* decision might create substantial difficulties
for future constitutional challenges to the copyright statute.

Thus, many commentators are concerned that the decision might
create setbacks to potential challenges to other copyright statutes, such
as the DMCA, the Uruguay Round Agreements Act,\(^{155}\) or potential
database protection legislation.\(^{156}\) Some commentators, however, are
more optimistic and suggested that *Eldred* might offer hope for potential
constitutional litigants. At the end of the decision, the Court seemed to
imply that further First Amendment inquiry may be necessary "when . . .
Congress has . . . altered the traditional contours of copyright
protection."\(^{157}\) Based on this wording, Professor Jack Balkin suggested
in his weblog that the DMCA is constitutionally suspect, for the statute
takes away such traditional public interest safeguards as the idea-
expression dichotomy and the fair use privilege.\(^{158}\)

Notwithstanding this insightful observation, it is unclear whether
the Court would find that the DMCA had altered "the traditional
contours of copyright protection." After all, Congress has enacted a lot
of "nontraditional" legislation in the past. For example, the
Semiconductor Chip Protection Act of 1984\(^{159}\) created new sui generis

\(^{153}\) *Eldred*, 537 U.S. at 221.

\(^{154}\) *Id.* (quoting and affirming *Eldred v. Reno*, 239 F.3d at 375).


\(^{157}\) *Eldred*, 537 U.S. at 221.


protection for mask works that might otherwise fail to secure copyright protection.\textsuperscript{160} The anti-bootlegging provision of the copyright statute affords protection to works that are not fixed within the definition of the Copyright Act.\textsuperscript{161} To allow the United States to comply with the World Trade Organization framework and the Agreement on Trade-Related aspects of Intellectual Property Rights ("TRIPS"), the Uruguay Round Agreements Act of 1994 added protection to materials that were withdrawn from the public domain.\textsuperscript{162} And most recently, Congress extended copyright-like protection to boat hull designs by passing the Vessel Hull Design Protection Act,\textsuperscript{163} which reversed the 1989 Supreme Court decision of \textit{Bonito Boats, Inc. v. Thunder Craft Boats, Inc.}\textsuperscript{164} It is very unlikely that the Court will invalidate all of these statutes, just as it was unlikely that the Court would invalidate all the copyright statutes that were enacted since 1790.

III. INTERNATIONAL DEVELOPMENTS

In \textit{Eldred}, the Court openly embraced the United States’ need to harmonize its copyright law with that of the European Union. As the Court observed, "a key factor"\textsuperscript{165} in the passage of the Bono Act was the Council Directive 93/98/EEC of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights,\textsuperscript{166} which instructed member states of the European Union to extend copyright protection for an additional twenty years.\textsuperscript{167} Based on this observation, one might assume that the Bono Act successfully harmonized United States copyright law with that of the European Union. Unfortunately, the opposite is true. As Justice Breyer pointed out in his dissent, the United States and the European Union provide different copyright terms for a

\footnotesize
\bibitem{160} See id.
\bibitem{164} See 489 U.S. 141, 168 (1989) (invalidating the Florida statute that protects against the copying of boat hull designs).
\bibitem{165} Eldred v. Ashcroft, 537 U.S. 186, 205-06 (2003).
\bibitem{167} See EC Copyright Term Directive, supra note 166, recital (5), arts. 1(1), 1(3), 2(2).
large number of works, including works-made-for-hire, pre-1978 works, and anonymous and pseudonymous works.

Consider sound recordings, for example. In the United States, sound recordings are deemed works-made-for-hire and are protected for ninety-five years. In the European Union, recordings are protected for only fifty years. Recently, many sound recordings—including popular 1950s albums by such artists as Maria Callas, Ella Fitzgerald, and Elvis Presley—have fallen into the public domain in Europe. In response, the United States recording industry has been calling for stronger protection against parallel imports, those presumably cheaper foreign goods imported without the authorization of the copyright holders. As the recording industry points out, it does not matter whether the recordings are in the public domain abroad; as long as they remain

168. See Eldred, 537 U.S. at 257-58 (Breyer, J., dissenting); see also William F. Patry, The Copyright Term Extension Act of 1995: Or How Publishers Managed to Steal the Bread from Authors, 14 CARDOZO ARTS & ENT. L.J. 661, 661-62 (1996) (arguing that the copyright term extension legislation would not create parity between European Union and United States authors); J.H. Reichman, The Duration of Copyright and the Limits of Cultural Policy, 14 CARDOZO ARTS & ENT. L.J. 625, 626 (1996) (arguing that the copyright term extension legislation "cannot be justified [as an exercise in] harmonization"). But see Constitutionality of Copyright Term Extension, supra note 152, at 690-91 (remarks of Prof. Arthur R. Miller) (arguing that the Bono Act will create parity between European Union and United States authors); id. at 698 (remarks of Prof. Jane Ginsburg) (arguing that the international trade rationale provides a stronger justification for copyright term extension than does the copyright rationale).


171. Compare 17 U.S.C. §§ 302(c), 304(a)-(b), with EC Copyright Term Directive, supra note 166, art. 1(3).

172. See 17 U.S.C. §§ 302(c), 304(a)-(b).

173. See EC Copyright Term Directive, supra note 166, art. 3.


protected in the United States, any unauthorized importation of these recordings would be an act of piracy.\(^{176}\)

Moreover, the United States copyright term does not match up with that of the other members of the international community, including its neighbor Canada. A recent dispute over Peter Pan demonstrates this disharmony. In 1904, Sir James Barrie wrote the play Peter Pan.\(^{177}\) Two decades later, Sir Barrie awarded the play’s copyright to the Great Ormond Street Hospital for Children in London.\(^{178}\) A subsequent British statute extended the hospital’s royalty rights in perpetuity.\(^{179}\) British law notwithstanding, the play has fallen into the public domain in many countries, including many member states of the Berne Convention.\(^{180}\) In those countries that adopted the Convention’s statutory minimum—life of the author plus fifty years for works created by an individual author—\(^{181}\) the copyright in Peter Pan would have expired in 1987, fifty years after Sir Barrie’s death.

Canadian author J.E. Somma recently published the book After the Rain: A New Adventure for Peter Pan.\(^{182}\) Although the book was published in Canada, it is available to British and United States customers via the Internet. To preempt legal action in the United States by the British hospital, Somma filed suit in San Francisco in December 2002 seeking a declaratory judgment.\(^{183}\) While she claimed that the characters in Peter Pan are now in the public domain, the British hospital contended that the United States Copyright Act had extended copyright protection for Peter Pan until 2023.\(^{184}\) The court has yet to

\(^{176}\) See Tommasini, supra note 174 ("'The import of those products would be an act of piracy.' . . . 'The industry is regretful that these absolutely piratical products are being released.'" (quoting Neil Turkewitz, Executive Vice President International of the RIAA)).


\(^{178}\) See id. at 369, 392.

\(^{179}\) See Copyrights, Designs and Patents Act, 1988, ch. 48, § 301 (Eng.); see also E. P. SKONE JAMES ET AL., COPINGER AND SKONE JAMES ON COPYRIGHT § 1-2 (13th ed. 1991) ("[T]he 1988 Act has created a new perpetual non-copyright right . . . to receive royalties in respect of certain acts of exploitation of the play Peter Pan by Sir James Matthew Barrie, notwithstanding that the copyright in such work expired on December 31, 1987.").


\(^{181}\) See id. art. 7(1); see also, e.g., Copyright Act, 1968, pt. III, div. 1, § 33(2) (Austl.) (adopting life-plus-fifty-years copyright term); Copyright Act, R.S.C., ch. C-42, § 6 (1985) (Can.) (same).


\(^{183}\) See Yu, Mickey Mouse, Peter Pan, supra note 104; Ian Stewart, "Peter Pan" Falls into Clutches of Lawyers: Author Challenges Copyright Ruling, SAN DIEGO UNION-TRIB., Jan. 1, 2003, at A6.

\(^{184}\) See id.
rule on the case, and it is unclear whether Peter Pan can grow up in the way Somma fantasized.

Although the European Union and the United States agree on the need for strong international intellectual property protection, the progress of copyright harmonization has been held back by the different backgrounds and traditions of European and United States copyright laws. While European copyright law was developed from the author's right (droit d'auteur) tradition, which covers both personal and economic rights, American copyright law emerged from the utilitarian tradition, which emphasizes economic rights.185

Consider, for example, the protection of moral rights.186 In Europe, an author, as compared to a copyright holder, has a right to claim authorship of the work and to prevent the use of his or her name as the author of any work the author did not create.187 The author also has the right to prevent any intentional distortion, mutilation, or modification of the work if such action would damage his or her reputation.188 Similar protection is not available in the United States, except in works of visual arts that exist in limited quantity, such as paintings, drawings, sculptures, and still photographic images.189

The United States and the European Union also disagree over many other copyright issues, including database protection,190 fair use,191 the


187. See Netanel, supra note 185, at 34-37 (discussing the right of attribution).

188. See id. at 37-45 (discussing the right of integrity).


190. For discussions of the expediency and constitutionality of United States database protection legislation, see generally the sources cited supra note 156.

first sale doctrine,\textsuperscript{192} the work-made-for-hire arrangement,\textsuperscript{193} and protection against private copying in the digital environment.\textsuperscript{194} In light of these differences, one might wonder if Eldred would change the tone of the international harmonization debate.

Although the Eldred Court openly—and to some extent uncharacteristically—embraced the need to harmonize United States copyright law with that of the international community, its ruling shows its strong and usual deference to Congress on the issue.\textsuperscript{195} Such deference is alarming, for it might make harmonization even more difficult. While Congress, on occasion, might harmonize its laws with those of the European Union or the international community, most of the time it does not.\textsuperscript{196} Due to its strong interest in exporting intellectual property-based products, the United States generally offers stronger intellectual property protection than countries abroad.\textsuperscript{197} By giving

---

United States copyright law). Compare Sega Enters. v. Accolade, Inc., 977 F.2d 1510, 1520 (9th Cir. 1992) (holding that reverse engineering for the purpose of gaining an understanding of the unprotected functional elements of a computer program qualifies as fair use), with Council Directive 91/250/EEC of 14 May 1991 on the Legal Protection of Computer Programs art. 6, ¶ 1, 1991 O.J. (L 122) 42 (permitting reverse engineering only for the purpose of "obtain[ing] the information necessary to achieve the interoperability of an independently created computer program with other programs").


\textsuperscript{193} See Reichman, \textit{supra} note 168, at 631-33 (arguing that "[a] more substantial discrepancy between American copyright law and that of other Berne Union countries stems from the greater reliance of the former on the work-made-for-hire doctrine in general and on the principle of corporate authorship in particular").

\textsuperscript{194} Compare, e.g., Audio Home Recording Act of 1992, 17 U.S.C. § 1002(c) (2000) (prohibiting manufacture, importation, and distribution of devices whose primary purpose or effect is to circumvent copy-protection technology), with Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, art. 6(2), 2001 O.J. (L 167) 10, 17 (requiring member states to provide "adequate legal protection" against the "manufacture, import, distribution, sale, rental, advertisement . . . , or possession" of devices with the primary purpose or effect of circumvention or which "are promoted, advertised, or marketed for the purpose of circumvention").

\textsuperscript{195} See Hamilton, \textit{supra} note 135, at 321-22, 335-46 (discussing how rare it is for the United States Supreme Court to address constitutional issues in copyright cases).


\textsuperscript{197} The United States was instrumental in putting intellectual property on the international trade agenda. See Assafa Endeshaw, \textit{A Critical Assessment of the U.S.-China Conflict on Intellectual Property}, 6 ALB. L.J. SCI. & TECH. 295, 337 (1996) (noting the United States' success "in placing intellectual property on an arguably 'international' pedestal"); Reichman & Samuelson, \textit{supra} note 156, at 97 ("Universal intellectual property standards embodied in the TRIPS Agreement had become enforceable within the framework of a World Trade Organization, largely as the result
Congress strong deference, the Court therefore encourages lower courts to uphold intellectual property statutes, even if they would isolate the country from the global community or if they would violate international norms.

A case in point is the Fairness in Music Licensing Act of 1998 ("FIMLA"), which the Court cited with approval in Eldred. Enacted as a compromise between copyright holders and small business enterprises, the FIMLA amended section 110(5) of the United States Copyright Act by exempting from royalties those restaurants, bars, and retail stores that use "homestyle" audio and video equipment to play broadcast music. In 1999, a WTO dispute settlement panel found the statute in violation of the United States' obligations under the TRIPS Agreement. In particular, the statute violated articles 11bis(1)(iii) and 11(1)(ii) of the Berne Convention as incorporated into the TRIPS Agreement. In view of this violation, the panel recommended that "the Dispute Settlement Body request the United States to bring [the FIMLA] into conformity with its obligations under the TRIPS Agreement."
In the years to come, it will be interesting to see how the "harmonization game" will play out. Will the United States change its laws in an effort to harmonize them with those of foreign countries? Or will other countries change their laws in an effort to harmonize them with American law? If there is no harmonization, the entertainment industry might face some new challenges from its foreign competitors.

IV. THE CHANGING TONE OF THE COPYRIGHT WAR

So far, the entertainment industry seems to be winning the war. As commentators have noted, the MP3.com and Napster litigation signified the end of what had been termed the "Wild, Wild West" era of the Internet.205 The copy-protection technologies and the DMCA also provide the industry with the needed self-help protection that allows it to adapt to the new environment. However, if one looks further, the Wild Wild West is even wilder than it was two years ago. True, the recording industry is no longer dealing with MP3.com and Napster. However, a whole host of engines and services—such as Madster (formerly Aimster), KaZaA, AudioGalaxy, Morpheus/MusicCity, Grokster, iMesh, Filetopia, BearShare, BitTorrent, and LimeWire—has emerged, and these "successors" can be used for the very same purposes as Napster.

In fact, from the industry's perspective, these engines are even more problematic. Unlike MP3.com and Napster, many of these engines and services do not have centralized servers.206 Rather, they allow users

---


206. See Riehl, supra note 50, at 1773-79 (describing the architecture of gnutella-based engines).
to transfer files among various locations. Some of them, like Freenet, also allow users to remain anonymous. Thus, enforcement has become a major problem, and the outcome of these battles becomes even harder to predict. The industry forced Napster to shut down its server, but there is little the industry could do to deal with gnutella and its uncountable successors.

Moreover, the transnational nature of the Internet might create jurisdictional barriers that curtail the industry’s litigation efforts. The KaZaA litigation, for example, involves first Estonian developers, then a Dutch company, and now Australian business executives in a company incorporated in the South Pacific tax haven of Vanuatu. To make things even more complicated, foreign countries might have different laws, and their courts might come to different conclusions even when they apply identical laws. Unless the recording industry is willing to go after all the users (which would likely result in an enforcement fiasco and a publicity disaster), piracy will remain rampant.

In recent years, the Eldred litigation and the public domain, free software, and open source movements have created a tremendous momentum toward a major change in copyright policy. As Professor Marci Hamilton put it, if the consumers “were to ally . . ., and organize, [with the open sourcers] together they could be a powerful movement.” Thus, regardless of how disappointing one would find the decision, Eldred might not be what Professor Siva Vaidhyanathan called the “‘Dred Scott case for culture.” After all, the case, as the Court stated in the opening sentence, is about the scope of Congress’s power

---

207. See id. at 1779-87 (describing the architecture of Freenet).
210. See Yu, supra note 196, at 232-41; see also Comm’n on Intellectual Property Rights, Integrating Intellectual Property Rights and Development Policy: Report of the Commission on Intellectual Property Rights 114 (2003) (noting that “it is not uncommon for different courts in Europe, even when applying identical law, to come to different conclusions on whether a patent is or is not obvious”); Patti Waldmeir, Material Published on the Internet and Thus Accessible Anywhere in the World Is Increasingly Being Challenged Under the Laws of Individual Nation States, Fin. Times (London), Dec. 16, 2002, at 19 (noting the increasing willingness of national courts to assert jurisdiction over activities conducted on the Internet).
211. Hamilton, supra note 104.
“to prescribe the duration of copyrights.” It is not about whether the public can use copyrighted works during the prescribed period.

Copyright has always been a balancing act. Indeed, the public interest safeguards—such as the idea-expression dichotomy, the first sale doctrine, and the fair use privilege—are “just as important as the grant of the right itself.” Thus, any change in one area of the copyright system could easily be offset by an opposite change in another area of the system. For example, increased copyright protection could be offset by an expanded reading of the fair use provision or the miscellaneous exemptions contained in the Copyright Act. In fact, some lower courts—especially those sympathetic to the Eldred cause—might be willing to adjust the existing copyright scheme in an effort to offset the effects of an extended copyright term.

Thanks to the MP3.com, Napster, Eldred, and KaZaA litigation, public awareness of intellectual property issues has increased considerably. In the past, copyright law was considered a complicated issue that was only of primary interest and concern to intellectual property lawyers, legal scholars, technology developers, and copyright holders. Today, members of the public increasingly see it as something that affects their daily lives. As political support grew, legislative proposals that placed a heavier emphasis on the protection of the public domain surfaced. For example, Congressman Richard Boucher introduced the Digital Media Consumers’ Rights Act to restore the historical balance in copyright law and to ensure proper labeling of copy-protected CDs. Senator Sam Brownback circulated among consumer groups and within the Senate a draft bill requiring copyright holders to file suits before obtaining the identities of alleged infringers.

215. See Constitutionality of Copyright Term Extension, supra note 152, at 701 (remarks of Prof. Jane Ginsburg) (expressing concern that, if the Court were to uphold the Bono Act, the decision might invite lower courts to further adjust the existing copyright scheme in an effort to offset the effects of a longer copyright term).
216. See, e.g., Hamilton, Copyright Arena, supra note 205.
217. See, e.g., Jane C. Ginsburg, Can Copyright Become User Friendly?, 25 Colum. J.L. & Arts 71, 71 (2001) (arguing that “[c]opyright law is too complicated and counterintuitive . . . [and] has been written by and for copyright lawyers”).
218. See Hamilton, Copyright Arena, supra note 205.
from Internet service providers. Most recently, Reps. Zoe Lofgren and John Doolittle introduced the Public Domain Enhancement Act, which, if enacted, would require copyright holders to pay a one-dollar fee to maintain their copyrights fifty years after the original publication of their works.

Scholars and commentators also have paid increasing attention to access issues and have proposed safeguards to limit copyright protection. For example, Professor Ann Bartow advocated the adaptation of "pre-existing real space copyright use norms to electronic formats as a mechanism for protecting the legitimate interests of copyright owners without depriving individuals of the customary real space access to information provided by bound books and periodicals." Professor Yochai Benkler advocated the use of Justice Louis Brandeis's concept that information should be "free as the air to common use" to limit property rights in information products. Professor Julie Cohen advocated the recognition of the right to read anonymously. Professor Niva Elkin-Koren argued that users must be allowed "to do the same things they are able to do in a non-digitized environment." Professor Marci Hamilton noted the need to construct a "free use zone" that will "mak[e] explicit what is already accepted practice in a hard copy universe—that copyright owners do not have rights to prohibit individuals from browsing and borrowing their works." Professor Lawrence Lessig called for significant term limits to copyright protection. And Professor Diane Zimmerman emphasized the

---


224. See Cohen, supra note 22, at 1003-04.


227. See, e.g., LESSIG, supra note 27, at 251 (proposing a regime whereby a published work will be protected for a term of five years once registered, the registration can be renewed fifteen times, and the work will fall into the public domain if the registration is not renewed); Lawrence Lessig, Protecting Mickey Mouse at Art's Expense, N.Y. TIMES, Jan. 18, 2003, at A17 (proposing a scheme whereby copyright holders will have to pay a tax fifty years after a work is published and
importance of providing exceptions for scholarship and scientific research.\textsuperscript{228}

Finally, some citizens might consider civil disobedience in the name of justice (or in the name of poor Mickey, who—as noted by a humor columnist—is denied sex, drugs, and cigarettes by its copyright holder and the Bono Act).\textsuperscript{229} Shortly after the Court handed down the \textit{Eldred} decision, strong, bitter reactions emerged from supporters of the public domain movement.\textsuperscript{230} While many believed the Court had sold them out to private corporations, like Disney, the more radical ones advocated civil disobedience as a counteracting strategy.\textsuperscript{231} In fact, long before the public debate on copyright term extension heated up, visionary commentators had considered MP3s “a kind of protest movement against record companies, which many artists hate because they control access to the music market.”\textsuperscript{232} Nonetheless, civil disobedience is generally discouraged, regardless of how strong one believes in the need to protect the public domain and maintain balance between copyright holders and the users at large; indeed, that was the reason why \textit{Eldred} was brought in the first place.\textsuperscript{233}

---

\textsuperscript{228} See Diane Leenheer Zimmerman, \textit{Copyright in Cyberspace: Don’t Throw Out the Public Interest with the Bath Water}, 1994 ANN. SURV. AM. L. 403, 405 (noting the need to “maintain] some approximation of our current cheap and simple access to copyrighted works for research, scholarship and pleasure”); see also Reichman & Samuelson, supra note 156, at 113-24 (discussing the adverse impact of sui generis database protection on scientific research and education); Reichman & Uhler, supra note 156, at 796-821 (discussing the adverse impact of database protection laws on scientific, technical, and educational users of factual data and information).


\textsuperscript{231} See Lord Macaulay, \textit{Speech Delivered in the House of Commons} (Feb. 5, 1841) (cautioning that an ill-advised copyright law eventually would be “repealed by piratical booksellers”), reprinted in \textit{EXTENDING MICKEY’S LIFE: ELDRED V. ASHCROFT AND THE COPYRIGHT TERM EXTENSION DEBATE} (Peter K. Yu ed., forthcoming 2004); Glynn S. Lunney, Jr., \textit{The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act}, 87 VA. L. REV. 813, 869-70 (2001) (suggesting that “civil disobedience may offer the only effective means for ordinary consumers to express their political discontent with copyright’s excessive scope”). But see Vaidhyanathan, supra note 212 (discouraging acts of civil disobedience by noting that “[w]hile disobedience might be more fun, the power of civil discourse remains” in the post-\textit{Eldred} era).

\textsuperscript{232} The Big Five Hit the Web, ECONOMIST, May 8-14, 1999, at 63.

V. WHAT SHOULD THE ENTERTAINMENT INDUSTRY DO?

A. Stop Fighting Multi-front Wars

First of all, the entertainment industry should stop its futile attempt to fight multi-front wars. Today, because of the emergence of digital technology and the Internet, peer-to-peer networks have caused major headaches for artists, songwriters, photographers, publishers, film producers, software developers, and other copyright holders. To fight pirates and protect its economic interests, the entertainment industry has deployed many different battle strategies, including lobbying, litigation, self-help, education, and licensing.\(^\text{234}\)

The industry was winning in the beginning, but its latest efforts have become increasingly futile, disorganized, and counterproductive. Although the industry initially boasted about its latest encryption technologies,\(^\text{235}\) those technologies were cracked,\(^\text{236}\) and the industry has had to resort to other low-technology or unconventional protective measures. For example, when Epic Records distributed review copies of Tori Amos, Pearl Jam, and AudioSlave albums in 2002, the label sent them inside portable CD players that had been glued shut.\(^\text{237}\) What an innovative protective technology! Likewise, before Madonna released her new single, *American Life*, the label started circulating a spoofed version of the song on the Internet, featuring the singer saying "'What the f___ do you think you're doing?"\(^\text{238}\) Unfortunately for the label, that strategy backfired when a hacker made MP3 copies of every song on the album available for download when the hacker took over Madonna’s website.\(^\text{239}\) Angry fans also responded by remixing Madonna’s tirade

---

234. See *supra* Part I (discussing the various battle strategies).

235. For example, the Secure Digital Music Initiative Foundation, an association of electronic companies involved in designing copy-protection technologies, issued a public challenge in September 2000, offering ten thousand dollars to those who successfully cracked their proposed copy-protection technologies. SDMI described its public challenge in a press release as follows: So here’s the invitation: Attack the proposed technologies. Crack them. By successfully breaking the SDMI protected content, you will play a role in determining what technology SDMI will adopt. And there is something more in it for you, too. If you can remove the watermark or defeat the other technology on our proposed copyright protection system, you may earn up to $10,000.


236. See *supra* note 25.


238. Id. at 66.

239. See *id*.
with other songs. Some websites even held contests for these remixes.

In April 2003, the recording industry won Recording Industry Association of America v. Verizon Internet Services, Inc., requiring the Internet service provider to hand over names of individuals whom the industry accused of illegally trading music. (The United States Court of Appeals for the District of Columbia Circuit subsequently overruled that decision.) However, on the next day, it lost an important case on Grokster and Morpheus/Music City, risking an unfavorable precedent upholding the legality of peer-to-peer file-sharing technology.

In the same month, the major record companies filed high-profile lawsuits against students at Princeton University, Michigan Technological University, and Rensselaer Polytechnic Institute, seeking billions of dollars in damages. Yet, they created an anti-climax when they settled with the student defendants for meager amounts. More ironically, one student was able to raise his entire twelve-thousand-dollar fine in less than six weeks over the Internet, while another was working his way to complete a similar feat.

---

240. See Nik Bonopartis, Firms Say the Swap Must Stop, POUGHKEEPSIE J. (N.Y.), July 16, 2003, at 1A.
241. See id.
243. See id. at 246, 275.
247. Jon Healey & P.J. Huffstutter, 4 Pay Steep Price for Free Music, L.A. TIMES, May 2, 2003, at § 1, 1 (reporting that students will pay the recording industry damages in the range of $12,000 to $17,500).
248. See Jefferson Graham, Fined Student Gets Donations to Tune of $12K, USA TODAY, June 25, 2003, at 4D.
More recently, the recording industry launched a mass litigation campaign against file swappers who made large number of songs available on peer-to-peer networks. Since September 2003, the recording industry has filed several rounds of lawsuits, suing more than two thousand individuals suspected of swapping music illegally via peer-to-peer networks. Understandably, the industry needs to protect artists aggressively against Internet pirates. However, its aggressive tactics might result in public backlashes while causing collateral damages, such as invasion of privacy.

In fact, the RIAA has had to apologize for issuing erroneous take-down notices. In one episode, it sent a notice to Speakeasy, a national broadband provider, alleging that one of Speakeasy’s subscriber sites had illegally "offer[ed] approximately 0 sound files for download." Approximately zero! In another episode, the industry—or, to be more precise, its automated web-crawlers—confused Usher the rhythm-and-blues performer with Peter Usher, a retired astronomy and astrophysics professor at Pennsylvania State University who stored on the departmental server an a cappella song about a gamma ray satellite. The RIAA later withdrew, and apologized for, the faulty copyright notice, which it attributed to a temporary employee. The trade group

---

249. See Jefferson Graham, Swap Songs? You May Be on Record Industry’s Hit List, USA TODAY, July 22, 2003, at 1D.


253. As Declan McCullagh described:

The department has on its faculty a professor emeritus named Peter Usher whose work on radio-selected quasars the FTP site hosted. The site also had a copy of an a cappella song performed by astronomers about the Swift gamma ray satellite, which Penn State helped to design.

The combination of the word “Usher” and the suffix “.mp3” had triggered the RIAA’s automated copyright crawlers.


254. See id.
also added that it would send Professor Usher an Usher CD and T-shirt "in appreciation of his understanding." 255

So far the entertainment industry has tried many different strategies to combat piracy. 256 Yet, most of them were ill-conceived, making the industry's efforts look hurried, confused, disorganized, and somewhat desperate. Instead of directing its energy toward the pirates, the industry has been fighting battles everywhere—against telecommunications service providers, consumer electronics developers, new media entrepreneurs, corporate employers, universities, lawyers, college researchers, hackers and cryptographers, students, legal scholars, civil liberty organizations, and ultimately consumers. What began as a war on piracy has now become a war against the whole world. No country has ever won a war by fighting battles on all fronts. 257 Not Napoleon's France. Not Hitler's Germany. The entertainment industry should take heed of this aphorism. Rather than using every weapon in its arsenal, it might be well advised to reconsider where and how it fights its battles.

B. Bridge the Copyright Divide

A robust and dynamic copyright regime requires support, and problems arise when support is lacking. Today, a copyright divide exists between those who have stakes in the copyright regime and those who do not. 258 While the stakeholders are eager to protect what they have, the nonstakeholders neither understand nor believe in the copyright system. As a result, the stakeholders and nonstakeholders battle against each other over the change and retention of the status quo. Unless the nonstakeholders understand why copyright needs to be protected and until they become stakeholders or potential stakeholders, they will not be eager to comply with copyright laws and consent to stronger copyright protection.

To help bridge the copyright divide, the entertainment industry can focus its remedial efforts in four areas. First, the industry must educate the nonstakeholders about the copyright system. It needs to make the nonstakeholders understand what copyright is, how copyright is protected, and why they need to protect such property. The industry also

255. Id.
257. Cf. Eric Hobsbawm, On the Edge of the New Century 49 (Allan Cameron trans., 2000) (cautioning that it is "a dangerous gamble" and "a mistake" for a single power, however great and powerful it is, to control world politics).
needs to show the nonstakeholders the benefits of copyright protection—how such protection can help them and how the lack thereof can hurt them. As a recent study by the National Research Council stated, "[a] better understanding of the basic principles of copyright law would lead to greater respect for this law and greater willingness to abide by it, as well as produce a more informed public better able to engage in discussions about intellectual property and public policy."259

Second, the industry needs to transform the nonstakeholders into stakeholders or potential stakeholders by helping them develop a stake in the system and understand how they can get their products protected and royalties paid. So far, the industry has a difficult time explaining why the general public has a stake in the copyright system. Although the industry has repeatedly extolled the benefits of strong copyright protection and how such protection can induce artists to create music, movies, and other entertainment products, the industry’s rhetoric was lost on most consumers.

Fortunately, the industry has begun to adopt other strategies to attract consumers. For example, some software manufacturers offer post-sale benefits that are not available to purchasers of counterfeit goods, such as warranty service, replacement part guarantees, free upgrades, and contests or giveaways.260 Some music publishers also include special photos, files, and interviews on password-protected websites that are made only accessible to purchasers of legitimate CDs.261 Some courageous publishers even compete directly against the pirates by upgrading the quality of their products, thus making their reproduction more expensive (and less profitable for the pirates).262

259. DIGITAL DILEMMA, supra note 18, at 16-17; see also INFO. INFRASTRUCTURE TASK FORCE, supra note 18, at 208 (outlining the controversial “just say yes” campaign to licensing).


261. For example, Gracenote CDKey allows CD owners to unlock bonus tracks, exclusive links, contests, and other bonus content. See What is CDKey? at http://www.cdkey-promotions.com/cdkeyabout.html (last visited Mar. 29, 2004).

262. As one pair of commentators recounted:

One joint venture publishing company which publishes popular comics chose to compete directly against their pirates. Beyond wrapping the magazine in hard-to-reproduce plastic, the company has continuously upgraded the quality of the comic’s graphics and paper relative to pirate editions, and included inexpensive, educational prizes with each issue. These gambits have worked. Despite being significantly more expensive than the pirated version, this popular comic book has seen increasing subscriptions and readership, and the company is planning to expand its operations.
Warner Brothers’s recent change of strategy toward Harry Potter fan sites provides an illustrative example. In December 2000, Warner Brothers threatened to sue a fifteen-year-old English schoolgirl, Claire Field, over her website and domain name, www.harrypotterguide.co.uk. In response, Field and others organized a boycott of Harry Potter merchandise in protest through another website, potterwar.org.uk. The studio eventually backed down. Since the incident, Warner Brothers changed its position toward fan sites. Instead of antagonizing Harry Potter fans, Warner Brothers now tries to bring them into the fold. To do so, the studio created a Webmaster Community page on its official site, allowing fans to enroll their unofficial sites and to download official banners, shields, and seals.

Third, the industry must help develop intellectual property laws and strengthen enforcement mechanisms. Today, although most countries have intellectual property laws that conform to international standards, very few have adequate mechanisms to enforce those laws. Thus, the industry needs to work with the United States government and policymakers in those countries to strengthen intellectual property laws and develop effective enforcement mechanisms.

While the United States government had used coercive tactics in the past to induce, if not compel, foreign countries to change their laws in the American image, past experience suggests that such changes would not be complete and sustainable until those countries consider...
themselves stakeholders or potential stakeholders in the international intellectual property system. Thus, the entertainment industry should work together with its foreign counterparts to increase the public awareness of intellectual property rights. For example, the Business Software Alliance and the Chinese Software Alliance successfully promoted the use of original software in China by teaming up together. Thanks to these efforts, many Chinese no longer see copyright protection as alien, abstract, and incomprehensible. Rather, they consider these rights closely related to their daily lives and the country's domestic growth and international reputation.

In addition, the industry can work together to develop digital rights management tools that help enable and manage transactions made in the online world. When the Internet was first developed, commentators discussed how the new environment allowed for the creation of a "celestial jukebox." Although this jukebox has yet to materialize in the form commentators envision and the Internet has made enforcement difficult at times, new communications technologies provide effective ways for copyright holders to enforce their rights and collect royalties.

Finally, the industry must help develop legitimate alternatives if products are needed, yet unaffordable, by the local people. As Gene


272. Goldstein, supra note 185, at 199.

273. See, e.g., Pippa Norris, Digital Divide: Civic Engagement, Information Poverty, and the Internet Worldwide 100 (2001) (noting that "officials normally find it far more difficult to silence critical voices on the new media compared with their ability to regulate and control the TV airwaves"); A. Michael Froomkin, The Internet as a Source of Regulatory Arbitrage, in Borders in Cyberspace: Information Policy and the Global Information Infrastructure 129 (Brian Kahn & Charles Nesson eds., 1997) (discussing the difficulties of censorship on the Internet); David R. Johnson & David Post, Law and Borders—The Rise of Law in Cyberspace, 48 Stan. L. Rev. 1367, 1373-74 (1996) (describing how efforts to control the flow of electronic information across physical borders will likely fail); Peter K. Yu, Bridging the Digital Divide: Equality in the Information Age, 20 Cardozo Arts & Ent. L.J. 1 (2002) (discussing how the nature of the Internet architecture has resulted in greater online freedom in countries in Asia, the Middle East, Europe, and Latin America).
Hoffman, the CEO of Emusic, Inc., said, "'[w]e think the best way to stop piracy is to make music so cheap it isn't worth copying.'"\textsuperscript{274} In April 2003, Apple Computer unveiled its iTunes Music Store.\textsuperscript{275} Since its opening, the service has sold more than 50 million songs,\textsuperscript{276} and customers seem to be satisfied with the service.\textsuperscript{277} It nevertheless remains interesting to see how the service will develop. Unless record companies are willing to provide content, the iTunes service eventually might end up with the same fate as other earlier subscription-based services, which failed to attract substantial interest from consumers.\textsuperscript{278}

To fight piracy, some copyright holders also have used bargain pricing to make products more affordable in foreign markets.\textsuperscript{279} For example, some movie studios have released low-priced audiovisual products dubbed in the local language or with added foreign-language subtitles.\textsuperscript{280} On the one hand, these bargain products are able to provide an affordable alternative that accommodates local needs. On the other hand, by dubbing the products in the local language or including subtitles, the studios successfully make the products unappealing to English-speaking consumers. This strategy therefore successfully prevents the discounted products from entering the English-speaking world as parallel imports.\textsuperscript{281}

\begin{footnotes}
\textsuperscript{274} DIGITAL DILEMMA, supra note 18, at 80.
\textsuperscript{275} See supra Part I.E.
\textsuperscript{277} See id.
\textsuperscript{278} See David Pogue, Online Piper, Payable by the Tune, N.Y. TIMES, May 1, 2003, at G1.
\textsuperscript{280} See, e.g., Don Groves, Warner Bros., MGM Dip into China Vid Market, DAILY VARIETY, Feb. 21, 1997, at 1 (stating that Warner Brothers and MGM have entered a licensing deal with a Chinese government-owned conglomerate to release low-priced video products dubbed in Mandarin).
\textsuperscript{281} For discussions of parallel imports, see the sources cited supra note 175.
\end{footnotes}
C. Adopt a Nonzero-sum Approach to Intellectual Property Dispute Resolution

Today, the copyright wars have antagonized consumers, making their relationship with the entertainment industry increasingly hostile. Consider the following imaginary conversation between two people using maritime radios:

FIRST SPEAKER Please divert your course 15 degrees to the north to avoid a collision, over.
SECOND SPEAKER Recommend you divert YOUR course 15 degrees, over.
FIRST SPEAKER This is the captain of a US Navy ship. I say again, divert your course, over.
SECOND SPEAKER No, I say again, divert YOUR course, over.
FIRST SPEAKER This is an aircraft carrier of the US Navy. We are a large warship. Divert your course now! Over.
SECOND SPEAKER This is a lighthouse, your call.

This conversation not only captures well the tone of the current copyright war, but provides valuable lessons on the counterproductiveness of the belligerent tactics used by the entertainment industry.

Commentators always talk about how society needs authors, and how some authors would take up more remunerative jobs—perhaps as copyright lawyers?—if they were not compensated for their creative efforts. The converse is also true. Authors need fans and customers, just as ships need lighthouses. Thus, the entertainment industry should cast aside its belligerent tactics and battle strategies and consider what I called the “nonzero-sum approach” to intellectual property dispute resolution. In game theory terms, a zero-sum game is a game in which a player’s gain must result in another player’s loss. If one wins, the other must lose. By contrast, in a nonzero-sum game, a player’s gain will not necessarily result in another player’s loss. Instead, there will be a win-win solution.

To be certain, the zero-sum approach does not necessarily result in confrontation, as parties might still cooperate through accommodation

and compromises, thus allowing them to split the difference by giving up something valuable and by sharing the pain of losing. However, the nonzero-sum approach is generally more preferable. It not only will create forward-looking solutions that provide mutual benefits to all the parties involved, but also will preserve the hard-earned relationships between the disputing parties.

Notwithstanding the usefulness of this approach, we should not forget its limitations and ignore other equally appealing solutions. In *Getting to Yes,* a book widely studied by students of conflict resolution, Professors Roger Fisher and William Ury discussed how to resolve a dispute between two children quarreling over an orange. Instead of dividing the orange in half or giving one child an apple—or maybe two—Fisher and Ury reminded us the need to understand what each child wants. As they explained, perhaps one child might want only the fruit to eat, while the other might want only the peel for baking a cake. By giving each of them what he or she wants, as compared to half of what each of them does not want, the parent might be able to find a nonzero-sum solution that is mutually beneficial to both children.

Although this nonzero-sum approach is insightful and works well in theory, there are many cases in which the approach is unsatisfactory. For example, it would be hard to imagine that every child fighting for an orange would want only the fruit to eat or only the peel for baking a cake. Most of the time, they fight because they want the same thing. Consumers want free music; yet, artists and record companies want to get paid. Moreover, as conflict resolution scholars pointed out, value creating in the nonzero-sum approach and value claiming in the zero-sum approach “are linked parts of negotiation. Both processes are present. No matter how much creative problem solving enlarges the pie, it must still be divided; value that has been created must be claimed.” Indeed, the interaction of the tactics used to create or claim value might
further exacerbate the tension between the cooperative and competitive moves. 293

In sum, the nonzero-sum approach has its limitations and might not work in every situation. Yet, the entertainment industry should always keep this option in mind. A nonzero-sum solution not only would benefit all the parties involved, but also would help reconcile the increasingly confrontational relationships between the industry and consumers. Maybe a copyright war is not what society needs. Maybe a copyright war is not what consumers want. Let's hope the industry will eventually figure that out.

CONCLUSION

When the digital copyright war first started, the entertainment industry was winning most of the battles. Notwithstanding these early victories, the war is now expanding and has become even more difficult for the industry to fight than it was a year ago. Today, copyright law is no longer a complicated issue that is only of interest and concern to copyright lawyers, legal scholars, technology developers, and copyright holders. Rather, it is a matter of public significance, affecting all of us in our daily lives. The ground has shifted. If the entertainment industry does not pay attention to the public and if it continues to use ill-advised battle strategies, it eventually might lose the war.

293. See id. at 34. As Lax and Sebenius explained:

First, tactics for claiming value . . . can impede its creation. . . .
Second, approaches to creating value are vulnerable to tactics for claiming value. . . .
In tactical choices, each negotiator thus has reasons not be [sic] open and cooperative. Each also has apparent incentives to try to claim value. Moves to claim value thus tend to drive out moves to create it. Yet, if both choose to claim value, by being dishonest or less than forthcoming about preferences, beliefs, or minimum requirements, they may miss mutually beneficial terms for agreement.

Id. at 34-35.
***