N O R T H W E S T E R N
JOURNAL OF TECHNOLOGY
AND
INTELLECTUAL PROPERTY

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Fall 2008 VOL. 7, NO. 1

Volume 7, Number 1 (Fall 2008)
Northwestern Journal of Technology and Intellectual Property

Meh.[1] The Irrelevance of Copyright in the Public Mind

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¶1 For many who went to high school in the mid-eighties, a music collection was a pastiche of copyright infringement. A mixtape was a tangible sign of affection, something to be given to those you cared most deeply about. There was also the teenage economy in which one person would purchase a particular tape and then dub copies for their friends. Perhaps these youth were ignorant concerning copyright law, perhaps they simply did not care. Yet this ambivalence toward copyright was not simply a product of that generation. D'Entremont states that "the habit of music-sharing among peers is culturally embedded, and predates the technology that now facilitates its expansion. In the 1950s, American teenagers with reel-to-reel tape recorders distributed home-made tapes of singles and albums among their friends."[2] This article suggests that the problems of enforcing copyright law are not only legal issues, but also rhetorical issues. When considering copyright law from a rhetorical standpoint, the question becomes how to make people *believe* in the law, because laws are only effective when they have public support. Copyright law is, to some extent, unenforceable in its current state because copyright is not really a concern in the public mind. This is so despite the media coverage of lawsuits by the Recording Industry Association of America (RIAA) and others against copyright infringers, and, more specifically, file sharers.[3]

¶2 The purpose of this article is to consider some rhetorical issues that may be preventing the public from supporting current copyright law and to suggest some possible solutions that would help copyright holders to gain public support for the enforcement of copyright law. Although rhetoric has many possible definitions, for the purposes of this article rhetoric can be thought of as the way people make sense of the world symbolically.[4] In this case, the rhetorical considerations encompass the narratives that

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[1] "Meh" is an expression of extreme indifference.

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[2] Jim D'Entremont, *Napster and the Dogs of War*, INDEX ON CENSORSHIP, Oct. 2003, at 9.

[3] File sharing typically takes place using a peer-to-peer (P2P) network with appropriate software, and allows users of the network to share files directly with one another. The software used for these networks functions as a client as well as a server, allowing the user to download from some users while uploading to others. While there is little difference between the P2P relationship and the traditional client-server relationship, the software is specifically designed to easily catalog and share files typically of interest to those sharing files on the network, such as music, video, or image files.

[4] There are likely as many definitions of rhetoric as there are rhetoricians. Rhetoric is now often used in a derogatory way to denote empty speech. However, rhetoric is anything but empty; rhetoric is how people make sense of the world. Perhaps the most important element to understand concerning rhetoric is that it

surround copyright and copyright enforcement, the sociocultural context in which copyright is enacted and enforced, and the arguments made in support of both copyright and infringement of copyright. Aristotle defines rhetoric as "an ability, in each [particular] case, to see the available means of persuasion."[5] The process of winning the hearts and the minds of the public is the province of rhetoric.

I. THE RHETORICAL CONSTRUCTION OF THE RIAA

¶3 Although there are other organizations with strong vested interests in copyright and intellectual property, such as the Business Software Alliance (BSA) and the Motion Picture Association of America (MPAA), the RIAA seems to have become the major player in attempting to shape public conceptions of copyright. Thus, this article will focus on the public perception of the RIAA, how the RIAA has attempted to frame the issue of copyright infringement, and the public resistance to that frame.

¶4 Before their public legal attack on Napster, the RIAA was relatively unknown to the general public. However, through a highly publicized (and highly criticized) campaign of lawsuits against individual file sharers, the RIAA quickly emerged from obscurity.[6] Reports of the RIAA lawsuits were not flattering toward the recording industry, as newspapers told the stories of children, single mothers, and grandmothers who were targeted by the lawsuits:

> "I watched the whole Napster thing on TV; I read about it in the papers," said McGough, 23, a single mother of two girls, ages 5 and 2. "I just assumed that if Napster was down, why would something be up that was illegal? I wouldn't intentionally put something on my computer that was illegal."[7]

A front page article in the *Los Angeles Times* also describes problems with how the RIAA identifies file sharers:

> The defendants named aren't necessarily the people using file-sharing networks. That's because the Recording Industry Assn. of America's investigation identified only the people whose Internet access accounts were being used to share files. They might be the parents, roommates or spouses of the alleged pirates.

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deals with the realm of the possible rather than the absolute. When considering how discourse functions rhetorically, it is difficult to determine how people actually perceived a particular message. The role of the critic, then, is to consider what kind of response a particular discourse invites. In other words, audiences are invited to view the rhetor a certain way through his or her discourse. Moreover, the audience is also invited to construct a relationship between themselves and the rhetor. This article will consider these rhetorical constructions.

[5] ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 36 (George Alexander Kennedy trans., Oxford University Press 1991).

[6] *See* D'Entremont, *supra* note 2, at 9; Frank Ahrens, *RIAA's Lawsuits Meet Surprised Targets; Single Mother in California, 12-Year-Old Girl in N.Y. Among Defendants*, THE WASHINGTON POST, Sept. 10, 2003, at E01; Jon Healey et al., *Song Swappers Face the Music; The Record Industry Sues 261 Internet Users. Thousands More Cases Are Expected in the Labels' Latest Attempt to Dissuade File Sharers*, L.A. TIMES, Sept. 9, 2003, at A1; Tom McGhee, *3 in Colorado Sued over Music Files Seek Unity*, DENVER POST, Sept. 10, 2003, at C01.

[7] Ahrens, *supra* note 6, at E01.

> Scott Bassett said neither he nor his wife used the family PC in Redwood City, Calif., for music, but their teenagers and dozens of their friends do. Had he known what was going on, he said, "I would have pulled the plug."
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> "I don't know what I'm going to do," said Bassett, a former junkyard operator. "Do I really need to hire a lawyer? I just call them up and say I'm sorry and give them back all the music that was downloaded? I'm just a little guy."[8]

¶5 The RIAA has sued hundreds of file sharers, framing itself as a victim that is only defending itself: "Nobody likes playing the heavy . . . but when you are being victimized by an illegal activity, there comes a time when you have to stand up and take appropriate action."[9] Yet, as some question whether suing twelve-year-olds for millions of dollars is an appropriate action, it comes as little surprise that anti-RIAA sentiment has increased.[10] Lorraine Sullivan, who was sued by the RIAA, stated in her testimony before the Senate Committee on Governmental Affairs, "Until the RIAA stops targeting unwitting victims, I am not going to buy any more CDs and I know many consumers feel the same."[11]

¶6 The RIAA made it clear that they intended to take any action necessary to fight music piracy. In a speech delivered July 8, 2002, then RIAA CEO Hilary Rosen stated, "No one likes to be the cop, but the role must be fulfilled. Let's be real. Piracy is hurting not only artists but the entire workforce whose jobs depend upon their success."[12] Mitch Bainwol, who succeeded Rosen as CEO, echoed this sentiment in a statement before the Senate Committee on Governmental Affairs:

> The root cause for this drastic decline in record sales is the astronomical rate of music piracy on the Internet. Computer users illegally download more than 2.6 billion copyrighted files (mostly recordings) every month. At any given moment, well over five million users are online offering well over 1 billion files for copying through various peer-to-peer networks. . . . And unlike traditional music piracy, piracy through networks is viral: unless the user takes affirmative steps to prevent it, the user automatically and immediately begins offering the files that the user copied to millions of other users. Moreover, the overwhelming majority of the distribution that occurs on peer-to-peer networks is unauthorized.[13]

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[8] Healey et al., *supra* note 6, at A1.

[9] *Id.*

[10] Ahrens, *supra* note 6, at E01.

[11] *Privacy and Piracy: The Paradox of Illegal File Sharing on Peer-to-Peer Networks and the Impact of Technology on the Entertainment Industry: Hearing Before the Permanent Subcomm. of Investigations of the Comm. on Governmental Affairs of the United States S.*, 108th Cong. 51 (2003) (statement of Lorraine Sullivan).

[12] Hilary Rosen, Chief Executive Officer, Recording Indus. Assoc. of America, Plug-In Speech (July 8, 2002), http://www.riaa.com/news/newsletter/071002.asp. This speech has been removed from the RIAA's website and does not seem to be available anywhere else. Readers who wish to read the entire speech may contact the authors for a copy of the text.

[13] *Privacy and Piracy: The Paradox of Illegal File Sharing on Peer-to-Peer Networks and the Impact of Technology on the Entertainment Industry: Hearing Before the Permanent Subcomm. of Investigations of the Comm. on Governmental Affairs of the United States S.*, 108th Cong. 79 (2003) (prepared statement of Mitch Bainwol, Chairman & CEO, Recording Industry Association of America).

The actions of the RIAA placed the recording industry under the public microscope in ways that it had previously avoided. D'Entremont writes:

> Despite the pieties about starving artists voiced by the RIAA and representatives of the National Association of Recording Arts and Science (NARAS), the industry is chiefly focused on the fiscal health of retailers, such as Wal-Mart, and media conglomerates such as AOL Time Warner and Vivendi Universal. Some fans feel that the music industry is itself stealing money and consider trafficking in music downloads fair revenge for exorbitantly priced CDs and concert tickets, content restrictions, disrespect for consumers and corporate bullying of artists.[14]

Sarah Holthusen echoes this sentiment: "The Napster litigation has made it painfully evident that the public is willing to steal from an industry that is perceived as somewhat disreputable."[15]

¶7 The content industry has worked to maintain its death grip on copyrighted materials. For example, it is no secret that Disney was one of the main backers of the Copyright Term Extension Act in an effort to keep Mickey Mouse from entering the public domain.[16] The RIAA was lambasted for attempting to slip an amendment into what became the USA Patriot Act, which "would immunize all copyright holders—including the movie and e-book industry—for any data losses caused by their hacking efforts or other computer intrusions 'that are reasonably intended to impede or prevent' electronic piracy."[17] Although the RIAA quickly backed off from this proposed amendment, this illustrates the lengths to which the content industry will go to in protecting its interests and assets. In an extreme example of this tenacity, the RIAA went so far as to continue a lawsuit after the plaintiff had died. Of course, it is impossible to sue a dead person, but it is possible to go after that dead person's family members.[18]

¶8 The RIAA has attempted to enforce its copyright claims, not only by litigating and by lobbying lawmakers, but also through direct action. An article in *LA Weekly* reports that the RIAA has taken to busting street vendors of allegedly pirated material:

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[14] D'Entremont, *supra* note 2, at 10.

[15] Sarah Holthusen, *The Napster Decision: Implications for Copyright Law in the Digital Age*, 21 U. QUEENSLAND L. J. 245, 250 (2001).

[16] Posting of Chris Sprigman to Findlaw's Writ, *The Mouse that Ate the Public Domain: Disney, the Copyright Term Extension Act, and Eldred v. Ashcroft*, http://writ.news.findlaw.com/commentary/20020305_sprigman.html (Mar. 5, 2002).

[17] Declan McCullagh, *RIAA Wants to Hack Your PC*, WIRED, Oct. 15, 2001, *available at* http://www.wired.com/politics/law/news/2001/10/47552.

[18] *See* Motion to Stay Case and to Extend All Deadlines at 2, Warner Bros. Records, Inc. v. Scantlebury, No. 05-74394 (E.D. Mich. Aug. 1, 2006), *available at* http://www.ilrweb.com/viewILRPDF.asp?filename=warner_scantlebury_motion. The motion states:

> 3. Plaintiffs do not believe it appropriate to discuss a resolution of the case with the family so close to Mr. Scantlebury's passing. Plaintiffs therefore request a stay of 60 days to allow the family additional time to grieve.
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> 4. In the event the parties do not reach a resolution with Mr. Scantlebury's estate or the other family members involved, Plaintiffs anticipate amending the complaint following depositions of members of Mr. Scantlebury's family.

> The RIAA acknowledges it all—except the notion that its staff presents itself as police. Yes, they may all be ex-P.D.? Yes, they wear cop-style clothes and carry official-looking IDs. But if they leave people like Borrayo [who was targeted by the RIAA enforcement squad] with the impression that they're actual law enforcement, that's a mistake.
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> "We want to be very clear who we are and what we're doing," says John Langley, Western regional coordinator for the RIAA Anti-Piracy Unit. "First and foremost, we're professionals."[19]

However, later in the article, one can detect traces of unprofessionalism that calls this assertion into question:

> "A large percentage [of the vendors] are of a Hispanic nature," Langley said. "Today he's Jose Rodriguez, tomorrow he's Raul something or other, and tomorrow after that he's something else. These people change their identity all the time. A picture's worth a thousand words."[20]

¶9 How the media frames a story can influence how the public perceives events, individuals, and organizations.[21] Through selection of quotes, choice of interviews, and description of the issue at hand, the media not only reports the news, but provides a way to think about the news. The preceding media portrayal depicts the RIAA as an organization that is willing to enforce its will through draconian means using potentially racist enforcement agents. This portrayal is likely to decrease public support for the RIAA's enforcement tactics.

¶10 Thomas Benson notes that in rhetorical discourse, audiences and speakers are continually defining each other.[22] However, the public may accept or reject the message based on a number of reasons, not least of which is the *ethos*, or the publicly constructed personas of those who would have the audience follow them. Aristotle describes *ethos* in the following way: "Persuasion is achieved by the speaker's personal character when the speech is so spoken as to make us think him credible. . . . This kind of persuasion, like

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[19] Ben Sullivan, *Music Industry Puts Troops in the Streets*, L.A. WEEKLY, Jan. 8, 2004, *available at* http://www.laweekly.com/2004-01-08/news/music-industry-puts-troops-in-the-streets/.

[20] *Id.*

[21] There has been extensive research on media framing and how it influences public perception of issues. For more on media framing, see Jules Boykoff, *Framing Dissent: Mass-Media Coverage of the Global Justice Movement*, 28 NEW POL. SCI. 201 (2006); Robert M. Entman & Andrew Rojecki, *Freezing Out the Public: Elite and Media Framing of the U.S. Anti-Nuclear Movement*, 10 POL. COMM. 155 (1993); Kirk Hallahan, *Seven Models of Framing: Implications for Public Relations*, 11 J. PUB. REL. RES. 205 (1999); Todd McElroy & John J. Seta, *Framing Effects: An Analytic-Holistic Perspective*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 610 (2003); Paula M. Poindexter et al., *Race and Ethnicity in Local Television News: Framing, Story Assignments, and Source Selections*, 47 J. BROADCASTING & ELECTRONIC MEDIA 524 (2003); Bertram Scheufele, *Frames, Schemata, and News Reporting*, 31 COMM.: EUR. J. COMM. RES. 65 (2006); Dietram A. Scheufele & David Tewksbury, *Framing, Agenda Setting, and Priming: The Evolution of Three Media Effects Models*, 57 J. COMM. 9 (2007); Kim Sei-Hill et al., *Think About It This Way: Attribute Agenda-Setting Function of the Press and the Public's Evaluation of a Local Issue*, 79 J. & MASS COMM. Q. 7 (2002); Adam Simon & Michael Xenos, *Media Framing and Effective Public Deliberation*, 17 POL. COMM. 363 (2000).

[22] THOMAS W. BENSON, *Rhetoric as a Way of Being*, *in* AMERICAN RHETORIC: CONTEXT AND CRITICISM 293, 313–320 (Thomas W. Benson ed., 1989).

the others, should be achieved by what the speaker says, not by what people think of his character before he begins to speak."[23] The way a message is delivered must be congruent with the content in order for the public to believe the message. Simultaneously presenting a message of caring for artists, while seemingly attacking working class citizens, is a difficult rhetorical stance to successfully maintain.

¶11 In the case of the RIAA, it has chosen to portray itself as a victim under attack by the public. The public seems to have largely rejected this assessment. Rather, the public has bristled at the tactics that the RIAA has employed, perceiving it not as protecting one's livelihood, but as bullying and intimidating. D'Entremont writes: "Many fans have a strong sense of entitlement to their music, resent its tightening link to corporate greed, and find the RIAA's tactics heavy handed. 'If industry honchos think they're going to terrorize people into buying more CDs, they're crazy,' says one occasional file-sharer in New England."[24] People that consider the RIAA to be corrupt have little incentive to buy into the RIAA's conception of copyright. As the public has become more aware of the practices of the recording industry, the public perception is that the public does not steal from the artist when they infringe; they steal from the record label.[25]

¶12 This brief discussion demonstrates the peril of attempting to enforce copyright law using only enforcement strategies and legislation, while disregarding the rhetorical dimensions of law. It is clear that the RIAA wants the public to obey copyright law, yet it has portrayed itself in such a way that it is difficult for the public to trust it. The RIAA's handling of copyright enforcement has been a public relations nightmare.[26] The RIAA has a problem with its public construction of *ethos*; as such, it will likely continue to paint itself into a rhetorical corner if it continues to insist that it is the aggrieved party and to portray itself as merely a victim who is acting only in self-defense.[27]

II. COPYRIGHT AND THE PUBLIC MIND

¶13 The RIAA and others who attempt to influence legislation that enforces copyright may be missing the mark. Rather than attempting to change the law in order to change the citizen, perhaps it is time to begin looking at the citizen to see why he or she does not abide by the law. Citizens need reasons to obey laws that transcend fear of punishment; this is why the public conception of the music industry matters. Michael Calvin McGee notes that audiences for rhetorical discourse bring together the arguments and fragments of their own experience to create a complete rhetorical text.[28] In other words, copyright law is more than an aggregate of statutes and case law. Copyright exists in a cultural context that colors people's views of it. Public conception of copyright is tied to how the public conceives of intellectual property in general. William Duckworth notes that:

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[23] ARISTOTLE, *Rhetoric*, *in* THE COMPLETE WORKS OF ARISTOTLE: THE REVISED OXFORD TRANSLATION 2152, 2155 (W. Rhys Roberts trans., Jonathan Barnes ed., 1984).

[24] D'Entremont, *supra* note 2, at 9.

[25] *See* Steve Albini, The Problem with Music, http://www.negativland.com/albini.html (last visited Oct. 29, 2008).

[26] *See generally* Sullivan, *supra* note 11.

[27] Sprigman, *supra* note 16.

[28] Michael Calvin McGee, *Text, Context, and the Fragmentation of Contemporary Culture*, 54 W. J. COMM. 288 (1990).

> [E]ven if the recording companies succeed in regaining control, and are able to curtail the swapping of files, the current attitudes among college students and others—about who owns the music on the Web—is not likely to disappear; after all, this is the generation that grew up believing that music is free.[29]

College age respondents in a study by Rajiv Sinha and Naomi Mandel "did not appear to view music piracy as a transgression of social norms. If anything, digital piracy is the social norm among this segment of consumers."[30] Such findings have serious implications for enforcement of copyright law.

¶14 It is clear that the public education campaigns that have been waged by the RIAA, MPAA, BSA, and others with a vested interest in protecting copyright have not had the desired outcome of altering public perception of the importance of copyright.[31] Whether or not they have succeeded in reducing copyright infringement (for the time being) is irrelevant if the public does not believe in the law or sees the law as unjust. Harsher laws merely open the doors for people to construct more inventive ways to circumvent the laws.[32] When all notions of shame are removed from the transgression of a particular law, our society is poised for a mass revolt against that law.[33] Jane Ginsburg argues that "the setting of the copyright balance is not immutable; rather, each significant technological progress may alter the balance of control between authors and users, in turn[,] eventually prompting a new legal calibration."[34] Society seems to have reached a crossroads where old conceptions of copyright can no longer be held.

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[29] WILLIAM DUCKWORTH, VIRTUAL MUSIC: HOW THE WEB GOT WIRED FOR SOUND 139 (2005).

[30] Rajiv K. Sinha & Naomi Mandel, *Preventing Digital Music Piracy: The Carrot or the Stick?*, 72 J. MKTG. 1, 13 (2008).

[31] A study by Sameer Hinduja found that 51.3% of their respondents "do not regard piracy as improper or intrinsically wrong." Sameer Hinduja, *Trends and Patterns Among Online Software Pirates*, 5 ETHICS AND INFO. TECH. 49, 54 (2003). And lest one forget that the United States is not the only consumer of intellectual property, consider that in a study of piracy in Hong Kong, eighty-one percent of respondents reported "buying pirated software on a regular basis" and Kenneth Kwong et al. found that seventy percent of their respondents had purchased pirated CDs. Trevor Moores & Gurpreet Dhillon, *Software Piracy: A View from Hong Kong*, 43 COMMS. ACM, Dec. 2000, at 92; Kenneth K. Kwong et al., *The Effects of Attitudinal and Demographic Factors on Intention to Buy Pirated CDs: The Case of Chinese Consumers*, 47 J. BUS. ETHICS 223, 231 (2003). Darrell William Davis makes similar observations concerning the use of VCDs and pirated movies in East Asia. *See generally* Darrell William Davis, *Compact Generation: VCD Markets in Asia*, 23 HIST. J. FILM, RADIO & TELEVISION 165 (2003). As we have argued, this all points to the rhetorical conception of copyright in the public mind. Alessandro Balestino argues that "the enforcement of the rules [of copyright] is at best a half-hearted affair, partly because piracy of information goods is almost impossible to monitor given its scope, partly because the legal norm does not reflect the actual social attitude." Alessandro Balestrino, *It Is a Theft but Not a Crime*, 24 EUR. J. POL. ECON. 455, 455 (2008).

[32] *See* ELECTRONIC FRONTIER FOUNDATION, RIAA V. THE PEOPLE: FOUR YEARS LATER 2 (2007), *available at* http://w2.eff.org/IP/P2P/riaa_at_four.pdf ("Napster was replaced by Aimster and AudioGalaxy, which were then in turn supplanted by Morpheus and Kazaa, which were in turn eclipsed by eDonkey and Bit Torrent. The number of filesharers, as well as the number of P2P software applications, has kept growing, despite the recording industry's early courtroom victories.").

[33] For more on the role of shame in American jurisprudence, see *Shame, Stigma, and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law*, 116 HARV. L. REV. 2186 (2003); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880 (1991). However, we are speaking more of the notion of shame in the sense that copyright infringement is not socially sanctioned in the same way that theft, murder, child abuse, or the transgression of other commonly held values. In other words, to admit to downloading music does not seem to have the same level of stigma from a moral or social sense.

[34] Jane C. Ginsburg, *Copyright and Control over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1614 (2001).

¶15 What can be seen in such legislation as the Copyright Term Extension Act (CTEA) and the Digital Millennium Copyright Act (DMCA) is an attempted power grab over the control of content. However, because these laws lack relevance in the public mind, they are, in some regards, unenforceable. This is not to say that law enforcement cannot arrest pirates or that the content creators—or, more correctly, those who hold the copyright on the infringed works—have no recourse through lawsuits. Rather, we suggest that laws that are not internalized by the public are difficult to enforce, especially if the public rebels against them. Lawrence Lessig writes:

> A regulation need not be absolutely effective to be sufficiently effective. It need not raise the cost of the prohibited activity to infinity in order to reduce the level of that activity quite substantially. If regulation increases the cost of access to this kind of information, it will reduce access to this information, even if it doesn't reduce it to zero.[35]

Although Lessig is discussing material such as sexually explicit content, the principle holds true for any information or material that a person wishes to acquire. With music piracy, for example, assertion of rights by the RIAA and others has not increased the cost of access to the information in question, and is not sufficiently effective. Since the explosion of piracy-enabling technological tools has kept the costs of participating in piracy very low, the only cost that the infringing party may encounter would come from a lawsuit by the copyright holder. It could be argued that simply causing those who are sharing files to consider the cost of a lawsuit has had an impact that we are unable to quantify. However, if the public has the mentality that "they can't catch everyone," the public will view piracy as having low risk and high reward. With over sixty million file sharers estimated in the United States and Canada alone, it seems unlikely that the RIAA will be able to file suit against even a substantial number of offenders.[36] In short, the odds remain with the file sharers, and thus it is likely that the public will continue to perceive the potential cost of file sharing as low. Recent estimates of peer-to-peer file sharing traffic comprising up to eighty percent of last mile bandwidth also seems to support this assessment.[37]

¶16 To explore public conception of copyright, it may prove useful to consider how the public uses copyrighted materials. The explosion of YouTube and file sharing demonstrates that the public and copyright holders have differing conceptions of how protected content is to be used. Perhaps this is the result of a generation that is accustomed to receiving content for free. With such a mindset, it is easy to see why the RIAA's assertion that file sharing is equivalent to shoplifting would fail; one cannot

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[35] Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403, 1405 (1996).

[36] Eric P. Chiang & Djeto Assane, *Music Piracy Among Students on the University Campus: Do Males and Females React Differently?*, 37 J. SOCIO-ECON. 1371 (2008).

[37] Last mile bandwidth represents the bandwidth available to the users of a network at the portion of the network closest to the user. For example, on a cable modem network, the "last mile" of the network is made up of coaxial cable that is connected to a fiber-optic network, which is attached to the "head end" (usually in the same city) of the cable company. On a DSL network, the "last mile" is a telephone cable (typically RJ-11) that connects the customer premises to the provider's central office. This is in contrast to the much less expensive and more substantial bandwidth available on the network that connects the cable or phone company to peering points and Internet exchanges (the general Internet). Co-author Shane Lunceford is an expert in broadband networking technologies.

shoplift that which is *supposed* to be free. One need only turn on a radio to hear the same songs that the RIAA sues people for downloading.

¶17 It is little wonder that the public is bewildered concerning the appropriate use of copyrighted materials when one considers the other technological norms in play. The *Betamax* case supported the rights of the consumer to time shift.[38] Although *Betamax* only explicitly discussed time shifting, time shifting almost always necessarily involves space shifting. For example, recording on a VHS tape requires that content be captured from a source, such as an RF (radio frequency) wave and copied permanently to a VHS tape. On a more practical level, people recognize that time and space shifting are acceptable because of the existence of products such as TiVo. The logic of the consumer dictates that if a product is freely available on the market, it is probably legal. Yet, if time and space shifting are acceptable for video, why does this equation not hold for the music that is found on the radio? In the minds of the public, it does not matter where the copy comes from. For many, perhaps, file sharing is simply a means of time and space shifting for the songs that one hears several times per day on the radio, provided free of charge to the consumer by the record label itself. Yet, record labels have used technologies such as Digital Rights Management (DRM) and rootkits to try to keep people from time and space shifting.[39]

¶18 People are accustomed to dealing with their media in a particular manner, which may cause them to react to the policing of such media in different ways. In the case of radio, a consumer can request a specific song, leaving the consumer with a kind of subconscious, although possibly misguided belief that the consumer can listen to desired music at a particular time. This is considerably different from the experience of seeing a movie, especially in regard to timing. One can request a song written three decades ago and have a reasonable chance of hearing it. To see a movie that is older than a year old, one must rent it or buy it. The medium invites a different response or, as Marshall McLuhan famously noted, "the medium is the message."[40]

¶19 People feel a deep sense of identity with the music, so it no longer belongs only to the musician or the record label in the minds of the public. This leads to an often overlooked competing public interest issue: the need for a robust public domain. There is little argument concerning who owns the Bible: it is in the public domain and thus belongs to all of us. However, what becomes of our society when other sacred (in the secular sense) works are kept out of the public domain? For example, when songs become indelibly etched into our minds through repetition, people begin to identify with them to the point where they may even identify a particular song as "their song." When does a song become a part of someone and not simply the creation of another? Music provides an excellent example of the problem of authorship. For example, Luc Sante notes that it is almost impossible to trace the history of the blues.[41] The rise of sampling

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[38] Sony Corp. of Am. v. Universal City Studios, Inc. (*BetaMax*), 464 U.S. 417 (1984).

[39] For a brief overview of DRM technologies including Sony's rootkit, see Nicola Lucchi, *Countering the Unfair Play of DRM Technologies*, 16 TEX. INTELL. PROP. L.J. 91, 94–102 (2007). For a detailed discussion of the legal issues surrounding Sony's rootkit, see Deidre K. Mulligan & Aaron K. Perzanowski, *The Magnificence of the Disaster: Reconstructing the Sony BMG Rootkit Incident*, 22 BERKELEY TECH. L.J. 1157 (2007). For public policy arguments concerning DRM, see Edward W. Felten, *DRM and Public Policy*, 48 COMMS. ACM , July 2005, at 112.

[40] MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 7 (1964).

[41] Luc Sante, *The Birth of the Blues*, *in* THIS IS POP: IN SEARCH OF THE ELUSIVE AT EXPERIENCE MUSIC

demonstrates the difficulty in defining when one has created something new. For example, William Duckworth discusses the difficulty of defining the creation of music in the age of "mash-ups" by closely examining the case of DJ Danger Mouse's "Grey Album" that combines Jay-Z's "Black Album" with the Beatles' "White Album."[42] The "Grey Album" was widely available online, despite copyright holders' attempts to quash it. At the most basic level of originality in music creation, consider the limit in chord progressions or beat structures that our culture finds aurally pleasing. For example, consider the effect if someone copyrighted the standard 4/4 drum beat, which is used by virtually every rock band in the United States.[43] After all, drums are just as much an instrument as a guitar or a keyboard. In such nebulous circumstances, it is little wonder that the public resists notions of originality and scoffs at the idea that anyone should have a complete monopoly on cultural artifacts.

III. GAINING PUBLIC SUPPORT OF COPYRIGHT LAW

¶20 People seem to decide what laws to keep based on their own evaluation of perceived value. To explore how this mindset operates, consider the case of another law that is often broken: speed limits. Benjamin Barber illustrates how this can be a result of the often contradictory roles of consumer (individual) and citizen:

> Consumers make private choices about their private needs and wants. Citizens make choices about the public needs and the public goods of the nation. There is no way, as private consumers, we can do that. We all know that. I love driving a fast car. As a consumer, I love it, but as a citizen, I helped to make laws that limit the size and speed of cars because I know having a lot of large, gas-guzzling, fast-moving cars is dangerous for the health of me, my children, and every citizen of the United States. I know the difference between those two things. I can distinguish the citizen in me and the consumer in me. You can't turn over civic public choices to private consumers. We cannot, one by one, as private persons deal with the social consequences of those private choices. That's why we have public institutions. That's why we have government: precisely to make the tough choices about and deal with the social consequences of private choices.[44]

Perhaps Barber's optimism concerning the general public's ability to act as citizens is misplaced. Barber suggests that as citizens we think speed limits are a good idea, but police statistics, traffic court logs, and our own personal experiences likely suggest otherwise. The National Highway Traffic Safety Administration (NHTSA) conducted a survey in 2002, wherein seventy-eight percent of respondents reported speeding in the

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PROJECT 68 (Eric Weisbard ed., 2004).

[42] For more on this see DUCKWORTH, *supra* note 29. *See also* Noah Balch, *The Grey Note*, 24 REV. LITIG. 581 (2005); André Sirois & Shannon Martin, *United States Copyright Law and Digital Sampling: Adding Color to a Grey Area*, 15 INFO. & COMM. TECH. L. 1 (2006).

[43] The standard 4/4 drum beat consists of four quarter notes on the bass drum, eighth notes on the hi-hat cymbals and hitting the snare drum on the second and fourth beat of the measure. All of this is in 4/4 time. Co-author Brett Lunceford is an expert percussionist.

[44] Ira Magaziner & Benjamin Barber, *Democracy and Cyberspace: First Principles*, *in* DEMOCRACY AND NEW MEDIA 113, 130–31 (David Thorburn et al. eds., 2003).

last month on interstate highways.[45] The percentage was the same for two-lane roads. In addition, seventy-three percent of respondents reported speeding in city, town, or neighborhood streets, and eighty-three percent admitted to speeding on non-interstate multi-lane roads.[46] It seems that Americans are all consumer all of the time; if the public exists in a state of split personality the consumer portion seems intent on killing off the citizen portion.

¶21 Yet, individuals may want to break speed limits while still recognizing the utility of and need for speed limits—in some cases. One may flaunt the laws on the freeway, but still obey speed limits in school zones during posted hours. For example, seventy-eight percent of those polled in the NHTSA survey felt that photo enforcement was appropriate for speeding in a school zone.[47] This has little to do with a belief in the speed limit as a concept; rather, one can see the utility of the law in that particular situation. For example, in Las Vegas, Nevada, it is not uncommon to see motorists on Maryland Parkway driving at 60 MPH suddenly drop their speed to 15 MPH once they enter a school zone.[48] The story that is often told to explain this includes two elements: a little girl was hit and killed in a school zone; thus, fines were dramatically increased and police enforced these limits aggressively.[49] One part of this equation is legal—increased enforcement of the laws and stronger punishments. However, the more important reason for adherence to the speed limit in this instance is rhetorical—citizens needed a reason to believe in the law. Motorists believe in limiting speeds in school zones because they wish to avert tragedy and, more importantly, they believe that by obeying the speed limit they may realistically prevent accidents involving school children. Thus, they choose to obey one speed limit, while breaking the speed limit on either side of the school zone, despite the fact that the economic incentives are similar in each case. Much like this example of speed limit adherence, one must locate the conditions under which the general public will follow copyright law. In other words, what parts of copyright law do they believe in?

¶22 When legislators create copyright law, in whose name do they do so? Michael McGee notes that arguing for change in the name of "the people" is a powerful rhetorical strategy, despite the fact that the people exist only as a rhetorical fiction.[50] Thus, although it may seem that the public is a unified aggregate, citizens all maintain their own conceptions of such ideals as "justice" and "fairness." Although laws are made, presumably, in the name of the people, there seems to be little incentive for citizens to

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[45] *See* U.S. DEP'T OF TRANSPORTATION, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, DOT HS 809 730, NATIONAL SURVEY OF SPEEDING AND UNSAFE DRIVING ATTITUDES AND BEHAVIOR: 2002, at 1 (2004), *available at* http://www.nhtsa.dot.gov/staticfiles/DOT/NHTSA/Traffic%20Injury%20Control/Articles/Associated%20Files/HS809730.pdf.

[46] *Id.*

[47] *Id.* at 10.

[48] Author's personal experience.

[49] Whether or not this actually happened is irrelevant. The very act of telling and retelling this story is what makes it relevant in the public mind. It provides a reason for citizens to keep the law. Walter Fisher provides a discussion of how narrative functions rhetorically, stating, "By 'narration,' I refer to a theory of symbolic actions—words and/or deeds—that have sequence and meaning for those who live, create, or interpret them." Walter R. Fisher, *Narration as a Human Communication Paradigm: The Case of Public Moral Argument*, 51 COMM. MONOGRAPHS 1, 2 (1984).

[50] Michael C. McGee, *In Search of "The People": A Rhetorical Alternative*, 61 Q. J. SPEECH 237, 238 (1975).

obey copyright law as it currently exists. Thus, a conception of copyright that provides some incentive for the public to keep that law—beyond the obvious economic threat of a lawsuit—may be necessary.

¶23 The media framed laws such as the DMCA and the CTEA as a land grab that benefited only copyright holders. Many members of the public now recognize that copyright owners are not necessarily the creators of the content—this issue gained publicity when, in 1985, Michael Jackson purchased the publishing rights of a large portion of the Beatles' catalog.[51] However, the finger of blame cannot be pointed squarely at the media. Congress has made it increasingly clear that they will continue to protect copyright holders by continuing to increase copyright terms. Sonny Bono, after whom the Copyright Term Extension Act[52] was named, wanted the copyright term to be set at "infinity minus one" in order to be considered a "limited time," in accordance with the Constitution.[53] With such statements, it is difficult to see acts such as the CTEA as anything but an abuse of Congress's authority to define the terms of copyright protection at the expense of the public domain. In its opinion on *Eldred v. Ashcroft*,[54] the Supreme Court conceded that although they may act unwisely in doing so, Congress has the right to set copyright terms.[55] Jonathan Band notes:

> The paradox [of copyright enforcement] is rooted in a mismatch between the stated ends of the content community and the means employed to reach them. The content industries have responded to the threat of Internet piracy by pushing for more legislation, such as the DMCA and UCITA [Uniform Computer Information Transactions Act]. But although new legislation is the most expedient response to the threats posed by new technologies, it probably will not hinder Internet piracy because the problem with piracy is not the inadequate breach of contract.[56]

Legislators and content providers have displayed a shocking lack of rhetorical sensitivity in their zeal to protect copyright holders.

¶24 Thus, one issue to consider in inducing people to obey copyright law is the publicly constructed *ethos* of those who create, enforce, and support the law. For many citizens, the CTEA may appear to be a thinly veiled gift to the content industry, especially Disney. As such, there is little incentive for citizens to follow what appears to be copyright law

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[51] Angella Johnson, *Jackson Angers Ex-Beatles: Fellow Artist Who Bought Publishing Rights "Cheapened" Songs by Using Them in Adverts*, THE GUARDIAN, Nov. 6, 1995, *available at* http://www.guardian.co.uk/thebeatles/story/0,11212,606544,00.html.

[52] 17 U.S.C. §§ 302, 304 (2006).

[53] Mary Bono stated on the record: "Actually, Sonny wanted the term of copyright protection to last forever. I am informed by staff that such a change would violate the Constitution. I invite all of you to work with me to strengthen our copyright laws in all of the ways available to us. As you know, there is also Jack Valenti's proposal for term to last forever less one day. Perhaps the Committee may look at that next Congress." 144 CONG. REC. H9952 (daily ed. Oct. 7, 1998) (statement of Mary Bono), *available at* http://www.coolcopyright.com/images/cases/eldredmarybonoquote.pdf.

[54] 537 U.S. 186 (2003).

[55] *Id.* at 208 ("In sum, we find that the CTEA is a rational enactment; we are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be.").

[56] Jonathan Band, *The Copyright Paradox: Fighting Content Piracy in the Digital Era*, BROOKINGS REV., Winter 2001, at 34.

spun out of control. In order for lawmakers to encourage adherence to the laws that they pass, they must present them in such a way that they seem to fulfill a compelling public interest. Perhaps the problem with copyright laws such as the CTEA is that they fail to fulfill any obvious public policy issue in the way that laws against murder and child abuse or even speed limits do.

¶25 From a legislative perspective, the public would also benefit from clear delineations concerning what can and cannot be done with copyrighted material. Current statutes are too vague. When assigning these parameters, legislators must articulate clear public policy arguments that acknowledge the current use of media rather than simply attempting to squelch these uses. For example, if sampling is outlawed, then Congress should articulate the public policy issue surrounding this prohibition.[57] The public policy issues for copyright as it stands are not obvious to the general public. The legislature must make a compelling case for these laws. Making these changes with a clear explanation of how this will benefit the public as a whole would help to generate public support for copyright laws. If these public benefits are found lacking, then the legislature should reconsider the reasons for altering copyright law.

¶26 There is also the question of how copyright holders themselves could persuade consumers to obey copyright law. First, it would be illustrative to consider what parts of copyright law the public, in general, already keeps. Consumers seem to obey copyright when there is some incentive outside of the law to do so. For example, few individuals would make a Xerox copy of an entire book in order to avoid paying for the text and even if the text is available for free, people are willing to purchase it in book form so they can have a copy of it on the bookshelf. An example of this can be found in the case of the book *Thinking in Java* by Bruce Eckel.[58] Before its publication in book form, Eckel originally posted the text online and offered it free of charge. However, there was an overwhelming demand for a print version of the book because people did not want to print out a thousand page book and read it on loose leaf sheets. The packaging was a value-add that customers were willing to pay for. In this case, Eckel could not even give away the text—people were clamoring for him to publish it so they could pay for it.[59]

¶27 Finding some kind of value-add for the product may be an important component in inducing individuals to obey copyright laws. Along the same lines, providing the consumer with something that they cannot reproduce may help to encourage compliance. One can approximate a book by printing it and placing it in a binder; it is not as neat and it takes up more space, but provides the same functionality. However, there are also qualitative elements that cannot be reproduced. For example, a bootleg CD of a concert provides the same functionality as a live show; one can hear what the band sounds like live. However, this does not mean that people will stop going to concerts. In fact, some will purchase a CD of a concert that they attended. For example, the band Pearl Jam

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[57] Sampling is one case where the law is particularly nebulous. *See* Mike Suppappola, *Confusion in the Digital Age: Why the De Minimis Use Test Should Be Applied to Digital Samples of Copyrighted Sound Recordings*, 14 TEX. INTELL. PROP. L.J. 93 (2006).

[58] BRUCE ECKEL, THINKING IN JAVA (1998).

[59] The online version of THINKING IN JAVA has been available for free since the first edition. *Id.* at 2. At the time this paper was written, THINKING IN JAVA, 4th edition was ranked #5,278 on Amazon in the Books category and #9 in Books > Computers & Internet > Programming > Java. Amazon.com: Thinking in Java (4th Edition): Bruce Eckel: Books, http://www.amazon.com/Thinking-Java-4th-Bruce-Eckel/dp/0131872486/ (last visited Oct. 2, 2008).

released recordings of every performance of its 2000 tour.[60] The concert experience is something that cannot be easily replicated and fans will pay to hear songs played live that they already own on CD and know by heart.

¶28 To persuade consumers to follow copyright even without added value, the record industry must overcome its constructed *ethos*. Consumers find it easy to fight against a faceless corporation that maintains draconian control over the creative output of those who are little more than outside contractors. In their fight against the RIAA, groups such as Downhill Battle encouraged people to post flyers exposing the financial practices of the music industry and go to stores to place stickers on CDs with messages such as "Warning! Buying this CD funds lawsuits against children and families."[61] The RIAA and others continue to insist that downloading music mainly hurts the artists, despite counter-messages by groups such as Downhill Battle that suggest that it is actually industry practices that most hurt artists. Judith Levine laments the fact that "today's new media technologies and techniques multiply authors' creative and commercial opportunities. But they also threaten to debase the creator, this time to low-paid, low status 'content provider.'"[62] But Albini points out that in the music industry's current state, this is exactly what the artists already are—low-paid content providers.[63]

¶29 The RIAA must construct a public image of itself that fosters credibility. One possible solution would be greater transparency in the record industry. The public may need to be convinced that the business model of the record label is appropriate and that the artists are being treated fairly. If this is the case, the record industry must do a better job of articulating this; it is not enough to simply assert that the record labels are treating the artists fairly. If the artists are being treated poorly, perhaps this is an opportunity for the recording industry to reconsider its business practices. However, with the recording industry as a whole under suspicion, it would have to gain support from those with credibility in the public eye—artists who are popular but not megastars, for example, or those who had previously been critical of the music industry such as Pearl Jam. In other words, record labels need to have the artists on its side, but not just any artist will do. Many of the smaller artists have explained that file sharing does little to impact their bottom line. D'Entremont points out that:

> [M]ost artists in the mainstream music business signed away significant rights to their own creations when they signed coveted contracts with major labels. Many singers and songwriters believe that music downloads serve to promote their work and increase sales. 'Who gets hurt by free downloads?' asks singer Janis

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[60] *See* Posting of Larry Greenemeier to InformationWeek's Google Weblog, *No (DRM) Code for Pearl Jam*, http://www.informationweek.com/blog/main/archives/2005/08/no_drm_code_for.html (Aug. 25, 2005, 18:32); *see also* Edna Gunderson, *Pearl Jam's Bootlegs Give Others the Boot*, USA TODAY, Aug. 31, 2000, *available at* http://www.usatoday.com/life/music/music255.htm.

[61] Downhill Battle – Music Activism, http://www.downhillbattle.org/ (last visited May 6, 2004). This website is now down, but the authors feel that it is important to discuss extreme groups who responded during the time of the RIAA lawsuits. Despite its lack of permanence, Downhill Battle was an important opposing voice to the RIAA. The authors have an archived version of the webpage and the interested reader can contact them for a copy of the webpage.

[62] Judith Levine, *The Cybercops Are Coming—But Whom Will They Serve?*, COLUM. JOURNALISM REV., Jan.–Feb. 2001, at 66, 67.

[63] Albini, *supra* note 25. *See also* Mark S. Nadel, *How Current Copyright Law Discourages Creative Output: The Overloaded Impact of Marketing*, 19 BERKELEY TECH. L.J. 785, 815 n.144 (2004).

> Ian in the May 2002 issue of Performing Songwriter. 'Save a handful of super-successes like Celine Dion, none of us. We only get helped.'[64]

¶30 The record labels would also have to combat assertions from artists such as Ian MacKaye, head of Dischord Records and member of legendary punk band Fugazi who observes, "If people lose their incentive to make music because they're not making money, they're not musicians. They're business people. Musicians don't have a choice in the matter, you gotta make music. There's no choice!"[65] These statements by artists such as MacKaye and Ian call into question the public policy argument that if artists are not granted exclusive rights to their creative output they will have no incentive to create.[66]

¶31 Another rhetorical problem that content providers and enforcers of copyright seem to have is an outmoded view of copyright. Copyright protection is increasing even as the dissipation of American culture is increasing. Consumers feel a sense of ownership, not only of the tangible product (i.e., the CD or DVD themselves) but also in the message or the content. Copyrighted content is increasingly becoming a mode of self identification. At any given university, a cursory examination of professors' doors will tell one much about those professors. These doors are a pastiche of comic strips, poetry, photographs, and song lyrics. As a society, we identify with these artifacts and despite their copyrighted status, we have claimed them as a part of ourselves. Burke suggests that rhetorical scholars replace the master term of persuasion with identification.[67] Perhaps it is the case that those who create our culture have done so too well; we identify with culture too completely and have begun to see it as rightfully ours. Despite our recognition that we did not create it, we are not willing to give up cultural ownership of artifacts such as our favorite songs, poetry, or sources of inspiration such as Dr. Martin Luther King Jr.'s "I Have a Dream" speech. Perhaps there needs to be a distinction between cultural ownership and economic ownership. If one posts song lyrics on a cubicle wall, he or she violates the letter of copyright law. There seems to be a tension between the desire to express one's identity through copyrighted material and the current state of copyright law. Perhaps one way to resolve this tension is to allow for certain non-commercial uses of copyrighted material.

¶32 Mark Shultz suggests, "If copyright owners pour most of their efforts into enforcement, they will miss the opportunity to encourage voluntary compliance by fostering pro-copyright social norms. In the long term, business practices and rhetoric that encourage voluntary compliance appear to be the most viable solutions to the file-

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[64] D'Entremont, *supra* note 2, at 9–10.

[65] Interview by Holmes Wilson with Ian MacKaye, Introduction by Nicholas Reville (Jan. 20, 2004), http://www.downhillbattle.org/interviews/ian_mackaye.php. This website is now down, and MacKaye's interview does not appear to be on any other website. The authors have an archived version of the webpage with the interview in question and the interested reader can contact them for a copy of the webpage.

[66] Elissa Hecker bluntly states, "There are a lot of authors' rights issues and moral issues, but in the United States, it really is all about the money. And to have the incentive to create original works and to disseminate and to share those works, you really need to compensate the creator." Elissa D. Hecker, *Understand and Respect the Copyright Law: Keep the Incentive to Create*, 53 CASE W. RES. L. REV. 741, 741–42 (2003). Yet Raymond Shih Ray Ku observes that "[c]onsumer copying does little to reduce the incentives for creation because, for the most part, the creation of music is not funded by the sale of copies of that music," explaining that "[t]he overwhelming majority of artists earn no royalties from the sale of music." Raymond Shih Ray Ku, *Consumers and Creative Destruction: Fair Use Beyond Market Failure*, 18 BERKELEY TECH. L.J. 539, 567 (2003).

[67] KENNETH BURKE, A RHETORIC OF MOTIVES 19–27 (1952).

sharing problem."[68] The recording industry seems too fixated on increasing control over copyright and on enforcing copyright. To some extent, copyright enforcement is like holding an egg—if one holds it too tightly it breaks, too loosely and it drops. The recording industry seems to have taken the iron fist approach to rhetorically holding the copyright egg. A better way to protect the egg is to convince those who would take it that it is not their right to do so, and do it in such a way that they actually believe it.

IV. CONCLUSION

¶33 Many scholars have noted that the United States is moving toward an information economy.[69] As such, words are becoming increasingly important. As a society, we can no longer afford to operate under the paradigms that made sense during the industrial revolution. Diane Zimmerman writes, "If we do have intellectual property law for the cyberspace of the future, it will—or, at least, should—be quite different from the general system that currently governs owners and users of communicative works in the analog world."[70] As society evolves, copyright law must also evolve. Barring this, copyright holders and legislators must continue to make a case for the public to follow copyright laws. The answers to the questions surrounding copyright do not lie in more draconian legislation that protects copyright holders. Rather, there must be a reconsideration of the balance between the public policy issues of protecting private interests and maintaining a robust public sphere. The balance between protecting private interests and the public commonwealth is currently skewed to the side of private interests, ignoring the importance of identity in consumption of copyrighted material. There is a prevailing notion that the government should protect the public good but the current state of affairs demonstrates otherwise. Mark Shultz argues, "If copyright law is to be rescued from non-compliance, it will be because most people choose to obey it voluntarily, like they do most other laws. More thought should be put into increasing normative support for copyright law."[71] This article has attempted to provide some suggestions concerning how this may be accomplished.

¶34 Laws are not created in a vacuum. Legislators must acknowledge the social context in which laws are enacted and those who seek to enforce these laws must consider how to persuade citizens to follow the law in the first place. To assume that citizens will obey the law simply because it is the law is as insulting to the citizen as it is wishful thinking on the part of the legislators and enforcers. K. Matthew Dames notes, "Neither large, corporate copyright owners nor Congress can expect Joe Citizen to abide by the interpretation of today's copyright law because that interpretation is unreasonable to the

[68] Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651, 719 (2006).

[69] *See* MANUEL CASTELLS, THE INFORMATION AGE: ECONOMY, SOCIETY AND CULTURE, THE RISE OF THE NETWORK SOCIETY 77–78, 98–101 (2nd ed. 2000); Luciano Floridi, *A Look into the Future Impact of ICT on Our Lives*, 23 INFO. SOC'Y 59 (2007); JORGE REINA SCHEMENT & TERRY CURTIS, TENDENCIES AND TENSIONS OF THE INFORMATION AGE: THE PRODUCTION AND DISTRIBUTION OF INFORMATION IN THE UNITED STATES 28–39 (1995); FRANK WEBSTER, THEORIES OF THE INFORMATION SOCIETY 6–29 (1995).

[70] Diane L. Zimmerman, *Living Without Copyright in a Digital World*, 70 ALB. L. REV. 1375, 1375–76 (2007).

[71] Schultz, *supra* note 68, at 667.

point of being stupid."[72] Those who would maintain copyright as it is must provide more nuanced, persuasive arguments. In short, they must revisit the ancient practice of rhetoric.

¶35 To be successful, copyright holders and legislators must consider the construction of *ethos* and credibility. This is done not only through the reputation that one gains, but also through the discourse itself. Legislators and copyright holders must portray themselves as trustworthy. More specifically, the recording industry must appear to be treating artists and fans fairly, and legislators must appear to be acting in the public interest. If either of these dimensions is found lacking, these problems should be remedied before attempting to gain public support of copyright. If the recording industry is indeed treating artists and fans fairly, and legislators are acting in the public interest, then greater efforts must be made to articulate these facts to the public. As the failure of prohibition demonstrated, the American people are quite willing to break laws with which they do not agree. Legislators and copyright holders must maintain a stance that encourages the public to obey copyright laws. When legislators consider altering copyright terms, the public domain is necessarily affected, and great consideration must be given to how the public will react to the proposed action. When the public sees little incentive to honor the ostensibly limited protection granted under copyright law, copyright law will increasingly become unenforceable. However, if the public is provided with compelling reasons why term limits are in the public interest, they may be more likely to support these terms. Likewise, copyright holders must make more compelling arguments concerning why the public should obey copyright law. If the people have a compelling narrative to follow, they will do so—whether it is true or not. The challenge, then, is not to craft better law; the challenge is to craft better rhetoric.

[72] K. Matthew Dames, *Copyright and the Speed Limit*, INFO. TODAY, Feb. 2008, at 18.