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Antibiotic Resistance

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Antibiotic Resistance

Jessica Litman

Abstract

In this essay, written for the 30th Anniversary of Cardozo's Arts and Entertainment Law Journal, I revisit the ruinous litigation strategy copyright owners pursued after Napster to secure control of the market for personal uses of copyrighted works, which I wrote about ten years ago in War Stories, 20 Cardozo Arts & Ent. L.J. 337 (2002). The litigation campaign had effects that copyright owners now have reason to regret. 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 harder to kill. Copyright owners' indiscriminate litigation against new entrants into the entertainment and information marketplace killed off a broad swath of potential competitors and partners. The ones who were left faced a less crowded field because old media had helpfully cleared it for them. The scorched-earth litigation strategy temporarily cleared the field, and made 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 are 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 under their own control.

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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 engaged 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 liability.[2] Napster also convinced

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[1] Jessica Litman, War Stories, 20 Cardozo Arts & Ent. L.J. 337 (2002).

[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 USC § 512 (2010). 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.

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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 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/millions 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]

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

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

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

[6] See generally Electronic Frontier Foundation, The RIAA v. The People: 5 Years Later (Sept. 30, 2008), at < https://www.eff.org/wp/riaa-v-people-five-years-later>; Sarah McBride and Ethan Smith, Music Industry to Abandon Mass Suits, Wall Street Journal, December , 2008, at <http://online.wsj.com/article/SB122966038836021137.html>.

[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 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 v. Tennenbaum, (1st Cir 2011); Capitol Records v. Thomas-Rasset, 680 F. Supp. 2d 1045 (D. Minn. 2010).

[9] See, e.g., Cisco, Cisco Visual Networking Index Usage (Oct. 25, 2010) at <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"). See also, e.g, Envisional, Technical Report: An Estimate of

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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 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 bricks 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

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Infringing Use on the Internet (January 2011), at http://documents.envisional.com/docs/Envisional-Internet_Usage-Jan2011.pdf (Commissioned by NBC-Universal).

[10] See Tom Zeller, Jr., The Ghost in the CD, New York Times, November 4, 2005, at < http://www.nytimes.com/2005/11/14/business/14rights.html> (quoting Mitch Bainwol, chief executive of the RIAA); Mitch Bainwol, Building a Brighter Future: Making AND Selling Great Music (August 12, 2005), at <http://dreadedmonkeygod.net/home/attachments/Bainwol.pdf>.

[11] See Bainwol, supra note 10.

[12] See, e.g., Brij Khurana, Halderman GS Sees copy-protection flaw in new CDs, Daily Princetonian, Oct. 9, 2003, at http://www.dailyprincetonian.com/2003/10/09/8785/; Reuters, CD Crack, Magic Marker Indeed, WIRED, May 20, 2002, at http://www.wired.com/science/discoveries/news/2002/05/52665.

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

[14] See, e.g., 40 Sad Portraits of Closed record Stores, BuzzFeed (2011), at <http://www.buzzfeed.com/mjs538/40-sad-portraits-of-closed-record-stores>.

[15] Tower Records Bankruptcy Heralds Industry Changes, PBS Newshour, Aug. 23, 2006, at http://www.pbs.org/newshour/bb/business/july-dec06/music_08-23.html; Yuki Noguchi, A Broken Record Store, Washington Post, Aug. 23, 2006, at < http://www.washingtonpost.com/wp-dyn/content/article/2006/08/22/AR2006082201350.html>.

[16] See Paul Fahri, For Tower Records, End of Disc, Washington Post, December 11, 2006, at < http://www.washingtonpost.com/wp-dyn/content/article/2006/12/10/AR2006121001003.html>.

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[17] Ben Sisario, Retailing Era Closes with Music Megastore, NY Times, June 14, 2009, at <http://www.nytimes.com/2009/06/15/arts/music/15virgin.html>.

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booksellers shut their doors;[18] then the Borders Group declared 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]

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 them

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[18] See, e.g., Michael Taylor, Cody's, Landmark Berkeley Bookstore, Closes: Poor sales blamed for Cody's demise, San Franciso Chronicle, July 23, 2008, at <http://articles.sfgate.com/2008-06-23/news/17165395_1_telegraph-avenue-uc-berkeley-cody-s-owner>; Thomas J. Lueck, Colliseum Books to Close Permanently by Year's End, NY Times, Oct. 3, 2006, at <http://www.nytimes.com/2006/10/03/nyregion/03coliseum.html>; Ethan Wilensky-Lanford, Wall-to-Wall Books, and All of them for the Lanlord, NY Times, May 23, 2007, at http://www.nytimes.com/2007/05/23/nyregion/23gotham.html; Robert Weisman, Wordworth Books' Final Chapter is Saturday, Boston Globe, Oct. 27, 2004, at C.5; Mary Morgan, Shaman Drum Bookshop to Close June 30, Ann Arbor Chronicle, June 9, 2009, at <http://annarborchronicle.com/2009/06/09/shaman-drum-bookshop-to-close-june-30/>.

[19] Mike Spector and Jeffrey A. Trachtenberg, Borders Forced to Liquidate, Close All Stores, Wall St. Journal, July 19, 2011, at <http://online.wsj.com/article/SB10001424052702303661904576454353768550280.html>.

[20] See, e.g., Lee C. Bollinger, Journalism Needs Government Help, Wall Street Journal, July 14, 2010, at http://online.wsj.com/article/SB10001424052748704629804575324782605510168.html.

[21] See, e.g., Hollywood Video Stores to Close, Business Journal, May 11, 2010, at 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 USC § 109, see Brooks Barnes, A Bid to Get Film Lovers Not to Rent, NYTimes, Nov. 11, 2011, at 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 40% 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 21st 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.

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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 ISP 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 unable to agree on settlement terms that are "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.

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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 v. Rosetta Books, 150 F. Supp. 2d 613 (SDNY 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 Street Journal, Dec. 13, 2009, at http://online.wsj.com/article/SB10001424052748704121504574594113096154756.html.

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

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

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

[29] Authors Guild v. Google, 770 F. Supp. 2d 666 (SDNY 2011).

[30] See Kim Armstrong, One million books scanned and returned to CIC university libraries, Inside Google Books, Feb. 4, 2011, at <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 (SDNY, filed Sept. 12, 2011). See James Grimmelmann, The Orphan Wars, The Laboratorium, Sept. 12, 2011, at http://laboratorium.net/archive/2011/09/12/the_orphan_wars.

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

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[32] Perfect 10 v. Amazon.com, 508 F. 3d 1146 (9th Cir 2007).

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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.

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 it's music to MusicNet; MusicNet wouldn't license its music to PressPlay.[38] Neither

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[33] See, e.g., Kate Murphy, In Some Cases, Even Bad Bacteria May be Good, NY Times, Oct. 31, 2011, at <http://www.nytimes.com/2011/11/01/health/scientist-examines-possible-link-between-antibiotics-and-obesity.html>; Center for Disease Control and Prevention, Antibiotic Resistance Questions and Answers, June 30, 2009, at http://www.cdc.gov/getsmart/antibiotic-use/anitbiotic-resistance-faqs.html.

[34] See, e.g., Dawn C. Chmielewski, Fee-based online music services sing the blues, San Jose Mercury News, December 2, 2002

[35] See 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 Magazine, June 26, 200, at http://money.cnn.com/magazines/fortune/fortune_archive/2000/06/26/283031/index.htm; Steve Jones, Major labels hop on lumpy gravy train They distort ideal ease of downloading, USA Today, Nov. 1, 2000, at 3D.

[36] See Don Davis, Record Giants, AOL and RealNetworks form MusicNet, Internet Retailer, April 2, 2001, at < 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 From Buys MusicNet Venture, NY Times, April 5, 2005, at < http://www.nytimes.com/2005/04/13/business/media/13net.html>.

[37] E.g., Dan Tynan, The 25 Worst tech Products of All Time, PC World, May 26, 2006, at http://www.pcworld.com/article/125772-3/the_25_worst_tech_products_of_all_time.html.

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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 in exchange for small equity stakes.[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 3% share of the worldwide computer market. Record labels described the launch of the iTunes music store as an experiment; Apple's tiny market share made it a pilot

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[38] See 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 23, 2003, at <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 (ND 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, April 18, 2003, at <http://www.businessweek.com/technology/content/apr2003/tc20030418_9975.htm>.

[39] See Neil Strauss, Record Labels' Answer to Napster Still Has Artists Feeling Bypassed, NY Times, Feb. 18, 2002, at <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, c|net News.com, May 19, 2003, at 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, at 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, NY Times, Sept. 23, 2002, at < http://www.nytimes.com/2002/09/23/business/copyright-hurdles-confront-selling-of-music-on-the-internet.html>.

[42] E.g., Jefferson Graham, USAToday, Feb. 25, 2003, at http://www.usatoday.com/tech/webguide/internetlife/notablesites/2003-02-25-rhapsody_x.htm; Tom Dinome, Baiscs: You Listen, You Pay, NY Times, March 7, 2002, at http://www.nytimes.com/2002/03/07/technology/basics-you-listen-you-pay-post-napster-music-services.html.

[43] See Graham, supra note 42; John Borland, Listen.com Sings Solo Tune, c|net News.com, Jan. 28, 2002, at http://news.cnet.com/Listen.com-sings-solo-tune/2100-1023_3-824502.html.

[44] See Edward C. Baig, Personal Tech: At the iTunes Music Store shopping is a breeze, USA Today, Apr. 29, 2003, at http://www.usatoday.com/tech/columnist/edwardbaig/2003-04-29-itunes_x.htm; John Borland, Apple Unveils Music Store, c|net News.com, April 28, 2003, at http://news.cnet.com/Apple-unveils-music-store/2100-1027_3-998590.html.

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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 downloaded 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 99 cent price for all downloads. They wanted the option to control the price of their product. Apple's iTunes had become too big to simply withdraw their recordings in favor of other services. They hoped, though, that the cellular telephone market would allow them to forge more advantageous partnerships.[49] (Apple would soon dash those hopes by 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

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[45] See John Borland, Apple's music: Evolution, not revolution, c|net News.com, April 28, 2003, at 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, at http://www.usatoday.com/tech/news/2004-01-05-ipod_x.htm.

[47] See http://web.archive.org/web/20040710030616/http://www.napster.com/compatible_devices/.

[48] See John Borland, Music Moguls Trumped by Steve Jobs, c|net News, April 14, 2005, at http://news.cnet.com/Music-moguls-trumped-by-Steve-Jobs/2100-1027_3-5671705.html.

[49] See id.

[50] See Fred Vogelstein, The Untold Story: How iPhone Blew up the Wireless Industry, 16 Wired #2, January 2008, at <http://www.wired.com/gadgets/wireless/magazine/16-02/ff_iphone>.

[51] See Editorial: the Digital Divide, N.Y. Times, Aug. 26, 2004, at http://www.nytimes.com/2004/08/26/opinion/26thurs3.html.

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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 any 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 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

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[52] See Eric Bangeman, RealNetworks Cracks the Fairplay Code, Ars Technica, July 26, 2004, at http://arstechnica.com/old/content/2004/07/4030.ars.

[53] See Peter Cohen, RealNetworks Promises Ipod Fix, PC World, Dec. 16, 2004, at http://www.pcworld.com/article/118975/realnetworks_promises_ipod_fix.html.

[54] See The Apple iPod iTunes Antitrust Litigation, No. 5:2005-cv00037, (ND. Cal. Filed Jan. 3, 2005); Jim Wagner, Apple Hit by Lawsuit, Internetnews.com, Jan. 6, 2005, at http://www.internetnews.com/bus-news/article.php/3455431; Pamela Maclean and Karen Gullo, Apple's Jobs Must Answer Questions in iTunes Antitrust Suit, Bloomberg.com, March 22, 2011, at http://www.bloomberg.com/news/2011-03-22/apple-s-jobs-must-answer-questions-in-itunes-antitrust-dispute.html.

[55] See, e.g., Cory Doctorow, Will Steve Jobs Drop iTunes DRM in a Heartbeat?, Boing Boing, Feb. 6, 2007, at http://boingboing.net/2007/02/06/will-steve-jobs-drop.html.

[56] See Jim Dalrymple, Apple, EMI Offer Higher Quality, DRM-Free formats, MacWorld, April 2, 2007, at <http://www.macworld.com/article/57098/2007/04/drmfree.html>.

[57] See Keith Regan, Amazon Pounces on iTunes with MP3 store, Ecommerce Times, Sept. 25, 2007, at <http://www.ecommercetimes.com/story/59498.html>.

[58] I Want My iTV, Businessweek, Nov. 19, 2007, at http://www.businessweek.com/magazine/content/07_47/b4059401.htm. NBC Chief Warns Over iTunes Pricing, FT.com, Oct. 29, 2007, at http://www.ft.com/intl/cms/s/8f799be2-865a-11dc-b00e-0000779fd2ac.html; Katie Marsal, NBC Chief Says Apple "Destroyed" Music Pricing, Appleinsider, Oct. 29, 2007, at http://www.appleinsider.com/articles/07/10/29/nbc_chief_says_apple_destroyed_music_pricing.html.

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[59] See Bolt.com, Why Join Bolt, archived on Feb. 15, 2006, at <http://web.archive.org/web/20060215081933/http://www.bolt.com/siteinfo/whyjoin.jsp>.

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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 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. The same year, Google augmented its video search engine with the opportunity to upload

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[60] Brian Garrity, Apple Peels Back NBC-iTunes Deal, NY Post, Sept. 1, 2007, at http://www.nypost.com/p/news/business/item_S349t7msmCO7HOqdr0XXzM; Natalie Finn, NBC Gets a Download of Itself, E! Online, Sept. 19, 2007, at <http://www.eonline.com/news/nbc_gets_download_of_itself/56222>.

[61] E.g., Frank Ahrens, Apple in a Fight for Rights to TV Shows, Washington Post, Oct. 25, 2007, at <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/24/AR2007102402410.html>; Brooks Barnes, NBC Will Not Renew iTunes Contract, NY Times, Aug. 31, 2007, at http://www.nytimes.com/2007/08/31/technology/31NBC.html.

[62] Brian Stelter, Media Decoder: NBC Shows will return to iTunes, NY Times, Sept. 9, 2008, at <http://mediadecoder.blogs.nytimes.com/2008/09/09/nbc-shows-will-return-to-itunes/>.

[63] See Michael Learmonth, NBC, News Corp Unveil Hulu.com, Variety, Oct. 28, 2007, at http://www.variety.com/article/VR1117974896?refCatId=1009; Brad Stone, Testing Over, Hulu.com to Open its TV and Film Offerings this Week, NY Times, Mar. 11, 2008, at http://www.nytimes.com/2008/03/11/business/media/11hulu.html.

[64] See Mark Berniker, Microsoft Debuts Free MSN Video Service, InternetNews.com, Oct. 14, 2003, at <http://www.internetnews.com/ec-news/article.php/3091691>.

[65] See, e.g., Scott Kirsner, Video Stars a La Internet, NY Times, Oct. 28, 2005, at http://www.nytimes.com/2005/10/28/technology/28iht-ptvideo29.html; Video that's Languishing? Put it On the Net Instead, NY Times, Jan. 24, 2006, at http://www.nytimes.com/2006/01/24/business/worldbusiness/24iht-video.html.

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

[67] See Ben Ratliff, A New Trove of Video in Web's Wild World, NY Times, Feb. 3, 2006, at <http://www.nytimes.com/2006/02/03/arts/music/03yout.html>.

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

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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] 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

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[69] Susan Kuchinskas, Lights, Camera, Google, InternetNews.com, April 14, 2005, at http://www.internetnews.com/ec-news/article.php/3497926; Yahoo!, MSN, and AOL followed in 2006. See Yahoo Video, archived Aug. 11, 2006, at http://web.archive.org/web/20060811014031/http://video.yahoo.com/; Microsoft Puts Up Own Viral-Video Website, FoxNews.com, Sept. 19, 2006, at <http://www.foxnews.com/story/0,2933,214556,00.html>; Alexandra DeFelice, AOL to Launch Free Video-Sharing Portal, TechNewsWorld, July 31, 2006, at <http://www.technewsworld.com/story/52123.html>.

[70] See Katie Dean, Blogging + Video = Vlogging, Wired, July 13, 2005, at <http://www.wired.com/entertainment/music/news/2005/07/68171>.

[71] Photobucket home page, archived on April 14, 2006, at http://web.archive.org/web/20060414162428/http://photobucket.com/.

[72] See Grouper.com Beta, What is Grouper?, archived Feb. 6, 2006, at <http://web.archive.org/web/20060206060647/http://www.grouper.com/about/what.aspx>.

[73] See Bolt home page, archived Feb. 9, 2006, at http://web.archive.org/web/20060209040512/http://www.bolt.com/; Bolt, Why Join Bolt?, archived Feb. 15, 2006, at http://web.archive.org/web/20060215081933/http://www.bolt.com/siteinfo/whyjoin.jsp.

[74] See Greg Sandoval, YouTube Dances the Copyright Tango, c|net News.com, July, 2006, at <http://news.cnet.com/2100-1025-6097365.html>.

[75] See Michael Liedke, Video Sharing Site YouTube.com Tests Boundaries, Seattle Times, April 10, 2006, at <http://seattletimes.nwsource.com/html/businesstechnology/2002921750_youtube10.html>; YouTube Serves Up More Than 100 million Videos a Day Online, USAToday, July 16, 2006, at http://www.usatoday.com/tech/news/2006-07-16-YouTube-views_x.htm; Richard McManus, YouTube Nearly Doubles Traffic in May, ReadWriteWeb, June 27, 2006, at <http://www.wired.com/entertainment/music/news/2005/07/68171>.

[76] Tur v. YouTube, 562 F.3d 1212 (9th Cir 2009); see Eric Berlowitz, Lawsuit Accuses Video Website YouTube of Copyright Infringement, USA Today, July 18, 2006, at < http://www.usatoday.com/tech/news/2006-07-18-youtube-suit_x.htm>.

[77] See, e.g., Olga Kharif, Sour Musical Notes on YouTube, MySpace, Businessweek, Sept. 18, 2006, at <http://www.businessweek.com/technology/content/sep2006/tc20060918_148703.htm>; Michael Liedteke, Now Starring on the Internet: YouTube.com, USA Today, April 9, 2006, at <http://www.usatoday.com/tech/news/techinnovations/2006-04-09-youtube-popularity_x.htm>; YouTube in Copyright Crosshairs, Wired, Sept. 14, 2006, at http://www.wired.com/techbiz/media/news/2006/09/71791; Jason Calacanis, Building a Business Based on Copyright Infringement (or bad business idea # 487), Calcanis.com, Feb. 2, 2006, at http://calacanis.com/2006/02/03/building-a-business-based-on-copyright-infringement/.

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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 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. 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.[85] That same month, 100 million viewers watched video on You Tube.[86] Hulu is doing just fine,[87] but it has yet to challenge

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[78] See Mark Cuban: Only a "Moron" Would Buy YouTube, FoxNews.com, Sept. 30, 2006, at <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, at <http://blogmaverick.com/2006/10/07/some-thoughts-on-youtube-and-google/> ("The copyright shit is going to hit the lawsuit fan.").

[79] Don Jeffrey Bloomberg, Warner Music, YouTube Cut Music Video Deal, USA Today, Sept. 19, 2006, at http://www.usatoday.com/money/media/2006-09-19-youtube-bloomberg_x.htm.

[80] Andrew Ross Sorkin and Jeff Leeds, Music Companies Grab a Share of the YouTube Sale, NY Times, Oct. 19, 2006, at http://www.nytimes.com/2006/10/19/technology/19net.html.

[81] See, e.g., Catherine Holahan, YouTube's New Deep Pockets, Businessweek, Oct. 10, 2006, at http://www.businessweek.com/technology/content/oct2006/tc20061010_083340.htm.

[82] See Don Dodge, Details of the YouTube Deal, Don Dodge on the Next Big Thing, Oct. 31, 2006, at http://dondodge.typepad.com/the_next_big_thing/2006/10/details_of_the_.html; Nicholas Carr, Shaft the Piano Player, RoughType, Oct. 30, 2006, at http://www.roughtype.com/archives/2006/10/shaft_the_piano.php.

[83] See Viacom Intl v. YouTube, 718 F. Supp. 2d 514 (SDNY 2010); see, e.g., Candace Lombardi, Week in Review: YouTube Honeymoon Over for Google, c|net News.com, March 16, 2007, at <http://news.cnet.com/Week-in-review-YouTube-honeymoon-over-for-Google/2100-1083_3-6167957.html>

[84] See Football Ass'n Premier League v. YouTube, 633 F. Supp. 2d 159 (SDNY 2009).

[85] See Clare 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.

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[86] Chloe Albanesius, Jan YouTube Viewers exceed 100 M for first time, PC Mag, March 8, 2009, at http://www.pcmag.com/article2/0,2817,2342533,00.asp.

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YouTube for dominance in the online streaming video market. In the summer of 2011, Hulu put itself up for sale.[88] Apparently, nobody wanted to buy it; the owners announced in October that they had reconsidered their plans.[89] In November of 2011, the US movie industry rolled out its latest initiative, dubbed "Ultraviolet."[90] Early reviews have ranged from skeptical to scathing.[91]

The upshot of the 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,[92] 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 Internet and online service providers and device manufactures to act as copyright police. Back in 1998,

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[87] See Brian Stelter, Hulu, Billed as Tomorrow's TV, Looks Boxed In, NY Times, July 23, 2011, at <http://www.nytimes.com/2011/07/24/business/media/hulu-billed-as-tomorrows-tv-looks-boxed-in-today.html>.

[88] See id.

[89] Sam Schechner, Hulu Puts Owners in New Quandary, Wall St. Journal, Oct, 2011, at < http://online.wsj.com/article/SB10001424052970204346104576635312926644524.html>.

[90] See Ultraviolet home page, http://www.uvvu.com/ (visited Nov. 14, 2011).

[91] See, e.g., Brooks Barnes, A Bid to Get Film Lovers Not to Rent, NY Times, Nov. 11, 2011, at 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. 3, 2011, at http://arstechnica.com/gadgets/news/2011/11/your-movie-on-every-platform-sort-of-for-a-while-how-the-new-ultraviolet-drm-fails.ars.

[92] See, e.g., Greg Sandoval, Google Music Launching Without Sony and Warner, c|net News.com, Nov. 14, 2011, at http://news.cnet.com/8301-31001_3-57323505-261/google-music-launching-without-sony-and-warner/; After Break with Apple, NBC goes to Amazon, MSNBC, Sept. 24, 2007, at http://www.msnbc.msn.com/id/20593227/#.TsVCsoD8cdM.

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copyright owner lobbies made a deal with Internet and online services: copyright owners could enlist ISPs to remove infringing content quickly and without the need to resort to copyright litigation; in return, ISPs 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.[93] 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.[94] 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.[95]

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.[96] If they hoped to expand Internet Service provider liability to encompass an affirmative duty to police their sites for infringing content, they were disappointed. Courts held that services inviting individuals to upload user-generated content, who blocked allegedly infringing

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[93] 17 USC § 512. 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.

[94] 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, at <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, c|Net News.com, May 13, 2003, at http://news.cnet.com/2100-1025-1001319.html; Ryan Paul, Oh No You Didn't: Warner Hits Lessig Vid with DMCA Takedown, Ars Technica, April 29, 2009, at 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. & Texc. 170, 177-87, 204-25 (2010)(describing examples).

[95] See, e.g., Greg Sandoval, RIAA Lawyer Says DMCA May Need Overhaul, c|net News.com, Nov. 6, 2011, at http://news.cnet.com/8301-31001_3-57319344-261/riaa-lawyer-says-dmca-may-need-overhaul.

[96] See, e.g., Perfect 10 v. Amazon.com, 487 F.3d 701 (9th Cir 2007); Perfect 10 v. Visa International, 494 F.3d 788 (9th Cir 2007); Disney Enterprises v. Hotfile, No. 11-20427-CIV-JORDAN (S.D. Fla., July 8, 2011); Flava Works v. Gunter, No. 10-C-6517 (ND. Ill. May 10, 2011); Viacom v. YouTube, 718 F. Supp. 2d 514 (SDNY 2010); Arista Records v. Lime Group, 715 F. Supp. 2d 481 (SDNY 2010); IO Group v. Jordon708 F. Supp. 2d 989 (C. D. Cal. 2010); UMG Recordings v. Veoh Networks, 665 F. Supp. 2d 1099 (C.D. Cal. 2009); Arista Records v. Usenet.com, Inc., 633 F. Supp. 2d 124 (SDNY 2009); Warner Brothers Entertainment v. Ideal World, 516 F. Supp. 2d 261 (SDNY 2007).

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content on receipt of a takedown notice were entitled to the shelter of section 512.[97] 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.[98] Defendants argued that their services came within the section 512 safe harbor. The first court to decide the issued agreed.[99] 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 rightsholders if such licenses were available on attractive terms, section 512 permitted them to go ahead without copyright licenses.[100]

Frustrated with the courts, the copyright owner lobbies have decided to press their case to Congress. As I write, they are championing 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 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.[101] As introduced, the bill empowers any

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[97] See, e.g., Perfect 10 v. Amazon.com, 487 F.3d 701 (9th Cir 2007); Viacom v. YouTube, 718 F. Supp. 2d 514 (SDNY 2010); UMG Recordings v. Veoh Networks, 665 F. Supp. 2d 1099 (C.D. Cal. 2009).

[98] See Capitol Records v. MP3Tunes, 2011 US Dist LEXIS 93351 (SDNY 2011); Disney Enterprises v. Hotfile Corp., 2011 US Dist LEXIS 78387(S.D. Fla. 2011).

[99] Capitol Records v. MP3Tunes, 2011 US Dist LEXIS 93351 (SDNY 2011); see Mitchell Zimmerman, Mp3.com redux? Music venture's model survives copyright challenge as S.D.N.Y. provides guidance for cloud-based services, AIPLA Lexology, Oct. 26, 2011, at <http://www.lexology.com/library/detail.aspx?g=6f9aba60-91f4-4d6b-9062-8afff86c99f5>.

[100] See, e.g., Timothy B. Lee, Are Google Music and Amazon Cloud Player Illegal?, Ars Technica, July 4, 2011, at < http://arstechnica.com/tech-policy/news/2011/07/are-google-music-and-amazon-cloud-player-illegal.ars>; Google Music Launches without Lanel Licenses, Hollywood Reporter, May 10, 2011, at < http://www.hollywoodreporter.com/news/google-music-launches-label-licenses-187022>.

[101] Stop Online Piracy Act, H.R. 3261 112th Cong. (2011); see Rashmi Rangnath, SOPA and the DMCA Safe Harbors, Public Knowledge Policy Blog, Nov. 3, 2011, at <http://www.publicknowledge.org/blog/sopa-and-dmca-safe-harbors>. Although the "rogue website" legislation is being marketed to Congress as a remedy directed at foreign infringers, see, e.g., http://www.mpaa.org/contentprotection/roguewebsites, the statutory language is broad enough to encompass many domestic sites with legitimate business models. See Mike Masnick, Viacom Exec: 'Everyone Knows A Rogue Site When They See One'… Except He Doesn't, TechDirt, Nov. 9, 2011, at <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 11, 2011, at http://www.techdirt.com/articles/20110620/01370314750/universal-music-goes-to-war-against-popular-hip-hop-sites-blogs.shtml; Rebecca MacKinnon, Stop the Great Firewall of America, N.Y. Times, Nov. 15, 2011, at http://www.nytimes.com/2011/11/16/opinion/firewall-law-could-infringe-on-free-speech.html. The provisions of H.R. 3261, as introduced, are so loopy that seems incredible that anyone might expect Congress to enact the legislation. The new Register of Copyrights, however, supports the bill, which she has described as "serious and comprehensive" as well as "measured". See Statement of Maria A. Pallante, Register of Copyrights on H.R. 3261, the "Stop Online Piracy Act" before the House Judiciary Comm., 112th Congress (Nov. 16, 2011), at <http://www.copyright.gov/docs/regstat111611.html>.

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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 be obliged to cease doing business with the site within five days.[102] 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 hope to persuade Congress to give them power to remove the sites from the Internet.

Does any of this matter? Big media adopted a strategy to preserve its dominance in the entertainment marketplaces, which, in retrospect, seems self-defeating. Content owners are suffering from wounds that are predominantly self-inflicted, and seeking to offload the blame on consumers and foreigners.[103] 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.[104]

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[105] and testimony to Congress,[106] they've not behaved very friendily. 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.[107] The 21st 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 enable them to pay minimal royalties.[108] Google has

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[102] H.R. 3261 § 103.

[103] It's not obvious that the music, movie, or book business is in decline overall. The competition 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 <http://mobile.bloomberg.com/news/2011-11-14/record-sales-rise-as-lady-gaga-adele-find-a-future-with-spotify.html>.

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

[105] See, e.g., http://www.youtube.com/watch?v=6YScoXn31Mg; see also MPAA, Rogue Websites: Stories from the Creators (2011), at http://www.mpaa.org/contentprotection/roguewebsites ("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").

[106] See, e.g., Promoting Investment and Protecting Commerce Online: The ART Act, the NET Act and Illegal Streaming: Hearing Before the Subcomm. on Intellectual Property of the House Judiciary Comm., 112th Cong. (June 1, 2011) (testimony of Michael P. O'Leary, Vice president of the MPAA), at http://judiciary.house.gov/hearings/pdf/OLeary0612011.pdf.

[107] See Jessica Litman, Real Copyright Reform, 96 Iowa L. Rev. 1, 8-12 (2010).

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[108] See FBT Productions v. Aftermath Records, 621 F.3d 958 (9th Cir. 2010); The Youngbloods v. BMG Music, 2011 US Dist LEXIS 1585 (SDNY); Ridenhour v. BMG Recordings, No. 11-cv-05321-DMR (ND

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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.[109] 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.[110]

Nor have copyright owners taken advantage of other opportunities to prove that they're the 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.[111] 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

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Cal. file Nov. 2, 2011); James v. UMG Recordings, No. 11-cv-01613 (ND Cal., filed April 1, 2011). See, e.g., Ben Sisaro, Eminem Lawsuit May Raise Pay for Older Artists, NY Times, March 27, 2011, at http://www.nytimes.com/2011/03/28/business/media/28eminem.html; Neil Strauss, Record Labels Answer to Napster Still has Artists Feeling Bypassed, NY Times, Feb. 18, 2002, at <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, at <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.).

[109] [Quote YouTube exec from FMC 2011 Policy summit when FMC posts the video at http://vimeo.com/futureofmusic]. See Elliot Van Buskirk, Niel Young: Failed Warner/YouTube Negotiations Penalized Artists, Wired, March 3, 2009, at <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."). See also Jon Irwin, Streaming Services Are Cutting Big Checks for Rights Holders, Billboard, Oct. 25, 2011, at 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").

[110] See, e.g., Ben Sisario, Sirius's Move to Bypass a Royalty Payment Clearinghouse Causes an Uproar, NY Times, Nov. 6, 2011, at 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.
>
> 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.

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[111] See, e.g., Kot, supra note 22, at 5-12; Joel Rasmussen & Andrew Shapter, Before the Music Dies (2006) (documentary film).

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from the 30,000 "John Doe" suits it filed against individual file sharers with the artists whose recordings were shared. Music publishers,[112] record labels,[113] and multimedia entertainment companies,[114] 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.

As Google, Amazon, and Apple have extended their reach into markets traditionally served by book publishers,[115] record labels,[116] and motion picture distributors,[117] they have introduced direct distribution options, which allow creators to bypass traditional intermediaries.[118] It remains to be seen whether

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[112] See Mills Music v. Snyder, 469 USS 153 (1985); Spier v. Bourne, 750 F. Supp. 648 (SDNY 1990); Scorpio Music v. Willis, No. 3:11-cv-01557-BTM –RBB (S.D. Cal., filed July 14, 2011).

[113] See Fifty Six Hope Road Music, Ltd. v. UMG Recordings, Inc., 2010 US Dist LEXIS 94500 (SDNY Sept. 10, 2010); Larry Rohter, Record Industry Braces for Artists' Battle Over Song Rights, NY Times, Aug. 15, 2011, at http://www.nytimes.com/2011/08/16/arts/music/springsteen-and-others-soon-eligible-to-recover-song-rights.html; Kal Rustiala & Chris Sprigman, The Music Industry Copyright Battle: When Is Owning More Like Renting, Freakanomics, Aug. 31, 2011, at http://www.freakonomics.com/2011/08/31/the-music-industry-copyright-battle-when-is-owning-more-like-renting/.

[114] See Classic Media, Inc., v. Mewborn, 532 F.3d 978 (9th Cir. 2008); Milne v. Slesinger, 430 F. 3d 1036 (9th Cir. 2005); Marvel Characters v. Simon, 310 F. 3d 280 (2d Cir. 2002); Marvel Worldwide v. Kirby, 777 F. Supp. 2d 720 (SDNY 2011); Siegel v. Warner Brothers Entertainment, 690 F. Supp. 2d 1048 (C. D. Cal. 2009); Archie Comic Publications v. DeCarlo, 258 F. Supp. 2d 315 (SDNY 2003).

[115] Julie Bosman, Agent and Former Publisher to lead New Imprint for Amazon, NY Times, May 23, 2011, at <http://artsbeat.blogs.nytimes.com/2011/05/23/agent-and-former-publisher-to-lead-new-imprint-for-amazon/>; Amazon.com, Amazon Publishing, http://www.amazon.com/gp/feature.html?ie=UTF8&docId=1000664761 (visited Nov. 17, 2011); Apple iTunes, What's on iTunes – Books, http://www.apple.com/itunes/whats-on/#books (visited Nov. 17, 2011); Google, Books-- Android Market, https://market.android.com/books (visited Nov. 17, 2011).

[116] See Amazon.com, MP3 Music Store, http://www.amazon.com/MP3-Music-Download/b/ref=sa_menu_mp3_str1/188-2383815-0714917?_encoding=UTF8&node=163856011 (visited Nov. 17, 2011); Apple iTunes, What's on iTunes: Music, http://www.apple.com/itunes/whats-on/#music (visited Nov. 17, 2011); Google, Music-- Android Market, https://market.android.com/music (visited Nov. 17, 2011)

[117] See Amazon.com, Amazon Instant Video, http://www.amazon.com/Instant-Video/b/ref=sa_menu_atv9?ie=UTF8&node=2858778011 (visited Nov. 17, 2011); Apple iTunes, What's on iTunes – Movies, http://www.apple.com/itunes/whats-on/#movies (visited Nov. 17, 2011); Apple iTunes, What's on iTunes – TV Shows, http://www.apple.com/itunes/whats-on/#tvshows (visited Nov. 17, 2011); Google, Movies--Android Market, https://market.android.com/movies (visited Nov. 17, 2001); YouTube home page, http://www.youtube.com/ (visited Nov. 17, 2011).

[118] See Amazon.com, Self-Publish With Us, http://www.amazon.com/gp/seller-account/mm-summary-page.html?topic=200260520&ld=AZSelfPublishMakeM (visited Nov. 17, 2011); Apple iTunes, Sell Your Content, http://www.apple.com/itunes/content-providers/ (visited Nov. 17, 2011); Google Music for Artists, http://music.google.com/artists/ (visited Nov. 17, 2011); David Streitfield, Amazon ReWrites the Rules for Book Publishing, NY Times, Oct. 16, 2011, at http://www.nytimes.com/2011/10/17/technology/amazon-rewrites-the-rules-of-book-publishing.html.

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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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