THE TIMES THEY ARE A-CHANGIN'[1]: HOW CURRENT PROVISIONS OF THE DIGITAL MILLENNIUM COPYRIGHT ACT, RECENT DEVELOPMENTS IN INDIRECT COPYRIGHT LAW AND THE GROWING POPULARITY OF STUDENT PEER-TO-PEER FILE-SHARING COULD "CHILL" ACADEMIC FREEDOM AND TECHNOLOGICAL INNOVATION IN ACADEMIA

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I. INTRODUCTION

The contours of the law of academic freedom have been molded over time by the guiding hands of political strife, racial inequality, and religious division.[2] In much the same way, the research and development efforts conducted at U.S. colleges and universities have shaped the technological progress of the last three decades.[3] However, as academia adapts to the modern technological landscape, the principles of academic freedom and the resulting technological advancement they foster may soon be influenced more by commercial interests than by societal unrest.

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1. BOB DYLAN, THE TIMES THEY ARE A-CHANGIN' (Columbia Records 1964).

2. *See generally* Sweezy v. New Hampshire, 354 U.S. 234 (1957); Keyishian v. Bd. of Regents, 385 U.S. 589 (1967); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Widmar v. Vincent, 454 U.S. 263 (1981).

3. *See generally* Lila Guterman, *Research Inc.*, CHRON. HIGHER EDUC., Nov. 25, 2005, at A13–A14.

Despite recent attempts by the entertainment industry to curb online copyright infringement, the number of people illegally "trading" copyrighted music, movies, and television programs over the Internet has never been greater.[4] According to industry officials, these so-called "pirates" utilize the Internet, along with peer-to-peer (P2P) networking software, to plunder potential profits from "[c]omposers, artists, musicians, technicians, and a multitude of others engaged in the music, film, and other entertainment industries."[5] Unfortunately, recent statistics indicate that college and university students represent a significant segment of the files-sharing community.[6] As the entertainment industry continues its legal crusade against P2P network software makers and those that use these services to infringe copyrighted works, many college and university officials have become increasingly concerned that their institutions will be targeted by this campaign.[7] Adding to the urgency, recent developments in indirect copyright law will undoubtedly operate as new weapons in the entertainment industry's campaign against illegal P2P file-sharing.[8] Consequently, many college and university officials are taking steps to prevent protracted litigation and limit potential liability.[9] These steps, in concert with current provisions of the Digital Millennium Copyright Act, may ultimately have a "chilling effect" on academic freedom and technological innovation at campuses nationwide.[10]

4. *See* Jefferson Graham, *Court Cases Don't Scare Music File Swappers Away*, USA TODAY, Sept. 7, 2005, at 5B.

5. *Protecting Copyright and Innovation in a Post-Grokster World: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Cary Sherman, President, Recording Industry Association of America), 2005 WLNR 15361093.

6. *See Peer-to-Peer Piracy on University Campuses: Hearing Before the Subcomm. on the Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong. 2 (2003), *available at* http://www.nacua.org/nacualert/docs/Peer_to_Peer/SmithStatement.htm [hereinafter *2003 Subcomm. Hearing*] (statement of Lamar Smith, Chairman, Subcomm. on the Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary).

7. *See* Memorandum from Timothy C. O'Rourke, Vice President for Computer and Information Services at Temple Univ. to Temple Univ. Students (Nov. 25, 2003), http://www.temple.edu/cs/VPannouncements/filesharingpolicy.html (last visited Apr. 3, 2006); Memorandum from Marye Anne Fox, Chancellor at N.C. State Univ. to N.C. State Univ. Students, Faculty, and Staff (Feb. 13, 2004), http://www.ncsu.edu/copyright/liability.html (last visited Apr. 3, 2006).

8. *See* Cathleen Flahardy, *Grokster Creates New Liabilities For Tech Industry*, CORP. LEGAL TIMES, Aug. 2005, at 54.

9. *See generally* EDUC. TASK FORCE OF THE JOINT COMM. OF THE HIGHER EDUC. AND ENTM'T COMMUNITIES, UNIV. POLICIES AND PRACTICES ADDRESSING IMPROPER PEER-TO-PEER FILE SHARING 2–6 (2004) [hereinafter *Univ. Policies and Practices*] (discussing various methods used by college and university officials to combat P2P file-sharing at campuses across the U.S.).

10. *See* THE ELECTRONIC FRONTIER FOUNDATION, UNINTENDED CONSEQUENCES: FIVE YEARS UNDER THE DMCA 1, http://www.eff.org/IP/DMCA/unintended_consequences.pdf (last visited Apr. 4, 2006) [hereinafter *Unintended Consequences*] (providing examples of how the "anti-circumvention" provisions of the DMCA have already "chilled" academic research and discussion); Andrea L. Foster, *Colleges Split Over Effects of Court Ruling on File Sharing*, CHRON. HIGHER EDUC., July 8, 2005, at A1 (stating that "a decision in favor of the entertainment industry [in the *Grokster* case] could stifle technological innovation and prevent scholars from legally trading data, video, music, and literature using peer-to-peer networks.").

II. OUR ALLEGED "CULTURE OF UNLICENSED USE"[11]

> No black flags with skull and crossbones, no cutlasses, cannons, or daggers identify today's pirates. You can't see them coming; there's no warning shot across your bow. Yet rest assured the pirates are out there because today there is plenty of gold (and platinum and diamonds) to be had. *Today's pirates operate not on the high seas but on the Internet . . .*[12]

This Recording Industry Association of America's (RIAA) portrayal cleverly demonstrates the current view pervasive in both the recording and motion picture industries.[13] In support of this view, both the RIAA and the Motion Picture Association of America (MPAA) offer numerous figures and statistics[14] as evidence of our current "culture of unlicensed use."[15] According to the RIAA, the recording industry as a whole loses approximately $4.2 billion worldwide each year due to illegal music copyright violations.[16] Moreover, they assert that illegal Internet file-sharing is to blame for the 21% drop in compact disc shipments from 1999 to 2004.[17] In a statement made before the U.S. House Subcommittee on Courts, the Internet, and Intellectual Property, Richard Taylor (Senior Vice President of the MPAA) estimated that more than 400,000 movies are illegally downloaded everyday.[18]

Although these figures may be somewhat exaggerated, the assertion at the heart of the entertainment industry's rhetoric appears valid. Despite recent attempts to curb illegal Internet file-sharing, the number of people using P2P networks has never been greater.[19] According to Eric Garland, CEO of the online media measurement company BigChampagne, approximately 9.6 million people were

11. Recording Industry Association of America Online Piracy and Electronic Theft Webpage, http://www.riaa.com/issues/piracy/online.asp (last visited Nov. 17, 2005) [hereinafter *RIAA Online Piracy and Electronic Theft*].

12. *Id.*

13. *See id.*; *see also* Motion Picture Association of America Internet Piracy Webpage, http://www.mpaa.org/piracy_internet.asp (last visited Apr. 3, 2006) (stating that "[d]ownloading a movie off of the Internet is the same as taking a DVD off a store shelf without paying for it").

14. *See* Recording Industry Association of America Anti-Piracy Webpage, http://www.riaa.com/issues/piracy/default.asp (last visited Apr. 1, 2006) [hereinafter *RIAA Anti-Piracy*] (estimating that illegal music piracy costs the record industry millions of dollars a day and accounts for total losses of $4.2 billion annually worldwide); Motion Picture Association of America 2004 Piracy Fact Sheet: US Overview (Nov. 2004) (on file with author), *available at* http://www.mpaa.org/USPiracyFactSheet.pdf (last visited Apr. 1, 2006) (stating that the film industry lost $3.5 billion in 2004 because of illegal movie piracy).

15. *RIAA Online Piracy and Electronic Theft*, *supra* note 11.

16. *RIAA Anti-Piracy*, *supra* note 14.

17. *See* Benny Evangelista, *Music File-Sharing Case Before High Court; Ruling Could Have Major Effect on Future of Entertainment Industry, Consumer Rights*, S. F. CHRON., Mar. 28, 2005, at A1.

18. *See Peer-to-Peer Piracy: Hearing Before the Subcomm. on the Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. (2005), 2005 WLNR 14949366.

19. *See* Graham, *supra* note 4.

logged onto these types of networks at any second in August 2005, demonstrating a 41% increase from the previous year.[20] Furthermore, according to some estimates, more than 60% of the total U.S. Internet traffic can be attributed to P2P network usage.[21] When considering the fact that unlawful copyrighted files like movies, music, and television programs constitute approximately 90% of the information available through these networks, the justification for the entertainment industry's "war" on illegal P2P file-sharing is more easily understood.[22]

Unfortunately, current evidence demonstrates that college and university students comprise a major portion of the P2P piracy "pie."[23] A statement made by Representative Lamar Smith, the chairman to the House Subcommittee on Courts, the Internet, and Intellectual Property, illustrates the prevalence of this problem on college and university campuses. At a 2003 oversight hearing, Smith stated:

> Research of FastTrack, a P2P file-sharing service, showed that 16% of all the files available at any given moment are located at IP addresses managed by U.S. educational institutions. In addition, FastTrack users trading from networks managed by U.S. educational institutions account for 10% of all users on FastTrack at any given moment.[24]

III. THE RESPONSE TO STUDENT FILE-SHARING

A. The Entertainment Industry

Media companies like the RIAA and MPAA are leading the charge against illegal P2P file-sharing on college and university campuses.[25] According to RIAA spokesperson Jenni Engebretsen, the RIAA has filed 1,062 copyright infringement lawsuits against students at 132 colleges and universities since September 2003.[26] Most of these claims stem from student file-sharing over P2P services like Kazaa, Grokster, Limewire, and i2hub.[27] As of October 2005, about 14,800 people had

20. *Id.*

21. *See Reducing Peer-to-Peer (P2P) Piracy on University Campuses: A Progress Report: Hearing Before the Subcomm. on the Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 65 (2005) (statement of Adam Schiff, Member, House Comm. on the Courts, the Internet and Intellectual Property).

22. *Id.*

23. *See 2003 Subcomm. Hearing*, *supra* note 6, at 3.

24. *Id.*

25. *See* Recording Industry Association of America, *Music Industry Continues Campaign Against Campus Internet Theft* (Oct. 26, 2005) (on file with author), *available at* http://www.riaa.com/news/newsletter/102605.asp (last visited Apr. 3, 2006); Claire Hoffman, *Anti-Piracy Message Stumbles at Colleges*, L.A. TIMES, Nov. 18, 2005, at C1 (discussing a recent MPAA college anti-piracy "tour" to increase awareness of illegal copyright infringement).

26. *See* Chad Smith, *Despite Risk of Lawsuits, N.Y.U. Students Live on the Download*, THE VILLAGER, Mar. 10, 2006, ¶ 16, *available at* http://www.thevillager.com/villager_149/despiteriskoflawsuitsnyu.html.

27. *See generally id.*

been sued by the RIAA for online copyright infringement.[28] Not to be outdone, in August 2005, the MPAA filed copyright infringement suits against 286 individuals accused of P2P piracy.[29] In addition, both organizations have partnered to promote a free software program called Digital File Check that helps to remove or block file-sharing software as well as identify and delete copyrighted music and movies from a user's computer.[30]

B. The Federal Government

The entertainment industry's crusade to control P2P piracy is also gaining support throughout the federal government.[31] In 2002, congressional leaders teamed with representatives from higher education and the entertainment industry to create the Joint Committee of Higher Education and Entertainment Communities.[32] This joint committee was formed for the expressed purpose of "examin[ing] ways to reduce the inappropriate use on campuses of P2P file sharing technologies."[33] Further, the U.S. House Subcommittee on Courts, the Internet, and Intellectual Property has held numerous oversight hearings exploring "the extent of P2P piracy on university campuses and what measures content owners and universities are taking to address the problem."[34] Also, as expected, legislation has been introduced to further strengthen existing U.S. copyright laws.[35] For instance, if enacted as proposed, the Inducing Infringement of Copyright Act of 2004 would extend civil liability to those who "intentionally induce" others to commit copyright infringement.[36]

Finally, the Federal Bureau of Investigation (FBI), in partnership with the RIAA and MPAA, has recently announced a new anti-piracy initiative that includes

28. *Id.*

29. *See* Motion Picture Association of America, *No Honor Among Thieves: Motion Picture Industry Takes Action Against Peer to Peer Movie Thieves Handed Over By Several Torrent Sites* (Aug. 25, 2005) (on file with author), *available at* http://www.mpaa.org/press_releases/2005_08_25.pdf (last visited Apr. 3, 2006).

30. *See* Motion Picture Association of America, *Film and Music Industries Team Up to Help Consumers Find Potentially Infringing Material on their Computers* (Sept. 30, 2005) (on file with author), *available at* http://www.mpaa.org/press_releases/2005_09_30b.pdf (last visited Apr. 3, 2006).

31. *See* Statement by Higher Education Members of Joint Comm., Purpose and Scope of the Joint Comm. of the Higher Educ. and Entm't Communities (Dec. 10, 2002) (on file with author), *available at* http://www.aau.edu/intellect/JointP2PCMR.pdf (last visited Nov. 21, 2005) [hereinafter *Higher Education Members*]; Federal Bureau of Investigation, FBI, In Partnership with Entertainment and Software Industries, Announces Anti-Piracy Warning Initiative (Feb. 19, 2004) (on file with author), *available at* http://www.fbi.gov/pressrel/pressrel04/piracy021904.htm (last visited Nov. 21, 2005).

32. *Higher Education Members*, *supra* note 31.

33. *Id.*

34. *2003 Subcomm. Hearing*, *supra* note 6, at 3.

35. *See*, *e.g.*, S. 2560, 108th Cong. § 2 (2004).

36. *Id.* Currently, this act, which was originally introduced during the 108th session of Congress, has been referred to the Senate Committee on the Judiciary for debate. *See* Library of Congress THOMAS Legislative Database, S. 2560 Bill Summary and Status, http://thomas.loc.gov/bss/108search.html (search "Bill Number" for "S. 2560").

increased enforcement efforts and the introduction of a new FBI anti-piracy warning label.[37] This label, which will be affixed to a lot of the material that falls within the scope of U.S. copyright law, warns potential violators of the penalties associated with illegal copyright infringement.[38]

C. Colleges and Universities

Finally, due to entertainment industry pressure, concern for students, and the desire to protect limited computing resources, many colleges and universities are now addressing the P2P file-sharing threat in a number of ways.[39] Many now sponsor extensive education campaigns, informing students and faculty of the consequences that could result from illegal P2P file-sharing.[40] Also, a growing number of institutions are now offering, or are planning to offer, free music download services to students as a legitimate, legal alternative to illegal P2P file-sharing.[41]

At the far end of the prevention "spectrum," many college and university officials have now implemented more invasive measures including strict enforcement penalties and extensive preemptive network monitoring.[42] These penalties vary at each institution, but most impose varying levels of computing suspensions on students depending on the frequency of infringement.[43] For example, at the University of Pittsburg, a second offense of P2P file-sharing results in judicial proceedings.[44] At Harvard University, a similar offense results in a one-year ban from all campus computing resources.[45] Additionally, the University of Florida has recently developed software it calls "ICARUS," (Integrated Computer Application for Recognizing User Services) which monitors all campus Internet traffic and detects P2P use over campus networks.[46] When any P2P activity is

37. *See* Federal Bureau of Investigations Cyber Investigations Webpage, http://www.fbi.gov/ipr/ (last visited Apr. 3, 2006).

38. *Id.*

39. *See generally Univ. Policies and Practices*, *supra* note 9, at 1–9.

40. *See* JAMES E. PORTER & MARTINE COURANT RIFE, MGM V. GROKSTER: IMPLICATIONS FOR EDUCATORS AND WRITING TEACHERS 3–4 (2005), http://www.wide.msu.edu/widepapers/grokster/wide_grokster.pdf (last visited Dec. 6, 2005). Many institutions, such as Emory University, have chosen to communicate the negative consequences associated with illegal P2P file-sharing through paid advertisements in campus newspapers, emails sent to every campus network user, and/or posters and pamphlets displayed throughout campus. *Id.* at 3. Also, many institutions, like the University of Virginia, require all students to complete online training sessions on the pitfalls of P2P copyright infringement and pass a quiz before utilizing any campus computing resource. *Id*. Finally, many institutions, like the University of Pennsylvania and Princeton University, offer periodic presentations to students and faculty outlining the effect P2P file-sharing can have on campus computing resources and the personal consequences of direct copyright infringement. *Id.*

41. *Univ. Policies and Practices*, *supra* note 9, at 5.

42. *Id.* at 4–6.

43. *Id.* at 5.

44. *Id.*

45. *Id.*

46. *Id.* at 4.

found, ICARUS "automatically disconnects the student for increasing periods of time depending on the number of offenses, with a third offense resulting in student judicial procedures."[47]

IV. STATUTORY & COMMON LAW UNDERPINNINGS

A. The Federal Copyright and Copyright Infringement

The federal Copyright Act (Copyright Act) protects the exclusive rights of those who own valid copyrights to various original artistic works.[48] Generally, copyright infringement occurs when a person "interferes" with one of these exclusive rights.[49] Because copyright infringement is considered a strict liability tort, culpability for an offense does not depend on the existence of actual intent to harm.[50]

Anyone who personally commits an infringing act is liable under the principles of "direct" copyright infringement.[51] Also, under the "indirect" theory of contributory infringement, liability may be imposed on those who do not directly perform infringing acts.[52] Contributory infringement occurs when, "with knowledge of the infringing activity, [one] induces, causes or materially contributes to the infringing conduct of another . . . ."[53]

Under the current statutory scheme, anyone who infringes a valid copyright may be subject to civil liability,[54] including "actual damages" equal to the loss resulting from the infringement and any subsequent profits gained by the violator, or "statutory damages." Statutory damages can range from $750 to $150,000 for each infringed copyrighted work.[55] Also, anyone who "willfully" violates the rights of a copyright owner for commercial purposes or for private financial gain may be punished criminally by up to five years in prison and $250,000 in fines.[56]

47. *Id*. at 5.

48. *See* G. PETER ALBERT, JR., INTELLECTUAL PROPERTY LAW IN CYBERSPACE 213 (1999).

49. *See* BLACK'S LAW DICTIONARY 348 (2nd pocket ed. 2001).

50. *See* Elliot M. Zimmerman, *P2P File Sharing: Direct and Indirect Copyright Infringement*, 78 FLA. BAR. J. 40, 41 (2004).

51. *See* ALBERT, JR., *supra* note 48, at 246.

52. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 435 (1984).

53. Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971).

54. *See* EDUC. TASK FORCE OF THE JOINT COMM. OF THE HIGHER EDUC. AND ENTM'T COMMUNITIES, 108th Cong., BACKGROUND DISCUSSION OF COPYRIGHT LAW AND POTENTIAL LIABILITY FOR STUDENTS ENGAGED IN P2P FILE SHARING ON UNIV. NETWORKS 6, 8 (2003) [hereinafter *Background Discussion of Copyright Law*].

55. *See* 17 U.S.C. § 504 (2000); *Background Discussion of Copyright Law*, *supra* note 54, at 8. In cases of "willful" infringement, the court has the discretion to increase the statutory damage award to a maximum of $150,000 for each infringed copyrighted work. *Id*. "Willful" infringement is established when the defendant knew, had reason to know, or recklessly disregarded the fact that his or her conduct constituted infringing activity. *Id.* at 7.

56. *See* 17 U.S.C. § 506 (2000); *see also* Recording Industry Association of America

B. The Digital Millennium Copyright Act's "Anti-Circumvention" and "Safe Harbor" Provisions

In 1998, the Digital Millennium Copyright Act (DMCA) was enacted in an attempt to harmonize U.S. copyright laws with those of other World Intellectual Property Organization (WIPO) Treaty countries,[57] thereby ushering U.S. copyright law into the information age.[58] Included among the major additions were certain "anti-circumvention" provisions, which now appear in Section 1201 of the Copyright Act.[59] These provisions, which impose both civil and criminal liability, [60]

> ban[ ] the bypassing of technical measures used by copyright owners to protect access to their works[,] outlaw[ ] the manufacture or distribution of technologies primarily designed or produced to circumvent technical measures used by copyright owners to protect their works[, and] make[] removal or alteration of copyright management information (CMI) from digital copies of copyrighted works illegal.[61]

In ratifying these provisions, Congress intended to further promote worldwide access to copyrighted works by reassuring copyright holders that their works would not succumb to the "unique threat" posed by digital technologies.[62] Despite these intentions, the DMCA "anti-circumvention" provisions have been widely criticized as a threat to civil liberties, the free exchange of information and, as discussed below, academic freedom.[63]

Additionally, the DMCA amended the Copyright Act to include certain "safe harbor" provisions that limit the liability of Internet "service providers."[64] These statutory safe harbors can be employed, under certain circumstances, to protect qualifying parties from monetary damages that may result from the copyright

Copyright Law Webpage, http://www.riaa.com/issues/copyright/laws.asp#uscopyright (last visited Apr. 3, 2006).

57. *See* Lance C. McCardle, *Despite Congress's Good Intentions, the DMCA's Anti-Circumvention Provisions Produce a Bad Result—A Means to Create Monopolies*, 50 LOY. L. REV. 997, 1003 (2004).

58. U.S. COPYRIGHT OFFICE, EXECUTIVE SUMMARY DIGITAL MILLENNIUM COPYRIGHT ACT SECTION 104 REPORT, http://www.copyright.gov/reports/studies/dmca/dmca_executive.html (last visited Apr. 3, 2006).

59. *Unintended Consequences*, *supra* note 10, at 1.

60. *Id.* at 2.

61. Pamela Samuelson, *Anticircumvention Rules: Threat to Science*, SCI., Sept. 14, 2001, at 2028.

62. Mia K. Garlick, *Locking Up the Bridge on the Digital Divide—A Consideration of the Global Impact of the U.S. Anti-Circumvention Measures for the Participation of Developing Countries in the Digital Economy*, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 941, 952 (2004).

63. Myron Hecht, *Reconciling Software Technology and Anti-Circumvention Provisions of the Digital Millenium Copyright Act*, 2004 J.L. & TECH. 3, 3 (2004). For further discussion on issues of academic freedom as they relate to the "anti-circumvention" provisions of the DMCA, please see Section VII below.

64. *See Background Discussion of Copyright Law*, *supra* note 54, at 7.

violations of its users.[65] Because of the Act's broad definition of "service provider," most institutions of higher education qualify for protection under these safe harbor provisions.[66] However, these provisions only apply when the service provider adheres to the specific conditions established in 17 U.S.C. § 512(i).[67] Most importantly, a service provider must have "adopted and reasonably implemented . . . a policy [which has been communicated to all network users] that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers."[68]

V. THE EVOLUTION OF PEER-TO-PEER CONTRIBUTORY COPYRIGHT JURISPRUDENCE

A. Sony, Napster & Aimster

From its inception, the "Betamax defense" crafted by the U.S. Supreme Court in *Sony Corp. of America v. Universal City Studios, Inc.* served as a broad limitation on claims of indirect copyright liability.[69] In holding that Sony was not liable under the theory of contributory infringement, the Court stated that "the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes [, or] [i]ndeed, [is] . . . merely . . . capable of substantial noninfringing uses."[70]

After *Sony*, the well-publicized *A & M Records, Inc. v. Napster, Inc.* case marked the first opportunity for a federal appellate court to address whether a company could be held liable as a contributory infringer for producing, marketing, and distributing P2P file-sharing software to users who utilize the software to directly infringe copyrights.[71] Ultimately, the Ninth Circuit Court of Appeals found Napster liable as a contributory infringer, expressly denying Napster's claim that it was immune from liability under the *Sony* Betamax defense.[72] Although

65. *Id.*

66. *Id.* at 6.

67. *Id.* at 7.

68. 17 U.S.C. § 512(i)(1)(A) (2000).

69. John A. Fedock, Comment, *The RIAA v. The People: The Recording Industry's Misguided Attempt to Use the Legal System to Save Their Business Model*, 32 PEPP. L. REV. 947, 960 (2005).

70. *Sony Corp. of Am.*, 464 U.S. at 442.

71. *See* Robert A. Gilmore, *Peer-to-Peer: Copyright Jurisprudence in the New File-Sharing World, the Post Grokster Landscape of Indirect Copyright Infringement and the Digital Millennium Copyright Act*, 5 FLA. COASTAL L.J. 85, 98 (2004).

72. *See* A&M Records v. Napster, Inc., 239 F.3d 1004, 1021 (9th Cir. 2001). In finding Napster liable as a contributory infringer, the court concluded that Napster "had actual [knowledge] of direct infringement because the RIAA informed it [that] more than 12,000 infringing files" existed on Napster's P2P network. *Id.* at 1022 n.6. Also, the court found that Napster had materially contributed to its users' direct infringement by providing the "site and facilities" utilized by Napster users to locate and download copyrighted music. *Id.* at 1022.

Napster argued that its network was capable of "substantial noninfringing uses," the court refused to strictly apply the *Sony* precedent.[73] Instead, the court applied an alternative line of cases, concluding that the Betamax defense did not apply given Napster's actual knowledge of its users' direct infringement and its ability to identify and remove copyrighted material from its network.[74]

Shortly after the *Napster* case was decided, the Seventh Circuit Court of Appeals was confronted with the similar case of *In re Aimster Copyright Litigation*.[75] Here, as in *Napster*, the court specifically rejected Aimster's assertion of immunity under the *Sony* Betamax defense.[76] Although the court acknowledged that the Aimster network was capable of many noninfringing uses, it reasoned that the proportion of infringing uses to noninfringing uses was controlling.[77] In other words, it is not sufficient that substantial noninfringing uses were possible; rather, Aimster was required to proffer evidence that its network was "*actually* used for . . . the stated non[]infringing purposes" to avoid contributory liability.[78]

B. Grokster I & II

In 2004, the Ninth Circuit was again presented with a P2P file-sharing liability case in *Metro-Goldwyn-Mayer, Inc. v. Grokster, Ltd.* (*Grokster I*).[79] In refusing to hold Grokster liable as a contributory infringer,[80] the court specifically contradicted the probable noninfringing use standard articulated by the Seventh Circuit in *Aimster*.[81] Restating its holding in *Napster*, the court held that, because the Grokster network was capable of substantial noninfringing uses, contributory liability would only attach if Grokster had actual knowledge of specific infringing files on the network and failed to act on that knowledge.[82] According to the court, Grokster lacked this knowledge and the subsequent ability to prevent the acts of direct infringement because it maintained no "master list" of the materials available for distribution over its network.[83]

Faced with the task of clarifying the applicability of the doctrine of contributory infringement and the application of the *Sony* Betamax defense in a P2P context, the U.S. Supreme Court granted certiorari to the subsequent *Grokster* appeal (*Grokster*

73. *Id.* at 1020.

74. *Id.* at 1021–22.

75. In re Aimster Copyright Litig., 334 F.3d 643, 645 (7th Cir. 2003).

76. *Id.* at 653.

77. *Id.*

78. *Id.*

79. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd., 380 F.3d 1154 (9th Cir. 2004), *vacated*, 125 S. Ct. 2764 (2005).

80. *Id.* at 1160, 1163.

81. *Id.* at 1162 n.9.

82. *Id.* at 1162.

83. *Id.* at 1163. The court stated that, if Grokster "closed their doors and deactivated all computers within their control, users of their products could continue sharing files with little or no interruption." *Id.* (citation and quotation omitted).

II).[84] In this opinion, the Court declined to clarify the Betamax defense,[85] unanimously applying the "active inducement" theory of liability commonly employed in patent litigation.[86] According to the opinion authored by Justice Souter, "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties."[87] Pointing to "clear" evidence of such intent, the Court vacated the Ninth Circuit holding, remanding the case for further proceedings.[88] Specifically, the Court drew attention to Grokster's attempts to attract former Napster users to its service.[89] Moreover, Grokster's need to secure substantial infringing user volume in order to generate advertising revenue and its failure "to develop filtering tools or other mechanisms to diminish the infringing activity using their software" highlighted its "intentional facilitation of their users' infringement."[90] Finally, in what is likely the most puzzling portion of the opinion, the Court stated the following in footnote twelve:

> Of course, in the absence of other evidence of intent, a court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement, if the device otherwise was capable of substantial noninfringing uses. Such a holding would tread too close to the *Sony* safe harbor.[91]

Despite this reference, the Court specifically left "further consideration of the *Sony* [Betamax] rule for a day when that may be required."[92]

Unfortunately, the *Grokster II* Court did more to muddle the contributory infringement "water" than to purify it. In expressly sidestepping any detailed application of *Sony*, the Court failed to clarify whether, under *Sony*, a network's substantial noninfringing uses must be probable (as in *Aimster*) or just capable (as in *Napster* and *Grokster I*) to avoid indirect liability.[93] Additionally, the Court further confused the already nebulous "active inducement" standard by, in the opinion of one legal theorist, setting "a fairly low and confusing bar for finding the 'active' part of the inducement."[94] Specifically, under this opinion, companies are

84. *See* Christine Pope, *Unfinished Business: Are Today's P2P Networks Liable for Copyright Infringement?*, 2005 DUKE L. & TECH. REV. 24, ¶ 25 (2005).

85. *Id.* at ¶ 29.

86. *Id.* at ¶ 25.

87. *Metro-Goldwyn-Mayer Studios, Inc.*, 125 S. Ct. at 2770.

88. *See id.* at 2782–83.

89. *Id.* at 2781.

90. *Id*.

91. *Id*. at 2781 n.12.

92. *Id.* at 2779.

93. Pope, *supra* note 84, at 2784.

94. Ernest Miller, *Kicking the Sony Can Down the Road*, THE IMPORTANCE OF…: LAW AND I.T., June 28, 2005, http://importance.corante.com/archives/2005/06/28/kicking_the_sony_can_down_the_road.php. Ernest Miller is a graduate of Yale Law School and currently serves as a fellow of the Information Society Project at Yale Law School. *Id.*

not required to include infringement-reducing design features in their products and are free to adopt business models that require advertising revenue.[95] However, as soon as a company "pass[es] some unknown threshold of intent," these otherwise lawful and rational business decisions may be considered.[96] As a result, the Court established a precedent under which future courts searching for evidence of intent of inducement may scrutinize every business, marketing, and design choice with twenty-twenty hindsight.[97]

C. Monotype

To date, the only case to specifically apply the "active inducement" standard enumerated by the *Grokster II* Court in a contributory infringement action is *Monotype Imaging, Inc. v. Bitstream Inc.*[98] In this case, Monotype Imaging, Inc. (Monotype) brought a contributory infringement action against Bitstream Inc. (Bitstream), a competing computer font software development company, to prevent the further distribution of Bitstream's TrueDoc font typeface replication software.[99] In applying *Grokster II*, the district court found "no evidence in the record that supports that Bitstream acted with the requisite intent to make it liable under *Grokster* [*II's*] intentional inducement of infringement cause of action."[100] Pointing to the three indicators of intent mentioned above, the court found that Bitstream's software did not specifically target known infringing users, that the software's success was not dependant on high infringing user volume, and that Bitstream had taken precautions to prevent the use of its software with copyrighted fonts.[101]

VI. THE PERCEIVED INSTITUTIONAL LIABILITY

In light of these recent developments, the current scope of contributory copyright liability is unclear. However, given this ambiguity, we can expect that the recording and film industries will read the statutory and common law as broadly as possible to target other P2P file-sharing intermediaries, including colleges and universities.[102] Consequently, many colleges and universities are left guessing as to the extent to which they must police P2P file-sharing over campus

95. *See* Ernest Miller, *Kicking the Sony Can Down the Road*, THE IMPORTANCE OF…: LAW AND I.T., June 27, 2005, http://importance.corante.com/archives/2005/06/28/kicking_the_sony_can_down_the_road.php.

96. *Id.*

97. *See* Derek Slater, *What is "Inducement"?*, SCOTUSBLOG, June 27, 2005, http://www.scotusblog.com/discussion/archives/2005/06/what_is_inducem.html. Derek Slater is a student fellow at the Berkman Center for Internet and Society. *Id.*

98. Monotype Imaging, Inc. v. Bitstream Inc., 376 F. Supp. 2d 877, 882–83 (N.D. Ill. 2005).

99. *Id*.

100. *Id.* at 889.

101. *Id.*

102. PORTER & RIFE, *supra* note 40, at 2.

networks in order to avoid claims based on these principles.[103]

As mentioned previously, most colleges and universities that offer campus-wide Internet access may qualify for protection under the "safe harbor" provision of the DMCA as "service providers."[104] But, in order to qualify, these institutions must have "adopted and reasonably implemented . . . a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers."[105] Unfortunately, the DMCA is silent as to what constitutes "appropriate circumstances" or who may be defined as a "repeat infringer." So, depending on judicial interpretation, a college or university could be held liable as a contributory infringer even though its administration took action against student copyright violators.

Additionally, many critics suggest that the *Grokster II* decision could be used by the entertainment industry as a basis to require "academic institutions to assume the role of cop, judge and jailer" in the fight against student copyright infringement.[106] Although such action is unlikely in light of the probable, limited *Monotype*-like application of the "active inducement" theory, uncertainty still remains. Specifically, given the highly factual nature of the inquiry under *Grokster II's* "active inducement" theory, the Court's ill-defined "threshold of intent" which is required to establish inducement could require institutions to engage in expensive, protracted discovery before being absolved from liability.

Finally, the ambiguity inherent in the proposed Inducing Infringement of Copyright Act, which criminalizes actions by anyone that "intentionally induces" the direct infringement of copyrighted materials, only adds to the confusion.[107] Under this Act, "intent may be shown by acts from which a reasonable person would find intent to induce infringement based upon all relevant information about such acts then reasonably available to the actor, including whether the activity relies on infringement for its commercial viability."[108] The "reasonable person" standard relied on here is difficult to define, and is ultimately open to varying judicial interpretations. As a result, the Act would provide the entertainment industry with an additional tool, strengthened by the accompanying threat of stiff criminal penalties, which could be employed in contributory liability litigation against colleges and universities.

VII. THE RESULTING "CHILL" ON ACADEMIC FREEDOM AND TECHNOLOGICAL INNOVATION

Above all, the mission of institutions of higher education is to facilitate and

103. *Id.*

104. *See supra* notes 64–68 and accompanying text.

105. 17 U.S.C. § 512(i)(1)(A) (2000).

106. THE ELECTRONIC FRONTIER FOUNDATION, UNIVERSITIES SHOULD RESIST NETWORK MONITORING DEMANDS, http://www.eff.org/IP/P2P/university-monitoring.pdf (last visited Apr. 4, 2006) [hereinafter *Universities Should Resist*].

107. *See supra* notes 35–36 and accompanying text.

108. S. 2560, 108th Cong. § 2 (2004).

encourage the free and open exchange of ideas.[109] According to the U.S. Supreme Court, "[t]he college classroom with its surrounding environs is peculiarly 'the marketplace of ideas.'"[110]

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.[111]

Increasingly, students and faculty at U.S. colleges and universities are using web logs (also known as "blogs") and digital bulletin boards to facilitate academic discourse.[112] As the Ninth Circuit recognized in a lower *Grokster* decision, P2P file-sharing technology is "regularly used to facilitate and search for public domain materials, government documents, media content for which distribution is authorized, media content as to which the rights owners do not object to distribution, and computer software for which distribution is permitted."[113]

Despite this, the DMCA "anti-circumvention" provisions, which outlaw the distribution of tools and technologies that facilitate the circumvention of anti-piracy protections, along with liability-limiting measures like extensive network surveillance and mandatory computing, have created an environment of distrust in which the free exchange of ideas is possible.[114] As currently imposed, this "strait jacket" poses a very real threat to academic freedom and the technological innovation that results from it.[115] For example, companies like Hewlett Packard and Sony have used the threat of litigation under the "anti-circumvention" provisions to impede the spread of computer security-related "vulnerability" research.[116] As a result of measures like this, "online service providers and bulletin board operators have begun to censor discussions of copy-protection systems . . . and students, scientists and security experts have stopped publishing details of their research on existing security protocols."[117]

Furthermore, this "strait jacket" could have an additional and more tangible chilling effect on the development of innovative, multipurpose technologies nationwide. Today, private industry relies more heavily on the research and development efforts of colleges and universities than ever before.[118] Increasingly, the early-stage innovations that are made in these research laboratories are patented and licensed to private companies, who unlimitedly develop new products

109. *Universities Should Resist*, *supra* note 106.

110. Healy v. James, 408 U.S. 169, 180 (1972) (citation omitted).

111. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

112. *Unintended Consequences*, *supra* note 10, at 2, 7.

113. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd., 259 F. Supp. 2d 1029, 1035 (C.D. Cal. 2003), *aff'd*, 380 F.3d 1154 (9th Cir. 2004), *vacated* 125 S. Ct. 2764 (2005).

114. *Unintended Consequences*, *supra* note 10, at 1.

115. *Id*.

116. *Id.* at 1–2.

117. *Id.* at 2.

118. *See generally* Guterman, *supra* note 3.

and bring them to market.[119] More so now than ever, collaboration facilitated by P2P file-sharing between researchers around the world makes these innovations possible.[120] These networks operate as an efficient way for researchers to disseminate innovative ideas throughout academia, work side-by-side with colleagues on the other side of the world, and pool the collective intellect of the world's foremost experts in a field.[121]

Most notably, these provisions discourage computer "vulnerability" research that works to expose potential threats to computer system security.[122] To illustrate, consider the story of Princeton professor Edward Felten and his team of computer security researchers.[123] In September 2000, Felten and his researchers successfully defeated digital watermark technology that was thought to protect copyrighted music files in response to a public challenge issued by the Secure Digital Music Initiative (SDMI).[124] When Felten and his team attempted to present this research at an academic conference, SDMI brought the full weight of the "anti-circumvention" provisions to bear, threatening both Felten and conference organizers with civil liability under the DMCA.[125] With much hesitation, Felten and his team eventually conceded to SDMI's threats, pulling the research from the conference.[126] Unfortunately, threats like these are not unique.[127] When coupled with the liability limiting computing practice employed by many college and university administrators, it is easy to understand why many of America's innovators may choose to change the course of their research and development efforts or abandon them altogether. Subsequently, next generation technologies, like the Digital Video Recorders (DVR), Digital Video Disc (DVD) players, and iPods, may never make it to market.[128]

119. *See generally id.*

120. *See generally* Heather Green, *Commentary: Are the Copyright Wars Chilling Innovation?*, BUSINESS WEEK ONLINE, Oct. 11, 2004, http://www.businessweek.com/magazine/content/04_41/b3903473.htm (last visited Dec. 7, 2005).

121. *See id.*

122. *See generally Unintended Consequences*, *supra* note 10, at 2.

123. *See id*.

124. *Id*.

125. *Id.*

126. *Id.*

127. For example, in April 2003, educational software company Blackboard Inc. used the threat of civil liability under these provisions to prevent Georgia Institute of Technology students from presenting research on computer security weaknesses in a Blackboard Inc. product at a computer security conference in Atlanta. *Id.* at 3.

128. *See generally* Brief of Intel Corporation as *Amicus Curiae* Supporting Affirmance at 19, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd., 125 S. Ct. 2764 (2005) (No. 04-480).

VIII. POTENTIAL SOLUTIONS & REFORMS

A. Judicial Clarification

Certainly, any proposed solution to remedy the potential "chill" on academic freedom and technological innovation at U.S. colleges and universities should begin with judicial action. Fortunately, much of the ambiguity that has arisen from the Supreme Court's *Grokster II* opinion could easily be remedied with a simple stroke of the U.S. Supreme Court's pen. As stated earlier, many college and university administrators are left guessing as to what level of preemptive and post-infringement action must be taken in order to avoid indirect contributory liability.[129] Furthermore, despite the Supreme Court's limited application of the *Grokster II* "active inducement" standard in *Monotype*, many questions are left unanswered. As a result, the Supreme Court should re-examine both the application of the *Sony* Betamax defense and its newly established "active inducement" standard in subsequent opinions. Specifically, the Court should clarify what continued relevance, if any, the *Sony* Betamax defense maintains in a post-*Grokster II* world. More importantly, the Court should clearly demarcate the boundaries of its "active inducement" doctrine, better explaining the point at which a party's actions are transformed from valid business decisions to specific evidence of an intent to induce the copyright infringement of others. In doing so, the Court could eliminate much of the confusion caused by the interaction between the "active inducement" standard and footnote twelve of the *Grokster II* opinion.[130]

B. Legislative Revisions and Reform

In addition to judicial action, legislative revisions and reforms are needed to help mitigate the threat to academic freedom and technological innovation. To date, numerous critics, legislators, and public interest groups have proposed a range of potential solutions.[131] Among them, the Digital Media Consumers' Rights Act of 2005 (DMCRA)[132] has been put forward to remedy the "overzealous copy protection[s]" enumerated under the DMCA.[133] According to advocates, this act, which was sponsored by Virginia Democratic Representative Rick Boucher, would restore the historic balance "between the rights of the users of intellectual

129. PORTER & RIFE, *supra* note 40, at 2.

130. *See supra* Part V.B.

131. *See*, *e.g.*, Robin D. Gross, *Circumvention Prohibitions Reconsidered: Why America's Mistake is Europe's Future*, IP JUSTICE EUCD UPDATE, http://www.ipjustice.org/eucd012903.shtml (last visited May 1, 2006); Congressman Rick Boucher Official Homepage, http://www.boucher.house.gov/ (follow "Legislative Information" hyperlink; then follow "Internet and Technology Initiatives" hyperlink) (last visited May 1, 2006) [hereinafter *Boucher Homepage*]; EDUCAUSE, THE DMCA REVISITED: WHAT'S FAIR?, http://www.educause.edu/ir/library/pdf/EPO0410.pdf (last visited May 1, 2006).

132. Digital Media Consumers' Rights Act of 2005, H.R. 1201, 109th Cong. (1st Sess. 2005).

133. Andrea L. Foster, *Library Groups Join Effort to Ease Copyright Law's Restrictions on Digital Sharing*, CHRON. HIGHER EDUC., July 9, 2004, at A31.

property and the rights of those who create it."[134] In doing so, this act would amend the "anti-circumvention" provisions of the DMCA to permit the bypassing of copyright protection measures as long as such conduct does not ultimately result in unlawful copyright infringement.[135] Through this amendment, vital scientific research like that of Edward Felten and his team would no longer be hindered by threats and intimidation, and research could be more widely shared throughout the academic community.

Moreover, in conjunction with the passage of the DMCRA, Congress should amend the DMCA to include "penalty" provisions allowing for a defendant's automatic recovery of reasonable attorney's fees from any unsuccessful civil plaintiff. As discussed above, ill-defined doctrines, standards, and tests permeate current contributory copyright law. As a result, colleges and universities may be required to undertake expensive and time-consuming discovery to defend even the most frivolous contributory infringement actions. However, if this burden was shifted off the shoulders of colleges and universities, and instead placed on those instituting unsuccessful civil actions, college and university administrators could relax current liability-limiting safeguards that work to discourage academic freedom and technological innovation.

IX. CONCLUSION

It is well settled that college and university students contribute significantly to illegal P2P file-sharing "piracy," putting them at odds with the entertainment industry, Congress, and general principles of copyright law. Until recently, P2P file-sharing intermediaries, like colleges and universities, were afforded the protection of the well-established, bright-line rules. However, the ambiguity inherent in the recent *Grokster II* and *Monotype* decisions and the proposed Inducing Infringement of Copyright Act of 2004, along with the vague language and sometimes broad provisions of the Digital Millennium Copyright Act, undermine these established principles, creating an expansive new weapon in the entertainment industry's crusade against P2P piracy. To limit the threat of potential litigation, some college and university officials are implementing harsh measures that could ultimately create an environment of distrust at their respective institutions. Unfortunately, the collective effect of these measures, along with current statutory law, may have the unintended consequence of chilling the academic discourse vital to higher education's central goal and the technological innovation on which private industry has come to rely. To remedy this, both Congress and the courts should act to reduce ambiguity and clarify nebulous concepts, thereby encouraging the type of free and open exchange that is crucial to academia's "marketplace of ideas."

134. *Boucher Homepage*, *supra* note 131 (follow "Legislative Information" hyperlink; then follow "Internet and Technology Initiatives" hyperlink; then follow "Boucher's Statement Before the Subcommittee on Telecom and the Internet" hyperlink under "H.R. 1201, the Digital Media Consumers' Rights Act") (last visited May 1, 2006).

135. Foster, *supra* note 133, at A1.