February, 2006

War and Peace: The 34th Annual Donald C. Brace Lecture

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WAR AND PEACE: THE 34TH ANNUAL DONALD C. BRACE LECTURE

by JESSICA LITMAN*

I'd like to thank the Copyright Society and the Brace committee for inviting me to speak to you this evening. I am honored that you invited me to give this lecture. I want to talk a little bit about war — copyright war — and then I want to talk a little bit about peace.

It's become conventional that we're in the middle of a copyright war.[1] I tried to track down who started calling it that, and what I can tell you is that about ten years ago, about the time that copyright lawyers everywhere were arguing about the White House Information Infrastructure Task Force "White Paper" Report, we started seeing the phrase "copyright war" used as a figure of speech to express some of the passion and vitriol that characterized those arguments.[2] It popped up more and more often until, by a couple of years ago, all the irony had leached out of the phrase and people were matter-of-factly referring to what's going on as the "copyright war" in news accounts, law review articles, and weblogs.[3] So, by

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1 *See*, *e.g.*, Heather Green, *Are the Copyright Wars Chilling Innovation*?, BUS. WEEK, Oct. 11, 2004, at 210; Saul Hansell & Jeff Leeds, *A Supreme Court Showdown for File Sharing*, N.Y. TIMES, Mar. 28, 2005, at C1.

2 *See*, *e.g.*, Kathleen Hollingsworth, *1995 Year in Review*, LEGAL INTELLIGENCER, Jan. 8, 1996, at 9.

3 *See*, *e.g.*, Kathryn Balint, *Music Industry Widens Digital Copyright War*, SAN DIEGO UNION-TRIB., Mar. 2, 2001, at A-1; Niva Chonin, *Holiday Electronics: MP3 Sites a Mixed Bag*, S.F. CHRON., Dec. 3, 1998, at C3 ("Is online music the final blow to an ailing record industry? Are the MP3 pirates proletarian heroes or base thieves? It depends on whom you ask and who wins the escalating copyright war."); Amy Harmon, *Black Hawk Download: Moving Beyond Music, Pirates Use New Tools to Turn the Net Into an Illicit Video Club*, N.Y. TIMES, Jan. 17, 2002, at G1 (quoting the MPAA's Jack Valenti: "We're fighting our own terrorist war."); John Logie, *A Copyright Cold War? The Polarized Rhetoric of the Peer-to-Peer Debates*, FIRST MONDAY, July 7, 2003, http://www.firstmonday.org/issues/issue8_7/logie; Beth Piskora, *The Copyright Wars: Piano Rolls to Napster*, N.Y. POST, Feb. 19, 2001, at 37; Mike Snider, *Media vs. Web in Digital Copyright War*, USA TODAY, Feb. 17 2000, at 1A; Dan Tennant, *The Copyright War*, LIBRARY J., June 15, 2001, at 28; Jonathan Zittrain, *Calling Off the Copyright War*, BOSTON GLOBE, Nov. 24, 2003; Editorial, *Copyright War: Find a Truce*, L.A. TIMES, Mar. 19, 2002, at 12; *Eisner Calls for ISPs to Be Forced to Stop Illegal*

2003, the usage had become standard. That year, by the way, was the year we saw the district court decision in *Grokster*,[4] the Supreme Court decision in *Eldred*,[5] and the first lawsuits filed against individual consumers for using peer-to-peer file sharing networks.[6]

I. REAL WAR

During the same couple of years, the United States has been involved in what I'm going to call a "real war." When I speak of a real war, I mean the kind of war where we arm soldiers with guns and ship them off to kill people and be killed. Watching a real war reminds us of things we know about wars that we tend to forget during peacetime. Whether you support or oppose the United States war in Iraq, the disadvantages of war over other methods of dispute resolution are, I think, pretty uncontroversial.

Wars are incredibly expensive. It costs all the money you have on hand, sucks up any extra, and then plunges you into debt. Not all of the money you end up spending is sensibly spent. War typically sees the building of costly, but poorly-designed and ill-thought out, fortifications.

Wars are polarizing. The world divides itself into "us" versus "them." In wartime, we can forget even longstanding customs of tolerance towards opposing views. Loyalty to one's own side, in wartime, can seem to demand that we turn a blind eye to our compatriots' mistakes. Meanwhile, people who disagree with "our" side seem to be consorting with the enemy. War inspires a well-founded paranoia that makes it difficult to trust people who don't hew to the official line.

War causes incredible damage: some of it purposeful and some of it unintentional or at least collateral. The territory over which the war is being fought can be badly damaged or even utterly destroyed. There's an African proverb: "When elephants fight, it's the grass that suffers." The

Copies, WASH. INTERNET DAILY, June 8, 2000; *Music Wars: A Timeline*, CORP. COUNSEL, Sept. 2003, at 66. I contributed to the trend. *See* JESSICA LITMAN, DIGITAL COPYRIGHT 151-65 (2001) ("Chapter Ten: The Copyright Wars"); Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337 (2002).

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

[5] Eldred v. Ashcroft, 537 U.S. 186 (2003).

[6] *See* Frank Ahrens, *Music Industry Sues Online Song Swappers: Trade Group Says First Batch of Lawsuits Targets 261 Major Offenders*, WASH. POST, Sept. 9, 2003, at A1. *See also 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 Subcomm. on Permanent Investigations of the Senate Comm. on Governmental Affairs*, 108th Cong, (2003), *available at* http://hsgac.senate.gov/_files/shrg108275privacy_piracy.pdf.

longer a war goes on, the more damage it causes, and the more difficult and expensive it is to rebuild afterwards.

Making peace usually requires combatants on both sides to settle for less than they promised themselves going in. Even the winner of a war commonly finds itself with less than it started with before the war. Rebuilding is hard; sometimes it just isn't feasible.

Most of what I've just said is uncontroversial. Supporters of a particular war still agree that war is terrible, though they'll argue that sometimes it is important to make a stand and fight for what is right, or for the greater good, or to protect ourselves against something worse. But most people agree that war is an acceptable solution only when there is no other acceptable solution.

With that under our belts, I want to talk about the copyright war. "Wait a minute," you're thinking. "Isn't that a pretty unfair comparison? You just said that real wars involve soldiers, and guns and bombs and killing people, and, well, copyright wars don't." Bear with me for a minute. Real wars are expensive, polarizing and destructive. Is the same thing true about copyright wars? Is it, in particular, true of this copyright war, the one we're in the middle of at the moment?

II. THE COPYRIGHT WAR

On one side of this war are people who believe in article 1, clause 8, section 8 of the Constitution, and insist that copyright law does and should promote the Progress of Science and the useful Arts.[7] On the other side of the war we have, well, it depends on your viewpoint. The enemies in the copyright war are either apologists for piracy who insist that information and entertainment want to be free[8] or they're corrupt fat cats who are misusing copyright law to shield their antiquated business models from competition.[9] At least, that's what I read.

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[7] *See*, *e.g.*, Brief Amicus Curiae of Law Professors J. Glynn Lunney, Jr., et al., Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., at 1, 127 S. Ct. 2764 (2005) (No. 04-480), *available at* http://www.eff.org/IP/P2P/MGM_v_Grokster/20050301_lunney.pdf; Amicus Curiae of the Intellectual Property Owners Association, at 14, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 127 S. Ct. 2764 (2005) (No. 04-480), *available at* http://www.eff.org/IP/P2P/MGM_v_Grokster/050124_IPO_brief.pdf; Brief Amicus Curiae of IEEE-USA, at 1, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 127 S. Ct. 2764 (2005) (No. 04-480), *available at* http://www.eff.org/IP/P2P/MGM_v_Grokster/050124_IEEE.pdf.

[8] *See*, *e.g.*, National Music Publishers Association, The Engine of Free Expression: Copyright on the Internet, http://www.nmpa.org/nmpa/expression.html.

[9] *See* Katie Dean, *Battling the Copyright Big Boys*, WIRED NEWS, Nov. 30, 2004, http://www.wired.com/news/politics/0,1283,65651,00.html; Barry

I'm not going to talk about whether waging this particular copyright war was a good idea in the first place — it's a little late for that. I'm not going to express any opinion about who might have started it; I don't think I know the answer and, in any event, it doesn't much matter now. I do want to talk about what this war is costing us, and what we're going to have to come to terms with when we finally decide that it's time to stop.

Like real wars, the copyright war has been very expensive. The litigation and lobbying budgets of major copyright-affected industries have gone through the roof. We've all been the beneficiaries of that spending spree. I suppose we should think of ourselves as the defense contractors and arms dealers of the copyright wars.

And I don't think anyone would dispute that the copyright war has been polarizing. The middle ground seems to have disappeared entirely. One is either "one of us" or "one of them."[10] I know that for many people in this room, I am indelibly one of the "them." It's small consolation, I know, that most of what I'm saying would be equally unwelcome in a room full of the people that you think of as my "us." The disappearing middle ground has forced people who might once have been in a position to mediate to choose sides. People for whom copyright has been at best a peripheral issue have involved themselves in the battle. Look at the briefs filed in the *Grokster* case: On one side are the Attorneys General of forty states,[11] the Commissioner of Baseball,[12] and the Christian Coalition of

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Ritholtz, The Big Picture: New Arguments Against P2P: The Phony Moral Debate, Apr. 5, 2005, http://bigpicture.typepad.com/comments/2005/04/new_arguments_a.html.

[10] *See*, *e.g.*, *Piracy of Intellectual Property: Hearing Before the Subcomm. on Intellectual Property of the Senate Comm. on the Judiciary*, 109th Cong., (2005) (testimony of Marybeth Peters, Register of Copyrights), *available at* http://www.copyright.gov/docs/regstat052505.html:

> What is problematic is that some American commentators who are prone to hyperbole about what they see as an imbalance in the U.S. Copyright Act are providing arguments and rationalizations that foreign governments use to defend their failure to address this type of organized crime. The confusion wrought by the imprecision and lack of clarity in these commentators' statements is not helpful to our achieving the goal for which there is no credible opposition: dramatic reduction in organized piracy of U.S. copyrighted works abroad.

[11] *See* Brief Amici Curiae of Utah et al. in Support of Petitioners, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 127 S. Ct. 2764 (2005) (No. 04-480), *available at* http://www.eff.org/IP/P2P/MGM_v_Grokster/050124_StatesAG.pdf.

[12] *See* Brief of Amici Curiae Office of the Commissioner of Baseball, et al., in Support of Petitioners, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 127 S. Ct. 2764 (2005) (No. 04-480), *available at* http://www.eff.org/IP/P2P/MGM_v_Grokster/050124_copyright_owners_brief.pdf.

America.[13] On the other side is the Intel corporation,[14] Consumers Union,[15] the American Conservative Union,[16] and the Eagle Forum.[17]

This polarization has been particularly unfortunate in my own small puddle of the world. In legal academia, we don't actually like to take sides. That's not our job. Our job is to try to figure out what's true, and then to say it as well as we can. Scholarship written from an orthodox and pre-examined point of view, whatever side you're on, tends to be second-rate scholarship. The conflict has been so protracted and so venomous, though, that most of us have found ourselves on one side or the other. (There were nine different law professor briefs filed in *Grokster*: Six on Grokster's side[18] and three on MGM's.[19]) I've been teaching copyright

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[13] *See* Brief of Kids First Coalition et al. as Amici Curiae in Support of Petitioner, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 127 S. Ct. 2764 (2005) (No. 04-480), *available at* http://www.eff.org/IP/P2P/MGM_v_Grokster/050124_kidsfirst-cc-cw.pdf.

[14] *See* Brief of Intel Corp. as Amicus Curiae Supporting Affirmance, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 127 S. Ct. 2764 (2005) (No. 04-480), *available at* http://www.eff.org/IP/P2P/MGM_v_Grokster/20050301_intel.pdf.

[15] *See* Brief of the Consumer Federation of America et al. as Amici Curiae Supporting Respondents, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 127 S. Ct. 2764 (2005) (No. 04-480), *available at* http://www.eff.org/IP/P2P/MGM_v_Grokster/20050301_CFA-CU-FP-PK.pdf.

[16] *See* Brief of Amici Curiae the American Conservative Union and the National Taxpayers Union in Support of Affirmance, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 127 S. Ct. 2764 (2005) (No. 04-480), *available at* http://www.eff.org/IP/P2P/MGM_v_Grokster/20050301_acu_ntu.pdf.

[17] *See* Brief of Amicus Curiae Eagle Forum Education & Legal Defense Fund in Support of Respondents, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 127 S. Ct. 2764 (2005) (No. 04-480), *available at* http://www.eff.org/IP/P2P/MGM_v_Grokster/20050301_eagle.pdf.

[18] *See* Brief of Amici Curiae Law Professors in Support of Affirmance, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 127 S. Ct. 2764 (2005) (No. 04-480), *available at* http://www.eff.org/IP/P2P/MGM_v_Grokster/20050301_lunney.pdf (Prof. J. Glynn Lunney, Jr., et al.); Brief of Amici Curiae Sixty Intellectual Property and Technology Law Professors et al. in Support of Respondents, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 127 S. Ct. 2764 (2005) (No. 04-480), *available at* http://www.eff.org/IP/P2P/MGM_v_Grokster/20050301_tech_law_profs_usacm.pdf (Prof. Pamela Samuelson et al.); Brief of Amici Curiae Internet Law Faculty in Support of Respondents, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 127 S. Ct. 2764 (2005) (No. 04-480), *available at* http://www.eff.org/IP/P2P/MGM_v_Grokster/20050301_internet_law_profs.pdf (Prof. William W. Fisher, III, et al.); Amicus Brief of Malla Pollack, et al., Supporting Grokster, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 127 S. Ct. 2764 (2005) (No. 04-480), *available at* http://www.eff.org/IP/P2P/MGM_v_Grokster/20050301_mpollack.pdf; Brief of Professor Edward Lee et al. as Amici Curiae in Support of Respondents, Metro-Goldwyn-Mayer Studios, Inc. v.

law for long enough that I'm still on pretty friendly terms with a bunch of people who disagree with me, but I can't tell you how often I've tried to have a conversation in which I talk about some point somebody's made in his or her work with someone on the opposite side and just run into a brick wall. It makes constructive conversation difficult when one can't even stretch one's mind around the concept that so-and-so, who's one of "them", might have the germ of a ghost of a point. There is also a whole new generation of young, smart scholars who are trying to carve out a space for themselves in the neglected middle ground. These are the people we're going to need to be listening to when we finally decide that we can bear to make peace, but right now, my impression is that nobody in the copyright bar wants to hear what they're trying to say. Indeed, we may not be doing such a good job for them ourselves. Some of these scholars may be finding the halls of copyright academe a little chilly.

More important than either the cost or the intellectual divide is the fact that this war has caused real and significant damage to the body of law we've been fighting over. Think of great big elephants trampling all over the grass.

Some of that damage comes in the form of the expensive, ill-designed fortifications I mentioned earlier. We don't build them very well in wartime. We're in too much of a hurry, and too eager to load new statutory

Grokster, Ltd., 127 S. Ct. 2764 (2005) (No. 04-480), *available at* http://www.eff.org/IP/P2P/MGM_v_Grokster/20050301_law_profs.pdf; Brief of Amicus Curiae Charles Nesson in Support of Respondents, Metro-Goldwyn-Mayer Studios v. Grokster, Ltd., 127 S. Ct. 2764 (2005) (No. 04-480), *available at* http://www.eff.org/IP/P2P/MGM_v_Grokster/20050301_nesson.pdf. This includes neither the Creative Commons brief authored by Stanford Law Professor Larry Lessig nor the Free Software Federation Brief authored by Columbia Law Professor Eben Moglen. *See* Brief for Creative Commons as Amicus Curiae in Support of Respondents, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 127 S. Ct. 2764 (2005) (Mar. 1, 2005) (No. 04-480), *available at* http://www.eff.org/IP/P2P/MGM_v_Grokster/20050301_cc.pdf; Brief Amici Curiae of the Free Software Foundation and New Yorkers for Fair Use in Support of Respondents, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 127 S. Ct. 2764 (2005) (No. 04-480), *available at* http://www.eff.org/IP/P2P/MGM_v_Grokster/20050301_fsf_nyfu.pdf.

19 *See* Brief of Amicus Curiae Law Professors et al, in Support of Petitioners, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 127 S. Ct. 2764 (2005) (No. 04-480), *available at* http://www.eff.org/IP/P2P/MGM_v_Grokster/050124_law-economics-treatise.pdf (Prof. James Gibson et al.); Brief of Amici Curiae Kenneth Arrow et al., Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 127 S. Ct. 2764 (2005) (No. 04-480), *available at* http://www.eff.org/IP/P2P/MGM_v_Grokster/050124_Lichtman2.pdf; Brief of Professor Peter S. Menell et al., Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 127 S. Ct. 2764 (2005) (No. 04-480), *available at* http://www.eff.org/IP/P2P/MGM_v_Grokster/050125_Menell.pdf.

provisions up with language to defend us against multiple imagined threats. We haven't taken the luxury of enough time to craft legislation so that it will actually be useful rather than pernicious. In recent years, it has seemed as if negotiations over copyright amendments have lasted long enough to generate language that is long, complicated, counterintuitive and difficult to understand, but not long enough to produce a well-written second draft.

It should surprise none of you that I believe that section 1201 belongs in that category of expensive and poorly designed fortifications.[20] I think nobody would question the assertion that section 1201 cost a lot of money to build.[21] And for what? As far as I can tell, section 1201 has done very little to prevent unlawful copying of copyrighted works. The sorts of copy-protection and access protection technologies currently in use are simply no barrier to businesses engaged in large scale commercial piracy. If you're a consumer who wants to engage in small-scale non-commercial piracy,[22] meanwhile, doing so is pretty simple. DeCSS and programs like it[23] are readily available to anyone who wants to copy a motion picture from a DVD. Similarly, instructions for copying songs from copy-protected CDs are all over the Internet.[24] What the current copy-protection and access-protection systems do is make it difficult and unreasonable for consumers who want to play by the rules by introducing maddening and gratuitous incompatibility. Someone who wants to subscribe to Napster's all-you-can-rent music service or purchase a few tracks from the Real-player music store needs to junk her iPod and go out and buy a Rio; once she does, she won't be able to listen to any of the music she bought from iTunes. People who buy DVDs of obscure Japanese movies in Japan discover that to play them on a US DVD player, they need to tell their DVD player it's Japanese — then, of course, it won't play any of their existing American DVDs.

Not that we haven't seen 1201 in the courts. It's just that the cases and controversies, at least so far, do not have a whole lot to do with copyright infringement. Section 1201 has been invoked by a garage door manufacturer to prevent the sale of replacement garage door openers,[25] and used by a printer manufacturer in an attempt to prevent the sale of third

[20] 17 U.S.C. § 1201 (2000).

[21] *See generally* Litman, *supra* note 3, at 122-50. R

[22] I've argued elsewhere that "piracy" is an inappropriate term for this sort of behavior. *See id.* at 84-86.

[23] *See* DeCSS, Wikipedia, http://en.wikipedia.org/wiki/DeCSS; Dave S. Touretsky, Gallery of CSS Descramblers, http://www-2.cs.cmu.edu/~dst/DeCSS/Gallery.

[24] *See*, *e.g.*, Mads Haahr, Guide to Copying Copy-Protected Music CDs (revised May 17, 2005), http://www.dsg.cs.tcd.ie/~haahrm/copying-protected-cds.

[25] Chamberlain Group, Inc., v. Skylink Techs., 381 F.3d 1178 (Fed. Cir. 2004).

party printer cartridges.[26] Section 1201 was the basis for a threat to sue a computer science professor at Princeton for presenting a paper on computer science research,[27] and another threat against one of his students to prevent the publication of the paper that revealed that one digital rights management scheme for music on CDs could be defeated by depressing the shift key.[28] And section 1201 was the basis for arresting and imprisoning a Russian programmer for a program he wrote in Russia that was legal under Russian law.[29] These are the stories the news media reports.[30] No wonder the public believes that section 1201 is abusive.

Nor is section 1201 the only or even the worst offender. Section 114[31] has become virtually unteachable. I still try. Last month, I sat my advanced copyright students down with sections 106, 112, 114 and 115 and asked them to figure out how to license music for a hypothetical client's podcast.[32] Anyone who has tried this will tell you that current law makes this especially difficult. My students were pretty frustrated. Section 114 doesn't seem to be working particularly well, either, even in the contexts it was intended to address. Congress keeps adding pages and pages of provisions to deal with narrow specific situations in ways that can't be genera-

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[26] Lexmark Int'l, Inc., v. Static Control Components, Inc., 387 F.3d 522 (6th Cir. 2004).

[27] *See* Felten v. RIAA, No. 01 CV 2669 (D.N.J., filed June 6, 2001); David S. Touretsky, *Free Speech Rights for Programmers*, COMMUNICATIONS OF THE ACM, Aug. 1, 2001, at 23; Fred Von Lohmann, *A Failing Grade: The DMCA Doesn't Stop Piracy, and It Discourages Fair Use*, IP L. & BUS., Jan 21, 2003, at 32.

[28] *See* Peter K. Yu, *Is Anti-Piracy Law Stifling Cybersecurity Innovation?*, LEGAL TIMES, Mar. 29, 2004, at 20.

[29] *See* United States v. Elcom, Ltd., 203 F. Supp. 2d 1111 (N.D. Cal. 2002).

[30] *See*, *e.g.*, Charles Cooper, *Rethinking the DMCA*, c—net News.com, Apr. 8, 2005, http://news.com.com/Rethinking™he‡MCA/2010-1030_3-5659364.html; John Schwartz, *Copyright Was Can Use Some Common Sense*, MIAMI DAILY BUS. REV., Apr. 21, 2004, at 8.

[31] 17 U.S.C. § 114 (2000).

[32] *See* Lex 7990: Digital Copyright Assignment for March 8, 2005, http://www.law.wayne.edu/litman/classes/digitalcopyright/syllabus.htm. For an introduction to Podcasting, see generally Katie Zernike, *Tired of TiVo? Beyond Blogs? Podcasts Are Here*, N.Y. TIMES, Feb. 19, 2005, at 1; Wikipedia, Podcasting, http://en.wikipedia.org/wiki/Podcasting. A podcast is a downloadable program designed for private performance on MP3 players or computers. ASCAP and BMI have both claimed to offer licenses for Podcasts. ASCAP offered licenses to cover Podcasting in early 2005, but later removed any reference to Podcasts from its Web site. BMI has recently begun to offer licenses to cover public performance rights, if any, implicated by podcasts, but advises licensees that they will need to seek additional licenses from both music publishers and record labels. *See* BMI and Podcasting, http://bmi.com/licensing/podcasting/index.asp.

lized as technology develops.[33] The section has been amended repeatedly because it failed to address this or that way of delivering music over digital networks. The whole conglomeration burdens any digital music performance with a host of silly conditions that don't in fact advance the interests of either the composition copyright owner or the sound recording copyright owner.

But besides the damage done by badly thought-out or badly-written amendments, there's damage that I think is much more frightening because it affects copyright law's core. Copyright law has lost the high moral ground. Ten or fifteen years ago, all of us were wont to bemoan copyright law's obscurity and low profile. If only more people would pay attention to copyright.

Well, guess what? They're finally paying attention. Napster did that.[34] The *Eldred* case did that.[35] The John Doe suits did that.[36] The only problem is that people aren't paying attention to the stuff we wanted them to see. They are looking at copyright through the lens of this war and seeing a pretty unattractive picture.[37] Copyright law, folks are learning, is what prevents your favorite radio station from publishing its playlist until the next day.[38] It's what prevents Sirius or XM radio from broadcasting a whole album.[39] It's what makes it illegal for people to tell you how to play your Napster music on your iPod or your iTunes music on

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[33] *See* Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780, 2781, 2784; Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2890, 2894, 2897 (1998); Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 105-80, 111 Stat. 1529, 1531.

[34] A&M Records v. Napster, 239 F.3d 1004 (9th Cir. 2001); A&M Records v. Napster, 284 F.3d 1091 (9th Cir. 2002). *See* Jefferson Graham, *Who's Liable for Actions of People Who Share*, USA TODAY, Mar. 29, 2005, at 3B; Jefferson Graham, *Music Industry Files First Wave of Lawsuits Against Swappers*, USA TODAY, Sept. 9, 2003, at 6D.

[35] Eldred v. Ashcroft, 537 U.S. 186 (2003). *See* Allen Pusey, *Court Protects Mickey Mouse: Justices Uphold Law Extending Copyrights for 20 years*, DALLAS MORNING NEWS, Jan. 16, 2003, at 1D; Jesse Walker, *Copy Catfight*, REASON, Mar. 1, 2000, at 24.

[36] *E.g.*, UMG Recordings v. Does 1-199, Civil Action No. 04-093 (CKK) (D.D.C. filed Jan. 21, 2004). *See* Kathryn R. Satterfield, *Downloaders Face the Music: The Recording Industry is Singing the Blues and Suing Music Fans*, TIME FOR KIDS, Sept. 19, 2003, at 6.

[37] *See*, *e.g.*, Robert S. Boynton, *The Tyranny of Copyright*, N.Y. TIMES, Jan. 25, 2004, Magazine section, at 40.

[38] *See* WFNK radio FAQ, http://www.wfnk.com/radio; Musicchoice Frequently Asked Questions, http://www.musicchoice.com/what_we_are/faqs.html.

[39] *See*, *e.g.*, Chris Castle, Getting a Fair Share of the Digital Pie, BoycottRIAA.com (Dec. 19, 2003), http://www.boycott-riaa.com/article/print/9574.

your Rio.[40] It's what allows the recording industry to sue 12 year old Brianna LaHara.[41] Copyright law, people are learning, is not just or even mostly about getting money to authors and artists so that they can earn a living writing stuff — indeed, it seems to do a pretty bad job of that. Instead, people are hearing that copyright law is about protecting the way big entertainment and information conglomerates do business.[42] Last week, Larry Lessig and Jeff Tweedy came to the New York Public Library to talk about copyright law, and the New York Times reported that the line of people waiting to get in stretched around the block.[43]

Copyright law has been hemorrhaging its moral legitimacy. The public no longer believes the story of copyright law as a mechanism to allow authors the creative and financial freedom to earn money from their works.

Now, we who do copyright law for a living can tell them that there are some pretty good reasons why authors and artists don't control their own copyrights, and why such a small percentage of them make enough money from their works to be able to quit their day jobs and create works of authorship full-time. The fact of the matter is that copyright law in the United States is structured to channel both the economic rewards and the control into the hands of intermediaries — the people who distribute and disseminate copyrighted works — because that's where we need to direct the money and control. The system relies on intermediaries to be conduits from authors to the people who enjoy their works.[44] That eats up a lot of money. If we ask book publishers or record labels or software publishers to pay their authors more, they would all tell us, "gee, we'd love to. That would be great. The trouble is, we can't afford to. What we do is incredibly expensive."

And they're absolutely right about that. Being a book publisher, or a record label, or a motion picture studio, is incredibly expensive. They don't have any extra money lying around to spend on sweetening what they pay to authors. Mass dissemination has always required significant capital investment, in office space and printing presses or recording studios, film cameras or special effects plants, in CD stamping plants, in sales reps and warehouses and shipping departments and trucks and payola, in

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40 *See*, *e.g.*, Hiawatha Bray, *Apple's Music Operation Hits a Sour Note*, BOSTON GLOBE, Aug. 2, 2004, at C2.

41 *See* Satterfield, *supra* note 36. R

42 *See*, *e.g.*, LAWRENCE LESSIG, FREE CULTURE 8-9 (2004).

43 David Carr, *Exploring the Right to Share, Mix, and Burn*, N.Y. TIMES, Apr. 9, 2005, at B11. Video and audio archives of the event are available online at http://wilcoworld.net/wired.

44 *See* PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY 7-8 (1994); Jessica Litman, *Sharing and Stealing*, 37 HASTINGS COMM. & ENT. L.J. 1, 2-4 (2004).

store fronts and publicity departments. That's an important reason why US copyright law has channeled the proceeds of copyright into the hands of intermediaries. We've needed copyright as a bribe for the profit-making intermediaries, who understandably need a business model calculated to produce profits before they make the significant capital investment to become a book publisher or a record label, and the intermediaries have been absolutely necessary parties in the distribution chain.[45]

Until recently. Now we have the Internet. Digital distribution over digital networks is not capital-intensive, or at least it need not be. When tech-savvy consumers look at copyright law, the way we're used to doing it, what they see looks less like a necessary conduit, and more like a bunch of gratuitous barriers.

III. THE IMPLICATIONS FOR PEACE

I promised to spend half my time talking about peace. I think that making peace this time is going to be hard. I understand that nobody is ready yet, but I also want to make the point that the longer the war goes on, the more difficult, and expensive, and just plain galling we're liable to find the concessions that we will have to make in order to make peace. We've missed some opportunities to come out of this war relatively cheaply. There were a bunch of moments back there when, instead of settling the dispute with an enemy on reasonable terms, we pressed on, seeking total annihilation.

There was a moment, four or five years ago, when it would have been possible to settle the *Napster* case by licensing Napster. Napster could have paid a per-subscriber, per-month fee, could have agreed to adjust the fee upward some years down the road if it looked as if the market could bear it. Napster could also have agreed that, with advance notice, it would block identified new hot releases for say, a six to nine month period. The recording and music industries would have gained a tame peer-to-peer system with blocking capability tied to a central server, as well as a steady income stream. That's a better deal then they are going to be able to take away from this five years later. I understand all the reasons why recording companies and music publishers decided that it was unacceptable to settle with Napster on terms that would have left it operating.[46] By letting that opportunity go by, though, we've let the public enjoy peer-to-peer file sharing for five years. The peer-to-peer systems people are using today are designed in ways that make them much harder to tame. I haven't seen any reliable hard numbers, but everybody's rough back-of-the-napkin esti-

[45] *See* GOLDSTEIN, *supra* note 44, at 7-8. **R**

[46] For one account of some of those reasons, see JOSEPH MENN, ALL THE RAVE: THE RISE AND FALL OF SHAWN FANNING'S NAPSTER 223-307 (2003).

mates are that about as many American consumers are trading music over peer-to-peer file sharing networks as voted for President Bush in 2004.[47] That's a lot of people. I think it's going to be really difficult to persuade them to give it up. Consumers have gotten used to sharing music. They've gotten used to exercising the sort of creativity and self-expression that, in other contexts, we reward with a compilation copyright. They get that peer-to-peer file trading is illegal, but not that it's *wrong*, because they no longer believe that the copyright law is well calibrated to divide right from wrong.

Or think about the choice to sue Michael Robertson's MP3.cin into bankruptcy.[48] Despite Robertson's "bad boy" image, his launch of the My MP3.cin "Beam it" Service looked like he was trying to be a good citizen. He purchased performance licenses from ASCAP, BMI, and SESAC,[49] he implemented rudimentary access controls to try to limit the service to people who purchased CDs, and he relied on the advice of counsel as to what the copyright law required. I belong to a listserv of people who teach intellectual property and Internet law, and when Beam It showed up, the majority of professors on that list insisted that the fair use privilege shielded the copying that Robertson got sued for. The judge disagreed, holding MP3.cin liable for willful infringement, and awarding damages accordingly,[50] which forced the liquidation of the company.[51] Now, again, I can see why people were angry, but they could have reached a settlement calling for modest royalties that would have exceeded anything that's being collected today under section 112 for ephemeral copies. Choosing to litigate the entire site out of business sent precisely the wrong message to other innovators. If you're going to get buried with a stake through your heart even if you purchase a license for what you are doing, and try to obey what your lawyers reasonably conclude the law says, why even try?

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47 *See*, *e.g.*, Electronic Frontier Foundation, Let the Music Play (Sept. 2003), http://www.eff.org/share; Xeni Jardin, *P2P in the Legal Crosshairs*, WIRED NEWS, Mar. 15, 2004, http://wired-vig.wired.com/news/digiwood/0,1412,62665,00.html.

48 *See* UMG Recording v. MP3.com, 92 F. Supp. 2d 349 (S.D.N.Y. 2000); TeeVee Toons v. MP3.com, Inc., 134 F. Supp. 2d 546 (S.D.N.Y. 2001); Zomba Recording Corp. v. MP3.com, Inc., 00 Civ. 6831 (JSR), 00 Civ. 6833 (JSR), 2001 U.S. Dist LEXIS 9647 (S.D.N.Y. July 10, 2001); Copyright.net Music Publishing v. MP3.com, 256 F. Supp. 2d 214 (S.D.N.Y. 2003)

49 *See* Country Rd. Music, Inc. v. MP3.com, Inc., 279 F. Supp. 2d 325, 327-28 (S.D.N.Y. 2003).

50 *See* UMG Recordings v. MP3.com, Copy. L. Rep. (CCH) ¶ 28,141 (S.D.N.Y. Sept. 6, 2000).

51 *See* Kari Lynn Dean, *MP3.com Loot Hites the Auction Block*, WIRED NEWS, Mar. 9, 2004, http://wired-vig.wired.com/news/culture/0,1284,62584,00.html; Brad King, *Lawsuit Could Stunt Online Games*, WIRED NEWS, Apr. 12, 2002, http://www.wired.com/news/games/0,2101,51747,00.html.

Proceeding without a license is undeniably risky, but seeking to negotiate licenses for a new, potentially lucrative market seems both foolish and futile.

Indeed one problem with drawing statutory privileges and licenses so narrowly that they can't be extended to any novel use or technology is that you offer innovators little choice but to start operating without permission. The only other alternative is to track down and negotiate individually with every copyright owner who claims rights in whatever you are doing, and without a proof of concept and some investment capital, you can't afford the lawyer time to manage the licensing.

Speaking of investment capital, there's the suit against Hummer Winblad.[52] That sent precisely the chill it was intended to into Silicon Valley.

All of that may be a fine way to behave if the goal is to be the biggest, baddest, scariest, superpower in the copyright war. It does make it more difficult to make peace.

At this point, everyone is feeling besieged and insisting on greater concessions to restore a basic comfort level. These sorts of demands are fueling a vicious cycle. The specificity of the provisions drawn to defend against last year's threat make them ineffective against today's innovation. Some copyright owners have responded by broadening their demands, fueling fear among technology businesses that copyright owners seek radical expansion of contributory and vicarious liability. High tech interests for their part, have concluded that some copyright owners' litigation habit is out of control. They are increasingly seeking to codify provisions that would bar copyright owners from suing them,[53] which makes copyright owners feel as if they are being asked to lay down all of their weapons while the battle is still ongoing.[54]

We are not going to be able to rebuild the law that we're destroying in this war without a great deal of compromise, many concessions, and a large dose of mutual trust, and we've just spent the past ten years proving to one another that we can't be trusted. There's a great deal of mistrust

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[52] *In re* Napster Copyright Litigation v. Hummer Winblad Venture Partners, 343 F. Supp. 2d 1113 (N.D. Cal. 2005). The suit, brought by twelve of the plaintiffs in the copyright infringement litigation against Napster, alleges that venture capital firm Hummer Winblad and two of its principals, should be held vicariously and contributorily liable for the copyright infringement of people who used Napster to exchange music files, because of the firm's investment in Napster and involvement in its operation.

[53] *See*, *e.g.*, Digital Media Consumers Rights Act of 2003, H.R. 107, 108th Cong. § 5(b) (2003).

[54] *See*, *e.g.*, *H.R. 107, The Digital Media Consumers' Rights Act of 2003: Hearing Before the Subcomm. on Commerce, Trade and Consumer Protection of the House Comm. on Energy and Commerce*, 108th Cong., (2004) (testimony of Jack Valenti, Motion Picture Association of America).

right now and it certainly looks to me as if most of it is richly deserved. There's been an inordinate amount of bullying and threats, a fair amount over-zealous advocacy on all sides that has sometimes crossed the line into bad faith litigation or deceptive lobbying. I was not involved in any way in last year's effort to come up with some mutually agreeable language on the Induce Act,[55] but watching it from the outside, it seemed to me to me to reveal bad faith bargaining, or at least willful deafness, on the part of everyone involved.

Now everyone is waiting to see what the Court does in *Grokster*.[56] We're all much too revved up, though, for the Court's decision in *Grokster* to actually settle anything. I was talking last month with a well-respected academic who pays pretty close attention to what's going on in Washington. This is someone the majority of folks in this room would probably see as a member of your "us" rather than my "them." He told me that lobbyists he knows have made it clear to him that, if the motion picture studios are dissatisfied with the Supreme Court's decision in *Grokster,* they are determined to purchase the enactment of the Induce Act,[57] whatever it costs them. (The turn of phrase is his, not mine.)

The studios may use the opportunity to open a new front in the copyright war and escalate hostilities, or they can try to use the occasion to explore détente. I'm not hopeful. Even though I believe that the studios' options are more constrained than they may realize, I think that peace

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[55] Senator Hatch introduced the Inducing Infringement of Copyrights Act of 2004, S. 2560, 108th Cong., 2d Sess. (2004), on June 22, 2004. The bill would have made anyone who "aids, abets, induces, or procures" infringement liable as an infringer if a reasonable person, looking at all available information including whether the aiding, abetting, inducing or procuring "activity relies on infringement for its commercial viability" would infer that actor intended to aid, abet, induce or procure infringement. The bill was supported by the Recording Industry Association of America, and bitterly opposed by representatives of the consumer electronics and high technology industries. *See Protecting Innovation and Art While Preventing Piracy: Hearing Before the Senate Comm. on the Judiciary*, 108th Cong. (2004), *available at* http://judiciary.senate.gov/hearing.cfm?id=1276. At Senator Hatch's request, the Copyright Office supervised negotiations among stakeholders to try to reach a consensus draft. Those negotiations failed to produce agreement. In September, the Copyright Office suggested its own compromise language. *See* UNITED STATES COPYRIGHT OFFICE, RECOMMENDATION ON AMENDMENTS TO S. 2650 (2004), *available at* http://www.copyright.gov/docs/S2560.pdf. The Copyright Office version proved even more controversial than the original bill. *See* Katie Dean, *Senate Shelves Induce Review*, WIRED NEWS, Oct. 7, 2004, http://wired-vig.wired.com/news/politics/0,1283,65255,00.html.

[56] Metro-Goldwyn-Mayer Studios, inc. v. Grokster, Ltd., 380 F.3d 1154 (9th Cir. 2004), *cert. granted*, 160 L. Ed. 2d 518, 125 S. Ct. 686 (2004).

[57] *See supra* note 55. **R**

may not seem like an attractive choice. I predict that copyright owners and their lawyers are going to find peace talks painful. The folks they've cast as their enemies include mainstream consumer electronics and high tech businesses, and those interests are going to insist on more concessions and more meaningful assurances than they have in the past or would have even as recently as a year ago, and I think they have good reason. High technology industry groups were already on their guard after last year's negotiations over the Induce Act, after the position movie studios took in the debate over the Consumer Broadband and Digital Television Promotion Act,[58] after the arguments being made in the broadcast flag proceeding,[59] and after the lawsuit against Hummer-Winblad.[60] They're now even more concerned because of the copyright owners' positions in the *Grokster* case.[61] They will require firm assurance that copyright owners aren't going to insist that they morph into tomorrow's copyright police.

Moreover, even after this is all sorted out among the music industry, movie industry, recording industry, book publishers, consumer electronics industry, telephone companies and Internet service providers, libraries and politicians, we aren't going to be done. There's the matter of the sixty million or so John Does, their families and friends. It's easy to forget about them, both because we've marginalized them by calling them "pirates," and because we have the tools, collectively, to persuade Congress to pass legislation that the public does not and will not support.[62] Getting such bills written into law, though, is a little bit like finding a congenial politician and announcing to the world that he's the new government of Afghanistan. If what we're trying to do is affect the public's behavior, announcing the solution we've chosen because it's the one that suits us is unlikely to do the trick. We won't be able to enforce it. The recording and motion picture industries took a calculated risk when they decided to treat millions of consumer noncombatants as guerilla warriors, but the result is

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58 S. 2048, 107th Cong., (2002). The bill, introduced by Senator Fritz Hollings, allegedly at the behest of the Walt Disney Company, see Paul Boutin, *US Prepares to Invade Your Hard Drive*, SALON, Mar. 29, 2002, *available at* http://www.salon.com/tech/feature/2002/03/29/hollings_bill, would have required consumer electronics and computer hardware manufacturers to implement government-approved copy protection technology in their products.

59 *See* Am. Library Ass'n v. F.C.C., 406 F.3d 689 (D.C. Cir. 2005).

60 *See supra* note 52. **R**

61 *See*, *e.g.*, Brief of Amici Curiae The Consumer Electronics Association, The Computer & communications Industry Association, and the Home Recording Rights Coalition in Support of Affirmance, at 5, 10-13, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 127 S. Ct. 2764 (2005) (No. 04-480), *available at* http://www.ccianet.org/filings/ip/Grokster_Brief.pdf.

62 *See* Litman, *supra* note 3, at 22-32, 84-86, 111-17. **R**

that millions of consumers now see this war as a war against them. Having drawn them into the war, it will be necessary to make peace with them too — and that's going to be especially difficult because there's no way to sit them down at the table to negotiate.

I've heard some people insist that people who download music without permission don't care whether it's wrong, because they're just thieves. They want to get stuff for free and they don't care whom they steal it from. I think that picture is of a piece with the rest of the wartime propaganda I've been talking about. I suspect that people who believe that 60-plus million consumers who use peer to peer software do so because they're are thieves came to that conclusion in part because they've been making overbroad claims about what copyright law ought to entitle them to control. Everything I've seen persuades me that most consumers want to believe in the idea of copyright, if the evidence of copyright they see doesn't clash irreconcilably with their ideals. Most of the ones I run into insist that they're willing to pay the authors of works if they are given some reasonable mechanism for doing so.

We're still too angry at each other to talk about giving consumers reasonable opportunities to pay for peer-to-peer file trading.[63] We can't even see the request to make peer-to-peer legal as a legitimate one, so we don't really grasp how much we need to repair the way that copyright law looks to the people who are asking. Just as we, as a community, missed some opportunities to make peace, I think we also missed some chances to make very small changes in the way we do business that would have given the public a different picture of how copyright operates. So long as the recording and motion picture industries decided to pursue John Doe suits, imagine how much more effectively it would have played as an education tool if the plaintiffs had announced that they would reserve 20% of any settlement to be paid to the performers and composers who created whatever works are listed on Schedule A? If the recording industry had done this two years ago, I think public support for the John Doe suits would have been significantly higher. It sends a very different message to the public if the suits that are supposed brought on behalf of composers and performers actually put a little money in their pockets.

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[63] In the past several years, a number of commentators have proposed copyright reforms that would permit licensed, paid peer-to-peer file sharing. *See*, *e.g.*, WILLIAM FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW AND THE FUTURE OF ENTERTAINMENT 199-258(2004); Daniel Gervais, *The Price of Social Norms: Toward a Liability Regime for File-Sharing*, 12 J. INTELL. PROP. 39 (2004); Neil W. Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J. L. & TECH. 1 (2003). The response of the recording and motion picture industry to all of these proposals has been dismissive. *See* Litman, *supra* note 44, at 34-38. **R**

Indeed, since digital distribution is in many ways cheaper than bricks and mortar distribution, imagine if some record label had announced that from now on, it would pay double the customary performers' royalty and double the statutory mechanical royalty for licensed digital downloads? That's a feature that makes DRM and incompatibility a little easier to swallow. Consumers would know that while they might be getting less music for their money because of the limitations imposed by DRM, they would be buying it in a form that puts more money in the musicians' pockets.

Instead, we've been acting as if we've forgotten both authors and consumers in the battles between copyright owning intermediaries and the folks who make digital technology. Some people have pinned their hopes on pervasive digital rights management systems.[64] All these skirmishes, some folks say, are a delaying tactic designed to buy the copyright law time until we can deploy robust digital rights management to prevent unauthorized copying of digital files. I don't think it will work. For one thing, settling on a digital rights scheme is never as easy as it looks like it should be. Remember the SDMI initiative?[65] Second, we live in an increasingly global world. It is at least a generation too late to be trying to enforce digital borders. That means that as a practical matter we can't make pervasive DRM work unless we convince all of our trading partners to want to adopt it too, and there are too many reasons why it's a bad idea. Finally, open source software is almost ready for prime time. There are open-source alternatives to most proprietary programs, with pretty good functionality and improving user-interfaces. They actually work pretty well. Any DRM-encumbered device faces potential competition from open source alternatives that eschew the most obnoxious technological protection measures. That will limit just how unreasonably any DRM can restrict consumer use of copyrighted works.

I think we have three choices. We can accept that 65 million or so consumers will share music and other works of authorship over peer-to-peer networks whatever the law says, and try to deter them with a combination of John Doe lawsuits, criminal prosecution, and well poisoning – flooding peer-to-peer networks with spoofed files and viruses. (Someone

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64 *See Consumer Benefits of Today's Digital Rights Management (DRM) Systems: Hearing Before the Subcomm. on Courts, the Internet and Intellectual Property of the House Comm. on the Judiciary*, 107th Cong., (2002), *available at* http://judiciary.house.gov/legacy/80031.PDF; MOTION PICTURE ASSOCIATION OF AMERICA, CONTENT PROTECTION STAUS REPORT (2002), *available at* http://judiciary.senate.gov/special/content_protection.pdf; MOTION PICTURE ASSOCIATION OF AMERICA, CONTENT PROTECTION STAUS REPORT III (2002), *available at* http://judiciary.senate.gov/special/mpaa110702.pdf.

65 *See* Secure Digital Music Initiative, http://www.sdmi.org, which remains "on hiatus." *See* What's New, http://www.sdmi.org/whats_new.htm.

is going to get sued for that some day, and as a Torts teacher, my guess is that the well-poisoners will lose.) That's pretty much we're doing now. The biggest risk I see with this strategy is that it is likely to cause continuing damage to the fabric of the copyright law, and continuing erosion in public support for it.

Option two: we can give consumers a better legitimate deal than illegal peer-to-peer offers. There are a bunch of pretty interesting proposals out there, but the most plausible ones feature a collective or statutory license that allows everyone to engage in peer-to-peer file sharing, but gives them an opportunity to pay for it.[66] Those proposals are designed in a way that they would probably work pretty well for music, and adapting them for books and ebooks wouldn't be difficult. It's a little tougher to make them work for software and movies. This option also has some significant disadvantages.[67] It is vulnerable to a host of objections, and it would do little to ameliorate the damage that I've been discussing. Its most pressing advantage is that it looks reasonably easy to get there from here.

Option three is to regain copyright law's moral legitimacy. That's my favorite, but it's also, I think, the least likely. That's because it's going to require more than public relations. It's going to involve some real law reform. I don't think we, collectively, and by we I mean we copyright lawyers, have the political will or energy to get involved in significant copyright law reform.

What would that take? Let's start with the premise that we want copyright law to give meaningful protection to authors, that we want it to encourage the creation and widespread dissemination of lots and lots of works of authorship, and that we want it to look legitimate, reasonable and fair. A substantial and growing segment of the public apparently no longer believes that copyright law is an effective incentive for authors. It seems no longer to believe that copyright law is the engine of free expression that enables us to enjoy a wide variety of works of authorship. It no

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66 *See* Electronic Frontier Foundation, A Better Way Forward: Voluntary Collective Licensing of Music File Sharing (Feb. 2004), *available at* http://www.eff.org/share/collective_lic_wp.pdf; Netanel, *supra* note 63; Fisher, *supra* note 63; Gervais, *supra* note 63; Litman, *supra* note 44, at 39-49. R R

67 *See* Litman, *supra* note 44, at 35 & n.134. Some people oppose any solution based on statutory or collective licenses on what are essentially religious grounds. Some of these opponents insist that any unnecessary inroad on the author's control of the exploitation of her work is offensive; others complain that it is unacceptable to allow the government or any government-approved entity to set rates for the enjoyment of works of authorship. Even those who favor collective, blanket, or statutory licenses in principle acknowledge that nearly a century of experience has taught us that collecting license fees is much easier than figuring out how to distribute the proceeds. R

longer thinks that copyright allows any but a small handful of authors to be compensated fairly for their works. The public no longer sees copyright as the mechanism that connects them with authors and their works. Increasingly, the view of copyright law that more and more people hold is that copyright is a device used by big conglomerates to put up unnecessary and unreasonable barriers between authors and the public. The most copyright-protective route to a workable, lasting peace is to show everyone that that view is wrong. But the public isn't dumb. Trotting out a stream of entertainers of the week to make public service announcements isn't going to do it.[68] We can't really convince the public that that view is wrong, unless we change the law to make it wrong.

The copyright story that the public wants to buy into is a story with the author at its center. Initially, that might seem odd. We think of author-centric copyright law as the way they do it in Europe.[69] But it shouldn't be surprising. The romantic idea of the individual creator has a powerful hold on the American imagination. Whenever we take up patent law reform, lots of people worry how the changes will affect the lone inventor who creates inventions in his garage.[70] Those of you who attended the *Grokster* oral argument, or read the transcript, probably noticed that the Justices expressed concern about how the rule the studios were proposing would affect the guy in the garage.[71]

The idea of copyright with authors at its center is a very American idea. Nonetheless, American copyright law long ago pushed authors upstage, for a variety of compelling economic reasons.[72] In a networked digital world, though, many of those reasons have far less force.[73] And that gives us an opportunity, if we have the will, to reclaim the moral high ground by taking advantage of the economies of digital distribution to allow copyright to more nearly be about the connection between authors and the public.

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[68] *See* Patrick Goldstein, *The Big Picture: Hollywood Deals with Piracy, a Wary Eye on CDs*, L.A. TIMES, Sept. 9, 2003, at E1.

[69] *See*, *e.g.*, Edward J. Damich, *The Right of Personality: A Common – Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1 (1988); Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991 (1990).

[70] *See*, *e.g.*, *Perspectives on Patents: Hearing before the Senate Comm. on the Judiciary*, 109th Cong. (2005) (testimony of Dean Kamen, Inventor).

[71] *See* Transcript of Oral Argument, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 127 S. Ct. 2764 (2005) (No. 04-480) (Mar. 29, 2005), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-480.pdf, at 15 (remarks of Justice Souter) (asking about the "guy . . . sitting in the garage figuring out whether to invent the iPod or not").

[72] *See* Litman, *supra* note 44, at 2. R

[73] *See id.*; Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1563-66 (2005).

Certainly, it's worth considering whether we'd be willing to fashion our copyright law in a more author-centric mode if it allowed us to recapture some of the moral legitimacy we've been losing. How? Models of author-centric copyright are all around us. Whenever we talk about harmonization, we focus on harmonizing terms, or scope of rights,[74] but when we make those arguments, we need to avert our eyes from the fact that the terms and rights we're trying to import are part of a body of law that's far more author-centric than U.S. copyright law has ever been.[75] In a networked digital milieu, moreover, many of the intermediaries between individual authors and the people who enjoy their work have become optional.

So, one idea that I'd like you to take away from this lecture, and put in a box somewhere until you feel that peace is a thinkable proposition, is that an important step in restoring legitimacy to copyright law is to make it more author-centric than it has been.[76]

We also need to break our current habit of enacting ultra-narrow specific privileges, tailored to particular licensees and technology, but incapable of generalization.[77] Innovators who want to innovate and follow the rules should be able to do so. We need to stop using the copyright lawmaking process to load the statute up with gratuitous entry barriers. Ten years ago Bruce Lehman's White Paper Report recommended a campaign to persuade the public to "just say yes" to licensing.[78] The propaganda campaign is only half – the less important half — of that effort. The other

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74 *See*, *e.g.*, *Hearing on S. 483 Before the Senate Comm. on the Judiciary*, 104th Cong. (1995) (testimony of Bruce Lehman, Commissioner of Patents); William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 22 NOTRE DAME L. REV. 907, 930 (1997).

75 *See*, *e.g.*, Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063 (2003).

76 Members of the Brace Lecture audience pressed me for specific proposals. I haven't included any specific prescriptions here because, in today's polarized environment, many people skip right to the proposals and decide how to view the other stuff in light of the agenda that the proposals appear to embody. My critique of wartime copyright lawyering is independent of any specific copyright reform agenda. I believe that the problems I describe affect all copyright lawyers, without regard to how they hope the law might evolve in the future. Those readers interested in the specific solutions I might advocate can find some discussion of the subject in my previously published work. *See* Litman, *supra* note 3, at 179-86; Litman, *supra* note 44, at 39-50. **R**

77 *See* Litman, *supra* note 3, at 22-69, 122-50. **R**

78 *See* INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 208 (1995).

half is to make it easy to get a license, and we don't.[79] We need mechanisms that not only encourage tomorrow's Napster, Grokster & MP3.cin to seek the licenses they need, but that actually make it easy for them to get them.

But that is emphatically not the sort of copyright law we've gotten in the habit of making. And, just as we would face a really difficult task in breaking the public of its peer-to-peer file trading habit, we are unlikely to have an easy time weaning ourselves from our addiction to wartime lawmaking. That's why I'm not hopeful. I'm afraid that we probably can't get there from here. That leaves us with a choice between door number one (more of the same) and door number two (a new collective or statutory license, which will solve a narrow problem for a short time.) Neither one seems to me to be likely to reverse the damage caused by the copyright war, and neither one looks like a viable strategy for addressing the new problems that will inevitably arise.

I wish I had a more optimistic assessment.

So, what should we do about all this? Well, as I said, none of us is ready yet to end the copyright war. So, let's all go back to our offices. You can tell your colleagues that I said a bunch of silly things, or, for that matter, just forget everything I said for now. We'll wait to see what the Supreme Court has to say in *Grokster*. Early next fall, when the lobbying season opens, we can watch Senators and Representatives promise to put some copyright bill or other on the fast track, and then we can watch negotiations bog down, and somewhere in there, Joe Beard will mail you an issue of the Journal of the Copyrght Society that reprints this lecture. And, when that happens, I'd ask you to riffle through the pages, if only to remind yourself of how wrong I was. And, just maybe, by then, we'll all be more nearly ready to think about peace.

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[79] *See* Litman, *supra* note 44, at 13-23; Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673 (2003). R