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Antibiotic Resistance

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Antibiotic Resistance

--- Jessica Litman[·]

Ten years ago, when I wrote *War Stories*,[1] copyright lawyers were fighting over the question whether unlicensed personal, noncommercial copying, performance or display would be deemed copyright infringement. I described three strategies that lawyers for book publishers, record labels, and movie studios had deployed to try to assure that the question was answered the way they wanted it to be. First, copyright owners were labeling all unlicensed uses as "piracy" on the ground that any unlicensed use might undermine copyright owners' control. That epithet helped to obscure the difference between unlicensed uses that invaded defined statutory exclusive rights and other unlicensed uses that might not be illegal. Second, copyright lobbyists insisted that Internet service providers and the makers of software or devices that allowed consumers to engage in unlicensed uses of copyrighted works had a legal obligation to act as copyright police. Finally, copyright owners had filed lawsuits against businesses that sought to exploit statutory gaps or legal privileges to make money from the unlicensed enjoyment of copyrighted works with the apparent goal of litigating those businesses into bankruptcy, whether or not their business models were actually illegal.

A decade later, those strategies have yielded mixed results. Dozens of new businesses have folded in the face of litigation. Napster, Limewire, Scour, Aimster, 321Studios, Sonic Blue, Zediva, Olga, Veoh, Bnetd.org, Puretunes.com, Bolt.com, LokiTorrent, Bleem!, and MP3Board are gone. Some of them hung on long enough to be litigated into dust. Napster, for example, managed to raise several defenses that the courts agreed merited further consideration. It persuaded the 9th Circuit that it should be permitted to show at trial that the safe harbor provisions in the Digital Millennium Copyright Act shielded it from

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[1] Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337 (2002).

liability.[2] Napster also convinced the district court that it should be able to conduct further discovery on the questions whether the record labels actually owned the recordings they claimed and whether their anticompetitive conduct in licensing digital distribution of their recordings constituted copyright misuse.[3] The trial never happened, of course. Napster ran out of money and shut down. Not satisfied with merely burying Napster, music publishers and labels sought to drive a stake through its heart: They filed a copyright infringement suit against the venture capital firm that had invested in Napster, claiming that it, too, should be held liable for the copyright infringements committed by 60,000 Napster users.[4]

In *MGM v. Grokster*, motion picture studios and record labels persuaded the Supreme Court that distributing peer-to-peer file sharing software with the intent that individuals use it to share copyrighted files over the Internet was itself unlawful, because its goal was to encourage individuals to infringe. A company that distributed file sharing software with the aim of promoting infringement, the Court ruled, could be held liable for deliberately inducing infringement.[5]

It would seem to follow that the file sharing itself is copyright infringement. No court has disagreed. The record labels filed tens of thousands of lawsuits against individual peer-to-peer file sharers between 2003 and 2008.[6] Most of the cases settled. A small handful

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[2] A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001). Section 512 of the Copyright Act allows Internet service providers to avoid liability both for infringing material stored on their servers at the instance of users and for links or other pointers to sites containing infringing material, so long as they remove the material or links when properly notified by the copyright owner. 17 U.S.C. § 512 (2006). Napster argued that it neither hosted nor transmitted infringing content; it merely provided links or pointers to copies of content on users' hard disks. Thus, it claimed, it qualified for the safe harbor in section 512(d) for information location tools. The court concluded that whether Napster could take advantage of the safe harbor raised issues that would need to be more fully developed at trial. 239 F.3d at 1025.

[3] In re Napster, Inc. Copyright Litigation, 191 F. Supp. 2d 1087 (N.D. Cal. 2002).

[4] UMG Recordings, Inc. v. Hummer-Winblad, 377 F. Supp. 2d 796 (C.D. Cal. 2005).

[5] 545 U.S. 913, 936-37 (2005).

[6] *See generally* Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J. (Dec. 19, 2008) http://online.wsj.com/article/SB122966038836021137.html; RIAA v. The People: 5 Years Later, ELECTRONIC FRONTIER FOUND. (Sept. 30, 2008), https://www.eff.org/wp/riaa-v-people-five-years-later.

went to trial, where defendants lost badly. Courts rebuffed defendants' arguments that their file sharing should be privileged as fair use or innocent infringement.[7] Where cases were tried to juries, labels succeeded in persuading jurors to hold defendants liable for hundreds of thousands of dollars in damages for willful infringement.[8] The question whether it is legal for individuals to share copies of copyrighted music or movies over peer-to-peer file sharing networks, then, appears to have been settled definitely in copyright owners' favor. Online copyright infringement, however, does not appear to have decreased.[9]

Shortly after its victory in *Grokster*, the recording industry floated the suggestion that peer-to-peer file sharing was not so dire a threat as consumers' unauthorized copying of CDs.[10] Strong copy-protection technology would be needed to protect music from consumers who ripped and burned CDs they bought from record stores.[11] Early efforts to protect recorded music with strong digital copy protection led to

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[7] *See, e.g.,* BMG Music v. Gonzalez, 430 F.3d 888, 889-91 (7th Cir. 2005); Maverick Recording v. Harper, 598 F. 3d 193 (5th Cir.), *cert. denied*, __ US __, 131 S. Ct. 590 (2010); Sony BMG Music Entm't v. Tenenbaum, 672 F. Supp. 2d 217 (D. Mass. 2009). See also Arista Records LLC v. Doe, 604 F.3d 110, 124 (2d Cir. 2010)(holding assertions of fair use privilege to use P2P insufficient grounds to quash subpoena seeking file sharer's identity).

[8] *See* Sony BMG Music Entm't v. Tennenbaum, http://www.ca1.uscourts.gov/pdf.opinions/10-1883P-01A.pdf (1st Cir. 2011) (discussing $675,000 jury verdict); Capitol Records v. Thomas-Rasset, 680 F. Supp. 2d 1045 (D. Minn. 2010) ($1.92 million jury verdict).

[9] *See, e.g.,* Cisco Visual Networking Index: Usage, CISCO 1 (Oct. 25, 2010), http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/Cisco_VNI_Usage_WP.pdf ("While still growing in absolute terms, P2P is growing more slowly than visual networking and other advanced applications."); Eduardo Porter, *Editorial, State of Play—The Perpetual War: Pirates and Creators*, N.Y. TIMES (Feb. 4, 2012) http://www.nytimes.com/2012/02/05/opinion/sunday/perpetual-war-digital-pirates-and-creators.html; Technical Report: An Estimate of Infringing Use on the Internet, ENVISIONAL 2-3 (January 2011), http://documents.envisional.com/docs/Envisional-Internet_Usage-Jan2011.pdf (Commissioned by NBC-Universal).

[10] Tom Zeller, Jr., *The Ghost in the CD*, N.Y. TIMES (Nov. 14, 2005), http://www.nytimes.com/2005/11/14/business/14rights.html (quoting Mitch Bainwol, chief executive of the RIAA); Mitch Bainwol, Chief Exec. Officer, Recording Indus. Ass'n of Am., Building a Brighter Future: Making AND Selling Great Music (August 12, 2005), *available at* http://dreadedmonkeygod.net/home/attachments/Bainwol.pdf.

[11] *See* Bainwol, *supra* note 10.

public relations disasters: some didn't work;[12] another worked too well, disabling personal computers and leading to FTC action and a recall of the protected disks.[13] The inadequacies of copyright protection technology turned out to matter less than one might have envisioned, because record stores had already begun to disappear.[14] A year after the *Grokster* decision, Tower Records filed for bankruptcy.[15] The company's assets were sold in liquidation, and the last Tower Records store closed before Christmas.[16] Musicland liquidated, selling its Sam Goody's record stores to Best Buy, which rebranded some of them as FYE stores and closed the rest. Virgin Megastore closed its stores in 2009.[17]

Did peer-to-peer file sharing kill the record stores? Did *Grokster* come too late to save them? Probably not. Other brick-and-mortar outlets for copyrighted works went out of business en masse at about the same time, even though there was no significant copyright piracy problem affecting their products. As the record stores closed down, for example, book stores began to vanish. First, beloved independent booksellers shut their doors;[18] then the Borders Group declared

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[12] *See, e.g., CD Crack: Magic Marker Indeed*, WIRED (May 20, 2002), http://www.wired.com/science/discoveries/news/2002/05/52665; Brij Khurana, *Halderman GS Sees Copy-Protection Flaw in New CDs*, DAILY PRINCETONIAN (Oct. 9, 2003), http://www.dailyprincetonian.com/2003/10/09/8785.

[13] *See* Press Release, Fed. Trade Comm'n, Sony BMG Settles FTC Charges (Jan. 30, 2007), *available at* http://www.ftc.gov/opa/2007/01/sony.shtm; J. Alex Halderman & Edward W. Felten, *Lessons from Sony CD DRM Episode*, HALDERMAN (Feb. 14, 2006), https://jhalderm.com/pub/papers/rootkit-sec06-full.pdf.

[14] *See, e.g., 40 Sad Portraits of Closed Record Stores*, BUZZFEED, http://www.buzzfeed.com/mjs538/40-sad-portraits-of-closed-record-stores.

[15] Yuki Noguchi, *A Broken Record Store*, WASH. POST (Aug. 23, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/08/22/AR2006082201350.html; *Tower Records Bankruptcy Heralds Industry Changes*, PBS NEWSHOUR (Aug. 23, 2006), http://www.pbs.org/newshour/bb/business/july-dec06/music_08-23.html.

[16] *See* Paul Farhi, *For Tower Records, End of Disc*, WASH. POST (Dec. 11, 2006) http://www.washingtonpost.com/wp-dyn/content/article/2006/12/10/AR2006121001003.html.

[17] Ben Sisario, *Retailing Era Closes with Music Megastore*, N.Y. TIMES (June 14, 2009) http://www.nytimes.com/2009/06/15/arts/music/15virgin.html.

[18] *See, e.g.,* Robert Weisman, *Wordsworth Books' Final Chapter Is Saturday*, BOSTON GLOBE, Oct. 27, 2004, at C.5, *available at* http://www.boston.com/ae/books/articles/2004/10/27/wordsworth_books_final_chapter_is_saturday; Thomas J. Lueck, *Coliseum Books to Close Permanently by Year's*

bankruptcy, ultimately liquidating all of its stores.[19] Newspapers shrank; some closed.[20] Video stores went out of business.[21] Copyright infringement had very little to do with any of this. Some of it was bad business judgment.[22] Some of it was bad business luck: not all business models made obsolete by digital technology had obvious substitutes.[23]

End, N.Y. TIMES (Oct. 3, 2006), http://www.nytimes.com/2006/10/03/nyregion/03coliseum.html; Mary Morgan, *Shaman Drum Bookshop to Close June 30*, ANN ARBOR CHRON. (June 9, 2009), http://annarborchronicle.com/2009/06/09/shaman-drum-bookshop-to-close-june-30; Michael Taylor, *Cody's, Landmark Berkeley Bookstore, Closes: Poor Sales Blamed for Cody's Demise*, S.F. CHRON. (June 23, 2008), http://articles.sfgate.com/2008-06-23/news/17165395_1_telegraph-avenue-uc-berkeley-cody-s-owner; Ethan Wilensky-Lanford, *Wall-to-Wall Books, and All of Them for the Landlord*, N.Y. TIMES (May 23, 2007), http://www.nytimes.com/2007/05/23/nyregion/23gotham.html.

[19] Mike Spector & Jeffrey A. Trachtenberg, *Borders Forced to Liquidate, Close All Stores*, WALL ST. J. (July 19, 2011), http://online.wsj.com/article/SB10001424052702303661904576454353768550280.html.

[20] *E.g.*, Lee C. Bollinger, *Journalism Needs Government Help*, WALL ST. J. (July 14, 2010), http://online.wsj.com/article/SB10001424052748704629804575324782605510168.html.

[21] *E.g.*, *Hollywood Video Stores to Close*, BUS. J. (May 11, 2010, 1:01 AM), http://www.bizjournals.com/milwaukee/stories/2010/05/10/daily22.html. Netflix probably contributed an enormous amount to the video stores' demise by coming up with a more attractive business model that competed with the brick-and-mortar stores on convenience, price and selection. Copyright owners may have resented Netflix for its efficient exploitation of the first sale doctrine codified in 17 U.S.C. § 109 (2006), *see* Brooks Barnes, *A Bid to Get Film Lovers Not to Rent*, N.Y. TIMES (Nov. 11, 2011), http://www.nytimes.com/2011/11/12/business/media/with-flixster-studios-bet-consumers-will-buy-movies-again.html, but there was nothing infringing about its video-rental business.

[22] Book publishers' decisions to set retail book prices high enough to allow online booksellers to make a profit while offering forty percent discounts and free shipping seems, at least in retrospect, to have been shortsighted. In his book Ripped, music critic Greg Kot argues that part of the decline of CD sales in the early twenty-first century should, similarly, be blamed on extravagant increases in CD retail prices. See GREG KOT, RIPPED: HOW THE WIRED GENERATION REVOLUTIONIZED MUSIC 45-47 (2009).

[23] Newspapers have relied for centuries on a business model that bundled journalism with classified ads; they were able to charge little or nothing for subscriptions because they could sell their readers' eyeballs to advertisers. The introduction of Craigslist and similar sites made the bundle an inefficient alternative for classified advertising; without the subsidy of classified ads, though, newspapers lost money.

The relentless litigation, though, did have the effect of temporarily clearing the field of pesky unlicensed startups in the digital music, ebook, and online video businesses, presumably making room for record labels, book publishers and movie studios to introduce their own versions. More on that in a minute.

Not all of the lawsuits were as successful. In 2001, literary agent Arthur Klebanoff started Rosetta Books, an independent ebook publisher. Rosetta licensed the ebook rights to popular older novels from their authors, and made the novels available in ebook format. The day after Rosetta's website went live, Random House filed a federal copyright infringement suit, claiming that as publisher of the original books, it owned the ebook rights.[24] The courts disagreed.[25] When an Internet service provider invited real estate agents to post listings on its website, a national real estate information provider filed suit, claiming that it owned the copyright in the images of properties for sale. The court held that the service provider was not liable for infringement.[26] Record labels failed to persuade courts that Launchcast's music streaming service, which allowed listeners to create personalized playlists, exceeded the scope of the statutory webcasting license.[27] Several cases settled with defendant businesses' continuing to engage in their allegedly infringing activities. Marvel Comics backed down from its suit against NC Soft over its online game *City of Heroes.*[28] A massive class action against Google for making digital copies of library books has been mired in complexity. The parties would prefer a settlement to continued litigation, but have been

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[24] *Reader's CHOICE: Despite the Limited Selection, e-books are Taking off at Libraries, Universities and Online Retailers*, NEWSDAY (New York), July 11, 2001, at C10.

[25] Random House, Inc. v. Rosetta Books LLC, 150 F. Supp. 2d 613 (S.D.N.Y. 2001), *aff'd*, 283 F.3d 490 (2d Cir. 2002). Random House nonetheless claims that, notwithstanding the decision, it owns the ebook rights to all of its backlist books. *See* Jeffrey A. Trachtenberg, *Random House Lays Claim to e-Book Rights*, WALL ST. J. (Dec. 13, 2009), http://online.wsj.com/article/SB10001424052748704121504574594113096154756.html.

[26] CoStar Group, Inc. v. Loopnet, Inc., 373 F.3d 544 (4th Cir. 2004), aff'g 164 F. Supp. 2d 688 (D. Md. 2001).

[27] Arista Records, LLC v. Launch Media, Inc., 578 F.3d 148 (2d Cir. 2009).

[28] Press Release: Marvel Entertainment, Inc., NCsoft Corporation, NC Interactive, Inc., Cryptic Studios, Inc. Settle All Litigation (December 14, 2005), *available at* http://us.ncsoft.com/en/news/press-releases/marvel-entertai.html; *see* Marvel Enterprises v. NCSoft Corp., No. CV 04-9253-RGK (C.D. Cal. March 2, 2005).

unable to agree on settlement terms that the court would find to be "fair, adequate and reasonable."[29] Meanwhile, Google continues to digitize the books.[30] Long-running lawsuits filed by content owners against Google[31] and Amazon.com[32] for inducing copyright infringement on the *Grokster* model have so far resulted in court rulings that favor defendants more than plaintiffs. Still, the overall success of the music, movie and other content industries in persuading courts to endorse a broad interpretation of their copyright rights was impressive. Although consumers apparently didn't significantly reduce their online copyright infringement, the lawsuits did a pretty good job of discouraging new businesses designed to profit from it.

Medical experts tell us that powerful antibiotics are highly effective in killing off both good and bad bacteria, but at a significant risk. Bugs that survive the treatment grow bigger, stronger, and resistant to antibiotics. They become much more dangerous because they are so much harder to kill.[33] Indiscriminate litigation against new entrants into the entertainment and information marketplace killed off a broad swathe of potential competitors and partners. The ones who were left, though, faced a less crowded field because old media had helpfully cleared it for them. The music, movie, and book publishing businesses no doubt expected to take advantage of the opening themselves, but discovered significant difficulties in doing it well.

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[29] The Authors Guild v. Google, Inc., 770 F. Supp. 2d 666, 669 (S.D.N.Y. 2011).

[30] Kim Armstrong, *One Million Books Scanned and Returned to CIC University Libraries*, INSIDE GOOGLE BOOKS BLOG (Feb. 4, 2011), http://booksearch.blogspot.com/2011/02/one-million-books-scanned-and-returned.html. This past September, frustrated by the stalemate, the Authors Guild filed a related lawsuit against some of Google's university library partners. Authors Guild v. Hathi Trust, No. 1:2011cv06351 (S.D.N.Y., filed Sept. 12, 2011). *See also* James Grimmelmann, *The Orphan Wars*, LABORATORIUM (Sept. 12, 2011), http://laboratorium.net/archive/2011/09/12/the_orphan_wars.

[31] *E.g.*, Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007); Viacom Int'l, Inc. v. YouTube, Inc., 718 F. Supp. 2d 514 (S.D.N.Y. 2010).

[32] *Perfect 10*, 508 F. 3d 1146.

[33] *See, e.g.*, About Antimicrobial Resistance: A Brief Overview, CENTER FOR DISEASE CONTROL AND PREVENTION (July 22, 2010), http://www.cdc.gov/drugresistance/about.html; Antibiotic Resistance Questions and Answers, CENTER FOR DISEASE CONTROL AND PREVENTION (June 30, 2009), http://www.cdc.gov/getsmart/antibiotic-use/anitbiotic-resistance-faqs.html; Kate Murphy, *In Some Cases, Even Bad Bacteria May Be Good*, N.Y. TIMES (Oct. 31, 2011), http://www.nytimes.com/2011/11/01/health/scientist-examines-possible-link-between-antibiotics-and-obesity.html.

As it vanquished start-up businesses through strenuous litigation, the music industry made some tentative and not especially successful forays into digital music.[34] Sony Music was first, with a clunky website that permitted tethered download of a limited selection of copy-protected files for $3.49 per track. The service was widely panned, even after Sony lowered its prices.[35] In 2001, two major labels formed an unsuccessful joint venture with AOL and Real Networks to offer paid music subscription services through online retail partners. They christened their venture "MusicNet."[36] In 2002, major labels launched PressPlay, a money-losing music subscription service widely criticized for low-quality audio, limited selection, and unfriendly licensing restrictions.[37] PressPlay wouldn't license its music to MusicNet; MusicNet wouldn't license its music to PressPlay.[38] Neither

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[34] *See, e.g.*, Dawn C. Chmielewski, *Fee-Based Online Music Services Sing the Blues*, SAN JOSE MERCURY NEWS, Dec. 2, 2002, at 1A.

[35] *See* Steve Jones, *Major Labels Hop on Lumpy Gravy Train: They Distort Ideal Ease of Downloading*, USA TODAY, Nov. 1, 2000, at 3D; Amy Kover, *Napster: The Hot Idea of the Year Lawsuits May Kill Napster, but the Concept Behind the Company Could Revolutionize Infotech and Reinvigorate the PC Industry*, FORTUNE MAG. (June 26, 2000), http://money.cnn.com/magazines/fortune/fortune_archive/2000/06/26/283031/index.htm.

[36] *See* Don Davis, *Record Giants, AOL and RealNetworks Form MusicNet*, INTERNET RETAILER (Apr. 2, 2001, 12:00 AM), http://www.internetretailer.com/2001/04/02/record-giants-aol-and-realnetworks-form-musicnet. MusicNet was chronically short of cash. Consumers hated it, and, a few years later, the labels sold their stake. *See* Saul Hansell, *Private Investment Firm Buys MusicNet Venture*, N.Y. TIMES (Apr. 5, 2005), http://www.nytimes.com/2005/04/13/business/media/13net.html.

[37] *E.g.*, Dan Tynan, *The 25 Worst Tech Products of All Time*, PCWORLD (May 26, 2006), http://www.pcworld.com/article/125772-3/the_25_worst_tech_products_of_all_time.html.

[38] Devin Leonard, *Songs in the Key of Steve: Steve Jobs May Have Just Created the First Great Legal Online Music Service. That's Got the Record Biz Singing His Praises*, CNN MONEY (May 12, 2003), http://money.cnn.com/magazines/fortune/fortune_archive/2003/05/12/342289/index.htm. The two services may have had antitrust law worries about cooperating rather than competing. *See* In re Napster, Inc. Copyright Litigation, 191 F. Supp. 2d 1087 (N.D. Cal. 2002). Both services eventually permitted subscribers to downloaded copy-protected versions of a limited number of songs, but allowed subscribers to listen to them only so long as they continued to pay monthly subscription fees. *See* Peter Burrows, Ronald Grover & Tom Lowry, *Steve Jobs, the Music Man*, BUSINESSWEEK (Apr. 18, 2003), http://www.businessweek.com/technology/content/apr2003/tc20030418_9975.htm.

service attracted a significant subscriber base. Nor did either service generate significant royalties for recording artists.[39] When Napster shut down, Roxio bought its service marks and logos in a bankruptcy liquidation auction, purchased PressPlay from the labels, and rebranded PressPlay as Napster 2.0.[40] Meanwhile, in 2001, Listen.com had rolled out Rhapsody, a competing music streaming service featuring recordings from independent labels. Over the next year, Rhapsody secured licenses from the five major labels.[41] Journalists praised the service,[42] but it struggled financially.[43]

In 2003, Apple launched the iTunes store, offering customers the opportunity to purchase copy-protected downloads of recorded music for 99¢ per track.[44] Initially, the iTunes Store worked only with Macintosh computers, which had a three percent share of the worldwide computer market. Record labels described the launch of the iTunes music store as an experiment; Apple's tiny market share

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[39] *See* Neil Strauss, *Record Labels' Answer to Napster Still Has Artists Feeling Bypassed*, N.Y. TIMES (Feb. 18, 2002), http://www.nytimes.com/2002/02/18/arts/record-labels-answer-to-napster-still-has-artists-feeling-bypassed.html.

[40] Jim Hu, *PressPlay Bid Points to Napster Remix*, CNET NEWS (May 19, 2003, 8:29 AM), http://news.cnet.com/Pressplay-bid-points-to-Napster-remix/2100-1027_3-1007516.html. The rebranded service never caught on. A year later, Roxio spun Napster off; it struggled. In 2008, it sold itself to Best Buy. Napster continued to lose subscribers. Three years later, Best Buy sold Napster to Rhapsody. *See Best Buy Gets Back to Basics, Exits Mobile Music Biz with Napster Sale*, FORBES (Oct. 17, 2011, 11:44 AM), http://www.forbes.com/sites/greatspeculations/2011/10/17/best-buy-gets-back-to-basics-exits-mobile-music-biz-with-napster-sale.

[41] *See* Amy Harmon, *Copyright Hurdles Confront Selling of Music on the Internet*, N.Y. TIMES (Sept. 23, 2002), http://www.nytimes.com/2002/09/23/business/copyright-hurdles-confront-selling-of-music-on-the-internet.html.

[42] *E.g.*, Tom Di Nome, *Basics; You Listen, You Pay: Post-Napster Music Services*, N.Y. TIMES (Mar. 7, 2002), http://www.nytimes.com/2002/03/07/technology/basics-you-listen-you-pay-post-napster-music-services.html; Jefferson Graham, *Money-to-Burn Rhapsody Is Music to Consumers' Ears*, USA TODAY, (Feb. 25, 2003), http://www.usatoday.com/tech/webguide/internetlife/notablesites/2003-02-25-rhapsody_x.htm.

[43] *See* John Borland, *Listen.com Sings Solo Tune*, CNET NEWS (Jan. 28, 2002, 1:45 PM), http://news.cnet.com/Listen.com-sings-solo-tune/2100-1023_3-824502.html; Graham, *supra* note 42.

[44] Edward C. Baig, *At the iTunes Music Store, Shopping Is a Breeze*, USA TODAY (Apr. 29, 2003, 9:03 PM), http://www.usatoday.com/tech/columnist/edwardbaig/2003-04-29-itunes_x.htm; John Borland, *Apple Unveils Music Store*, CNET NEWS (Apr. 28, 2003, 12:16 PM), http://news.cnet.com/Apple-unveils-music-store/2100-1027_3-998590.html.

made it a pilot project with relatively low stakes.[45] The experiment was fabulously successful: in its first week, the iTunes music store sold more than a million tracks. By the end of the year, Apple had introduced a Windows-compatible version, and sold more than 25 million songs.[46] In 2005, it added video and movies.

The content owners' insistence on copy protection initially worked to Apple's advantage. Its iPod line was by far the market leader in portable digital music players. Music purchased from the iTunes store could play on iPods but not on Rios, Zens, or Zunes. Music downloaded from Napster could be played on a Rio or a Nomad, but not on an iPod.[47] Rhapsody limited its service to music streaming, and did not offer downloads at all until 2005; those downloads initially played only on a handful of portable players. Customers who wanted to play music on their iPods faced the choice of ripping their own CDs, downloading MP3 files from peer-to-peer networks, or buying tracks from iTunes. Apple quickly became the leading music retailer in the United States.

Apple's unexpected dominance in the music download market made record labels uncomfortable.[48] Labels resented Apple's insistence on setting a flat ninety-nine cent price for all downloads. They wanted the option to control the price of their product. Apple's iTunes had become too big for them to simply withdraw their recordings in favor of other services. The labels hoped, though, that the cellular telephone market would allow them to forge more advantageous partnerships.[49] (Apple would soon dash those hopes by

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[45] John Borland, *Apple's Music: Evolution, Not Revolution*, CNET News, (Apr. 29, 2003, 4:00 AM) http://news.cnet.com/Apples-music-Evolution%2C-not-revolution/2100-1027_3-998675.html ("Label executives privately say the Apple service is an experiment, which could be expanded if it proves successful. Apple's small market share means that the stakes are relatively low. 'It's a test, with a small subset of consumers,' one label executive said.").

[46] *E.g.*, Theresa Howard, *Ads for iPods Offer Big Music in Small Package*, USA TODAY (Jan. 5, 2004, 3:11 AM), http://www.usatoday.com/tech/news/2004-01-05-ipod_x.htm.

[47] See Portable Devices Compatible With Napster, NAPSTER, http://web.archive.org/web/20041213024911/http://www.napster.com/compatible_devices/ (archived Dec. 13, 2004).

[48] *See* John Borland, *Music Moguls Trumped by Steve Jobs?*, CNET NEWS (Apr. 15, 2005, 4:00 AM), http://news.cnet.com/Music-moguls-trumped-by-Steve-Jobs/2100-1027_3-5671705.html.

[49] *Id.*

introducing an iPhone.[50]) Competing music services, meanwhile, claimed that Apple should be forced to license its copy protection to other music services and to manufacturers of competing portable players.[51] RealNetworks, now the owner of Rhapsody, released software to make Rhapsody downloads iPod-compatible;[52] Apple promptly redesigned its software so that the hack wouldn't work.[53] Customers complained; some sued.[54]

Apple reconsidered the benefits of copy protection. At least in the music business, it had probably gained most of the competitive advantage offered by the incompatibility of music files purchased from competing services with its popular player. In February of 2007, Steve Jobs announced that he hoped to get rid of copy protection on iTunes music.[55] In April, iTunes announced a deal to sell tracks from EMI in a higher quality format, at a premium price, and without copy protection.[56] Still uncomfortable with Apple's dominant market position, EMI and Vivendi licensed their music to Amazon.com; that fall, Amazon.com opened its MP3 store, selling digital downloads of

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[50] *See* Fred Vogelstein, *The Untold Story: How iPhone Blew up the Wireless Industry*, WIRED, (Jan. 9, 2008), http://www.wired.com/gadgets/wireless/magazine/16-02/ff_iphone.

[51] *See* Editorial, The Digital Divide, N.Y. TIMES (Aug. 26, 2004), http://www.nytimes.com/2004/08/26/opinion/26thurs3.html.

[52] Eric Bangeman, *RealNetworks Cracks the Fairplay Code*, ARS TECHNICA (July 26, 2004, 2:37 AM), http://arstechnica.com/old/content/2004/07/4030.ars.

[53] Peter Cohen, *RealNetworks Promises Ipod Fix*, PCWORLD (Dec. 16, 2004, 9:00 AM), http://www.pcworld.com/article/118975/realnetworks_promises_ipod_fix.html.

[54] The Apple iPod iTunes Antitrust Litigation, No. 5:2005-cv00037 (N.D. Cal. Jan. 3, 2005); Pamela MacLean and Karen Gullo, *Apple's Jobs Must Answer Questions in iTunes Antitrust Suit*, BLOOMBERG (Mar. 22, 2011, 3:14 PM), http://www.bloomberg.com/news/2011-03-22/apple-s-jobs-must-answer-questions-in-itunes-antitrust-dispute.html; Jim Wagner, *Apple Hit by Lawsuit*, INTERNETNEWS.COM (Jan. 6, 2005), http://www.internetnews.com/bus-news/article.php/3455431.

[55] *E.g.*, Cory Doctorow, *Will Steve Jobs Drop iTunes DRM in a Heartbeat?*, BOINGBOING (Feb. 6, 2007, 9:06 PM), http://boingboing.net/2007/02/06/will-steve-jobs-drop.html.

[56] See Jim Dalrymple, *Apple, EMI Offer Higher-Quality, DRM Free Downloads*, MACWORLD (Apr. 2, 2007, 3:00 AM), http://www.macworld.com/article/57098/2007/04/drmfree.html.

music without any copy protection at all, and undercutting iTunes's price.[57]

Meanwhile, the owners of video programming found Apple's dominance as a seller of online video as unnerving as the labels had.[58] NBC grumbled that the revenues it had earned from iTunes sales of its content were paltry, and insisted that it should get more control over the price of video downloads of its content and a share of the revenue Apple earned from iPod sales.[59] Apple refused. NBC announced that it would withdraw its programming from iTunes at the end of the current contract, and would instead launch its own advertising-supported subscription streaming video-on-demand service in partnership with Fox at Hulu.com. Apple responded that it would stop carrying new NBC television programming four months earlier, at the

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[57] See Keith Regan, *Amazon Pounces on iTunes with MP3 Store*, ECOMMERCE TIMES, (Sept. 25, 2007, 2:57 PM), http://www.ecommercetimes.com/story/59498.html. In 2010, book publishers adopted a similar strategy to gain leverage over Amazon.com. Amazon.com insisted on setting ebook prices substantially below the prices of hardcover and paperback books. Publishers believed those prices were too low, and resented Amazon.com's resistance to raising them. Publishers responded to the impasse by negotiating ebook licenses with Apple that permitted the publishers to set ebook prices. They then threatened to withdraw their ebooks from Amazon.com unless it agreed to adopt the same pricing terms. Amazon.com capitulated. See Motoko Rich & Brad Stone, *Publisher Wins Fight with Amazon over E-Books*, N.Y. TIMES (Jan. 31, 2010), http://www.nytimes.com/2010/02/01/technology/companies/01amazonweb.html; Motoko Rich, *Publishers Win a Bout in E-Book Price Fight*, N.Y. TIMES (Feb. 8, 2010), http://www.nytimes.com/2010/02/09/books/09google.html. Both the United States Justice Department and the European Commission have announced investigations to determine whether the ebook pricing deal between book publishers and Apple violated antitrust laws. *U.S., European Regulators look at E-Books*, REUTERS (Dec. 7, 2011, 5:27 p.m.), http://www.reuters.com/article/2011/12/07/us-ebooks-antitrust-idUSTRE7B62BX20111207.

[58] Joshua Chaffin, *NBC Chief Warns over iTunes Pricing*, FINANCIAL TIMES (London), Oct. 30, 2007, at 17, *available at* ProQuest ID 1374619611; Cliff Edwards, *I Want My iTV*, BUSINESSWEEK (Nov. 19, 2007), http://www.businessweek.com/magazine/content/07_47/b4059401.htm.; Katie Marsal, *NBC Chief Says Apple "Destroyed" Music Pricing*, APPLEINSIDER, (Oct. 29, 2007, 5:00 PM), http://www.appleinsider.com/articles/07/10/29/nbc_chief_says_apple_destroyed_music_pricing.html.

[59] *See* Tom Krazit, *Report: NBC Wanted a Cut of iPod Revenue*, CNET NEWS (Oct. 29, 2007 4:15 p.m.), http://news.cnet.com/8301-13579_3-9806737-37.html; Michael Learmonth, *Zucker Says Apple Deal Rotten*, VARIETY (Oct. 29, 2007, 7:34 a.m.), http://www.variety.com/article/VR1117974910.

beginning of the new season.[60] The divorce generated tons of news coverage,[61] but lasted only a year before NBC returned to iTunes on Apple's terms.[62] Meanwhile, NBC had launched Hulu.com.[63] Hulu was, and has continued to be, modestly successful. It didn't make money in its initial years, but it attracted a growing base of subscribers and advertisers. But Hulu had to contend with a variety of other video-streaming sites, some licensed and others unlicensed, which had gotten to the market before it.

At the same time as Apple was establishing dominance in the video download market, AOL, MSN and RealNetworks rolled out subscription-based streaming of television clips.[64] Meanwhile, small start-ups were launching video-streaming sites based on user-uploaded videos.[65] Vimeo appeared in 2004 and began accepting video uploads in May of 2005.[66] YouTube[67] and Veoh[68] launched in 2005.

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[60] Natalie Finn, *NBC Gets a Download of Itself*, E! ONLINE (Sept. 19, 2007, 9:28 PM), http://www.eonline.com/news/nbc_gets_download_of_itself/56222; Brian Garrity, *Apple Peels back NBC-iTunes Deal*, N.Y. POST (Sept. 1, 2007, 5:00 AM), http://www.nypost.com/p/news/business/item_S349t7msmCO7HOqdr0XXzM.

[61] *E.g.*, Frank Ahrens, *Apple in a Fight for Rights to TV Shows*, WASH. POST (Oct. 25, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/10/24/AR2007102402410.html; Brooks Barnes, *NBC Will Not Renew iTunes Contract*, N.Y. TIMES (Aug. 31, 2007), http://www.nytimes.com/2007/08/31/technology/31NBC.html.

[62] Brian Stelter, *NBC Shows Will Return to iTunes*, N.Y. TIMES BLOG, (Sept. 9, 2008, 2:46 PM), http://mediadecoder.blogs.nytimes.com/2008/09/09/nbc-shows-will-return-to-itunes.

[63] Michael Learmonth, *NBC, News Corp Unveil Hulu.com*, VARIETY (Oct. 28, 2007, 11:00 PM), http://www.variety.com/article/VR1117974896?refCatId=1009; Brad Stone, *Testing Over, Hulu.com to Open its TV and Film Offerings this Week*, N.Y. TIMES, (Mar. 11, 2008), http://www.nytimes.com/2008/03/11/business/media/11hulu.html.

[64] Mark Berniker, *Microsoft Debuts Free MSN Video Service*, INTERNETNEWS.COM (Oct. 14, 2003), http://www.internetnews.com/ec-news/article.php/3091691.

[65] *See, e.g.*, Scott Kirsner, *Video Stars a la Internet*, N.Y. TIMES (Oct. 28, 2005), http://www.nytimes.com/2005/10/28/technology/28iht-ptvideo29.html; *Video That's Languishing? Put it on the Net Instead*, N.Y. TIMES (Jan. 24, 2006), http://www.nytimes.com/2006/01/24/business/worldbusiness/24iht-video.html.

[66]About Vimeo, VIMEO, http://web.archive.org/web/20050525004247/http://www.vimeo.com/doc=about (archived May 24, 2005); WTF, BLUMPY http://web.archive.org/web/20041229045901/http://www.blumpy.org/vimeo/?page=wtf (archived Dec. 29, 2004).

[67] Ben Ratliff, *A New Trove of Music Video in Web's Wild World*, N.Y. TIMES (Feb. 3, 2006), http://www.nytimes.com/2006/02/03/arts/music/03yout.html.

The same year, Google augmented its video search engine with the opportunity to upload videos.[69] Bloggers started vlogging.[70] Photo-sharing sites like Photobucket added video capability.[71] Grouper.com,[72] Bolt,[73] and others joined in. By July, c|Net journalist Greg Sandoval reported that more than 150 video sharing sites had cropped up in the past year.[74]

Within months, YouTube became the web's most popular video destination,[75] and attracted its first copyright infringement suit.[76]

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[68] Veoh Frequently Asked Questions, VEOH, http://web.archive.org/web/20051024082435/http://www.veoh.com/about/faq.php (archived Oct. 24, 2005).

[69] Susan Kuchinskas, *Lights, Camera, Google*, INTERNETNEWS.COM (Apr. 14, 2005), http://www.internetnews.com/ec-news/article.php/3497926. Yahoo!, MSN, and AOL followed in 2006. *See* Alexandra DeFelice, *AOL to Launch Free Video-Sharing Portal*, TECHNEWSWORLD (July 31, 2006, 2:26 PM), http://www.technewsworld.com/story/52123.html; *Microsoft Puts up Own Viral-Video Website*, FOXNEWS.COM, (Sept. 19, 2006), http://www.foxnews.com/story/0,2933,214556,00.html; Yahoo! Video, YAHOO!, , http://web.archive.org/web/20060811014031/http://video.yahoo.com (archived Aug. 11, 2006).

[70] Katie Dean, *Blogging + Video = Vlogging*, WIRED (July 13, 2005), http://www.wired.com/entertainment/music/news/2005/07/68171.

[71] Photobucket Home, PHOTOBUCKET, http://web.archive.org/web/20060414162428/http://photobucket.com (archived Apr. 14, 2006).

[72] *See What Is Grouper?*, GROUPER, http://web.archive.org/web/20060206060647/http://www.grouper.com/about/what.aspx (archived Feb. 6, 2006).

[73] *See Why Join Bolt?*, BOLT, http://web.archive.org/web/20060215081933/http://www.bolt.com/siteinfo/whyjoin.jsp (archived Feb. 15, 2006).

[74] Greg Sandoval, *YouTube Dances the Copyright Tango*, CNET NEWS (July 24, 2006, 9:22 AM), http://news.cnet.com/2100-1025-6097365.html.

[75] Michael Liedtke, *Video-Sharing Site YouTube.com Tests Boundaries*, SEATTLE TIMES (Apr. 10, 2006, 12:00 AM), http://seattletimes.nwsource.com/html/businesstechnology/2002921750_youtube10.html; Richard McManus, *YouTube Nearly Doubles Traffic in May*, READWRITEWEB (June 27, 2006), 11:38 PM, http://www.readwriteweb.com/archives/youtube_nearly.php; *YouTube Serves Up 100 Million Videos a Day Online*, USATODAY (July 16, 2006, 9:56 PM), http://www.usatoday.com/tech/news/2006-07-16-YouTube-views_x.htm;.

[76] Tur v. YouTube, Inc., 2007 WL 1893635 (C.D. Cal. 2007), *appeal dismissed*, 562 F.3d 1212 (9th Cir. 2009); see Eric Berkowitz, *Lawsuit Accuses Video Website YouTube of*

Critics denounced it as a business based on stealing other people's content.[77] Billionaire investor Mark Cuban predicted that its copyright violations would soon lead to its being "sued into oblivion."[78] Just like those other pesky startups. YouTube sought licenses from media companies, but rights holders were skeptical.[79] YouTube, after all, wasn't actually making any money it could share. Warner Music struck a deal first; Sony BMG and Vivendi followed. The deals gave the labels equity stakes in YouTube[80] and an opportunity to choose either to block uploaded content incorporating their recordings or to share revenue from ads served alongside it.[81] As some cynical observers noted at the time, structuring the licensing deal as an equity stake enabled the labels to shelter the proceeds from obligations to pay royalties to artists and composers.[82] Then Google bought YouTube for

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Copyright Infringement, USATODAY (July 18, 2006, 8:20 PM), http://www.usatoday.com/tech/news/2006-07-18-youtube-suit_x.htm.

[77] *See, e.g.*, Jason Calacanis, *Building a Business Based on Copyright Infringement (or, "Bad Business Idea #487")*, CALCANIS.COM (Feb. 3, 2006), http://calacanis.com/2006/02/03/building-a-business-based-on-copyright-infringement; Olga Kharif, *Sour Musical Notes on YouTube, MySpace*, BUSINESSWEEK (Sept. 18, 2006), http://www.businessweek.com/technology/content/sep2006/tc20060918_148703.htm; Michael Liedtke, *Now Starring on the Internet: YouTube.com*, USATODAY (Apr. 9, 2006, 5:35 PM), http://www.usatoday.com/tech/news/techinnovations/2006-04-09-youtube-popularity_x.htm; *YouTube in Copyright Cross Hairs?*, WIRED (Sept. 14, 2006), http://www.wired.com/techbiz/media/news/2006/09/71791.

[78] *Mark Cuban: Only a "Moron" Would Buy YouTube*, FOXNEWS.COM (Sept. 30, 2006), http://www.foxnews.com/story/0,2933,216714,00.html; *see also* Mark Cuban, *Some Thoughts on YouTube and Google*, BLOG MAVERICK (Oct. 7, 2006, 2:46 AM), http://blogmaverick.com/2006/10/07/some-thoughts-on-youtube-and-google ("The copyright shit is going to hit the lawsuit fan.").

[79] *See* Don Jeffrey Bloomberg, *Warner Music, YouTube Cut Music-Video Deal*, USATODAY (Sept. 19, 2006, 12:39 AM), http://www.usatoday.com/money/media/2006-09-19-youtube-bloomberg_x.htm.

[80] Andrew Ross Sorkin & Jeff Leeds, *Music Companies Grab a Share of the YouTube Sale*, N.Y. TIMES (Oct. 19, 2006), http://www.nytimes.com/2006/10/19/technology/19net.html.

[81] *E.g.*, Catherine Holahan, *YouTube's New Deep Pockets*, BUSINESSWEEK (Oct. 10, 2006), http://www.businessweek.com/technology/content/oct2006/tc20061010_083340.htm.

[82] *See* Nicholas Carr, *Shaft the Piano Player*, ROUGH TYPE (Oct. 30, 2006), http://www.roughtype.com/archives/2006/10/shaft_the_piano.php; Don Dodge, *Details of the YouTube Deal*, DON DODGE ON THE NEXT BIG THING (Oct. 31, 2006), http://dondodge.typepad.com/the_next_big_thing/2006/10/details_of_the_.html.

1.6 billion dollars worth of Google stock. The purchase persuaded entertainment behemoth Viacom, which was dissatisfied with the negotiations, to stop bargaining and sue for copyright infringement.[83] A music publisher and British sports league followed, filing a class action copyright suit two months later.[84] Those suits are ongoing, but have not so far gone well for plaintiffs.

By January 2009, NBC's Hulu attracted 24 million viewers per month.[85] Hulu had added content from other television networks and a major record label; it had persuaded Disney to join the partnership; and it would shortly announce the debut of a paid subscription version of the site.[86] That same month, 100 million viewers watched video on You Tube.[87] Hulu is doing just fine,[88] but it has yet to challenge YouTube for dominance in the online streaming video market. In the summer of 2011, Hulu put itself up for sale.[89] Apparently, nobody wanted to buy it; the owners announced in October that they had reconsidered their plans.[90] In November of 2011, the U.S. movie

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[83] Viacom Int'l Inc. v. YouTube, Inc., 718 F. Supp. 2d 514 (S.D.N.Y. 2010); *see, e.g.*, Candace Lombardi, *Week in Review: YouTube Honeymoon over for Google*, CNET NEWS (Mar. 16, 2007, 11:00 AM), http://news.cnet.com/Week-in-review-YouTube-honeymoon-over-for-Google/2100-1083_3-6167957.html.

[84] The Football Ass'n Premier League Ltd. v. YouTube, Inc., 633 F. Supp. 2d 159 (S.D.N.Y. 2009).

[85] Jason Kilar, *365 Days and Counting: Hulu Launched Publicly One Year Ago Today*, HULU BLOG (Mar. 12, 2009), http://blog.hulu.com/2009/03/12/one-year-anniversary/.

[86] Claire Atkinson, *Chase Carey: Hulu to Charge in 2010*, BROADCASTING AND CABLE (Oct. 21, 2009), http://www.broadcastingcable.com/blog/ADverse_Atkinson_on_Advertising/23941-Chase_Carey_Hulu_to_Charge_in_2010.php.

[87] Chloe Albanesius, *Jan. YouTube Viewers Exceed 100M for First Time*, PC MAG. (Mar. 8, 2009, 4:05 PM), http://www.pcmag.com/article2/0,2817,2342533,00.asp.

[88] *See* Brian Stelter, Hulu, *Billed as Tomorrow's TV, Looks Boxed in*, N.Y. TIMES (July 23, 2011), http://www.nytimes.com/2011/07/24/business/media/hulu-billed-as-tomorrows-tv-looks-boxed-in-today.html.

[89] *See id.*

[90] Sam Schechner, *Hulu Puts Owners in New Quandary*, WALL ST. J. (Oct.17, 2011), http://online.wsj.com/article/SB10001424052970204346104576635312926644524.html.

industry rolled out its latest initiative, dubbed "Ultraviolet."[91] Early reviews have ranged from skeptical to scathing.[92]

The upshot of copyright owners' scorched earth litigation strategy is that it temporarily cleared the field, making room both for tepid, content-industry-controlled efforts to distribute music, books, and video online, and for new entrants with the stamina and resources to survive copyright infringement suits. Apple, Amazon, and Google took advantage of that environment to grow into dominant distributors who have become obligatory partners for any serious online content distribution plan, and who insist on calling the shots on price, format, and other matters that content owners believe should rightfully be their decisions. Had copyright owners exercised more restraint, they might have tolerated start-ups long enough to permit them to explore and develop new markets and gain modest footholds. At that point, big media would have had the opportunity to purchase or grant favorable licenses to the ones it liked best, while discouraging any of them from achieving the sort of dominant market position that makes it difficult for copyright owners to exercise their bargaining power. Instead, copyright owners litigated a bunch of promising companies into liquidation, leaving a small number of very strong players who can insist on doing business on terms that suit them. Book publishers, record labels and film companies have had some modest success in playing Apple, Amazon and Google off of one another,[93] but less success in competing with them with businesses structured to suit content owners' preferences.

Frustrated with the results of the litigation campaign, some copyright owners have returned their attention to the effort to force

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[91] *See* Ultraviolet Home, http://www.uvvu.com/ (last visited Jan. 6, 2012).

[92] *See, e.g.*, Brooks Barnes, *A Bid to Get Film Lovers Not to Rent*, N.Y. TIMES (Nov. 11, 2011), http://www.nytimes.com/2011/11/12/business/media/with-flixster-studios-bet-consumers-will-buy-movies-again.html; Casey Johnston, *Your Movie on Every Platform, Sort of, for a While: How the New UltraViolet DRM Fails*, ARS TECHNICA (Nov. 2, 2011, 12:33 PM), http://arstechnica.com/gadgets/news/2011/11/your-movie-on-every-platform-sort-of-for-a-while-how-the-new-ultraviolet-drm-fails.ars.

[93] *See, e.g.*, *After Break with Apple, NBC Goes to Amazon*, MSNBC (Sept. 4, 2007, 7:43 PM), http://www.msnbc.msn.com/id/20593227/#.TsVCsoD8cdM; Thomas Catan, *Justice Department Confirms E-Book Pricing Probe*, WALL. ST. J. (Dec. 8, 2011) http://online.wsj.com/article/SB10001424052970203501304577084331269336926.html; Greg Sandoval, *Google Music Launching Without Sony and Warner*, CNET NEWS (Nov. 11, 2011, 3:18 PM), http://news.cnet.com/8301-31001_3-57323505-261/google-music-launching-without-sony-and-warner; sources cited supra note 57.

Internet and online service providers and device manufactures to act as copyright police. Back in 1998, copyright owner lobbies made a deal with Internet and online service providers. Copyright owners could enlist service providers to remove infringing content quickly and without the need to resort to copyright litigation; in return, service providers who blocked allegedly infringing content on receipt of a proper request would be sheltered from liability for infringing material posted by their subscribers. Congress enacted the deal as section 512 of the Digital Millennium Copyright Act.[94] At the time, nobody imagined peer-to-peer file sharing; few believed that user-generated content could compete for attention with content that was professionally produced. A dozen years later, copyright owners have been forced to admit that they have sometimes abused the system, sending out takedown notices for non-infringing content.[95] They nonetheless complain that the burden of finding infringing content and requesting its removal should be born by the businesses that make money from allowing consumers to post it rather than by the copyright owners whose work is being stolen.[96]

After the Supreme Court read the copyright statute to permit an action for inducing copyright infringement in the *Grokster* case, copyright owners filed a host of suits against Internet and online service providers for inducement, claiming that the businesses induced massive copyright infringement by inviting consumers to upload files, many of which were infringing.[97] If they hoped to expand service

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[94] 17 U.S.C. § 512 (2006); *see War Stories*, *supra* note 1, at 360-62. It was this statutory safe harbor that Napster claimed should protect it from liability. *See supra* note 2 and accompanying text.

[95] *See, e.g.*, Timothy B. Lee, *Warner Bros: We Issued Takedown Notices for Files We Never Saw, Didn't Own Copyright to*, ARS TECHNICA (Nov. 9, 2011, 7:50 PM), http://arstechnica.com/tech-policy/news/2011/11/warner-admits-it-issues-takedowns-for-files-it-hasnt-looked-at.ars; Declan McCullagh, *RIAA Apologizes for Erroneous Letters*, CNET NEWS (May 13, 2003, 4:41 PM), http://news.cnet.com/2100-1025-1001319.html; Ryan Paul, *Oh No You Didn't: Warner Hits Lessig Vid with DMCA Takedown*, ARS TECHNICA (Apr. 29, 2009, 10:05 AM), http://arstechnica.com/tech-policy/news/2009/04/lessig-presentation-on-youtube-hit-with-dmca-takedown-notice.ars; *see generally* Wendy Seltzer, *Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 HARV. J.L. & TECH. 171, 177-87, 204-25 (2010) (describing examples).

[96] *See, e.g.*, Greg Sandoval, *RIAA Lawyer Says DMCA May Need Overhaul*, CNET NEWS (Nov. 6, 2011, 8:59 AM), http://news.cnet.com/8301-31001_3-57319344-261/riaa-lawyer-says-dmca-may-need-overhaul.

[97] *See, e.g.*, Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701 (9th Cir. 2007); Perfect 10, Inc. v. Visa Int'l Serv., Ass'n, 494 F.3d 788 (9th Cir. 2007); Disney Enters., Inc. v.

provider liability to encompass an affirmative duty to police their sites for infringing content, they were disappointed. Courts held that services that invited individuals to upload user-generated content, but blocked allegedly infringing content on receipt of a takedown notice, were entitled to the shelter of section 512.[98] When services providing online "music lockers" popped up, copyright owners filed suit, claiming that the services were inducing consumers to commit copyright infringement by copying their music files and transmitting them to a remote location.[99] Defendants argued that their services came within the section 512 safe harbor. The first court to decide the issue agreed.[100] Even before that decision, though, Amazon.com, Google, and Apple had announced their own online music locker storage services, and had insisted that while they would seek licenses from rights holders if such licenses were available on attractive terms, section 512 permitted them to go ahead without copyright licenses.[101]

Frustrated with the courts, the copyright owner lobbies decided to press their case to Congress. They championed new "rogue websites" legislation that would enable copyright owners to designate any online site as "dedicated to the theft of U.S. Property," and require

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Hotfile Corp., 798 F. Supp. 2d 1303 (S.D. Fla. 2011); Flava Works, Inc. v. Gunter, No. 10-C-6517, 2011 WL 3205399 (N.D. Ill. May 10, 2011); Viacom Int'l, Inc. v. YouTube, Inc., 718 F. Supp. 2d 514 (S.D.N.Y. 2010); Arista Records, LLC v. Lime Group LLC, 715 F. Supp. 2d 481 (S.D.N.Y. 2010), *superseded by* 784 F. Supp. 2d 398 (S.D.N.Y. 2011); IO Group, Inc. v. Jordon, 708 F. Supp. 2d 989 (N.D. Cal. 2010); UMG Recordings, Inc. v. Veoh Networks, Inc., 665 F. Supp. 2d 1099 (C.D. Cal. 2009); Arista Records, LLC v. Usenet.com, Inc., 633 F. Supp. 2d 124 (S.D.N.Y. 2009); Warner Bros. Entm't, Inc. v. Ideal World Direct, 516 F. Supp. 2d 261 (S.D.N.Y. 2007).

[98] *See, e.g.*, *Perfect 10 v. Amazon.com*, 487 F.3d 701; *Viacom*, 718 F. Supp. 2d 514; *Veoh*, 665 F. Supp. 2d 1099.

[99] *See* Capitol Records, Inc. v. MP3Tunes, LLC, No. 07 Civ. 9931 (WHP), 2011 U.S. Dist. LEXIS 93351 (S.D.N.Y. Aug. 22, 2011); *Hotfile*, 798 F. Supp. 2d 1303.

[100] *MP3Tunes*, 2011 U.S. Dist. LEXIS 93351; *see* Mitchell Zimmerman, *Mp3.com Redux? Music Venture's Model Survives Copyright Challenge as S.D.N.Y. Provides Guidance for Cloud-Based Services*, LEXOLOGY (Oct. 26, 2011), http://www.lexology.com/library/detail.aspx?g=6f9aba60-91f4-4d6b-9062-8afff86c99f5.

[101] *E.g.*, Antony Bruno, *Google Music Launches Without Label Licenses*, HOLLYWOOD REP. (May 10, 2011, 3:23 AM), http://www.hollywoodreporter.com/news/google-music-launches-label-licenses-187022; Timothy B. Lee, *Unlicensed: Are Google Music and Amazon Cloud Player Illegal?*, ARS TECHNICA (July 4, 2011, 6:00 PM), http://arstechnica.com/tech-policy/news/2011/07/are-google-music-and-amazon-cloud-player-illegal.ars.

ad services and payment processors to stop doing business with the site, even if it would have qualified for safe harbor protection under section 512.[102] As introduced, the bill empowered any intellectual property owner harmed by a site that facilitates copyright infringement to serve a notice on credit companies or advertising services that do business with the site. On receipt of the notice, and without any judicial involvement, the credit card and advertising companies would have been obliged to cease doing business with the site within five days.[103] This is an extension of the name-calling strategy that, ten years ago, resulted in a vast expansion of the meaning of the term "piracy." By branding ordinary websites with the "rogue" and "dedicated to theft" labels, copyright owners hoped to persuade Congress to give them power to remove the sites from the Internet. In January of 2012, a coalition of high tech companies and millions of Internet users rose up in protest of the legislation.[104] The

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[102] *See* Rashmi Rangnath, *SOPA and the DMCA Safe Harbors*, PUB. KNOWLEDGE POL'Y BLOG, (Nov. 3, 2011), http://www.publicknowledge.org/blog/sopa-and-dmca-safe-harbors. Although the "rogue website" legislation was marketed to Congress as a remedy directed at foreign infringers, *see, e.g.*, *Rogue Websites Legislation*, MOTION PICTURE ASS'N AM., http://www.mpaa.org/contentprotection/roguewebsites (last visited Jan. 6, 2012), the statutory language was broad enough to encompass many domestic sites with legitimate business models. *See* Rebecca MacKinnon, *Stop the Great Firewall of America*, N.Y. TIMES (Nov. 15, 2011), http://www.nytimes.com/2011/11/16/opinion/firewall-law-could-infringe-on-free-speech.html; Mike Masnick, *Viacom Exec: 'Everyone Knows a Rogue Site When They See One'... Except He Doesn't*, TECHDIRT (Nov. 9, 2011, 12:03 PM), http://www.techdirt.com/articles/20111108/23201616688/viacom-exec-everyone-knows-rogue-site-when-they-see-one-except-he-doesnt.shtml; Mike Masnick, *Universal Music Goes to War Against Popular Hip Hop Sites & Blogs*, TECHDIRT (June 20, 2011, 11:22 AM), http://www.techdirt.com/articles/20110620/01370314750/universal-music-goes-to-war-against-popular-hip-hop-sites-blogs.shtml. The provisions of H.R. 3261, as introduced, were so loopy that it seems incredible that anyone might have expected Congress to enact the legislation. The Register of Copyrights, however, supported the bill, which she described as "serious and comprehensive" as well as "measured." *Hearing on H.R. 3261 Before the H. Comm. on the Judiciary*, 112th Cong. (Nov. 16, 2011), *available at* http://www.copyright.gov/docs/regstat111611.html (statement of Maria A. Pallante, Register of Copyrights).

[103] H.R. 3261 § 103(b)(1)–(2).

[104] *See* Jonathan Weisman, *In Fight Over Piracy Bills, New Economy Rises Against Old*, N.Y. TIMES (Jan. 18, 2012) http://www.nytimes.com/2012/01/19/technology/web-protests-piracy-bill-and-2-key-senators-change-course.html.

bills' supporters backed off.[105] Copyright owner lobbies complained that the strong public opposition had been manufactured by an irresponsible misinformation campaign orchestrated by Google.[106] They have not given up on a legislative solution.[107] They are realizing with some chagrin, however, that it may be impossible to persuade Congress to enact the relief they seek without the cooperation of the very companies that they are seeking to hold responsible.

Does any of this matter? Big media adopted a strategy to preserve its dominance in the entertainment marketplaces. That

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[105] *Id.;* Editorial, *Online Piracy and Political Overreach*, N.Y. TIMES (Jan. 18, 2002) http://www.nytimes.com/2012/01/19/opinion/online-piracy-and-political-overreach.html.

[106] *E.g.,* Darren Franich, *The MPAA Talks About SOPA-PIPA and Responds to the "Campaign of Misinformation,"* POPWATCH BLOG, ENTERTAINMENT WEEKLY (Jan. 25, 2012, 7:30 p.m.) http://popwatch.ew.com/2012/01/25/sopa-pipa-mpaa-thomas-edison/. This exchange between the interviewer and the Motion Picture Association's Vice President for Global Policy and External Affairs captures the flavor:

> ENTERTAINMENT WEEKLY: Major internet companies and plenty of people in the online community were up in arms over this legislation. From your perspective, where does this negative response come from?
>
> Michael O'Leary, SEVP for GP & EA, MPAA: I think it's not a big secret that that was driven mostly by Google. When this debate moved from Congress to the Internet, they control the platform there. They control the means of communication in that space. They used it without any discretion or without any restraint. What you had was this campaign of misinformation which, frankly, caused the reaction that you saw. I don't think from our perspective there's any big mystery where this came from.

Id. See also, Cary Sherman, *What Wikipedia Won't Tell You*, N.Y. TIMES (Feb. 7, 2012) http://www.nytimes.com/2012/02/08/opinion/what-wikipedia-wont-tell-you.html ("When Wikipedia and Google purport to be neutral sources of information, but then exploit their stature to present information that is not only not neutral but affirmatively incomplete and misleading, they are duping their users into accepting as truth what are merely self-serving political declarations."). In contrast, *Forbes* magazine's Larry Magid argues that Internet advocacy groups had been working for months to defeat the legislation, but that nobody paid attention until Google and Wikipedia got on board. Larry Magid, *SOPA and PIPA Defeat: People Power or Corporate Clout?,* FORBES (Jan. 31 2012, 10:40 AM) http://www.forbes.com/sites/larrymagid/2012/01/31/sopa-and-pipa-defeat-peoples-power-or-corporate-clout/.

[107] *E.g.*, *Artists on SOPA/PIPA*, LOCUS, Feb. 2012, at 10, 72; Declan McCullagh, *Hollywood's Gentler post-SOPA Strategy: A Charm Offensive*, CNET NEWS (Feb. 6, 2012 2:15 p.m.) http://news.cnet.com/8301-31921_3-57372174-281/hollywoods-gentler-post-sopa-strategy-a-charm-offensive/; Sherman, *supra* note 106.

strategy, in retrospect, seems to have been self-defeating. Content owners are suffering from wounds that are predominantly self-inflicted, and seeking to offload the blame on consumers, search engines, and foreigners.[108] Readers, viewers and listeners have access to an extraordinary variety of works, which they can choose to buy, rent, borrow or steal via diverse routes.[109]

On the other hand, the story so far is not ending happily for creators. While legacy entertainment behemoths have cast themselves as creators' friends in their anti-piracy commercials[110] and testimony to Congress,[111] they've not behaved very friendlily. First, there's the matter of payment. Twentieth-century copyright law created a system with notable weaknesses in its mechanisms for paying the creators who authored works.[112] The twenty-first century is shaping up to be worse. Legacy content owners have begun to license their content to online disseminators, but have sought to structure the licenses to

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[108] It's not obvious that the music, movie, or book business is in decline overall. *See, e.g.*, Michael Masnick & Michael Ho, The Sky is Rising: A Detailed Look at the State of the Entertainment Industry (Jan. 2012) http://gigaom2.files.wordpress.com/2012/01/theskyisrising.pdf. The competition among music providers, for example, has led to a decrease in the price of recorded music; sales appear to have increased in response to better prices. Brett Pulley, *Record Sales Increase as Lady Gaga, Adele Find a Future with Spotify, Rdio*, BLOOMBERG (Nov. 14, 2011, 12:01 AM), http://mobile.bloomberg.com/news/2011-11-14/record-sales-rise-as-lady-gaga-adele-find-a-future-with-spotify.html.

[109] Readers, listeners and viewers who bought subscriptions to services that have closed their virtual doors and erased their customers' music have some cause for complaint. *See* Eliot Van Buskirk, *Sony Connect Music Store Closing (Sony Players to Add Plays for Sure)*, WIRED (Aug. 30, 2007), http://www.wired.com/listening_post/2007/08/sony-connect-mu; Matt Rosoff, *MySpace Buries iMeem*, CNET NEWS (Dec. 8, 2009, 4:14 PM), http://news.cnet.com/8301-13526_3-10411710-27.html.

[110] *E.g.*, *Antipiracy PSA*, YOUTUBE, http://www.youtube.com/watch?v=6YScoXn31Mg (uploaded June 9, 2011); *see also* Rogue Websites Legislation, MOTION PICTURE ASS'N AM., http://www.mpaa.org/contentprotection/roguewebsites (click "Stories from Creators") ("Meet just a few of the working men and women in America's creative community whose lives - and livelihoods - are affected by internet content theft.").

[111] *See, e.g.*, *Promoting Investment and Protecting Commerce Online: The ART Act, the NET Act and Illegal Streaming, Hearing Before the Subcomm. on Intellectual Prop., Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. (June 1, 2011) (testimony of Michael P. O'Leary, Vice President of the Motion Picture Association of America), *available at* http://judiciary.house.gov/hearings/pdf/OLeary0612011.pdf.

[112] Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 8-12 (2010).

enable them to pay minimal royalties.[113] Google has introduced a host of ways for copyright owners to "monetize" their content by splitting ad revenue. It pays that money to rights holders, not creators, relying on the rights holders to pay creators.[114] Or not. Apple, Amazon, Sirius-XM, and Rhapsody similarly, license music from rights holders, who may or may not exploit opportunities to reduce their royalty obligations.[115]

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[113] *See* FBT Prods., LLC v. Aftermath Records, 621 F.3d 958 (9th Cir. 2010); Ridenhour v. UMG Recordings, No. 4:11-cv-05321-DMR (N.D. Cal. Nov. 2, 2011); James v. UMG Recordings, No. 3:11-cv-01613-SI (N.D. Cal. Apr. 1, 2011); "The Youngbloods" v. BMG Music, No 07 Civ. 2394 (GBD)(KNF), 2011 U.S. Dist. LEXIS 1585 (S.D.N.Y. Jan. 6, 2011). *See, e.g.*, Ben Sisario, *Eminem Lawsuit May Raise Pay for Older Artists*, N.Y. TIMES (Mar. 27, 2011), http://www.nytimes.com/2011/03/28/business/media/28eminem.html; Neil Strauss, *Record Labels' Answer to Napster Still Has Artists Feeling Bypassed*, N.Y. TIMES (Feb. 18, 2002), http://www.nytimes.com/2002/02/18/arts/record-labels-answer-to-napster-still-has-artists-feeling-bypassed.html?pagewanted=all&src=pm. *See also* Mark Cuban, *Some Intimate Details on the Google YouTube Deal*, BLOG MAVERICK (Oct. 30, 2006, 5:35 AM), http://blogmaverick.com/2006/10/30/some-intimate-details-on-the-google-youtube-deal (reposting an anonymous report that entertainment companies negotiated with YouTube to acquire small equity stakes in the company rather than making licensing deals in order to avoid royalty obligations).

[114] *See* Future of Music Coalition, *Killer Apps, Conflicting Law: Remixing Music Compensation*, Vimeo (Oct. 4, 2011), http://vimeo.com/32891305; Eliot Van Buskirk, *Neil Young: Failed Warner/YouTube Negotiations 'Penalized' Artists*, WIRED (Mar. 2, 2009, 1:24 PM), http://www.wired.com/epicenter/2009/03/neil-young-yout (quoting YouTube Spokesman Chris Dale: "YouTube connects music, musicians, and fans . . . . We have deals with all of the other major record labels and with musicians, songwriters, and other independent creative producers. It is the record labels' responsibility to represent and pay their artists."); Jon Irwin, *Streaming Services Are Cutting Big Checks for Rights Holders*, BILLBOARD (Oct. 25, 2011), http://www.billboard.biz/bbbiz/industry/digital-and-mobile/streaming-services-are-cutting-big-checks-1005432232.story ("Rhapsody has generated hundreds of millions of dollars in royalties that have been paid out to record labels, music publishers and their representatives. . . . We trust that this royalty revenue is flowing to artists, writers and the other creative folks responsible for the music . . . .").

[115] *See, e.g.*, Ben Sisario, *Sirius's Move to Bypass a Royalty Payment Clearinghouse Causes an Uproar*, N.Y. TIMES (Nov. 6, 2011), http://www.nytimes.com/2011/11/07/business/media/siriuss-move-to-bypass-royalty-agency-causes-uproar.html.

> Sirius's move was only the latest example of a gradual shift in the financial infrastructure of music. Many companies, from major labels to providers of background music, have been trying to reduce costs and gain control by circumventing the large organizations that have historically processed licenses and royalties.

Nor have copyright owners taken advantage of other opportunities to prove that they're creators' friends. As publishers, record labels and film studios have become divisions of huge corporate conglomerates, they have responded to pressure to improve their bottom lines by reducing artist development efforts and declining to invest in projects that don't seem likely to become megahits.[116] The recording industry missed an important opportunity to show that its interests aligned with its artists' when it failed to share any of the settlement money collected from the 30,000 "John Doe" suits it filed against individual file sharers with the artists whose recordings were shared. Music publishers,[117] record labels,[118] and multimedia entertainment companies[119] have fought tooth and nail to prevent authors and their heirs from exercising their statutory rights to terminate copyright transfers, rather than spend money to renegotiate deals.

Such direct deals are perfectly legal. But opponents of the move by Sirius say that it could result in less money and more complications for artists. *Id.*

[116] *See, e.g.*, Kot, *supra* note 22, at 5-12; JOEL RASMUSSEN & ANDREW SHAPTER, BEFORE THE MUSIC DIES (2006) (documentary film), *available at* http://www.imdb.com/video/hulu/vi3758949145.

[117] *See* Mills Music, Inc., v. Snyder, 469 U.S. 153 (1985); Scorpio Music S.A. v. Willis, No. 3:11-cv-01557-BTM-RBB (S.D. Cal. July 14, 2011) (complaint available at http://iptablog.org/uploads/ScorpioMusic-v-Willis.pdf); Larry Spier, Inc. v. Bourne, Co., 750 F. Supp. 648 (S.D.N.Y. 1990).

[118] *See* Fifty Six Hope Road Music, Ltd. v. UMG Recordings, Inc., No. 08 Civ. 6143 (DLC), 2010 U.S. Dist. LEXIS 94500 (S.D.N.Y. Sept. 10, 2010); Kal Raustiala & Chris Sprigman, *The Music Industry Copyright Battle: When Is Owning More Like Renting*, FREAKONOMICS BLOG (Aug. 31, 2011, 10:38 AM), http://www.freakonomics.com/2011/08/31/the-music-industry-copyright-battle-when-is-owning-more-like-renting; Larry Rohter, *Record Industry Braces for Artists' Battle over Song Rights*, N.Y. TIMES (Aug. 15, 2011), http://www.nytimes.com/2011/08/16/arts/music/springsteen-and-others-soon-eligible-to-recover-song-rights.html.

[119] *See* Classic Media, Inc., v. Mewborn, 532 F.3d 978 (9th Cir. 2008); Milne ex rel. Coyne v. Stephen Slesinger, Inc., 430 F.3d 1036 (9th Cir. 2005); Marvel Characters, Inc., v. Simon, 310 F. 3d 280 (2d Cir. 2002); Marvel Worldwide, Inc. v. Kirby, 777 F. Supp. 2d 720 (S.D.N.Y. 2011); Siegel v. Warner Bros. Entm't, Inc., 690 F. Supp. 2d 1048 (C.D. Cal. 2009); Archie Comic Publ'ns, Inc., v. DeCarlo, 258 F. Supp. 2d 315 (S.D.N.Y. 2003).

As Google, Amazon, and Apple have extended their reach into markets traditionally served by book publishers,[120] record labels,[121] and motion picture distributors,[122] they have introduced direct distribution options, which allow creators to bypass traditional intermediaries.[123] It remains to be seen whether creators will be able to realize more money or reach larger audiences by sidestepping legacy intermediaries. But conventional media companies are giving most of them scant reason to stick around.

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[120] *See* Julie Bosman, *Agent and Former Publisher to Lead New Imprint for Amazon*, N.Y. TIMES BLOG (May 23, 2011, 8:46 AM), http://artsbeat.blogs.nytimes.com/2011/05/23/agent-and-former-publisher-to-lead-new-imprint-for-amazon. *See also* Amazon Publishing, AMAZON, http://www.amazon.com/gp/feature.html?ie=UTF8&docId=1000664761 (last visited Jan. 6, 2012); Google Books, ANDROID MARKET, https://market.android.com/books (last visited Jan. 6, 2012); What's on iTunes – Books, APPLE, http://www.apple.com/itunes/whats-on/#books (last visited Jan. 6, 2012).

[121] *See* Amazon MP3, AMAZON, http://www.amazon.com/MP3-Music-Download/b/ref=sa_menu_mp3_str1/188-2383815-0714917?_encoding=UTF8&node=163856011 (last visited Jan. 6, 2012); Google Music, ANDROID MARKET, https://market.android.com/music (last visited Jan. 6, 2012); What's on iTunes: Music, APPLE, http://www.apple.com/itunes/whats-on/#music (last visited Jan. 6, 2012).

[122] *See* Amazon Instant Video, AMAZON, http://www.amazon.com/Instant-Video/b/ref=sa_menu_atv9?ie=UTF8&node=2858778011 (last visited Jan. 6, 2012); Google Movies, ANDROID MARKET, https://market.android.com/movies (last visited Jan. 6, 2012); What's on iTunes – Movies, APPLE, http://www.apple.com/itunes/whats-on/#movies (last visited Jan. 6, 2012); What's on iTunes – TV Shows, APPLE, http://www.apple.com/itunes/whats-on/#tvshows (last visited Jan. 6, 2012); YouTube Home, http://www.youtube.com (last visited Jan. 6, 2012).

[123] *See* Google Music for Artists, GOOGLE, http://music.google.com/artists/ (last visited Jan. 6, 2012); Partner as a Content Provider, APPLE, http://www.apple.com/itunes/content-providers/ (http://www.apple.com/itunes/content-providers); Self-Publish with Us, Amazon, http://www.amazon.com/gp/seller-account/mm-summary-page.html?topic=200260520&ld=AZSelfPublishMakeM (last visited Jan. 6, 2012); David Streitfield, Amazon Signs up Authors, Writing Publishers out of Deal, N.Y. TIMES (Oct. 16, 2011), http://www.nytimes.com/2011/10/17/technology/amazon-rewrites-the-rules-of-book-publishing.html.