Whodunit ! Assessing Copyright Liability in *Cyburbia*: Positing Solutions to Curb the Menace of Copyrighted '*File Sharing*' Culture [1]

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Abstract. The electronic age has kick started the information boom and with an ever increasing pace, it has begun to spread its canvas to engulf mankind as its greatest beneficiary and perhaps its most susceptible slave. This is evident from the universal phenomenon of copyrighted file sharing culture promoted by P2P technologies. Indeed, the P2P architecture poses a threat to the entertainment and software industries which stand on the legislative guarantee of copyright laws. But technological advances have not only caused legislative obsolescence , but have also altered the dynamics of information exchange in the online environment. The word 'State' seems to have lost its meaning somewhere. Therefore, there is a pressing need on us, as an international society, to devise alternative solutions and approaches to substantially curb the abuse of digital copyrighted works, for copyright laws to have any meaning. It is this global concern which gives birth to this paper.

Key Words: Online Piracy, P2P Software's, Secondary Infringement Liability, Private Copying, Policy Options

> For economic incentives to work appropriately, property rights must protect the rights of capital assets…At present…severe economic damage [is being done] to the property rights of owners of copyrights in sound recordings and musical compositions…under present and emerging conditions, the industry simply has no out…unless something meaningful is done to respond to the …problem, the industry itself is at risk.
>
> -Alan Greenspan (1983) [2]

The wise words of the man who went to become the Chairman of Federal Reserve of the United States is germane even today, when the century has turned a new leaf. Analog piracy is passé and digital piracy has become a global concern. The borderless Internet, which originated in the United States is now a medium to which every man in the world can enjoy a green card and which can be accessed from almost any part of the planet where civilization exists.

From the times of Gutenberg's Printing Press to the modern day Internet technologies, a lot of water has flown beneath the bridges. The world has witnessed a progressive transition from the physical tangible to the ephemeral. We are leaving the industrial world of the past 250 years and entering the new networked world of cyberspace - the global interactive multimedia information and communications network. (Lin, 2001, p. 1) We all want to be a part of this digital information society and enjoy easy, quick and cheap access to varied genres of entertainment media such as mp3 music, full length DVD movies, software, games etc. at the click of the mouse button. Indeed, the pervasive information gateway has revolutionized the economics of accessing information and bears an influence on every facet of the human specie be it trade and commerce, business and industry, stock markets, laws and legislations, social and political environments, personal lives and personal relations of human persons who are mere 'units' in the lawless waves of cyberspace.

The so-called copyright industries welcomed and rejoiced the *dot com boom*, but soon realized and faced the technological blow, the wounds of which haven't been healed unto this date. Indeed, much 'meaningful' work has been done on the legal and technological front since Greenspan raised his concern in 1983, yet the above concern seems crystallized in time and there is a pressing need to revisit the present, anticipate the future and posit

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[2] From Greenspan's testimony in 1983 on the Home Recording Act. Hearings before the Subcommittee on Patents, Copyrights and Trademarks, October 25, 1983. cf. Liebowitz, S. (2003). In Gordon, W. J., Watt, R (eds.), *The Economics of Copyright: Developments in Research and Analysis*. UK: Edward Elgar.

legal and technological solutions for the approaching tomorrow keeping in mind the prevailing social, economic, political realities, fundamental democratic principles and technological possibilities and alternatives.

1. Online Piracy – The Beauty of this Beast

Intellectual Property Rights, principally copyright laws protect the immaterial property in the intangible cyberspace. However, infringement in the online environment is exacerbated, not only by the speed at which copyrighted data can be transferred across political boundaries of Nation - States but on a much basic level, where software, driven by the *mens rea* of internet pirates is utilized to duplicate the digital file into so many copies, sufficient enough to impair the market of the creator or the owner of the copyrights therein.

However, one must not forget that there is a line of distinction between 'owned knowledge' and 'shared knowledge' and what IP laws protect is the former which submerges into the latter after the definite period of protection expires. Though the Information and Communication Technologies (ICT's) has universalized the concept of communication and provided a common platform for mankind to carry out business, it is equally true that the very same technology is vulnerable to cyber pirates and can be exploited in the most perverse manner. Such is the beauty of this beast as well as its bane. Indeed, it has rightly been said that technology is a double edged sword and the ICT's are no exception to that. Truly, 'technology is copyright industry's best friend and worst enemy.' (Geetesh, 2007, p. 1)

1.1 'Share' but with 'Care'

The digital world may be a need, an addiction, a facilitator, a tool which can be used from communication to creativity, for accessing news to penning down views (on online bulletin boards), to transact without 'being there' and celebrating the online culture to 'share'.

It is this 'celebration' which is under the legal scanner and has to be examined through the lens of copyright (as a discipline of law). This paper addresses a very delicate issue concerning P2P Networks which has proliferated the culture to 'share' which has naturally had an adverse impact on copyright industries. 'Delicate' because the fact is that almost all having access to the internet and personal computers use it almost indiscriminately and most of us would prefer to use it *ad infinitum* and unfettered including authors, like you and us who write pages of literature advocating the ban of such software's from the standpoint of legal sanctity. Courts ban it, grant injunctive relief against it, award damages yet, it resurfaces itself only under different names and once installed, the network grows uncontrolled by the hour. Therefore, mere criticism (though constructive) would not suffice, but an attempt has to be made by the academic community to offer alternative approaches, policy options and realistic solutions to curtail this social 'evil'. This paper attempts to do that precisely.

Such issues arise in the network society because there is no cyber police or e-government. It is like space, where monitoring (to protect the work against the abuse of infringement) is a technological myth. The artistic creations of creative individuals were never immune from piracy but piracy with respect to P2P Networks has the effect which can be compared to the impact of malignant cancer on the body of the patient. Indeed, it has the potential to destroy the prospects of securing fair returns on labor, just and well deserved monetary rewards, basically defeating the stimulus which motivated the creation or from a jurisprudential perspective, defeating the goals of copyright law which in the preambular dictates of Queen Anne's statute [3] have been beautifully described as 'An Act for encouragement of learning'. Your favorite music or movie is downloadable at the click of the mouse. It is not the question of money, but only a matter of time. Such are the excesses of 'access' in the online environment. Copyright seems meaningless.

1.2 The Age of P2P giants – Ever heard of 'Free' Copyrighted Digital File?

If it is free, it cannot be copyrighted. If it is copyrighted, it cannot be free. Business is not equivalent to charity but P2P swapping giants seem to combine business with charity by sharing copyrighted works for free and making big bucks behind the curtain under the guise of 'dual use technologies' which has sounded the death-knell of digital copyright industry. We are all witness to the fact that the information and communications technologies coupled with state of the art software applications has completely altered the dynamics of industries who have a 'business stake' in copyright laws [4] and whose operations are tangential to technological developments. Online piracy in copyrighted works is rampant and the digital threat to copyright has assumed incalculable proportions with the

[3] 8 Anne, c. 19 (1710). Statute of Anne, 1710 is the first Copyright legislation (England) in the world.

[4] For instance, it has been alleged that the Congress enacted the Copyright Term Extension Act (CTEA) of 1998 which raised the term of copyright protection from the standard Berne 50 years p.m.a. to 70 years p.m.a. as result of extensive lobbying efforts of Disney whose copyrights in major cartoon characters including "Mickey Mouse" were about to expire.

advent of P2P Softwares which can be downloaded for free. The ease and speed with which a work can be replicated, once it is rocketed into the dot-com stratosphere compounds the problem even further. And thereafter, such unauthorized data is made available to the world through the file sharing network. In other words, access to a P2P service can be best described as a passport to piracy. Indeed, it is a 'theft' of intellectual property. But the moot question is - Who is liable and to what extent? Is it the liability of the person who in an unauthorized manner downloaded the copyrighted content without paying the legitimate price or is it the P2P Software creator who is to be caught by the long arm of the law or is it the Internet Service Provider who has abetted the offence? Whodunit?

As copyright is technologically challenged, the courts become the arbiters of how copyright will be interpreted. (Halbert, 1999, p.50) They therefore shoulder a great responsibility to protect digital copyrights even where the legislature is yet to frame rules to respond to technological developments which lack legal sensitivity.

2. Species of Secondary Infringement

Unlike the Patent Act of the U.S. which makes those who actively induce infringement of a patent [5], indirectly liable as infringers, copyright law does not expressly render anyone liable for infringement committed by another. However, the Courts cannot turn a deaf ear where technology poses a threat and law has not developed in commensurate terms to grapple with it. As a result, the jurisprudential moorings of copyright law have produced doctrines of secondary liability grounded in common law principles.[6]

It is largely agreed that copyright infringement can be classified into two broad heads – direct and indirect/ secondary/ third party infringement. Intermediaries such as ISP's, P2P Networks and Online Bulletin Boards are liable indirectly and the direct infringer is the 'netizen' who downloads the copyrighted content through the technological tools and infrastructure provided by the former few, thereby violating at least one of the exclusive rights granted by the copyright statute.

The P2P network provider is generally sued, under the doctrines of secondary infringement, for it is difficult to sue individual infringers as it is not worth the 'time' and 'money' to pursue a multitude of individual infringers who download copyrighted content without any sense of obligation to pay. When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement.[7] More so, because internet offers anonymity and infringers are made liable by physical courts which are located across political boundaries. The worst part is that it is considered 'natural' to share as the large part of the world wide web is free. Netizens are inclined to believe that internet is public domain. The wise words of Justice Peterson [8] that 'what is worth copying in worth protecting' has little significance in the online environment where plasticity of digital media seduce netizens to believe, in the poetic words of Tagore that 'knowledge is free'. Strictly speaking, 'knowledge is free' indeed as it is difficult to commodify and fix a price tag on this noble intangible but in this age of 'intellectual property' what is taxed is the 'access' to this knowledge 'good'.

'Good fences make good neighbors', so said Frost in 'Mending Wall.' (1914) But cyburbia is borderless therefore a question of fencing copyrighted content against technological breach and abuse of piracy cannot be solved easily. Moreover, the free proprietary software provided by the P2P giants is taking piracy to unprecedented levels.

2.1 Revisiting the *Sony Betamax* decision

Copyright confers a bundle of exclusive rights upon the creator who is the first owner of copyrighted work. It is essentially a property right which can be transferred, principally by way of license or an assignment. A copyright is said to be infringed when any of the exclusive rights conferred upon the copyright holder is violated. In this way, copyright is not only a positive right granting the exclusive right to the creator to commercially exploit the work, but like the nature of the right in law of tort, it is essentially a negative right to prevent all others from enjoying the benefits arising from the use of such 'intellectual property'.

It is a settled law that [t]here can be no contributory infringement by a defendant without direct infringement by another.[9] A good majority of such decisions have been delivered by the U.S. Courts[10] , which has

[5] 35 U.S.C.A. § 271 (b)
[6] See M-G-M Studios., et al. v. Grokster, Ltd., et al. 545 U.S. 913, 914 (2005)
[7] M-G-M Studios., et al. v. Grokster, Ltd., et al. 545 U.S. 913, 929-930 (2005)
[8] University London Press v. University Tutorial Press (1916) 2 Ch 60
[9] Religious Tech. Ctr. v. Netcom On-Line Communication Services., Inc., 907 F.Supp. 1361, 1371 (N.D.Cal.1995)
[10] The first such case arose in 1908 in Scribner v. Straus, 210 U.S. 352 (1908).

perhaps dealt the maximum number of suits in respect of P2P technologies - from Napster to Aimster (later renamed "Madster") to Grokster and so forth, all have been illegal file sharing copyright disasters.

It was in *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*[11], where the Second Circuit Court noted that "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer." The intention of inducing or encouraging direct infringement was the ingredient to be satisfied in order to succeed in a claim of contributory infringement. The same Court in respect of vicarious liability succinctly observed that, "one may be vicariously liable if he has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities." Profiting from direct infringement while declining to exercise a right to stop or limit it was held to be a way of ascertaining vicarious liability. [12]

The controversy as to whether the use of VTR's were "fair use" or "productive use" and whether for the market sale of the same, could Sony could be declared liable for contributory infringement was settled by the U.S. Supreme Court in favor of Sony in its landmark decision delivered more than two decades ago. The Apex Court, arrived at the conclusion that Betamax is capable of "substantial non infringing uses" and the likelihood of market harm is minimal, in effect holding that Sony' s sale of Betamax VTR does not make them liable as contributory infringers considering that the principal use of this devise for "time shifting", and thus 'fair'. Though the District Court assumed that Sony had constructive knowledge of the probability that the Betamax machine would be used to record copyrighted programs, notwithstanding, it found that Sony merely sold a "product capable of a variety of uses, some of them allegedly infringing." [13]

The Sony Court observed that contributory infringement doctrine is grounded on the recognition that adequate protection of a monopoly may require the Courts to look beyond actual duplication of a device or publication to the products or activities that make such duplication possible. Holding VCR's as capable of substantial non infringing uses, the Court held that sale of copying equipment does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Expounding on the staple article of commerce doctrine, the Court observed [14]that the doctrine must strike a balance between a copyright holder's legitimate demand for effective-not merely symbolic-protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce. The Supreme Court made clear in the Sony decision that the producer of a product that has substantial non infringing uses is not a contributory infringer merely because some of the uses actually made of the product (…) are infringing. [15]We know today that VCR did not harm the motion picture industry but a contrario helped to enhance the sales of video cassettes.

Justice Stevens concluded Sony's Betamax fate by pointing out that new technology has created a lacuna in the statute, observing that "it is not the Court's job to apply laws that have not yet been written". However the Sony case imported the "staple article of commerce" of Patent law and transplanted it into copyright.

The contours of indirect liability lack shape and at least one U.S. District Court conceded that "the lines between direct infringement, contributory infringement, and vicarious liability are not clearly drawn...." [16] which the Supreme Court has reaffirmed. [17] Indeed, considerations of causation, knowledge, and intent are the pillars on which these doctrines of indirect liability differ. Having knowledge and the ability to act to prevent infringement but willfully turning a blind eye or a deaf ear will not help in escaping liability under the tort of contributory infringement.

2.2 The absurdity of the so-called "dual use" technologies in File Swapping Networks

Dual use technologies refer to all technologies which are capable of both infringing and substantial non infringing uses. Typewriters, Photocopying machines and even VCR's can be considered as 'dual use' technologies for the

[11] 443 F.2d 1159, 1162 (CA2 1971)

[12] See Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 307 (C.A.2 1963). See also Fonovisa, Inc. v. Cherry Auction, Inc. 76 F.3d 259 (1996)

[13] Sony Corporation of America, et al. v. Universal City Studios, Inc., etc., et al. 464 U.S. 417 (1984)

[14] Sony Corporation of America, et al. v. Universal City Studios, Inc., etc., et al. 464 U.S. 417, 442 (1984)

[15] In re Aimster Copyright Litigation 334 F.3d 643, 647 (2003). The Sony Court placed reliance on the staple article of commerce doctrine in 480 F.Supp. at 468 (1979) where it was observed that 'Whatever the future percentage of legal versus illegal home-use recording might be, an injunction which seeks to deprive the public of the very tool or article of commerce capable of some noninfringing use would be an extremely harsh remedy, as well as one unprecedented in copyright law.'

[16] 480 F.Supp. 457-458 (1979).

[17] Sony Corporation of America, et al. v. Universal City Studios, Inc., etc., et al. 464 U.S. 417 (1984)

'technology' itself suffers from certain limitations that it is not easy to apply it for infringing purposes on a mass scale by the large majority without incurring costs in money, time and hardware, sufficient enough so as to deter breach of copyright laws, however P2P softwares on the digital superhighway coupled with the standard functions of 'cut-copy-paste' in Windows make them capable not of, "both infringing and substantial non infringing uses", but much the other way round, that the technology is appropriated principally to substantial infringing uses and used in infringing ways, and the non infringing use becomes 'de minimis' in copyright parlance. 'Sharing' is equivalent to copying and constitutes the most conspicuous use of the network. The piracy only escalates, thus growing the consumer base which bears a direct adverse impact on sales [18]and also empowers 'them' to become a worldwide distributor of 'stolen' files thus implicating the technological abuse of the law.

The P2P software providers are only interested to take advantage owing to the fact that statutory response to technological developments is slow. The fine thread which runs common to all such anonymous P2P distribution systems is the notoriety of how to evade the copyright roadblocks rather than devising technological responses to meet legal challenges. They would prefer to reap as much benefits as they could possibly, before they are dragged to the Courts, instead of developing technologies to prevent infringement of copyrighted works. They take the 'defense' of "space-shifting" [19]or trying to fit within the parameters of the Sony judgment by making illusory attempts, like providing encryption technologies to encrypt their unlawful distribution of copyrighted materials [20]in the hope that it will click just like Sony's defense of "time shifting"[21] , attempt to resort to affirmative defenses of fair use [22] and substantial non-infringing use [23], (the latter defense of which stems from the staple article of commerce doctrine [24]), challenge[25] the injunctive relief on the first amendment free speech values [26]of the Constitution when it will little help; considering, that the judicial development of this four factor test of 'fair use', would under no circumstance permit wholesale copying of works[27], considering that 'they' themselves possess the knowledge that 'the most credible explanation for the exponential growth of traffic to the website is the vast array of free MP3 files offered by other users - not the ability of each individual to space-shift music she already owns' [28]and knowing fully well that there is little truth in the claim that majority of P2P users fully respect copyright laws. [29]

Indeed, if technology is fettered through technological controls and 'filtration' tools which limit and/ or substantially reduce online infringement over the network, such that the non infringing purposes seem plausible in the chequered history of such technologies, it may indeed be conferred the "dual use" status, for being capable of substantial non infringing use.

However, the Courts themselves are witness to the fact that P2P technologies have encouraged infringement by not only failing to act upon the knowledge of infringement, and that instead of developing filtering tools [30], the file sharing giants have actively induced customers to commit infringement[31], thus expanding

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[18] See observation of Fine Report at A & M Records, Inc. et al. v. Napster, Inc. 114 F.Supp.2d 896, 909-910 (2003)

[19] See defense of Napster at ¶ 10, A & M RECORDS, INC. et al. v. Napster, Inc. 114 F.Supp.2d 896, 904 (2000). "Space-shifting" refers to the process of converting a CD the consumer already owns into MP3 format and using Napster to transfer the music to a different computer-from home to office.

[20] See In re Aimster Copyright Litigation 334 F.3d 643, 653, 654 (2003)

[21] See observations of the U.S. Supreme Court in Sony Corporation of America, et al. v. Universal City Studios, Inc., etc., et al. 464 U.S. 417, 456 (1984)

[22] UMG Recordings, Inc., v. MP3.com, Inc. 92 F.Supp.2d 349 (2000)

[23] See Napster defense ¶ 1, A & M Records, Inc. et al. v. Napster, Inc. 114 F.Supp.2d 896, 912 (2000)

[24] The staple article of commerce doctrine stipulates that where technology capable of both infringing and 'substantial noninfringing uses.', the manufacturer of a staple article of commerce cannot be held liable for infringement by purchasers of that product.

[25] See ¶ 1, A & M Records, Inc. et al. v. Napster, Inc. 114 F.Supp.2d 896, 922 (2000)

[26] Freedom of speech is granted by the first amendment to the US Constitution. See A & M Records, Inc. et al. v. Napster, Inc. 114 F.Supp.2d 896, 922 (2000) and In re Aimster Copyright Litigation 334 F.3d 643, 656 (2003)

[27] Napster (A & M Records, Inc. et al. v. Napster, Inc. 114 F.Supp.2d 896, 913) citing Marcus v. Rowley, 695 F.2d 1171, 1176 (1983)

[28] ¶ 15, A & M Records, Inc. et al. v. Napster, Inc. 114 F.Supp.2d 896, 916 (2000); See M-G-M Studios., et al. v. Grokster, Ltd., et al. 545 U.S. 913, 922, 947 (2005)

[29] 90% of the files available for download on the FastTrack system were copyrighted works, which was merely 3% greater than Napster's threshold of copyrighted files 545 U.S. 913, 922, 923 (2005)

[30] See See M-G-M Studios., et al.v. Grokster, Ltd., et al. 545 U.S. 913, 924 (2005)
M-G-M Studios., et al. v. Grokster, Ltd., et al. 545 U.S. 913 (2005)

[31] See M-G-M Studios., et al. v. Grokster, Ltd., et al. 545 U.S. 913, 926 (2005)

its customer base which in turn shall further advertising opportunities [32], the single most important source for generating revenue.

Placing reliance on the staple article of commerce doctrine, Napster, the first P2P service to be sued, defended by claming that it only aims for "space-shifting" of digital data which constitutes 'fair use' and thus precludes liability for contributory or vicarious infringement by virtue of the application of the doctrine, however, the Court was unconvinced by this 'stunt' of distinguishing Sony, and was of the opinion that whereas the VCR manufacturer did not extend past manufacturing and selling the VCRs, Napster maintain[ed] and supervise[d] an integrated system that users must access to upload or download files.[33] Therefore, Napster unlike Sony continued to exercise control over the device's use and maintained all files on a central server whose main purpose was to keep an index of all the Napster users currently online and connect them to each other. Though the server itself did not contain any of the MP3 files, it bridged the connection with another computer which hosted the requested file. This way Napster had reason to know of the third party's direct infringement and directly facilitated the same even though the infringing file never crossed Napster's server.

Moreover, plaintiff also demonstrated that [Napster] had actual notice of direct infringement because the Recording Industry Association of America (RIAA) informed it of more than 12,000 infringing files. [34] Placing reliance on Gershwin[35], the Napster Court held that law does not require actual knowledge of specific acts of infringement and rejected defendant's argument that titles in the Napster directory cannot be used to distinguish infringing from non-infringing files and that defendant cannot know about infringement by any particular user of any particular musical recording or composition. [36]

The Court concluded that Napster, Inc. plays an active role in facilitating file-sharing and can be labeled as contributory infringers. Accordingly, it was held liable under this count. As to the defendant's claim on vicarious copyright infringement, the Court guided by the ingredients spelled out in the Greshwin judgment[37] coupled with the evidence which suggested that defendant possesses the ability to supervise Napster users including methods to block copyright infringers, the first test of vicarious infringement, that defendant has the right and ability to supervise the infringing activity stood satisfied. However, Napster did not earn revenue from the distribution of the software which was free. Yet, it was held vicariously liable, as plaintiff established that there is a reasonable likelihood that Napster, Inc. has a direct financial interest in the infringing activity and economic incentives for tolerating unlawful behavior [38] , including its plans to "monetize" its user base and derive revenues. Injunctive relief was granted in the mid of 2000 and Napster met its end in 2002 [39], though today it has resurfaced and operates but under the legal banner.

2.3 Filling the void of *Napster* – The Legacy continues

Next in queue was *Aimster*, which was not a pure P2P service, nevertheless, served the same purpose through a 'new idea' of technological misappropriation. The *modus operandi* of *Aimster* was to enable file swapping when both the users are online and connected in a chat room enabled by an instant-messaging service. Unlike *Napster*, it did not maintain its own server and copies of the songs were exchanged between the users without any involvement of *Aimster*, except that it provided the proprietary software that could be downloaded free of charge from its Web site. *Aimster* tried to play a cat & mouse game by claiming that it lacked the knowledge of infringing uses as the encryption feature of *Aimster*'s service prevented Deep, the proprietor from knowing what songs were being copied by the users of his system.

The Court held that voluntarily turning a blind eye to infringement will not suffice and placed reliance on two cases to support its understanding where it was observed that 'One who, knowing or strongly suspecting that he is involved in shady dealings, takes steps to make sure that he does not acquire full or exact knowledge of the nature and extent of those dealings is held to have a criminal intent'[40] because 'a deliberate effort to avoid guilty knowledge is all that the law requires to establish a guilty state of mind.'[41] Thus, all roads by *Aimster* to escape liability were blocked by the Court which made it clear that neither technology nor precedent would provide a haven for promoting an illegal act. The Court also took the view that by eliminating the encryption feature (which

[32] See M-G-M Studios., et al. v. Grokster, Ltd., et al. 545 U.S. 913, 926 (2005)
[33] See ¶ 16 A & M Records, Inc. et al. v. Napster, Inc. 114 F.Supp.2d 896, 917 (2000)
[34] See ¶ 2 A & M Records, Inc. et al. v. Napster, Inc. (2000) 114 F.Supp.2d 896, 918
[35] Gershwin Publ'g Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1163 (2d Cir.1971)
[36] See ¶ 3, A & M Records, Inc. et al. v. Napster, Inc. 114 F.Supp.2d 896, 918 (2000)
[37] See supra at Note 34
[38] See ¶ 3, A & M Records, Inc. et al. v. Napster, Inc. 114 F.Supp.2d 896, 921 (2000)
[39] Napster is "alive" and operates in Canada
[40] See United States v. Giovannetti, 919 F.2d 1223, 1228 (1990)
[41] See United States v. Josefik, 753 F.2d 585, 589 (1985); AMPAT/Midwest, Inc. v. Illinois Tool Works Inc., 896 F.2d 1035, 1042 (1990)

was a part of the *Aimster* software and encrypted the file when the same was transferred from the sender to the recipient) and monitoring the use being made of its system, *Aimster* like *Sony* could have limited the amount of infringement. [42] Yet, *Aimster* was more interested in finding technical loopholes in the *Sony* verdict instead of introspecting and correcting the mess it had created. The Court of Appeals accordingly upheld the District Court's order of granting preliminary injunction.

2.4 Second generation P2P Softwares – *Aimster* gone but *Grokster* et al. is on

The most successful alternative, Gnutella, was developed by Justin Frankel, a programmer who worked for one of the very companies suing *Napster* for copyright infringement. (King, 2002) This technology was employed by *Streamcast*, the makers of *Morpheus* whereas two other P2P services - *Grokster* and *Kazaa* relied on the FastTrack technology. To exploit the quandaries of the *Napster* Court and surpass the legal technicalities of theories imposing secondary liability, the technology promoted file sharing culture but unlike *Napster*, it did not provide a central server and *'peer'* computers directly communicated with each other for file sharing purposes. Owing to the decentralized architecture of their software, the P2P Network succeeded at convincing the District Court and the Appellate Court, that they did not 'monitor' or 'control' the software's use thus proving their deceptive innocence. Notwithstanding, the Apex Court was discerning to observe the designs of these 'experienced' software providers and stopped them dead in their tracks by holding that 'one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.' [43] The two providers promoted infringement through illegal acts of advertising an infringing use or instructing how to engage in an infringing use. In so many words, the Court held the file sharing software provider was liable under the inducement theory of contributory infringement.

On the other side of the Pacific, *Kazaa*, the Internet file-sharing system met a similar fate where the Australian Court [44] restrained *Kazaa* to do any of the infringing acts, in relation to any sound recording without the license of the copyright owner. The Court observed that *Kazaa* has been designed to encourage copyright infringement on a mass scale and that the company was aware that the major use of the *Kazaa* system was the transmission of copyright material.

2.5 Post *Grokster* & *Kazaa* - The Saga continues

Subsequent to RIAA's victory in 'legally' banning *Grokster* and *Streamcast* P2P services in mid 2005, it sent cease and desist letters to such "similarly situated" seven P2P companies demanding that they halt their "practice of encouraging users to illegally distribute copyrighted material". (Kawamoto, 2005) Some have had their lessons whereas others have learnt from the judicial blow to their '*peer*' P2P's but some still continue to take RIAA head on. *Kazaa* and *Napster* have now become legal. BearShare, eDonkey, and WinMX, all ceased operations as a result of the RIAA letter, however, *LimeWire's* operations continued. (Mennecke, 2004) As a result, *Limewire* faces a lawsuit by RIAA under secondary liability heads of contributory copyright infringement and vicarious copyright infringement.

Most of the P2P business giants have the power to prevent infringement of copyright but choose not to for their popularity and revenue generating capacity increases by the every next user which succumbs to the temptation of P2P file swapping systems by subscribing to their free service. There is enough evidence to infer that the P2P giants are by no standard "innocent." Sharman's *Kazaa* promoted its Version 3 by advertising on its website, 'Having *Kazaa* is 100% legal'. *Grokster* and *Streamcast* had also displayed similar 'traits'.

3. Pulling off the plug! Its time to catch the small fish

There are millions of users of P2P software's across the globe. Most of us, sitting in the comfort zones of our homes, justify in promoting this illegal business on the lame excuse that "the world is doing it", however if we continue to live in such an ivory tower, we may end up shelling a fortune from our pocket for each file we download illegally. The RIAA and the Recording companies have started to sue individual infringers, left and right and have achieved moderate success. Unlike the P2P software companies, the users are directly liable for they directly violate the 'exclusive rights'. It is not necessary that the user must profit in monetary terms. The very fact that his act shall reduce market sales or deprive the copyright holder from prospective revenue is an illegality enough to convict him for copyright wrongs.

[42] 334 F.3d 643, 654 (2003)
[43] 545 U.S. 913, 937 (2005)
[44] Universal Music Australia Pty Ltd v Sharman License Holdings Ltd [2005] FCA 1242

Recently, in October 2007, Jammie Thomas has been pronounced guilty by a U.S. Court in America's first ever jury trial for "making available" 24 songs for download.[45] In another case instituted by the RIAA [46], the U.S. District Court in August 2007 held an individual infringer liable for making available 54 identified sound recordings on Kazaa P2P server for "peer download." The very same Media Sentry, the cyber cop which had assisted to burst the bubble in the Kazaa case, played a similar role is this case as well.

The principles which aid in ascertaining liability for copyright infringement on the world wide web have been propounded in a catena of judicial decisions, chief among them have been dealt in this section. It was the Hotaling [47]case which held that 'the owner of a collection of works who makes them available to the public may be deemed to have distributed copies of the works'. The Court also observed that in order to establish "distribution" of a copyrighted work, a party must show that an unlawful copy was disseminated "to the public." "Distribution" of copyrighted works is the heart of P2P business and "distribution" in copyright parlance need not involve any physical transfer. [48]The more number of users, the higher amount of revenue generation and greater number of copyrighted digital files 'traded' for free. In fact, the District Court [49]in the Napster case noted that Napster itself 'pretty much' acknowledge[s] that the user's activity of downloading and uploading 'free copyrighted digital files' constitutes infringement.

This reflects that when the law comes to ascertain responsibility for the alleged wrongs, it is natural for those, who are on the wrong side of the law to "pass the buck".

Where the plaintiff was sued for the tort of direct infringement, she tried to limit her liability by arguing that the alleged infringement would not have been possible without the use of the P2P software and therefore the creator of the software must be made a necessary and indispensable party to the suit which was turned down by the Court. [50]The evasive 'stunt' did not help.

Uploading files to the search index or in the 'shared folder' violates the exclusive right of distribution conferred upon the copyright holders whereas downloading files constitute the very basic copy-right of the holder - the right of reproduction or making copies. Where the individual infringer attempted to shield herself by contending that it an abuse of the legal process to organize a large-scale legal assault on small-scale copyright infringers, the Court negatived the same holding it necessary to bring would-be infringers in compliance with the law. [51] The defense that P2P software [Kazaa] has an automatic upload feature which causes any user to unknowingly distribute computer files over the internet [52]also lacks merit since any prudent 'peer' user with basic knowledge of the P2P architecture would know that one has to copy-paste the externally obtained file in "my shared folder" to share it with the world. Moreover, lack of intent to infringe [53]or even where the defendant believes in good faith that he is not infringing a copyright [54]does not excuse legal liability under the scanner of copyright jurisprudence. Innocent infringement can at the maximum - limit liability, but cannot exonerate the accused as if no wrong had been ever committed. In a capsule, the moral of the story for individual clients is that it is better to be safe than sorry by avoiding participation in infringing activities. The law will catch up, it is only a matter of time.

4. Do we need to tighten the belt? – Policy Options & Alternative Approaches

It has been said that:

> Men make laws, laws govern men
> If men grow flaws, shouldn't laws change then?

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[45] Virgin Records America, Inc. v. Thomas 2007 WL 2899450 (D.Minn.) (Special verdict form)
[46] Atlantic v. Howell No. 2007 WL 2409549 (D.Ariz.) August 24, 2007, Order Granting Summary Judgment to Plaintiffs.
[47] Hotaling v. Church of Jesus Christ of Latter-Day Saints 118 F.3d 199, 203 (1997)
[48] Hotaling v. Church of Jesus Christ of Latter-Day Saints 118 F.3d 199, 203 (1997) Hotaling v. Church of Jesus Christ of Latter-Day Saints 118 F.3d 199, 203 (1997)See Atlantic v. Howell 2007 WL 2409549 (D.Ariz.) (District Court decision, State of Arizona, United States of America)
[49] A & M Records v. Napster, Inc. 2000 WL 1009483 (transcript of proceedings). The United States Court of Appeals also placed reliance on this observation of the District Court in holding the Napster users responsible for copyright infringement.
[50] See Interscope Records v. Duty 2006 WL 988086, 2 (D.Ariz.)
[51] Interscope Records v. Duty 2006 WL 988086, 7 (D.Ariz.)
[52] *ibid*
[53] Ventura County v. Blackburn 362 F.2d 515, 518
[54] Pye v. Mitchell 574 F.2d 476, 481

Copyright legislations have been in place much before the online sharing culture started but that has served little 'deterrence value', much less than deterring a prospective purchaser to exercise his free download option than making a purchase decision. Thus, the economics of deterrence suggests alternative realistic approaches to turn things around. They may be tersely stated under the following heads.

4.1 Social Awareness

There is a compelling need to spread awareness about copyright laws, not as a tool of deterrence but in the context of social development. Times have gone where Courts pronounced that there are no property rights in information.[55] It is incumbent on the Government to address and educate the masses by using its various forums of communication including print media and information broadcasting. More than anything else, endeavor has to be made to foster respect for copyrighted works. Deterrence through laws is only a piecemeal attempt. The online copy culture is much deep rooted and pervasive.

The information society has to be made aware of the concept that there is something known as an 'intellectual property' theft against the generally understood concept that 'theft' is a legal wrong only in respect of a tangible object. The legal maxim that 'ignorance of law is no excuse' looks good more on paper than in actuality. That should not be an excuse for the Government to sleep over its duties. Not only there is 'ignorance of law' in respect of intellectual property in the electronic age but more importantly - the sense of 'wrong' in committing, what is considered as 'electronic theft' is missing. People have not been sensitized and it is for such harsh realities that 'action' is more important than just 'reaction'. For such reasons, the authors are of the view that the Government has a big role to play in the face of ensuring social justice. Affected industries such as the recording industry have rampaged on anti-piracy campaigns to protect commercial interests but the Governments have to act *pro bono publico* to encourage the genius of tomorrow, to ignite the creative potential of an artist, to ensure just rewards for labor and at the helm of all 'to promote the progress of science and useful arts', even if it involves protecting the interests of rich industries.

4.2 Legal response to technological advances

The law has to respond to technology. Since technology progresses exponentially, it necessitates a commensurate response by the legislator to act in order to control the excesses of the latter by human beings. U.S. is known for its technological might and it is apposite to study the developments of law to reign the abuse of technology. For instance, the legal response to fill the lacuna in copyright law and protect the work in the digital environment can be observed subsequent to the *LaMacchia* case where LaMacchia, a twenty-one year old student at the Massachusetts Institute of Technology (MIT) set up an electronic bulletin board and had made available, copyrighted software applications and computer games over the internet, however he was acquitted of charges of copyright violations because he did not 'sell' the software that he had pirated which led to the enactment of No Electronic Theft Act (NET Act) in 1997, which criminalizes the reproduction or distribution of copyrighted products (even) without any financial gain, an offence.

The U.S. Govt. for instance has enacted the Audio Home Recording Act, 1992 (AHRA) to combat the problem of digital audio private copying. The Act combine[s] a royalty payment system on digital audio recording devises and media for the benefit of copyright owners with the obligation to incorporate a technical control mechanism to prevent unauthorized serial copying of copyrighted works in digital audio recording and interface devises. (Davies, 2002, p.89)

However, the significance of AHRA in the digital environment is getting diluted for it only applies to "digital audio recording devices" [56](whose primary purpose is to make a digital audio copied recording for private use) and following the observation made in the *Diamond Rio* case [57], computer 'hard drive' are exempt from this provision, for their primary purpose is not to record digital audio, neither the statutory language intends to include it within the fold of AHRA. (Moser, 2001, p.62) However, with the enactment of the Digital Millennium Copyright Act in 1998, the United States has made a progressive leap to protect copyright in commodities of e-commerce as the Act makes it illegal to circumvent "effective technological measures" protecting a copyrighted work.

Not only is there a prohibition against circumvention of access-control technology but also prevents unauthorized copying of the work, once the access has been lawfully obtained. The United Kingdom too, has through S. 296 of the Copyright, Designs and Patents Act 1988 classified circumvention of copy-protection

[55] See Oxford v. Moss (1979) 68 Cr. App. Rep. 183., R. v. Stewart, [1988] 1 S.C.R. 963
[56] See Title 17, U.S. Code, §.1001(3) of Copyright Act (1976)
[57] RIAA v. Diamond Multimedia 180 F.3d 1072. The Court basing their observation upon perusing the statutory language and legislative history concluded that AHRA does not apply to a computer hard drive.

technology as an offence for the purpose of infringement. Thus, there is a need to enact and/ or update laws to protect copyright in the internet age.

4.3 Public Interest exemptions – Do we have a case?

Like "time shifting" was to Sony, could "space shifting" could be to P2P Networks? This defense was taken up by Napster, where the technology could be used to convert a CD which the consumer already owns and transferring the MP3 version of it through the software, say from home to office. But the Napster Court rejected this defense is not enough 'attraction' for its user base considering the evidence on record that the software was mostly used for infringing purposes and such a use was 'de minimis', neither substantial enough to preclude liability under the staple article of commerce doctrine.

Though the "fair use" defense recognizes that rigid application of the copyright statute would at times hinder the purpose of the copyright laws to promote original and creative works for the benefit of society [58], yet it is inapplicable in the present situation for it is evident that the 'socially harmful' use in permitting the software would outweigh its 'socially beneficial' use, therefore it is only in public interest that the red signal is shown unless there is a technological response to solve this legal quandary.

4.4 Technological copy controls

The answer to the machine is in the machine said Charles Clark. Tia Hall writes that 'A few of the "Big Five" major music labels are currently experimenting with anti-piracy technologies designed to combat the on-line file sharing of their products through peer-to-peer networks.' (2002) The article reveals that now such copy control technologies exist which can prevent consumers from listening to CDs on any type of CD-ROM or DVD player or permit listeners to play copy-protected CDs on not more than a single PC or to prevent consumers from reformatting songs into MP3 files and burning copies, or making them available on file-sharing systems. The idea is to prevent the ordinary buyer from indulging into acts of piracy.

New technolog[ies], called "digital 'watermarking' " and "digital fingerprint[ing]," can encode within the file, information about the author and the copyright scope and date, which "fingerprints" can help to expose infringers. [59] There are companies such as the New York based MediaSentry which provides online anti-piracy services. The technology in the words of Vice President Tom Mizzone 'tracks many popular distribution mediums including P2P networks ... using sophisticated scanning and detection software, to locate files that are suspected of infringing the rights of copyright owners'. [60]The software obtains the IP address and screen name of each user, and downloads a selection of files offered by each user which can then be reported to copyright owners for taking necessary action.

4.5 Seller '*beware*'

In the same vein, it is contended that entertainment and software industries must avoid to radically 'overcharge' the consumer which will go a long way to discourage piracy. Corporate interests are important but software industries and entertainment houses ought not exercise unbridled sovereignty over the dot com network. In the words of Gordon, 'a work distributed in expensive form is less socially valuable than the same work distributed to not only five, but also to a thousand more in an inexpensive edition.' (Gordon, 2003, p.xvii) *Moser Baer* CD's of Bollywood movies are being offered for sale at prices below that of the pirated markets in India. As a result, the consumer has shifted his loyalties to be on the safe side of the law than attract unwanted attention from it. *Apple's* online music service provider iTunes, is a digital music service where one can download almost any song from a major music company, for only 99 cents. (Wadhwa, 2007, p.18) There are many others such as *Dell* and *BuyMusic* who have setup online music services on a similar business model.

4.6 E-Governance - Thinking Futuristic

Indeed in the hustle bustle of this information superhighway, speed is the name of the game. There are no speed breakers and no traffic policemen on this unregulated highway which bears an 'international character'. Private copying could have been regarded as de minimis use only in the analog world. 'Drivers' akin to natural persons carry 'packets of information' but it may not be easy to differentiate the law abiding 'driver' from the 'driver' who

[58] See Campell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576-80 (1994) (stating that the defense "permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster").

[59] M-G-M Studios., et al. v. Grokster, Ltd., et al. 545 U.S. 913, 964 (2005)

[60] See Universal Music Australia Pty Ltd v Sharman License Holdings Ltd [2005] FCA 1242

has stolen such 'packets of information' for this technology offers anonymity and such drivers with the stolen 'packets of information' may just get away with it, if they know the right 'exits' on this global superhighway. [61]Cyber patrolling is not an easy chase.

Technological revolutions in mass production (especially the digitization of literary and musical works), coupled with the phenomenal growth of the consuming public, renders national law on illicit copying useless. (Griffiths & Suthersanen (eds.), 2005, p.110) When Pirate Bay (considered as the world's largest BitTorrent tracker, a P2P technology which allows users to share torrent files for free) was closed in Sweden in 2006 following a raid by the Swedish Police, it was only a matter of few days for it to resurface from a 'foreign land', which in this case was Netherlands. Likewise, it was not easy to catch the once Amsterdam based Kazaa Network which in the words of Toddy had its servers in Denmark, software in Estonia, domain registered Down Under, corporation on a tiny island in South Pacific and 60 million users across the globe. (2003)

A serious international deliberation and co-operation is required to 'fix' the situation. What Shawn Fanning started as a fascination in 1999 has become big business for anyone who can manage to device a file sharing software and trigger a nuclear piracy of copyrighted creations. There is a pressing need to filter the wheat from the chaff by permitting only legal P2P services who take realistic technological measures to curb piracy on their networks as against those which have been devised solely with the purpose of destroying the market of copyrighted digital entertainment media.

4.7 A legislative clause that P2P Services are prohibited by law

Recording companies and the RIAA would have ordered the legislature to come out with such a legislation were they to sit on the Bench and judge their own cause. But such a decision is not in public interest, considering the mandate of copyright laws and the fundamental guarantee of free speech and expression. When courts shut down new technologies, the world may literally never know what it is missing. (Lemley & Reese, 2004, p. 1389)

It cannot be out ruled that P2P softwares may be capable of substantial non infringing uses if they use filter technologies which separate the copyrighted from the non copyrighted works. *Kazaa* was given this option by the Australian Court but it failed to implement it then. In the light of the present scenario where copyrighted works particularly works of entertainment have assumed a global significance, it is important to chart out a 'Magna Carta' to prevent illegal digital exploitation of copyrighted works. All the above policy solutions and technological alternatives may serve as indices to come out with a model draft which requires an implementation on a global scale, otherwise the pirate companies shall only 'space shift' their technologies to safer havens, like *Kazaa* and *Pirate Bay* did.

5. A ray of hope…

With the growth of internet users, markets are becoming increasingly global and we all have to realize that no country benefits from the theft of another's intellectual property. In the world of innovation, even the devil must get his just dues. Copyrighted digital data without copy controls on the information superhighway is a work which for the purposes of copyright is as good as information 'deemed to be in public domain' for it then enters the domain of 'uncontrolled exchange'. However, keeping in mind, the interests of film, music, software industries, weighed against the larger public interest to have lawful access to copyrighted works and maintaining the pride of public domain, a blanket ban is not a solution as against technological controls which do seem to offer solutions.

The jurisprudential development of copyright urges one to share but we have to learn to 'share with care'. We have to learn to respect intellectual property even if we believe that we have are remote chance of being caught by the law as individual infringers. We should make efforts to curtail our selfish interests in the larger interests of public good. Such a cyber culture in the aftermath of digital revolution shall only stifle innovation and promote the evil designs of pirates. It is difficult to trade honesty with profitability, but somewhere somehow a beginning has to be made.

It has also been suggested that governments should have a positive "copyright policy", the aims of which should be to keep their copyright laws continually under review, so as to adapt them quickly to the changing environment and the challenges posed by rapid technological change, and to maintain a balance between the interests of the creators, on the one hand, and those of the public, on the other, thus ensuring the protection of both individual and collective interests. (Davies, 2002, p. 358) The moot question is not whether to act in the in the interests of entertainment industries or against the interests of file sharing giants. What is important that policy makers and technocrats of the world should jointly and on a regular basis deliberate across the table on a global level to devise feasible solutions from an overall perspective. Indeed, copyright in the electronic era has become

[61] It can be said that Recording Industry Association of America (RIAA) is constantly "patrolling" the "digital superhighway" for direct copyright infringers. The RIAA's zero-tolerance copyright campaign launched in September 2003, and has launched more than 20,000 lawsuits since then.

the most endangered specie. We need to act fast but with a balanced approach. The authors hope that the above posited solutions serve as an outline to start upon.

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