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***547** REBALANCING SECTION 512 TO PROTECT FAIR USERS FROM HERDS OF

MICE--

TRAMPLING ELEPHANTS, OR A LITTLE DUE PROCESS IS NOT SUCH A DANGEROUS
THING

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Abstract

I agree with the basic concept of [17 U.S.C. § 512](#); to protect Internet functionality, ISPs should have robust safe harbors against liability for their subscribers' copyright infringement. However, the current details of the notice and take down system are both unfair to the general public and unnecessary to the economic health of the United States. I suggest a robust, statutorily established digital fair use right backed by a notice and take down procedure protecting fair users. At a minimum, use of a purchased music file on any of the purchaser's equipment should be fair use. Preferably, all personal non-commercial use should be legal. Use or provision of technology to enable fair use should not violate Chapter 12 of Title 17. Additionally, ISPs should not be allowed (let alone incentivized) to cut off subscribers as repeat, online copyright infringers absent court decision on the alleged infringements.

***548** A Long Introduction

I have no quarrel with the basic concept of Section 512 of the Copyright Act, holding ISPs harmless for their subscribers' copyright infringement provided that the ISPs cooperate in notice-and-take-down and subscriber-information subpoena processes--the Internet is too valuable to be held hostage by the copyright industries. However, I want such ISP protection to be tied to protections for the ISPs' subscribers. Before I discuss the details of my suggestions, some background is appropriate.

My approach to third party liability for copyright infringement is driven by my approach to law, politics, and society in general. In my non-humble opinion, money can and will take care of itself. Government is necessary to take care of people. Yes, the Internet has major commercial applications, but its most important functions are not commercial. The Internet could be used to empower ordinary people to take part in culture, government, and social networking. [\[FN1\]](#) These possibilities should not be stifled in the name of protecting commerce.

Regarding the international situation, I am somewhat skeptical that the interests of Americans in general are harmed by the so-called global "piracy" epidemic. [\[FN2\]](#) First, I have seen no documentation that the profits from foreign sales of American-authored works end up primarily in the pockets of Americans or the coffers of the United States treasury. Instead, the reports routinely lump "exports" and "foreign sales" together, presumably to hide the amount of outsourcing involved. [\[FN3\]](#) Stronger intellectual property protection in *549 low-wage foreign nations, furthermore, makes outsourcing more attractive. Why should United States citizens be forced to pay higher prices to copyright holders to protect profits that do not help United States' citizens or their government? Second, I believe that much of this alleged "piracy" is a foreseeable result of forcing strong intellectual property protection on developing nations against their best interests. [\[FN4\]](#) Third, just as copyright infringement is not "piracy" except in rhetoric, not making even more money is not "losing money." Fourth, "piracy" figures are notorious for erroneously claiming full retail price for goods that would never have been bought at such prices. [\[FN5\]](#) If someone has ten dollars of disposable income to *550 buy music, ten dollars is all the

person will spend on music. Assuming the ten dollars was used to buy ten "bootleg" tapes and that authorized tapes cost ten dollars each, the authorized distributor has not lost one hundred dollars in sales. Yet this is exactly the illogic routinely used when the so-called copyright industries complain about "piracy." In short, international commercial considerations should not be used as an excuse to burden the population of the United States with greater copyright-levies.

[\[FN6\]](#)

As to Americans who have allegedly infringed copyright by disseminating copyright-protected works online, I believe that the content industries are reaping the foreseeable result of their long delay in providing networked customers with the type of products they want - unbundled, inexpensive, rapidly downloadable materials. This is especially true in the field of music. Most people are honest [\[FN7\]](#)- even college students. [\[FN8\]](#) Barnes and Noble profitably sold its paper *551 SparkNote series of study guides for years while simultaneously allowing free Internet download of the same content. [\[FN9\]](#) Music is not different. [\[FN10\]](#) If music had been readily available as Internet downloadable, reasonably priced, individual songs in the 1990s, the United States would have escaped widespread contempt for copyright law, widespread hatred of the recording industry, and most of the so-called P2P [\[FN11\]](#) piracy epidemic. [\[FN12\]](#) Even the former founder of Napster *552 now realizes that early P2P use "wasn't about free. It was about having every song or symphony or speech you ever heard, no matter how exotic or obscure, at your fingertips." [\[FN13\]](#) Furthermore, many activities that the content industry terms infringement should be legally recognized as protected fair use. Finally, [Section 512](#) only incentivizes good behavior by ISPs who are vulnerable to United States law; many downloads inside the United States are from servers physically located abroad. [\[FN14\]](#) In short, the major protections demanded by United States copyright industries are neither deserved nor effective.

*553 This preliminary discussion is relevant to the topic of this paper because it undercuts the bunker mentality of the content industry, an attitude which leads to the demonizing of any content use not totally controlled by copyright holders and to fear of allowing standard procedur-

al safeguards to alleged online infringers. None of this, however, means that I condone domestic competition by selling copyright protected content without paying copyright royalties. Such disputes, however, are disputes among various elephants and mice. This paper stands up for people.

Mice and elephants are common online denizens originally classified by Professor Peter Swire. [\[FN15\]](#) Elephants are large powerful creatures, such as Disney, Verizon, the Motion Picture Association of American (MPAA) and the Recording Industry Association of America (RIAA). Elephants have the respectful attention of legislatures; mice do not. Therefore, elephants are usually successful in obtaining statutes banning mouse-activities. But laws against mice are difficult to enforce; mice flee, hide, and reproduce at great speed. Driven crazy by repeated mouse-bites, elephants look for indirect regulatory approaches, the most common being making some other elephant responsible for the mice's depredations. [\[FN16\]](#) Hence, copyright holders' desire to make ISPs liable for their subscribers' infringements.

The online world, however, is not populated solely by mice and elephants. The overwhelming supermajority of the 'Net's inhabitants are merely people. Unlike elephants, people rarely get the attention of Congress or government agencies--except in their role as potential customers for elephants. [\[FN17\]](#) Unlike mice, people cannot run and hide. People are tied down by jobs, families, dentist appointments, and mortgaged houses. Nor do people have elephantine resources for coping with legal threats. Lawyers' letters generally come from elephants. If the recipient is another elephant, the opposing elephants trumpet and posture at each other until they either settle or sue. If the recipient is a mouse, the mouse scurries to another mouse-hole. If the *554 recipient is a person, the person generally surrenders without a fight and begs the elephant for mercy. [\[FN18\]](#)

My concern with [Section 512](#) is that numerous people (not rodents) are being trampled by enraged elephants. The specific subset of people who concern me are those making fair use of digitalized works. My suggested cure has two prongs: first, statutory recognition of a strong digital fair use right; second, modifications to the notice and take down provisions of [Section 512](#)

("NTP") to protect these fair uses. Perhaps such changes could be enacted if the copyright industries were mollified by subpoenas for the identity of P2P users. [\[FN19\]](#)

Two terminological clarifications: this article uses "take down" for any activity by the ISP which cuts off access to the allegedly infringing material, including disabling links or location tools. "Subscriber" is a broad term including any ISP patron.

Section one of this paper will briefly explain the history of NTP. Section two will outline the current status of NTP. Section three will discuss digital fair use. Section four will suggest a due process modification of [Section 512](#)'s NTP. While I believe the subpoena process of [Section 512\(h\)](#) could also benefit from better procedural protections, I will leave that topic for others.

*555 Section One: The Elephant Fight Leading to NTP

The copyright industries in the United States are a large herd of very rich elephants with long-standing paranoid tendencies. Underlying the paranoia is the deep-seated belief that artists (or intermediaries who distribute artistic works) have a natural right to all social benefits even remotely connected to their works. [\[FN20\]](#) On this, Noah Webster agrees with Jack Valenti. [\[FN21\]](#) I disagree, as does the United States Constitution as interpreted by the United States Supreme Court. [\[FN22\]](#) Copyright elephants' paranoia includes a myopic fear of technical change: player-pianos, copy machines, video home recorders, and now networked computers. [\[FN23\]](#)

The onset of the digital age, however, brought to Congress' attention a new set of extremely charismatic elephants - the maze of *556 telecommunication, equipment, and service businesses that enable global computer interconnection. For simplicity, I will dub this herd "network" and the copyright industry herd "content." Of course, not all content and network business entities are supersized, but the relatively small ones share many areas of common interest with the gigantic herd guardians.

The two elephant herds have a love-hate relationship. Obviously, they are interdependent. Digital commerce needs both network and content. Unfortunately, in the 1990s both wanted (as

is usual with elephants) the elephant's share. Network wanted no liability for anything-defamation, taxes, consumer discontent, and copyright infringement. Network won on defamation [\[FN24\]](#) and has done quite well, so far, on both taxes [\[FN25\]](#) and consumer discontent. [\[FN26\]](#) NTP is part of the congressionally brokered compromise on copyright infringement. [\[FN27\]](#) NTP is related to P2P technology because content elephants claim *557 that P2P renders the [Section 512](#) compromise insufficient to protect their interests. This claim, of course, is highly contested. Automated search functions can find files traded via P2P and P2P networks can be disrupted. [\[FN28\]](#)

Returning to history, the National Information Infrastructure Copyright Act of 1995 [\[FN29\]](#) was drafted solely to effectuate the WIPO Copyright Treaty's anti-circumvention and digital rights management information provisions. [\[FN30\]](#) This proposed legislation raised the fear level of network elephants because it did not address the open legal question of how vicarious and contributory copyright infringement doctrines would translate into the age of interconnected computing. In response, Congressman Goodlatte led discussions between the two herds (with some involvement of other parties) during the 104th and 105th congressional sessions. [\[FN31\]](#) The first compromise with enough support to be introduced as a bill was H.R. 2180, the On-Line Liability Limitation Act, introduced by Mr. Coble on July 17, 1997. [\[FN32\]](#)

H.R. 2180 was a very different model than finally adopted. The bill neither distinguished between direct and indirect copyright liability nor discussed technological details of network operation. H.R. 2180's core provision was a list of six broadly worded conditions that, if satisfied, rendered the network elephant not liable for its subscribers' copyright infringements. [\[FN33\]](#) The most controversial *558 was the last, which could be met in either one of two ways. The first option was the absence of some level of knowledge, raising the heated issue of what type of knowledge should be sufficient for liability - none, might know, should know, bright red flag, does know, or notice from a content elephant. Content elephants argued that network elephants wanted preferential treatment over other intermediaries such as bookstores; content elephants in-

sisted that only strict liability would incentivize network elephants to take action against infringers. [FN34] Additionally, a network elephant also fulfilled the last 2180 provision for non-liability if the network entity was "prohibited by law from accessing the material." This second option allowed the service provider to escape liability by contractually binding itself not to spy on its customers. [FN35] The second option, of course, has not been enacted. Instead, Congress abandoned the general approach of H.R. 2180.

While details and levels of complexity varied, all the later bills were quite similar in format to the provisions eventually codified as *559 [17 U.S.C. § 512](#). [FN36] Network elephants are not indirectly liable for copyright infringement by their clients if the infringement is committed via any of several separate, carefully defined technical aspects of the network, [FN37] provided that the network entity (i) expeditiously takes down allegedly infringing material (either on receiving notice from a copyright holder or on seeing a bright red flag), [FN38] (ii) does not interfere with content elephants' automated attempts to find infringers or protect copyrighted works, [FN39] (iii) refuses service to repeat infringers, (iv) maintains an agent for responding to take down notices; and (v) posts related information. [FN40] While the status of non-profit educational and library institutions varied greatly between bills, [FN41] the protections offered to persons whose postings *560 were subject to take down notices changed very little. Take down notices became slightly more content friendly, because ISPs were required to take action based on certain defective notifications. [FN42] Users obtained a slight additional protection; under the enacted version, alleged infringers (not just service providers) can obtain actual damages incurred from "[a]ny person who knowingly materially misrepresents" that posted material is infringing. [FN43] Apparently, this protection was motivated by the fear that one copyright holder would seek to undermine competition from another, not concern for mere people making fair use of copyrighted content. [FN44]

Section Two: Current Status of NTP

As intended, NTP is a privatized enforcement mechanism. [FN45] Copyright holders send to

ISPs simple notices of alleged infringement. ISPs are incentivized to immediately take down the content without any investigation because such take down provides a safe harbor from ISP liability to the copyright holder. ISPs have no incentive to investigate or resist the notice because take down creates *561 no potential liability to the subscriber, provided the ISP "takes reasonable steps" to notify the subscriber and responds to counter notifications. [\[FN46\]](#)

The statutorily set time line prioritizes the copyright holder over the subscriber. On receipt of a notice, the ISP (to get the safe harbor) must "expeditiously" take down the allegedly infringing content or link. The ISP takes down the material before making any attempt to contact the subscriber. After the take down the ISP "promptly," not "expeditiously," must attempt to notify the subscriber. But if the subscriber sends a counter notification, the ISP is not allowed to repost for ten days. Instead, the ISP must advise the copyright holder. If the copyright holder does not respond, the ISP must repost, but retains its safe harbor. However, the ISP is required not to repost if notified that the copyright holder has "filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material" involved. [\[FN47\]](#)

Notice the extraordinary lack of court protection available to the subscriber before s/he is silenced. In a copyright suit, the copyright holder has the burden of convincing a court to enjoin the alleged infringer. Even though preliminary injunctions are relatively easy to obtain in copyright suits, they still require an impartial federal judge to consider both sides. [\[FN48\]](#) In [Section 512](#) NTP, all presumptions are against the subscriber. His or her material is assumed illegal on the bare say-so of the copyright holder. That core requirement of due process, an independent decision maker, is curiously absent. [\[FN49\]](#) The copyright holder can block reposting merely by filing suit; no judicial decision is needed. The statute does not even require the copyright holder to request expedited court consideration.

Copyright holders have free license to target fair users. An aggrieved copyright holder is not liable for improper take down notices unless he "knowingly materially misrepresents" that the "material or activity is infringing." The knowledge requirement is subjective. The statute does

not say "reasonably." Fair use is notoriously difficult to decide objectively; courts are incredibly *562 unlikely to decide that a copyright holder subjectively knew that the targeted posting was fair use. One wonders if automatic searching robot mistakes would be considered "knowing" misrepresentations by copyright holders. [\[FN50\]](#)

Only four cases turn on the meaning of "knowingly materially misrepresents." [\[FN51\]](#) Three find the notifier not liable; the other is flawed. In the most authoritative interpretation, the MPAA saw "download free movies" on Internet Movies.com operated by Michael J. Rossi. The MPAA made no attempt to download any movies from the site or to investigate the site's content, which was not infringing and contained no movies. Instead, the MPAA dispatched take down notices, which resulted in Rossi's losing his original ISP. Rossi sued the MPAA alleging various state tort claims, including tortious interference with contractual relations. The Ninth Circuit affirmed summary judgment for MPAA on all claims. [\[FN52\]](#) Dissecting the language and legislative history of 512, the court properly concluded that the "good faith belief" in infringement required to support a take down notice was purely subjective, especially in light of the phrase "knowing misrepresentation." [\[FN53\]](#) It held that "[a] copyright owner cannot be liable simply because an unknowing mistake is made, even if the copyright owner acted unreasonably in making the mistake." [\[FN54\]](#) Relying on Rossi's subjective standard, the District of Colorado granted summary judgment that MGA Entertainment, Inc. had not violated 512(f) by using eBay's Verified Owner's Program to cancel an auction listing for a fleece hat with a Bratz® appliqué.

An unreported case in the Southern District of New York granted summary judgment to the RIAA when a targeted subscriber sued under state tort theories and 512(f) for knowing material misrepresentation in a take down notice. [\[FN55\]](#) RIAA sent a notice to MP3Board's ISP alleging that MP3Board's site had "direct links to *563 files on other Internet sites containing full-length sound recordings for other users to download, including songs by [listed] artists" and threatened the ISP with statutorily-unavailable money damages. The court supported its ruling with several largely conclusory statements. No evidence had been presented showing that any misrepresenta-

tion had been made "knowingly," seemingly using a subjective standard. While at least one of the links led to a copyright-holder licensed download, others did not. The statute does not penalize the notice-sender for misrepresenting the availability of monetary damages, or for any other error, except for knowing, material misrepresentations "that material or activity is infringing."

[\[FN56\]](#)

The only case penalizing a [Section 512](#) notifier is an oddity, a case where the copyright holder seemingly backed off, rather than appeal an obviously erroneous decision, because of negative publicity. [\[FN57\]](#) During the public controversy over the reliability of Diebold's voting machines, an unknown person posted an archive of internal Diebold emails online at several sites. Diebold responded with take down notices to the ISPs where the archive was posted and to ISPs hosting sites with hyperlinks to the posted archive. Some of the targets sued Diebold for, among other claims, knowing material misrepresentation in its take down notices. The parties cross-moved for summary judgment. At this point, Diebold "represented to the [c]ourt that it ha[d] withdrawn and in the future will not send a cease and desist letter pursuant to the DMCA to any ISP concerning the email archive." [\[FN58\]](#) Diebold admitted that some of the posting might be fair use, never identified the exact content allegedly covered by copyright which it believed was not fair use, and never filed a copyright infringement suit. [\[FN59\]](#) The court, relying on Black's Law Dictionary, but not looking at the legislative history, interpreted "knowingly" to include situations where "a party actually knew, should have known if it acted with reasonable care or diligence, or would have had no substantial doubt had it been acting in good faith, that it was making misrepresentations." [\[FN60\]](#) Based on this extremely *564 broad definition of "knowingly," the court held as a matter of law that Diebold "knowingly materially misrepresented [infringement] at least with respect to the portions of the email archive clearly subject to the fair use exception." [\[FN61\]](#) The court, therefore, piled on to its error regarding the required state of mind, a legal error regarding mixes of infringing and non-infringing material, [\[FN62\]](#) and a factual error about the clarity of fair use determinations. The decision obviously turned on the court's distaste for Diebold's motive in using copyright law, the desire to keep embarrassing ma-

terial from being made public. [FN63] However, copyright is not statutorily limited to the public-spirited. [FN64] Diebold, unfortunately, is a wrongly decided case that has not been appealed for public relations reasons.

In sum, the statute was drafted on the presumption that all targeted subscribers are infringing mice. Are they? Unfortunately, the private nature of the [Section 512](#) NTP system makes investigation difficult. No court record exists unless a copyright holder responds to counter-notification by filing suit. Even a search of all copyright complaints filed would be unable to gauge how often this happens; under federal pleading rules the copyright holder does not have to mention the take down notice in the filed complaint. Since copyright holders and ISPs are largely not government actors, freedom of information requests are useless. The number of notices not received by subscribers due to false contact information is extraordinarily important; the comparison of that figure with the number of take down notices sent would be a good indication of the number of *565 rodents involved, that is of the number of evil, infection-spreading mice inhabiting the Internet and nibbling on copyright-protected postings.

I am grateful that Jennifer Urban has taken on the important and difficult task of compiling empirical information on [Section 512](#) NTP. I consider her preliminary results to support the flawed nature of 512 NTP. [FN65]

Section Three. Solution Part One: Codify Digital Fair Use

"The sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors." [FN66] Digital rights management technology, [FN67] especially with the support of legal liability for circumventing it even absent infringement, drastically shifts the balance of copyright law in favor of the copyright holders. [FN68] Private NTP further chills those technologically capable of making fair use of digitalized copyrighted materials. Loss of fair uses is not a minor burden on the public amply justified by the need to protect copyright holders' income streams. As a matter of constitutional priorities, fair use is more important than such income streams. Furthermore, the

claims of economic harm have been vastly overstated.

On the economic impact of P2P, the RIAA's own figures demonstrate that most P2P uses are not substitutes for royalty-paying transactions. Even assuming (counter-factually) that P2P is the only reason CD album sales declined in the United States after 2000, [\[FN69\]](#) the *566 RIAA reported decline is 292 million albums per year, but P2P file sharing involved 31.2 billion albums annually. [\[FN70\]](#) P2P barely depresses industry revenue while vastly enhancing distribution. The RIAA's response would probably be that illegal downloads replace revenue-creating legal downloads. However, this response ignores the late entry of authorized downloading into the market. Only P2P motivated the music industry to listen to its customers. The music industry has scant entitlement to profits from a market it tried to suppress. [\[FN71\]](#)

Furthermore, the entire discussion of economic effect assumes that the present industry actors have some moral entitlement to all revenue that can be squeezed from cultural property even if the revenue is largely related to technology invented by others, and even if the industry tried to stifle the technology. [\[FN72\]](#) My position is that neither the recording industry nor the technology industry has a moral entitlement to the entire economic surplus created by content/network synergies. The public does. Since distribution is less expensive than *567 before digitalization, the public should not be forced to pay for no-longer-needed middlemen. Of course, the middlemen involved are unhappy, but they deserve no more government support than harness makers did when their jobs vanished as automobiles replaced horses. In this, despite RIAA rhetoric, the elephants do not represent the majority of creative artists. [\[FN73\]](#) The vast majority of Americans who download free music financially support the same artists in some other way. [\[FN74\]](#) The best adaptation to the digitally connected world might be for music to be supported by live performances, leaving distribution of non-live versions free to the public. [\[FN75\]](#) Other reasonable suggestions include use of statutory licenses or levies on technology for the benefit of copyright holders. [\[FN76\]](#) However, even while the current system survives, copyright can and must be adapted to be more equitable to the general public.

To make copyright morally acceptable, NTP must be modified by clarifying to all what digital uses are legal fair uses and modifying the NTP process to prevent chilling such uses. In suggesting the proper contours of digital fair use, my two starting points are the Constitution and general public opinion.

My constitutional base line is that Congress has power to enact only such copyright statutes as promote the distribution of knowledge and culture. I have supported this argument elsewhere and will not *568 repeat myself here. [\[FN77\]](#) Copyright's limit on First Amendment liberty is constitutional only when modified by fair use allowances. [\[FN78\]](#) "[T]he copyright laws are not intended to discourage or to control the emergence of new technologies, including (perhaps especially) those that help disseminate information and ideas more broadly or more effectively." [\[FN79\]](#) In short, the constitutional base line supports a strong fair use right to use the most effective means yet developed for distribution of cultural works, networked digital computers. This base line is too vague, however, to provide definitive boundaries for the required fair use right.

As to public opinion, I point to two main sources, the pro-private use laws of other nations and a recent opinion poll.

Countries whose legislatures have not been captured by copyright-industry special interest groups commonly recognize that making a single, personal-use copy of a copyright-protected work is not infringement--even if the user makes single copies of many such works. [\[FN80\]](#) United States cases hold, or at least imply, that personal-use copying is infringement, but this conclusion is still challengeable. First, the courts only interpret statutes; Congress is free to change them. Second, the Supreme Court has not reached the conclusion that personal-use copying infringes. In *MGM v. Grokster*, "Grokster and *569 StreamCast concede[d] the infringement in most downloads." [\[FN81\]](#) Furthermore, due process problems undercut any implied judicial conclusion that personal-use downloading is infringement. The leading cases "holding" private digital use to be copyright infringement were decided without participation by the alleged direct infringers. [\[FN82\]](#) Professor Lunney argues that had the courts first considered the fair use issue

in cases where the private users were the defendants, the courts would have reached the contrary conclusion. [\[FN83\]](#)

My second information source is the late 2004 report by the Pew Internet and American Life Project on attitudes toward the Internet and P2P, a study performed only after massive MPAA and RIAA copyright litigation and "education" campaigns bashing P2P. [\[FN84\]](#) The study includes the following information on attitudes toward what activities should be legal without permission (i.e. fair use):

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAY-
ABLE

***570** This information supports a number of relevant conclusions. First, the general public is more willing to respect intellectual property than are musicians and artists. Second, none of these groups translate disagreement with certain legal limitations into lawlessness; no one condones selling copyrighted content without paying royalties. [\[FN85\]](#) Third, the strongest disagreement with current positive ***571** law is with the limitation on a music purchaser's use of that music on other equipment the purchaser owns.

Oddly, the RIAA has also supported consumer format-switching. The following excerpt is from a written answer supplied to a congressional committee by the RIAA in September of 2003:

[Question] 2: Do you have a problem with an Internet user downloading a copyrighted song for their personal use? How much freedom should music fans, whether they obtain their music in a store or on line, have to make copies of songs or albums for their own use?

[Response:] Once an individual has purchased a sound recording (whether in a store or online), RIAA does not object to the purchaser making a copy for his or her own personal use. However, RIAA does object to the purchaser making unauthorized copies for others, and such copying is illegal. Such copying results in the distribution of a work from one consumer to another potential consumer and thus also directly substitutes for sales by copyright holders.

Downloading a copy of a recording for one's own personal use from the Internet is no different in effect than shoplifting the recording for one's own personal use from a brick-and-mortar store. The online theft of the recording causes economic harm to the Copyright holder by substituting for a legal sale that otherwise would have occurred. [\[FN86\]](#)

I would prefer Congress to enact a complete copyright exception for personal, non-commercial use, including modification to Chapter Twelve to allow anti-circumvention of controls preventing such use and making available technology to allow this circumvention. Unfortunately, I do not think congressional recognition of such public entitlements is likely. Ruefully, I cannot claim that the public currently recognizes how much the content industry has browbeaten it into accepting unnecessary wealth-transfers. However, I do have a more realistic suggestion.

The public strongly supports a fair use exception for making copies of content purchased in one format for use in any other format- including moving digital media between incompatible equipment. Even the RIAA acceded to this at one time. Such a fair *572 use right should be an actual, not a hypothetical one. Chapter Twelve of the copyright statute must be amended to end liability for bypassing digital controls for such transfer, and for providing the equipment or technology to bypass such controls. [\[FN87\]](#) The statute should make clear that if such legal behavior results in later illegal transfer or copying of files, the earlier behavior is not rendered illicit. Just as content elephants refused to sell downloads until goaded by P2P, I doubt that the involved pachyderms will agree to interoperable digital rights management technologies without strong economic pressure. [\[FN88\]](#)

This compromise might be possible if the pot were sweetened with a [Section 512](#) subpoena process for 512(a) ISPs, i.e. process to identify P2P users. The absence of such process merely reflects the fact that P2P was not well known in 1998. [\[FN89\]](#) The subpoena process should simultaneously be modified to give individuals greater due process protection for all types of 512(h) ISP subpoenas, but I leave that argument to other articles.

Section Four. Solution Part Two: Modify [Section 512](#) to Supply Due Process

Humans' due process rights were almost completely ignored during the legislative history of [Section 512](#). The only reported discussion is in a Senate report:

The second concern raised about the applicability of [section 512](#) to public universities and libraries, and indeed other public entities which operate as online service providers, is that by complying with the notice and take-down provisions of [section 512](#), the public entities might violate the due process rights of their users. Any *573 such due process objection suffers at least two flaws. In the first place, a prerequisite to any due process claim is a state law property interest. In the case of the relatively new concept of Internet access, the service provider contract, rather than any common law property interest, would appear to be the yardstick of the Internet user's property interest in continued access. The contract for Internet service, therefore, can limit any property interest that would form the basis for a procedural due process claim. Second, and even more important, the procedural protections afforded by the notification requirements of subsection 512(c)(3) and the provisions for the replacement of removed or disabled materials in subsection 512(f) provide all the process that is due. The Committee was acutely concerned that it provide all end-users--whether contracting with private or public sector online service providers--with appropriate procedural protections to ensure that material is not disabled without proper justification. The provisions in the bill balance the need for rapid response to potential infringement with the end-users' legitimate interests in not having material removed without recourse. [\[FN90\]](#)

I take exception to almost every point made in this report, though I admit that positive law has yet to enforce my view. First, the interest at issue is a liberty right related to the First Amendment, not a mere property interest which exists at the sufferance of the ISP contract. [\[FN91\]](#) Second, recognition of some common-carrier-like duties on ISPs is overdue. ISPs are no longer fledgling entities requiring super-tender congressional nurturing. The Internet has joined, and in many cases supplanted, land-line telephones as the life line between individuals - a life line that includes access to the communications necessary to find and perform a job. [\[FN92\]](#) Telephone

firms have long *574 been held to due process standards when ending service, even when law enforcement agencies allege illegal conduct. [FN93] No ISP should be allowed (let alone incentivized or required) to terminate a customer without much more robust process than provided in [Section 512](#). Congress should enact stringent limits on an ISP's ability to disconnect customers. Similarly, Congress should clarify that the "repeat infringers," which ISPs are required to disconnect in order to get [Section 512](#) safe harbors, [FN94] are limited to those who have been held repeat infringers by a court. [FN95] Such banishment from the 'Net should be for a limited period of time only. [FN96]

Additionally, the current NTP process assumes that the subscriber is a rodent and makes no provision for fair use. The process needs to be modified to protect the First Amendment and liberty interests of all online speakers. [FN97] I have several specific suggestions.

First, when an ISP receives a take down notice, it should first send a warning notice to the targeted subscriber. Before the content is disabled, the subscriber should have a reasonable amount of time to respond--for example, the ten days now allowed copyright holders to respond to counter-notifications. Because mice do inhabit the 'Net, "expeditious" take down should be allowed when specific indicia of rodenthood are present. These should be spelled out in the statute. If the email address or other contact information provided to the ISP by *575 the subscriber is false, the subscriber is likely to be a rodent. However, before take down, the ISP should have the duty to take reasonable steps to check whether misdelivery is caused by something innocuous, such as a typographical error. For example, the ISP should be required to try the telephone number if the email link does not work and to check available directories of email addresses. Additionally, the subscriber is likely to be a rodent if an extremely large number of music files or an entire newly released movie have been posted in a manner encouraging massive copying by others. Only in such circumstances should an ISP take down content "expeditiously" without giving the subscriber a chance to respond.

Second, the notice to the subscriber should spell out the extent of digital fair use and state

clearly that if the subscriber responds to the email with a claim of fair use, non-infringement for other reasons, or mistake of identity, the accused posting will stay up unless a court rules otherwise. The notice should also assure recipients that if the copyright claim is inaccurate, the claimant will bear all out of pocket costs involved in resisting take down.

Third, if the content is taken down before the subscriber responds (because of indicia of ro-denthood), it should be reposted immediately upon receipt of counter notification. The original notifier can then be promptly advised. The content should not be disabled again absent a court order issued after standard court process.

Fourth, the copyright holder should have strict liability for economic harm caused by any error of fact or law, including court costs and attorney's fees. The copyright holder has chosen to bypass the courts and should be penalized for erroneous self-help, as is common in tort doctrine. [\[FN98\]](#) Fifth, any copyright holder who is found liable for repeated acts of erroneous take down notification should be barred from sending more take down notices. "Repeated" should mean the same for this penalty as it does when considered sufficient to cancel a "repeat" infringer's Internet access. Both should be quantified in the statute. A copyright holder who sends take down notices after being ruled a repeat over-notifier should be subject to stiff penalties: the most appropriate might be the unenforceability of the involved copyrights, but statutory or punitive damages would be acceptable.

***576** Sixth, these details should be included in the policy ISPs must post online for subscribers' information.

In short, absent strong indications of rodenthood, people should not be treated like mice for the sole purpose of protecting copyright holders' property claims. With these changes to protect people, I support ISPs' immunity from copyright infringement by their subscribers.

Conclusion

[Section 512](#)'s privatization of copyright enforcement is not appropriate. Free speech and hu-

mans' due process rights are more important than copyright holders' potential monetary losses, except in very limited instances where strong specific indicia of rodenthood are present. [Section 512](#) should be modified accordingly.

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[FN1]. See generally Yochai Benkler, [Coase's Penguin, or, Linux and the Nature of the Firm](#), [112 Yale L.J. 369 \(2002\)](#) (explaining how the Internet allows individual volunteers to produce major cultural projects). The geographic spread of Japanese animation, and the increased economic value of that art form, was fueled by massive copyright infringement by fans. See Sean Leonard, [Celebrating Two Decades of Unlawful Progress](#), [12 UCLA Ent. L. Rev. 189, 225 \(2005\)](#).

[FN2]. Protecting Innovation and Art While Preventing Piracy: Hearing on the Induce Act, S. 2560 Before Sen. Comm. on the Judiciary, 108th Cong. (July 22, 2004) [hereinafter Induce Act Hearings], available at [http:// judiciary.senate.gov/hearing.cfm?id=1276](http://judiciary.senate.gov/hearing.cfm?id=1276) (last visited Feb. 8, 2005) (statement of Sen. Hatch, Rep. Utah) ("Research now suggests that these piracy rings - which call themselves filesharing networks - will create between 12 and 24 billion infringing copies this year alone. This unprecedented level of piracy fundamentally threatens America's world-leading music, movie, and software industries and the future of legitimate Internet commerce.").

[FN3]. See Piracy of Intellectual Property: Hearing Before the Sen. Subcomm. on Intellectual Property of the Comm. on the Judiciary, 109th Cong. (2005) [hereinafter May 2005 Hearings], available at [http:// judiciary.senate.gov/hearing.cfm?id=1514](http://judiciary.senate.gov/hearing.cfm?id=1514) (statement of Stephen M. Pinkos, Deputy Under Sec. of Commerce for Intellectual Property and Deputy Dir. of U.S. PTO, conflating foreign sales and exports in reliance on Stephen E. Siwek, Int'l. Intellectual Property Alliance, Copyright Industries in the U.S. Economy: The 2004 Report (2004)); Counterfeiting and

Theft of Tangible Intellectual Property: Challenges and Solutions: Hearing Before the Senate Comm. on the Judiciary, 108th Cong. (2004) (statement of Jon W. Dudas, Acting Under Sec. of Commerce for Intellectual Property and acting Dir. of the U.S. Patent and Trademark Office, conflating foreign sales and exports), available at http://judiciary.senate.gov/print_testimony.cfm?id=1119&wit_id=3193 (last visited Jan. 23, 2006); Malla Pollack, [Right to Know?, 17 Cardozo Arts & Ent. L.J. 47, 94-96 \(1998\)](#) (discussing Congress' reliance while considering DMCA on Stephen E. Siwek & Gale Mosteller, Int'l. Intellectual Property Alliance, Copyright Industries in the U.S. Economy: The 1998 Report (1998) which discusses "foreign sales" as if they are exports from the United States). The United States lost 2.7 million manufacturing jobs between July 2000 and April 2004. See *Pirates of the 21st Century: The Curse of the Black Market*, Hearings before the Sen. Subcomm. on Oversight of Government Management, the Federal Workforce, and the District of Columbia, of the Comm. on Homeland Security and Governmental Affairs, 108th Cong. 2 (2004) (statement of Sen. Voinovich, Rep. Ohio). Eliding exports and foreign sales puts on intellectual property infringement the burden that properly belongs on so-called "American" businesses' choice to outsource work, destroying American jobs to cut costs. See generally Robert Reich, *The Work of Nations* (First Vintage Books ed. 1992) (1991) (arguing that large firms no longer support their "native" countries' interests). In fact, one of the main supports of counterfeiting in China is the investment by American businesses in China, seemingly through creation of production facilities in China. See *Pirates of the 21st Century: The Curse of the Black Market*, Hearings before the Sen. Subcomm. on Oversight of Government Management, the Federal Workforce, and the District of Columbia, of the Comm. on Homeland Security and Governmental Affairs, 108th Cong. 22-23 (2004) (statement of Daniel Chow, Law Professor, Ohio State Univ.).

[FN4]. See Michael H. Davis, [Some Realism About Indigenism, 11 Cardozo J. Int'l & Comp. L. 815, 824 \(2003\)](#) ("IP is a major source of indigenous poverty. Surely, TRIPS is the biggest disaster faced by the Third World since the end of the territorial-based colonial era.").

[\[FN5\]](#).

Last week, the Business Software Alliance released a study that attached a dollar figure to losses from 'piracy.' This week, the research director of the company that conducted the study admitted that the figure announced to the press assumed that every unauthorized copy was a lost sale, whereas in reality perhaps one in ten actually represented such a loss.

Induce Act Hearings, *supra* note 2, at 7 (remarks of Gary J. Shapiro, Consumer Elec. Assn.). P2P studies are similarly flawed.

[\[FN6\]](#). Over half the revenues of the "American" copyright industries are from "foreign sales or exports." See May 2005 Hearings, *supra* note 3, at 1 (remarks of Eric Smith, President, Int'l I.P. Alliance).

[\[FN7\]](#). Empirical studies have repeatedly demonstrated that a large segment of the population values fairness. See Ernst Feht, Alexander Klein, & Claus M. Schmidt, *Contracts, Fairness and Incentives*, 2 (Ctr. for Econ. Studies and Ifo Inst. For Econ. Research, Working Paper No. 1215, 2004), available at <http://www.ssrn.com/abstract=549224> (last visited Feb. 8, 2006) ("[T]here is considerable evidence indicating that a substantial percentage of people also care about fairness"; citing multiple empirical studies). Therefore, contracts which rely on fairness produce better results for the contract offeror than those which rely solely on the offeree's desire to maximize his or her own economic reward. See *id.* (concluding that "concerns for fairness strongly affect the incentive properties of the contracts"); Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Fairness and the Assumptions of Economics*, 59 *J. Bus.* S285, S299 (1986) (reporting "the willingness of people to enforce fairness at some cost to themselves.").

[\[FN8\]](#). Government action supporting the copyright industries' efforts to demonize P2P and college students is bothersome. For example, one report bundled discussion of criminal investigation of copyright infringement rings with a report on RIAA's success in getting universities to reduce students' access to P2P on campus. Nothing in the report justified tying the for-profit criminals to either students or P2P. See U.S. Gen. Accounting Office, *GAO-04-504, File Sharing:*

Selected Universities Report Taking Action to Reduce Copyright Infringement (2004), available at <http://www.gao.gov/cgi-bin/getrpt?GAO-04-503> (last visited Feb. 8, 2006). See also Building on "Pornography, Technology, and Process: Problems and Solutions on Peer-to-Peer Networks," Hearings before the Sen. Comm. on the Judiciary, 108th Cong. (2003), available at <http://judiciary.senate.gov/hearing.cfm?id=902> [hereinafter Pornography Hearings] (hearing containing one panel on child pornography and abuse with another on P2P, even though the GAO report "released on March 13, 2003 indicates that, while reports on P2Ps have increased, ultimately only 1 percent of the tips from the public received by the National Center for Missing and Exploited Children since 1998 involved P2P technology.") (testimony of John Malcolm, U.S. Dept. of Justice). The FTC held a two day Public Workshop on "Peer-to-Peer File-Sharing Technology: Consumer Protection and Competition Issues," on Dec. 15 & 16, 2004, which attempted to tie P2P to various problems. See Federal Trade Commission, Peer-to-Peer File-Sharing Tech.: Consumer Protection and Competition Issues, available at <http://www.ftc.gov/bcp/workshops/filesharing/index.htm> (last visited Jan. 21, 2006) [hereinafter FTC Workshop].

[FN9]. See Protecting Copyright and Innovation in a Post-Grokster World, Hearing of the Senate Judiciary Comm., 109th Cong. (2005) [hereinafter Post-Grokster Hearing], available at <http://judiciary.senate.gov/hearing.cfm?id=1624> (last visited Jan. 21, 2006) (statement of Sam Yagen, former Barnes and Noble publisher).

[FN10]. Online music store magnatunes.com allows surfers to listen to all of several hundred albums without charge. If the customer wants to download an album by MP3, the customer is asked to pick a price with a minimum of five dollars and a suggested price of eight dollars. The average price chosen by the buyers is slightly over eight dollars. See Magnatune, <http://www.magnatune.com>; see also Tobias Regner & Ravier A. Barria, Magnatune: Variable Pricing for Music 14-20 (March 2005), (unpublished comment, on file with authors), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=721596 (last visited Feb. 8, 2006) (giving data

on purchases at magnatunes.com). Sixty-three percent of the analyzed magnetune sales are by United States customers. See *id.* at 17. "Jambands [such as the Grateful Dead] allow their fans to record live shows and to copy and distribute the recordings freely. Jambands have enjoyed great commercial success in distributing music via the Internet in forms that other bands have not dared to try. They have explicitly attributed their success to the bond of trust that they have with their fans." Mark F. Schultz, *Fear and Norms and Rock & Roll 2* (September 2005) (unpublished comment, on file with author), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=805945 (last visited Feb. 8, 2006).

[FN11]. The term "P2P," or "peer to peer," refers to the use of computers to share information, such as digital music, over the network without using a centralized server.

[FN12]. "Total music sales and profit of firm is higher, and total piracy (demand on the file sharing network) is lower, when the firm sells a downloadable version." Jeevan Jaisingh, *Piracy on File Sharing Networks: Strategies for Recording Companies* (July 22, 2004) (unpublished comment, on file with author), available at <http://ssrn.com/abstract=567681> (last visited Feb. 8, 2005) (recommending no use of digital rights management technology). "The proliferation of legitimate [digital] music distributors in the marketplace has helped stem the tide of piracy." "One of the major impediments to achieving a more level playing field... is the bewildering array of competing technologies." *Digital Music Interoperability and Availability: Hearing before the House Subcomm. on Courts, the Internet, and Intellectual Property, of the Comm. on the Judiciary, 109th Cong. 3* (2005) [hereinafter *Interoperability Hearings*] (statement of Howard L. Berman, Rep. Cal.). Only "last year," in 2004, "the recording industry finally accepted the inevitability of digital distribution of music. They sold more singles last year than any time in the previous 20 years, and consumers saved a great deal of money." *Id.* at 6 (statement of Mark Cooper, Dir. Research, Consumer Fed. Am.); "Five years ago, we said the only way to compete with Napster, an unlicensed Napster, was with a legal Napster...." *Id.* at 19 (statement of Michael Barcy, Future of Music Coalition); "B[usiness] S[oftware] A[lliance] believes that the most effective way to ad-

dress the harm done by operators of illicit file sharing networks is through the marketplace. Consumers will embrace appealing legal alternatives that offer a rich and varied array of content." Induce Act Hearings, *supranote 2* (testimony of Robert Holleyman, BSA at 2); "Any comprehensive solution [to copyright piracy] must involve... a reasonably priced, convenient, and portable distribution system that makes it as possible to download music legally as can be done today illegally." *Id.* (testimony of Kevin McGuiness, NetCoalition at 7). Accord *Pew Internet & American Live Project, Artists, Musicians and the Internet 43* (2004), http://www.pewinternet.org/pdfs/PIP_Artists.Musicians_Report.pdf [hereinafter *Pew Study*] ("Just over half of these down loaders (54%) say that they don't currently pay to download any type of media files right now, but they would if the price, quality, and choice they wanted were available."). Legal downloading services only became available in most Organization of Economic Cooperation and Development ("OECD") markets in 2004. See OECD, Directorate for Sci., Tech. & Indus., Comm. for Info., Computer and Commc'n Policy, Working Party on the Info. Econ., Report No. DSTI/ICCP/IE(2004)12/FINAL 9 (2005), available at <http://www.oecd.org/dataoecd/13/2/34995041.pdf> (last visited Feb. 8, 2006) [hereinafter *OECD 2005 Rpt.*]. The movie industry has been even more resistant, only providing robust online options in 2005. See Saul Hansell, *Forget the Bootleg, Just Download the Movie Legally*, N.Y. Times, July 4, 2005, at C1 ("After years of avoiding it, Hollywood studios are preparing to let people download and buy electronic copies of movies over the Internet..."). In September 2005, Register of Copyrights Marybeth Peters reaffirmed her belief that "the majority of consumers who have engaged in illegal peer-to-peer "file-sharing" of music would choose to use a legal service if it could offer a comparable product, and more fundamentally, if they knew which services were legal." See *Post-Grokster Hearing*, *supranote 9* (remarks of Mary Beth Peters, Register of Copyrights, at 4). She warned, however, that legal services would remain at risk from illegal competition as long as numerous rights-holders battled for control; therefore, she advised Congress to expand and simplify statutory licenses. See *id.* at 5.

[\[FN13\]](#). *Post-Grokster Hearing*, *supranote 9* (remarks of Ali Aydar, at 1). *Post-Grokster*, both

legal and shadow P2P are growing. However, only about one in five desired music files are available through licensed download services. See Issues Related to MGM v. Grokster: Hearing before the Senate Comm. on Commerce, Science & Transportation, 109th Cong. (2005) [hereinafter Commerce July 2005 Hearing] (remarks of Adam M. Eisgrau, Exec. Dir., P2P United, at 7), available at http://commerce.senate.gov/hearings/testimony.cfm?id=1594&wit_id=3971 (last visited Jan. 22, 2006).

[FN14]. See, e.g., Peter K. Yu, P2P and the Future of Private Copying, 76 Univ. of Colorado L. Rev. 653, 677-79 (2005) (discussing location of P2P firms outside United States jurisdiction). "Seven of the top ten major P2P software companies have chosen to locate outside the U.S." Post-Grokster Hearing, *supra*note 9 (remarks of Sam Yagan, developer of eDonkey, at 2). Having received a post-Grokster cease and desist letter from the RIAA, eDonkey is converting to a closed format rather than pay the cost of legal-self defense; it expects all open P2P to flee U.S. jurisdiction. See *id.* at 7. But see Post-Grokster Hearing, *supra*note 9 (remarks of Mary Beth Peters at 3-4) (pointing out that courts in Australia, Taiwan, and Korea ruled against P2P businesses shortly after Grokster decision).

[FN15]. See Peter P. Swire, Of [Elephants, Mice, and Privacy: International Choice of Law and the Internet](#), 32 *International Lawyer* 991 (1998) [hereinafter Swire, Elephants I]; see also Peter P. Swire, Elephants and Mice Revisited: Law and Choice of Law on the Internet, 153 Univ. Penn. L. Rev. 1975, 1978-80 (2005) (continuing metaphor).

[FN16]. See Swire, Elephants I, *supra* note 15, at 993, 1023-24.

[FN17]. "That content consumers have not had a strong influence on the shape of copyright law is well-documented." Tim Wu, [When Code Isn't Law](#), 89 *Va. L. Rev.* 679, 747 (2003).

[FN18]. See Privacy and Piracy: The Paradox of Illegal File Sharing on Peer-to-Peer Networks and the Impact of Technology on the Entertainment Industry: Hearing Before the Sen. Permanent Subcomm. on Investigations of the Comm. on Gov't Affairs, 108th Cong. 49-51 (2003)

[hereinafter Privacy Hearings] (statement of Lorrain Sullivan, a college student sued by the RIAA). As of Sept. 21, 2005, "the RIAA has sued some 10,000 Americans, mostly teenagers, their parents, and grandparents, and ruined some families financially." Post-Grokster Hearings, *supra* note 9 (testimony of Gary Shapiro, at 9). "With an average settlement of \$3000 per lawsuit, the RIAA has made some \$30 million on this venture." *Id.* at 9 n.14. According to other sources, RIAA filed over 14,000 lawsuits against individual P2P "infringers" between Sept. 2003 and Sept. 2005. See Recording Industry Sues More US File-Swappers, Reuters (Aug. 31, 2005), available at <http://www.freepress.net/news/print.php?id=11208> (last visited Feb. 8, 2006). But see Nick Farrell, RIAA Sued by Victim, *The Inquirer*, Oct. 3, 2005 (reporting that "Tanya Anderson, a 41-year old disabled single mother living in Oregon, has countersued the RIAA for, inter alia, electronic trespass, abuse of process, and RICO violations), available at <http://www.theinquirer.net/?article=26641> (last visited Feb. 8, 2005); Jon Newton, The "We're Not Taking Any More" Club (reporting on three individuals, including Anderson, who have stood up to RIAA), available at <http://p2pnet.net/story/6283> (last visited Jan. 22, 2006).

[FN19]. See [In re Charter Communications, Inc., Subpoena Enforcement Matter, 393 F.3d 771, 772 \(8th Cir. 2005\)](#) (ruling that 512 subpoenas are not available under [17 U.S.C. §512\(a\)](#), i.e., for the identity of subscribers who exchange allegedly infringing content via P2P). See also [RIAA v. Verizon Internet Svcs., Inc., 351 F.3d 1229 \(D.C. Cir. 2003\)](#); [In re Subpoena to Univ. of N.C., 367 F. Supp. 2d 945 \(M.D.N.C. 2005\)](#).

[FN20]. This claim is often based on eliding the difference between "property" and so-called "intellectual property." However, the owners of actual "property" do not, and should not, receive the full social value of their "property." See Mark A. Lemley, [Property, Intellectual Property and Free Riding, 83 Tex. L. Rev. 1031, 1046-51 \(2005\)](#) (explaining why "no property owner is entitled to capture the full social value of their property.").

[FN21]. See Lawrence Lessig, *Free Culture* 118 (Penguin Books 2004) (2003) (explaining that Jack Valenti's assertion that "creative property" involves the same rights as physical property is

an industry attempt "to restore the tradition that the British overturned in 1710."); Letter from Noah Webster to Senator Daniel Webster (Sept. 30, 1826), reprinted in Noah Webster, *A Collection of Papers on Political, Literary, and Moral Subjects* (Burt Franklin ed. 1968) (1843) (requesting perpetual protection for his writings). But see David Mickelthwait, *Noah Webster and the American Dictionary* 2, 10-11, 82-83 (2000) (asserting that Webster inconsistently wanted extreme protection for books he issued even though he borrowed heavily from earlier works).

[FN22]. See, e.g., [Feist Publications, Inc. v. Rural Tele. Svc. Co.](#), 499 U.S. 340, 349 (1991) ("The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.' [U.S. Const.] Art. I, § 8, cl. 8."); [Twentieth Century Music Corp. v. Aiken](#), 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. The sole interest of the United States and the primary object in conferring the monopoly... lie in the general benefits derived by the public from the labors of authors.... When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose.") (citations and internal quotation marks omitted). Unfortunately, this pro-public domain dicta has not led to pro-public domain decisions. See [Eldred v. Ashcroft](#), 537 U.S. 186 (2001) (holding constitutional the Sony Bono Copyright Term Extension Act allowing Congress to extend copyright terms of existing works despite claims of persons dependent on the public domain).

[FN23]. See, e.g., [Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.](#), 380 F.3d 1154, 1158 (9th Cir. 2003) (mentioning content industry's hatred of new technologies including player piano), rev'd on other grounds, [125 S. Ct. 2764 \(2005\)](#); Mark N. Cooper, *Time for the Recording Industry to Face the Music: The Political Social, and Economic Benefits of Peer-to-Peer Communications Networks* 23-25 (Stanford Law School Center for Internet and Society March 2005) (discussing numerous piracy panics), available at [© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.](http://cyber-</p></div><div data-bbox=)

law.stanford.edu/blogs/cooper/archives/BENEFITsofPEERtoPEER.pdf (last visited Feb. 8, 2006).

[FN24]. See [47 U.S.C. §230 \(2000\)](#), Communications Decency Act of 1996, which "creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." [Zeran v. America OnLine, Inc.](#), 129 F.3d 327, 330 (4th Cir. 1997), cert. denied, [524 U.S. 937 \(1998\)](#). Section 230 immunity is "broad" and survives "specific editing or [a] selection process." [Carafano v. Metrosplash.Com, Inc.](#), 339 F.3d 1119, 1123 (9th Cir. 2003). See generally Jonathan Band & Matthew Schrems, [Safe Harbors Against the Liability Hurricane: The Communications Decency Act and the Digital Millennium Copyright Act](#), 20 *Cardozo Arts & Ent. L.J.* 295, 300 (2002) (providing overview of cases, concluding "federal and state courts alike have applied Section 230 liberally and without qualification" to protect ISPs).

[FN25]. "No State or political subdivision thereof may impose any of the following taxes during the period... ending November 1, 2007: (1) Taxes on Internet access. (2) Multiple or discriminatory taxes on electronic commerce." The Internet Tax Nondiscrimination Act, [Pub. L. 108-435, § 2](#), 118 Stat. 2615 (2004).

[FN26]. AOL's posted "Terms of Current Use" (TUC) and related "Agreement to Rules of User Conduct" (ARUC) make clear that AOL has the right, but not the responsibility, to delete any content AOL deems objectionable. See AOL.com Agreement to Rules of User Conduct, <http://www.aol.com/copyright/rules.html> (last visited Feb. 8, 2006) (last paragraph). A suit is currently pending against AOL for allegedly over blocking email into the USA from foreign countries. See Verizon Blocked Email Class Action Home Page, <http://www.kohnswift.com/verizon.htm> (last visited Feb. 2, 2006). AOL also retains the right to terminate a subscriber without notice for any reason. See AOL.com Terms of Use, http://about.aol.com/aolnetwork/aolcom_terms (last visited Feb. 3, 2006). The only case I was able to locate which enforced access to an ISP is an unpublished opinion which enforced a provision

bargained for by an email business with its ISP to allow thirty days notice before disconnecting service. The court made clear that the customers' business use of the service was determinative. See [Cyber Promotions, Inc. v. Apex Global Information Svcs., No. 97-5931, 1997 WL 634384 \(E.D. Pa. Sept. 30, 1997\)](#).

[FN27]. See Cassandra Imfeld & Victoria Smith Ekstrand, The [Music Industry and the Legislative Development of the Digital Millennium Copyright Act's Online Service Provider Provision, 10 Comm. L. & Pol'y 291, 311 \(2005\)](#) (crediting heavy lobbying of content industry during 1988 for insertion of strong take down and subpoena power into statute providing limits on ISPs copy-right liability).

[FN28]. See BayTSP Corp., *Combating Online Software Piracy in an Era of Peer-to-Peer File Sharing* 5-7 (2004), <http://www.baytsp.com/downloads/WhitePaperFinal.pdf> (last visited Feb. 8, 2006) (advertising service to track and send take down notices effective against files sent by P2P technologies and listing other techniques used against P2P networks); BayTSP Corporation, *Solutions FAQ* (claiming usefulness of offered services against common P2P technologies), http://www.baytsp.com/solutions_faq.html (last visited Feb. 6, 2006). The DMCA has spawned a "whole industry of copyright 'bounty hunters.'" See *Pornography Hearings*, *supra*note 8 (testimony of William Barr, V.P., Verizon Comm., at 6).

[FN29]. H.R. 2441, 104th Cong. (1995), introduced in the House by Rep. Moorehead on Sept. 29, 1995 and its companion bill S.1284, 104th Cong. (1995).

[FN30]. These treaty obligations are the triggers for 17 U.S.C. §§ 51201- 1202 (2000).

[FN31]. See 144 Cong. Rec. H7095 (online ed. Aug. 4, 1998) (statement of Rep. Goodlatte, R-Va.) (remarks leading to vote on Digital Millennium Copyright Act).

[FN32]. Earlier and later discussion drafts were not introduced for lack of broad support. See *Hearing on H.R. 2180 and H.R. 2281 Before House Comm. on the Judiciary, Subcomm. on*

Courts and Intellectual Property, 105th Cong. (1997), available at <http://judiciary.house.gov/legacy/4001.htm> (last visited June 15, 2005) [hereinafter Sept. 1997 Hearings] (statement of Bruce A. Lehman, Asst. Secretary of Commerce and Commissioner of Patents and Trademarks) (mentioning earlier drafts); 144 Cong. Rec E165 (online ed. Feb. 12, 1998) (statement of Rep. Goodlatte, R-Va.) (remarks during introduction of H.R. 2281 and mentioning later drafts).

[\[FN33\]](#). (a) EXEMPTIONS- A person shall not be liable --

(1) for direct infringement, or vicariously liable for the infringing acts of another, based solely on transmitting or otherwise providing access to material on-line, if the person --

(A) does not initially place the material on-line;

(B) does not generate, select, or alter the content of the material;

(C) does not determine the recipients of the material;

(D) does not receive a financial benefit directly attributable to a particular act of infringement;

(E) does not sponsor, endorse, or advertise the material; and

(F) (i) does not know, and is not aware by notice or other information indicating, that the material is infringing, or

(ii) is prohibited by law from accessing the material;....

H.R. 2180, 105th Cong. § 2 (1997).

[\[FN34\]](#). Compare Sept. 1997 Hearings, *supra*note 32, (statement of Roy Neel, U.S. Tele. Assn.) (arguing that network should only be required to respond to notices sent by content), and *id.* (statement of Tushar Patel, U.S. Web) ("[i]magine if a construction company were liable because a car had an accident caused by the driver while driving on the road"; "I cannot exist with a liability potential that I cannot control or minimize"), with *id.* (statement of Lawrence Kenswil, Universal Music Group) (arguing that network businesses "are seeking preferential treatment over every other group that deals in copyrighted works every day"), and *id.* (statement of John Bettis,

ASCAP) (arguing that under 2180 "there would be no inducement for the infringing OSP to monitor the infringement, for its only liability would be an injunction, after the fact."), and *id.* (statement of Allee Willis, BMI) (arguing that "there should continue to be no knowledge requirement for either direct or vicarious liability of service providers. Nothing they do is so fundamentally different from traditional media as to warrant overturning the bedrock strict liability principle of U.S. copyright law.").

[\[FN35\]](#). See Sept. 1997 Hearings, *supra*note 32 (statement of Mike Kirk, Am. Intellectual Property Law Assn.) (objecting to disjunctive second clause in paragraph F).

[\[FN36\]](#). S. 46, 105th Cong. (1997) (introduced Sept. 3, 1997 by Sen. Ashcroft); S. 2037, 105th Cong. (1998) (introduced May 6, 1998 by Sen. Hatch), and Title II of the second through sixth versions of H.R. 2281, 105th Cong. (1998) (originally introduced by Mr. Coble on July 29, 1997 with no provision equivalent to current [§ 512](#)). Limitations on network elephants' copyright liability were enacted as Title II of Pub. L. 105- 304, the Digital Millennium Copyright Act (effective Oct. 28, 1998). The only subsequent amendments were completely technical in nature, merely correcting typographical errors in the original version. See Technical Corrections to [Title 17, Pub. L. 106-44, 113 Stat. 221 \(1999\)](#) (effective Aug. 5, 1999).

[\[FN37\]](#). "Transitory Digital Network Communications"; "System Caching"; "Information Residing on Systems or Networks at Direction of Users"; and "Information Location Tools." [17 U.S.C. §512\(a\)-\(d\) \(2000\)](#). The safe harbors for information posted by users and for information location tools also require that the ISP not receive any "financial benefit directly attributable to infringing activity, in a case in which the service provider has the right and ability to control such activity." [17 U.S.C. §§512\(c\)\(1\)\(B\), 512\(d\)\(1\)\(C\)\(2\)](#).

[\[FN38\]](#). The scant case law on point requires the flag to be very bright red. See [Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1108-10 \(W.D. Wa. 2004\)](#) (finding neither take down notices nor selling of celebrity photographs sufficient); [Perfect 10, Inc. v. CCBill, LLC, 340 F.](#)

[Supp. 2d 1077, 1103-04 \(C.D. Cal. 2004\).](#)

[FN39]. More specifically, the statute requires that an ISP "accommodates and does not interfere with standard technological measures." [17 U.S.C. §512\(i\)\(1\)\(B\)](#). These are defined as:

technical measures that are used by copyright owners to identify or protect copyrighted works and --

(A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process;

(B) are available to any person on reasonable and non discriminatory terms; and

(C) do not impose substantial costs on service providers or substantial burdens on their systems or networks.

[17 U.S.C. §512\(i\)\(2\)](#). While leading ISPs, such as Verizon, offered to begin the standards setting process in 1998 when NTP was enacted, as of Sept. 9, 2003, the copyright industry had not been willing to even begin discussions. Pornography Hearings, supra note 8 (remarks of William Barr, Verizon Commc'ns., at 1).

[FN40]. See [17 U.S.C. §512](#) (2005).

[FN41]. Compare S. 46, 105th Cong. (1997) (as introduced, Sept. 3, 1997) (including proposed 512(b)(3)(B) providing that take down notices are ineffective against a "person who is an employee or agent of a nonprofit educational institution, library or archive, acting within the scope of his employment" if "that person reasonably believed (i) that the allegedly infringing use was a fair use" or "(ii) was otherwise lawful"), with H.R. 2281, 105th Cong. (1998) (as reported to House, July 22, 1998) (having no section dealing with non-profit educational or library institutions), and id. (as passed by House, Aug. 4, 1998) (containing proposed 512(c)(2) protecting nonprofit educational institutions from ISP liability for actions of any "faculty member, administrative employee, student, or graduate student" unless such person is "exercising managerial or operational responsibilities that directly relate to the institution's function as a service provider"), and id. (as passed by Senate, Sept. 17, 1998) (inserting text of S. 2037 which makes no separate

provision for non-profit educational or library institutions but includes Sec. 204 requiring a study of the issue), and id. (as enacted and codified) (containing 512(e) slightly limiting responsibility of "public or other nonprofit institution of higher education" ISPs for actions of faculty members and graduate students).

[FN42]. Compare [17 U.S.C. §512\(c\)\(3\)\(B\)\(ii\)](#), with the version of H.R. 2281 reported to the House in late July 1998.

[FN43]. Compare 17 U.S.C. §512(f), with H.R. 2180's proposed § 512(d).

[FN44]. See Sept. 1997 Hearings, *supra*note 32 (testimony of Ronald G. Dunn, President Information Industry Assn.):

Copyright owners may suffer real harm if fraudulent complaints result in the takedown of their works. The Association feels strongly that in such instances a party whose material has been removed unjustifiably as a result of a complaint that is not bona fide should be entitled to seek appropriate remedies against the complainant for such removal.

[FN45]. See S. 1146, 105th Cong. tit. I, § 101(6) (1997) (including in the purposes of the bill "to create incentives for the rapid elimination of infringing material residing on an electronic communications systems or network without litigation.") (emphasis added); [Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1178 \(C.D. Cal. 2002\)](#) (recognizing § 512 as "a regulatory scheme in which courts are meant to play a secondary role to self-regulation" in which "service providers [have] strong incentives to work with copyright holders.") (emphasis in original).

[FN46]. See 17 U.S.C. §512(g) (2005).

[FN47]. See 17 U.S.C. §512(g)(2)(C) (2005).

[FN48]. See Mark A. Lemley & Eugene Volokh, [Freedom of Speech and Injunctions in Intellectual Property Cases](#), 48 *Duke L.J.* 147, 150 (1998) (arguing that routine issuing of preliminary

injunctions in copyright infringement cases is a First Amendment problem).

[FN49]. See [Connally v. Georgia, 429 U.S. 245, 249 \(1977\)](#) ("subjecting a defendant to trial before a judge having 'a direct, personal, pecuniary interest in convicting the defendant'... effect[s] a denial of due process.") (quoting [Tumey v. Ohio, 273 U.S. 510, 523 \(1927\)](#)).

[FN50]. The Ninth Circuit did not reach this issue because even though the site had been located by the Ranger automatic search program, MPAA employees reviewed the site before sending the take down notice. See [Rossi v. MPAA, 391 F.3d 1000, 1005 n.7 \(9th Cir. 2004\)](#).

[FN51]. In a fifth case, "[a]n allegation that a copyright owner created the infringing knock-offs that it demanded be removed from the defendant's computer network [was held] sufficient" to survive a motion to dismiss a 512(f) counterclaim. [Marvel Enterprises, Inc. v. NCSOFT Corp., No. 04-9253 \(C.D. Cal. Aug. 22, 2005\)](#), according to 70 BNA PTCJ 834 (Sept. 16, 2005).

[FN52]. See [Rossi v. MPAA, 391 F.3d 1000 \(9th Cir. 2004\)](#).

[FN53]. See [id. at 1003-06](#).

[FN54]. See [id. at 1005](#).

55 See [Dudnikov v. MGA Entertainment, Inc., 410 F. Supp. 2d 1010, 1012-13 \(D. Col. 2005\)](#).

[FN55]. See [Arista Records, Inc. v. MP3Board, Inc., 2002 WL 1997918, at * 1 \(S.D.N.Y. Aug. 29, 2002\)](#).

[FN56]. [Id. at *15](#).

[FN57]. [Online Policy Gp. v. Diebold, Inc., 337 F. Supp. 2d 1195 \(N.D. Cal. 2004\)](#). See also Alexander Lindey & Michael Landau, 1 Lindey on Entertainment, Publishing and the Arts §1:35 at 8 (commenting that "[w]hile Judge Fogel may have reached the political result that he desired... his opinion shows a profound misunderstanding of copyright law.") (Aug. 2005 update, available

from WESTLAW).

[FN58]. [Diebold, 337 F. Supp. 2d at 1202.](#)

[FN59]. See [id.at 1203-04.](#)

[FN60]. [Id.at 1204.](#)

[FN61]. Id.

[FN62].

[T]he district court finds in any event that a small, but more than negligible, body of unpublished material cannot pass the fair use test, given the strong presumption against fair use of unpublished work. Although we would characterize the use here as more than 'small,' it makes no difference insofar as entitlement to injunctive relief is concerned.

[New Era Publications Int'l v. Henry Holt & Co., 873 F.2d 576, 583-84 \(2d Cir. 1989\)](#)

(affirming that non-authorized biography of Church of Scientology founder L. Ron Hubbard infringed copyrights in Hubbard's unpublished papers), cert. denied, [493 U.S. 1094 \(1990\)](#).

[FN63]. See [Diebold, 337 F. Supp. 2d at 1204-05](#) ("Diebold... sought to use the DMCA's safe harbor provisions... as a sword to suppress publication of embarrassing content rather than as a shield to protect its intellectual property.").

[FN64]. See, e.g., [New Era Publications, 873 F.2d at 583](#) (rejecting district court's view that outcome in copyright case should turn on importance of a critical biography of controversial public figure); [Salinger v. Random House, 811 F.2d 90, 99 \(2d Cir. 1987\)](#) ("the need to assess the effect on the market for Salinger's letters is not lessened by the fact that their author has disavowed any intention to publish them during his lifetime."), cert. denied, [484 U.S. 890, 899 \(1987\)](#).

[FN65]. See Jennifer M. Urban & Laura Quilter, Efficient Process or "Chilling Effects" ? Take-down Notices Under Section 512 of the Digital Millennium Copyright Act, 22 Santa Clara Computer & High Tech. L.J. (forthcoming May 2006).

[FN66]. [Fox Film Corp. v. Doyal](#), 286 U.S. 123, 127 (1932), quoted in [Sony Corp. v. Universal City Studios, Inc.](#), 464 U.S. 417, 432 (1984).

[FN67]. Digital rights management technology allows content owners to determine and control who and how users can view content such as media files on the Internet and elsewhere.

[FN68]. "[T]o the extent that the DMCA appears to legitimate technological controls over copyrighted works, without regard to the effect on public policy, the statute effectively grants rubber-stamp approval to such private legislation...." Dan L. Burk & Julie E. Cohen, [Fair Use Infrastructure for Rights Management Systems](#), 15 *Harv. J.L. & Tech.* 41, 51 (2001). See also, e.g., Ann Bartow, [Electrifying Copyright Norms and Making Cyberspace More Like a Book](#), 48 *Villanova L. Rev.* 13 (2003); Stefan Bechtold, [Digital Rights Management In the United States and Europe](#), 52 *Am. J. Comp. L.* 323 (2004); Pamela Samuleson, [Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised](#), 14 *Berkeley Tech. L.J.* 519 (1999).

[FN69]. See OECD 2005 Rpt., *supranote 12*, at 8 (reporting that "[a]part from online piracy, there have been other changes in the market environment for music over the past ten years such as the increased number of entertainment sources which may explain changing music sales."); *id.* at 10 ("[I]t is very difficult to establish a basis to prove a causal relationship between the size of the drop in music sales and the rise of file sharing."). See also *Cooper*, *supranote 23*, at 44-46 (discussing inconsistent conclusions of various studies on relationship of P2P to music industry income).

[FN70]. See Brief of Amici Curiae Law Professors In Support of Respondent at 22-23, [Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.](#), 543 U.S. 1032 (2005) (No. 04-480), available at http://www.eff.org/IP/P2P/MGM_v_Grokster [hereinafter *Lunney Brief*] (this brief is the brilliant work of Prof. J. Glynn Lunney, Tulane Univ. School of Law). See also Rafael Rob & Joel Waldfoegel, *Piracy on the High Cs: Music Downloading and Social Welfare in a Sample of Col-*

lege Students 3 (NBER Working Paper 10874, Nov. 2004), available at <http://www.nber.org/papers/w10874> (concluding that, in his sample, the reduction in deadweight loss from downloading is almost twice the loss of industry revenue).

[FN71]. See, e.g., Post-Grokster Hearing, *supra* note 9 (the Grokster case led to a "surge in negotiations, agreements, and launchings of new legitimate online music services or technologies.") (remarks of Mary Beth Peters, at 3).

[FN72]. "The content industry has proven short-sighted, time and again, trying to stifle technologies that ultimately proved beneficial not only to society but even to copyright owners. They tried - and fortunately failed - to shut down juke boxes, radio, cable television, the VCR, and the mp3 player." Post-Grokster Hearing, *supra* note 9 (testimony of Prof. Mark Lemely, at 1). *Id.*(testimony of Sam Yagan, founder of eDonkey, at 2) (reporting how his attempts to legally license content were rebuffed by the content industry). "The music recording industry is a highly-concentrated five firm oligopoly. Much of dominance achieved by large firms in the industry results from control over the distribution and promotion of the products of the industry." Cooper, *supra* note 23, at 47. Furthermore, the industry engaged and still engages in anti-competitive and anti-consumer practices. P2P is one response to these industry practices. See *id.* at 46-54. Immediately following the Grokster decision, "content providers and distributors have been moving to announce in advance that they will 'license' only technologies and techniques that are satisfactory to them...." Post-Grokster Hearing, *supra* note 9 (remarks of Gary Shapiro, at 10).

[FN73]. Accord Pew Study, *supra* note 12, at 38 (concluding that majority of musicians do not think that RIAA law suits serve musicians' interests). "Half of all artists say that copyright regulations generally benefit purveyors of art work more than the original creators. Musicians echo those views." *Id.* at v.

[FN74]. See *id.* at 43.

[FN75]. This suggestion corresponds to the Ancillary Products and Services Mode. See Berkman

Ctr. for Internet and Soc'y, Harvard Law School, Content and Control: Assessing the Impact of Policy Choices on Potential Online Business Models in the Music and Film Industries 5 (2005), [http:// cyber.law.harvard.edu/media/files/content_control.pdf](http://cyber.law.harvard.edu/media/files/content_control.pdf) (last visited Feb. 8, 2006) (listing four basic models: digital media stores, P2P stores, Collective Blanket Licensing, and Ancillary Products & Services)

[FN76]. See, e.g., Burk & Cohen, *supra*note 69 (arguing for changes in DRMs to allow fair use, including coding changes and required use of escrowed key usable by external decision makers); Peter Eckersley, [Virtual Markets for Virtual Goods: The Mirror Image of Digital Copyright](#), 18 *Harv. J.L. & Tech.* 85 (2004) (proposing complex virtual markets where government distributes rewards decided on by users); Neil Weinstock Netanel, [Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer Sharing](#), 17 *Harv. J.L. & Tech.* 1 (2003) (proposing comprehensive noncommercial use levy on a broad range of goods and services in return for a broad right to use and manipulate cultural material for non-commercial purposes); See Yu, *supra*note 14, at 698-744 (proposing eight different models including mass licensing, compulsory licensing, voluntary collective licensing, and voluntary contribution).

[FN77]. See Amicus Brief of Malla Pollack and Other Law Professors Supporting *Grokster, Ltd.*, et al. at 15-26, [Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.](#), 543 U.S. 1032 (2005) (No. 04-480), available at [http:// www.eff.org/IP/P2P/MGM_v_Grokster](http://www.eff.org/IP/P2P/MGM_v_Grokster); Malla Pollack, The Democratic Public Domain: Reconnecting the Modern First Amendment and the Original Progress Clause (a.k.a. Copyright and Patent Clause), 45 *Jurimetrics* 23, 24-29 (2004) (summarizing argument); Malla Pollack, What Is Congress Supposed to Promote? Defining "Progress" in [Article I, Section 8, Clause 8 of the U.S. Constitution](#), or Introducing the Progress Clause, 80 *Nebraska L. Rev.* 754 (2001) (presenting full argument).

[FN78].

The 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 to

the extent such assertions raise First Amendment concerns, copyright's built-in free speech safeguards are generally adequate to address them.

[Eldred v. Ashcroft, 537 U.S. 186, 221 \(2001\)](#). These built in safe guards include the idea/expression dichotomy and fair use. See [id.at 220](#).

[FN79]. [Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 125 S. Ct. 2764, 2791 \(2005\)](#) (Breyer, J. concurring).

[FN80]. See Lunney Brief, *supranote 71*, at 6 n.10 (collecting authorities). Often such rights are premised on government levies on copying media and equipment. See Netanel, *supranote 77*, at 32-33. Accord Post-Grokster Hearing, *supranote 9* (taking position on behalf of the Consumer Electronics Association and the Home Recording Rights Coalition that creating a personal library of tapes of television shows is fair use under United States law) (remarks of Gary Shapiro, President, CEA, at 4).

[FN81]. [Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 125 S. Ct. 2764, 2772 \(2005\)](#).

[FN82]. See Lunney Brief, *supranote 71*, at 17-22.

[FN83]. See *id.at 22-26*; see also Niels B. Schaumann, Direct Infringement on Peer-to-Peer Networks 38 (William Mitchell College of Law, Working Paper No. 9, 2005) (arguing that "copying by P2P users is not infringing, but that their distribution of copyrighted works... does infringe"), available at <http://ssrn.com/abstract=703882> (last visited June 25, 2005). But see [BMG v. Gonzalez, 430 F.3d 888 \(7th Cir. 2005\)](#) (holding that downloading music for personal use is not "fair use").

[FN84]. See Pew Study, *supranote 12*.

[FN85]. The thesis that disagreement with one law will lead to flouting law in general has been assumed by many with scant, if any, empirical basis. Recent limited experiments have provided some support, but did not involve testing whether disagreement with one element of copyright

legislation led to refusal to follow other aspects of copyright law. See Janice Nadler, [Flouting the Law](#), 83 *Tex. L. Rev.* 1399 (2005).

[FN86]. Privacy Hearings, *supranote* 18, at 154 (response to supplemental questions for the record submitted by Sen. Tom Carper for Mitch Bainwol, Chairman & CEO RIAA).

[FN87]. I would prefer that all fair uses be exempted from Chapter 12 liability of any kind. Cf. H.R. 2281, 105th Cong. (1998) (creating a fair use exemption from the anti-circumvention provisions).

[FN88]. See Interoperability Hearings, *supranote* 12, at 25 (remarks of Rep. Howard L. Berman, R-Ca., stating that incompatible DRM technology prevents music purchased online from Apple and Sony being played on the other's equipment). Accord Burk & Cohen, *supranote* 69, at 54-55 (arguing that anti-circumvention "law should be designed to shift technological development in a direction that balances the incentive structure of copyright protection with copyright's concern for the public domain and for the legitimate fair use privileges of the public."); cf. Thomas Crampton, *France Weighs Forcing iPods to Play Other Than iTunes*, *N.Y. Times*, Mar. 17, 2006, at C3, available at http://nytimes.com/2006/03/17/technology/17ipod.html?_r=2.

[FN89]. See [RIAA v. Verizon Internet Svcs., 351 F.3d 1229, 1238-39 \(D.C. Cir. 2003\)](#) (recognizing that policy reasons for other 512 subpoena imply that Congress would have allowed subpoenas to 512(a) ISPs if Congress had been "anticipated [P2P's] development," but refusing to rewrite the statute to allow such subpoenas).

[FN90]. [S. Rep. No. 105-190, at 18 \(1998\)](#) (accompanying S. 2037), available at <http://www.thomas.loc.gov> (last visited June 15, 2005).

[FN91]. Accord [Meachun v. Fano, 427 U.S. 215, 226 \(1976\)](#) (recognizing both the Constitution and state law as sources of liberty interests protected by the Due Process Clause); [id. at 230](#) ("[N]either the Bill of Rights nor the laws of sovereign States create the liberty which the Due

Process Clause protects.") (Stevens, J., dissenting); Christopher L. Eisgruber, The Story of Dred Scott v. Sandford, in *Constitutional Law Stories* 151, 159 (Michael C. Dorf ed., Foundation Press 2004) ("Liberty is different from property because the definition of liberty flows from human nature and our ideals, not from historical accidents...."). The majority in *Meachun* agreed that some liberty interests flow from the Constitution itself, not state law. See [Meachun, 427 U.S. at 226](#).

[FN92]. Some consider broadband (as opposed to dial up) Internet access essential. See Steven Levy, Will Sticks Lick Broadband Fix?, *Newsweek*, Aug. 22, 2005, available at <http://www.msnbc.msn.com/id/8938152/site/newsweek> (last visited Aug. 16, 2005) ("High-speed Internet is quickly becoming an essential, just like electricity and phone service.... If someplace doesn't have broadband, people are less likely to move there and start businesses there.").

[FN93]. See [Sokol v. Pacific Utilities Comm., 53 Cal. Rptr. 673 \(Cal. 1966\)](#) (holding that state Public Svc. Comm. decision requiring telephone company to terminate without warning subscriber's service on police notification of allegedly illegal activity violates due process).

[FN94]. See 17 U.S.C. §512(i)(1)(A) (2000):

The limitations on liability established by this section shall apply to a service provider only if the service provider- (A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, 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 [copyright] infringers.

[FN95]. Compare [Corbis Corp. v. Amazon.com, 351 F. Supp. 2d 1090, 1105 \(W.D. Wa. 2004\)](#) (holding that 512(i) does not require ISP to end service to everyone targeted by multiple take down notices since notices do not take alleged infringers' defenses into account), with [Perfect 10 v. CCBill, 340 F. Supp. 2d 1077, 1088 \(C.D. Cal. 2004\)](#) (assuming that subscriber must be disconnected whenever two or more notices are received by an ISP).

[FN96]. Accord Mark A. Lemley & R. Anthony Reese, [A Quick and Inexpensive System for Resolving Peer-to-Peer Copyright Disputes](#), 23 *Cardozo Arts & Ent. L.J.* 1, 14-15 (2005)

(proposing limitation of five years for banishment of "repeat infringers" from the Internet).

[FN97]. See also Sonia K. Katyal, *Privacy v. Piracy*, 7 *Yale J.L. & Tech.* 232 (2004-05) (arguing that 512 violates subscribers' privacy entitlements).

[FN98]. See, e.g., Dan B. Dobbs, *The Law of Torts* § 81, at 187 (West 2000) (stating that person attempting to repossess a chattel is liable for mistake, even reasonable mistake, about his greater right).

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