



6-1-2004

How the RIAA Can Stop Worrying and Learn to Love the RICO Act: Exploiting Civil RICO to Battle Peer-to-Peer Copyright Infringement

Phillip Stuller

Follow this and additional works at: <https://digitalcommons.lmu.edu/elr>



Part of the [Law Commons](#)

Recommended Citation

Phillip Stuller, *How the RIAA Can Stop Worrying and Learn to Love the RICO Act: Exploiting Civil RICO to Battle Peer-to-Peer Copyright Infringement*, 24 Loy. L.A. Ent. L. Rev. 521 (2004).

Available at: <https://digitalcommons.lmu.edu/elr/vol24/iss3/3>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Entertainment Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

HOW THE RIAA CAN STOP WORRYING AND LEARN TO LOVE THE RICO ACT: EXPLOITING CIVIL RICO TO BATTLE PEER-TO-PEER COPYRIGHT INFRINGEMENT

I. INTRODUCTION

The Recording Industry Association of America¹ and its members (“RIAA”) is currently involved in thousands of lawsuits² attempting to stem the tide of copyright infringement caused by users of peer-to-peer file sharing (“P2P”) networks.³ These include suits for direct⁴ and secondary liability for copyright infringement⁵ and litigation testing the RIAA’s right to subpoena the identity of P2P users.⁶

The lawsuits are part of the RIAA’s overall strategy to fight P2P that also includes new legislation,⁷ education,⁸ amnesty agreements,⁹ and

1. RIAA, *About Us*, at <http://www.riaa.com/about/default.asp> (last visited Apr. 21, 2004) (defining the RIAA as a trade group that represents record companies, which “create, manufacture and/or distribute approximately ninety percent of all legitimate sound recordings produced and sold in the United States”).

2. *Warth v. Seldin*, 422 U.S. 490, 514–16 (1975) (holding that associations have standing to seek injunctive or declaratory relief on behalf of its members, but not to seek monetary damages if the claims of the members are not shared to an equal extent, based on individualized proof of the facts and extent of injury).

3. *Florida Court Sends RIAA Away*, WIRED NEWS.COM (April 1, 2004) at http://www.wired.com/news/digiwood/0,1412,62915,00.html?tw=wn_tophead_7 (stating that the RIAA has sued almost 2,000 P2P users for copyright infringement to date). Although it is arguable whether the branded versions of applications and protocols that enable P2P file sharing networks are, themselves, networks, throughout this article, they are described by the term “network.” See *infra* Part II.C. (providing background on P2P technology).

4. See *id.*

5. See *MGM Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1035 (C.D. Cal. 2003) (The district court found P2P networks Grokster and Morpheus not liable for secondary copyright infringement. The case has been appealed and arguments were heard by the Ninth Circuit on February 3, 2004.).

6. See generally *Recording Indus. Ass’n of Am. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1231 (D.C. Cir. 2003) (reversing lower court’s denial of a motion to quash subpoenas issued on behalf of RIAA seeking identities of P2P users).

7. Declan McCullagh, *Hollywood Hacking Bill Hits House*, CNET NEWS.COM (July 25, 2002), at <http://news.com.com/2100-1023-946316.html> (discussing the RIAA’s support of the

promotion of online sales as a substitute for P2P infringement.¹⁰ The RIAA has great incentive to ensure that its strategy succeeds. Independent researchers estimate that the industry lost \$700 million¹¹ from the sixty million people using P2P file sharing networks in 2002.¹² However, the court battles thus far have garnered mixed results, leaving the major legal issues unsettled.¹³

This comment will argue that the RIAA should exploit the civil version of the Racketeer Influenced and Corrupt Organizations Act (“RICO”) in its litigation strategy. RICO provides rich benefits for civil plaintiffs that can greatly reduce the RIAA’s legal expenses and avoid or reduce the effectiveness of the legal challenges it currently faces.¹⁴ These benefits include the ability to reduce the burden to prove the secondary liability of P2P networks,¹⁵ to avoid the “staple article of commerce” defense,¹⁶ to join scores of P2P users along with a network in a single

Berman Bill, H.R. 5211, which would permit copyright holders to use self-help measures to stop copyright infringement through P2P networks).

8. John Borland, *RIAA Files 80 New File-Swapping Suits*, CNET NEWS.COM (Oct. 30, 2003), at <http://news.com.com/2100-1027-5099738.html>.

9. *Id.*

10. Benny Evangelista, *RIAA Pursues 80 More / Suits Filed Against File Sharers Include 2 In Bay Area*, S.F. CHRON. Oct. 31, 2003, at B1, available at 2003 WL 3767040 (“RIAA President Cary Sherman said the group’s enforcement and education campaign was succeeding in raising awareness of copyright law and driving users to new, record-industry sanctioned online music services such as iTunes Music Store, Napster 2.0 and MusicMatch Downloads.”).

11. Robert MacMillan, *New RIAA Chief Seeks a Hit Single*, WASHINGTONPOST.COM (Sept. 5, 2003), at <http://www.washingtonpost.com/ac2/wp-dyn/A29504-2003Sep5>.

12. Evangelista, *supra* note 10.

13. *Compare Grokster*, 259 F. Supp. 2d at 1036 (holding that “liability for contributory infringement accrues where a defendant has actual—not merely constructive—knowledge of the infringement at a time during which the defendant materially contributes to that infringement”) with *In re: Aimster Copyright Litigation*, 334 F.3d 643, 650 (7th Cir. 2003) (holding that Aimster’s willful blindness of its users’ direct infringement was a sufficient state of mind for imposing liability).

14. *See, e.g.*, 18 U.S.C. § 1965(a) (2000) (establishing liberal venue requirements); *id.* § 1964(c) (mandating treble damages and attorneys’ fees for private plaintiffs); *Scheidler v. Nat’l Org. for Women, Inc.*, 537 U.S. 393, 411–12 (2003) (“RICO, which empowers both prosecutors and private enforcers, imposes severe criminal penalties and hefty civil liability on those engaged in conduct within the Act’s compass.”).

15. *See generally infra* Part III.B.4 (arguing that both conspiracy to violate RICO and aiding and abetting a RICO violation require less evidence to prove than contributory infringement or vicarious liability).

16. *See generally infra* Part III.B.4.c (contending that analogies to patent law, the basis for extending the staple article of commerce doctrine to copyright law, will not support further extension beyond contributory infringement).

suit,¹⁷ and to hold them all jointly and severally liable¹⁸ for treble damages plus attorney fees.¹⁹ This exploration of the advantages of using the civil RICO Act for P2P copyright infringement will also warn of the dangers that come from overindulging in RICO's generous benefits.

Part II provides the legal and technical backgrounds of three complex subjects: RICO, copyright law, and P2P network technology. Part III analyzes the use of RICO in P2P litigation. First, it demonstrates how to charge a RICO complaint against a P2P network and its users. Then, it addresses the strengths and weaknesses of adopting this strategy. Finally, Part IV will conclude that the RIAA should employ RICO against P2P networks but should only name the most egregious P2P users in its suits to avoid crossing constitutional lines prohibiting grossly excessive judgments.

II. BACKGROUND

A. Copyright Law

The United States Constitution provides Congress with the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²⁰ Pursuant to this power, Congress enacted Title 17, the Copyright Act.²¹ The Act defines infringement as a violation of “any of the exclusive rights of the copyright owner.”²² This includes, among other things, the exclusive right to reproduce and distribute the copyrighted work.²³ Thus, anyone who distributes or reproduces a copyrighted work without permission has infringed on the owner's rights.²⁴

Some exceptions to this rule operate as restrictions on the owner's exclusivity.²⁵ One exception subjects the owner's exclusivity to the “fair use” of the work by those that lawfully possess copies.²⁶ Fair use includes

17. *See* United States v. Diaz, 176 F.3d 52, 103 (2d Cir. 1999) (holding that joinder of codefendants involved in activities related to the RICO enterprise was proper if it tended to show the existence of the enterprise).

18. *See* United States v. Caporale, 806 F.2d 1487, 1507 (11th Cir. 1986).

19. § 1964(c).

20. U.S. CONST. art. I, § 8, cl. 8.

21. The Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

22. 17 U.S.C. § 501(a) (2000).

23. *Id.* § 106(1), (3).

24. *See id.* (All works that are copyrightable but have not yet been registered are similarly protected from infringement.).

25. *See id.* §§ 107–112, 117, 119, 121, 122.

26. § 107.

purposes such as criticism, news reporting, and scholarship.²⁷ A court considers several factors when determining whether an infringing activity was a fair use. These include the purpose and character of the use, the nature of the work, the proportional amount of the work used, and the effect of the use on its market.²⁸

A copyright owner harmed by infringement has available a panoply of both civil and criminal remedies.²⁹ For example, civil plaintiff may sue for actual damages, including lost profits, or for statutory damages that range from \$750 to \$150,000 per work.³⁰ Additionally, the court has the discretion of awarding costs and reasonable attorney fees to the prevailing party.³¹

While the Copyright Act only defines direct infringement liability, courts have developed two doctrines defining liability for the infringing activities of another: contributory infringement and vicarious liability.³² Both of these secondary liability doctrines require plaintiffs to prove elements additional to the primary infringement. For contributory infringement, they must demonstrate that the defendant: (1) knew or had reason to know of the direct infringement; and (2) induced, caused, or materially contributed to that conduct.³³ Vicarious liability for copyright infringement requires plaintiffs to show that defendants had “the right and ability to supervise the infringing activity and also ha[d] a direct financial interest in such activities.”³⁴

Congress enacted several amendments to the Copyright Act in the 1990s to combat a new threat stemming from the ease, speed, and quality of digital media copies.³⁵ Among these were statutes that gave advantages to prosecutors in criminal copyright infringement cases.³⁶ For almost ninety years prior to the rise of the Internet, the requirements for criminal infringement included that the defendant acted willfully and for the purpose

27. *Id.*

28. *Id.*

29. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433–34 & n.15 (1984).

30. 17 U.S.C. § 504(a)–(c).

31. *Id.* § 505.

32. *Sony*, 464 U.S. at 434–35.

33. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019–20 (9th Cir. 2001); *see also Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

34. *Gershwin*, 443 F.2d at 1162.

35. *See* Aaron M. Bailey, *Comment: A Nation of Felons?: Napster, the Net Act, and the Criminal Prosecution of File sharing*, 50 AM. U. L. REV. 473, 491–92, (2000).

36. *Id.* at 491–93 (citing, as examples, the Copyright Felony Act of 1992 and the No Electronic Theft Act of 1997).

of commercial advantage or private financial gain.³⁷ In 1996, Congress, concerned with organized crime's involvement in trafficking counterfeit goods, passed the Anticounterfeiting Consumer Protection Act.³⁸ The Act increased the penalties for criminal copyright infringement and added this offense to the list of predicate crimes under RICO.³⁹

As a reaction to infringement through Internet "warez" sites,⁴⁰ Congress enacted the No Electronic Theft ("NET") Act in 1997.⁴¹ The NET Act eliminated the requirement of possessing a profit motive in criminal copyright infringement where the retail value of works copied or distributed is sufficiently high.⁴² The current statute requires prosecutors to prove that the defendant *either* acted "for purposes of commercial advantage or private financial gain,"⁴³ *or* that the value of the works reproduced or distributed during a 180-day period exceeded \$1,000.⁴⁴

B. RICO

In 1970, Congress enacted Title IX of the Organized Crime Control Act, entitled the "Racketeer Influenced and Corrupt Organizations Act," and commonly known as RICO.⁴⁵ RICO provides prosecutors with powerful tools to fight organized crime.⁴⁶ Moreover, § 1964 of the Act grants a civil remedy in federal court to "[a]ny person injured in his

37. See 4 MELVILLE & DAVID NIMMER, NIMMER ON COPYRIGHT § 15.01 (Dec. 1998); Bailey, *supra* note 35, at 489–90.

38. See Pub. L. No. 104-153, § 3, 110 Stat. 1386 (1996) (adding criminal copyright infringement, 18 U.S.C. § 2319, to the list of RICO predicate offenses found at 18 U.S.C. § 1961(1)(B)); NIMMER, *supra* note 37 at § 15.05(B).

39. Anticounterfeiting Consumer Protection Act, Pub. L. No. 104-153, § 3, 110 Stat. 1386 (1996).

40. United States v. LaMacchia, 871 F. Supp. 535 (D. Mass. 1994). See Press Release, U.S. Department of Justice Criminal Division, Federal Law Enforcement Targets International Internet (Dec. 11, 2001), at <http://www.cybercrime.gov/warezoperations.htm> (last visited Mar. 31, 2004) (A warez site is a website or bulletin board where visitors can download unlicensed copyrighted works such as commercial computer programs and games. Warez sites store the works on a web server unlike the Napster and P2P applications, which store the material on user's computers.).

41. Pub. L. No. 105-147, 111 Stat. 2678 (1997).

42. See 17 U.S.C. § 506(a) (2000).

43. *Id.* § 506(a)(1) (emphasis added).

44. *Id.* § 506(a)(2) (emphasis added).

45. Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, Tit. IX, 84 Stat. 922, 941 (1970) (codified at 18 U.S.C. §§ 1961–1968 (2000)).

46. See 18 U.S.C. § 1963 (providing criminal penalties including fines, up to twenty years imprisonment, and forfeiture of property connected to the violation); *id.* § 1965(a) (broadening the general venue, service of process, and subpoena powers); *id.* § 1966 (expediting actions); *id.* § 1967 (permitting closed proceedings); *id.* § 1968 (permitting the attorney general to bypass courts to order the production of evidence).

business or property” by a violation of RICO.⁴⁷ There are many attractive benefits for successful civil RICO plaintiffs including treble damage awards, mandatory cost and attorney fee awards, nationwide service of process, worldwide personal jurisdiction (as long as the defendant has minimum contacts with the United States),⁴⁸ and broadened venue provisions⁴⁹ that supplement⁵⁰ the general venue statute.⁵¹ Plaintiffs may institute a civil RICO action in any district “in which such person resides, is found, has an agent, or transacts his affairs” whether or not the defendant is a corporation.⁵²

The Supreme Court has confirmed that Congress intended RICO to “be liberally construed to effectuate its remedial purpose.”⁵³ It is equally applicable to both legitimate and illegitimate businesses.⁵⁴ Plaintiffs have employed RICO in many forms of business litigation such as securities fraud, corporate takeover, antitrust, real estate development, and employment litigation.⁵⁵

In addition to primary liability for RICO violations, Congress also codified conspiracy to commit a RICO violation.⁵⁶ Many federal circuits also recognize a separate offense of aiding and abetting a violation of the RICO Act.⁵⁷

47. *Id.* § 1964(c).

48. *See BankAtlantic v. Coast to Coast Contractors, Inc.*, 947 F. Supp. 480, 488–89 (S.D. Fla. 1996).

49. § 1965(a).

50. *See The Organized Crime Control Act of 1970*, Pub. L. No. 91-452, § 904(b), 84 Stat. 947 (“Nothing in [RICO] shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies . . .”).

51. 28 U.S.C. § 1391(b) (stating that proper venue for a civil action not founded solely on diversity may be brought “in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.”).

52. 18 U.S.C. § 1965(a).

53. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 498 (1985) (citing Pub. L. 91-452, § 904(a), 84 Stat. 947).

54. *United States v. Turkette*, 452 U.S. 576, 591 (1981); *see also Slattery v. Costello*, 586 F. Supp. 162, 164 (D.D.C. 1983) (holding that criminal RICO precedents are equally applicable to civil RICO cases where both share the same substantive law).

55. Tower C. Snow, Jr. & David Ledecy, *Recent Developments In RICO Litigation*, 378 *PLI/Lit* 847, 852 (1989)

56. 18 U.S.C. § 1962(d) (2000).

57. *See generally infra* Part III.B.4.b (examining three different jurisdictional interpretations of the aiding and abetting cause of action).

C. P2P Networks and Technology

There would be no P2P if it were not for MP3, the graciously short acronym for Moving Picture Experts Group 1 Audio Layer 3.⁵⁸ MP3 is both a digital audio file format and a method of compressing digital audio data.⁵⁹ It is the specific format of copyrighted work that is at issue in the RIAA lawsuits.⁶⁰ “Ripping” is the popular term for the process of converting a song from a CD into an MP3 file on a computer.⁶¹ MP3 compresses relatively large music files into smaller files that can be transferred efficiently via the Internet while maintaining virtually pure sound quality.⁶² These two factors—speed and quality—led to the creation and phenomenal growth of P2P networks.⁶³

The “P”s in P2P stand for “peers”—the individual users (or nodes) of the networks who upload and download MP3 files.⁶⁴ P2P networks possess three key features: (1) a program that allows users to locate other users; (2) a method for searching for specific content; and (3) a process for transferring files between users.⁶⁵

There are three varieties of P2P networks.⁶⁶ Napster, which epitomized the first generation of P2P, utilized a centralized, index-server framework that maintained the location of all available MP3 files.⁶⁷ When users searched for a song, their request was sent to Napster’s index-servers, which returned the locations where the files were available.⁶⁸ The user then completed the transaction by downloading the song directly from that location.⁶⁹ Centralized framework systems maintain client-server functions.⁷⁰ Since Napster maintained the centralized index-servers, it was capable of exerting control over many variables such as the list of searches

58. Bailey, *supra* note 35, at 478–79.

59. *Id.*

60. *See id.* at 481–82.

61. Jeffrey L. Dodes, Comment, *Beyond Napster, Beyond the United States: The Technological and International Legal Barriers to On-Line Copyright Enforcement*, 46 N.Y.L. SCH. L. REV. 279, 287–88 (2002–03).

62. *See* Bailey, *supra* note 35, 478–79.

63. *See id.* at 478–79, 481–82.

64. *See* Tim Wu, *When Code Isn't Law*, 89 VA. L. REV. 679, 721 (2003).

65. *Id.* at 717–18.

66. Sandvine, Inc., *Regional Characteristics Of P2P: File Sharing As A Multi-Application, Multi-National Phenomenon*, 7 (2003), available at <http://www.sandvine.com/solutions/pdfs/euro-filesharing-Diffunique.pdf>.

67. *Id.* at 8.

68. *See id.*

69. *See id.*

70. *Id.*

that it permitted and the ability to bar users from the network.⁷¹

A second generation of P2P networks was intentionally developed to evade secondary copyright infringement liability⁷² by implementing a decentralized framework.⁷³ In a decentralized system, each node is both a client and a server.⁷⁴ Users execute both searches and transfers through other nodes in the network.⁷⁵ Because these networks have few, if any, centralized functions or control mechanisms—evidence showing secondary copyright infringement liability in the Napster suit—they avoid liability.⁷⁶ However, the lack of centralized functions may also render this type of network unstable and inefficient.⁷⁷ Examples of networks using this design are eDonkey and the early version of Gnutella.⁷⁸

The third generation of P2P networks is currently the most popular in the United States and is characterized by networks using FastTrack technology (Kazaa and Grokster).⁷⁹ FastTrack uses a controlled decentralized framework—a hybrid of the two other varieties.⁸⁰ The system distributes the tasks of a centralized file server to a number of supernodes—users selected dynamically by the network.⁸¹ Some functions are centralized, but designers were careful not to create any control mechanisms.⁸² For example, Kazaa maintains that it does not even have the ability to shut down its own network.⁸³

D. The RIAA's Current Litigation

Two distinct classes of litigants are facing liability for copyright infringement. The first class, individual users who are liable for primary copyright infringement, have little incentive or ability to challenge these

71. Wu, *supra* note 64, at 728–30.

72. *Id.* at 731.

73. *See Sandvine, supra* note 66, at 8.

74. *Id.*

75. *Id.*

76. Wu, *supra* note 64, at 732.

77. *Id.*

78. *See Sandvine, supra* note 66, at 7–8.

79. *See* Wu, *supra* note 64, at 734–35.

80. *Sandvine, supra* note 66, at 8.

81. *Id.* *See also* Kazaa, *The Guide, The Glossary, Participation Level, Supernodes*, KAZAA.COM at <http://www.kazaa.com/us/help/glossary/supernodes.htm> (last visited Feb. 19, 2004) (“[U]sers with the fastest Internet connections and the most powerful computers are automatically designated as Supernodes.” Users search requests are sent through supernodes which maintain indexes of available files.)

82. Wu, *supra* note 64, at 734–35.

83. *Id.* at 735.

suits. Many such users are teenagers and college students⁸⁴ without the resources (i.e., time or money) to mount an effective defense against the overwhelming resources of the RIAA and its attorneys. The users' incentive is low because the RIAA has been willing to settle suits well below the statutory maximum limits.⁸⁵ The cost of launching a defense would likely be higher than the cost of settling. This leaves most users with little incentive to attempt a defense. Additionally, incentive is low because the RIAA's claims against users are for primary copyright infringement, which is a strict liability tort that affords few defenses.⁸⁶

At the other extreme are the P2P networks such as Grokster and Morpheus. The RIAA is appealing a district court ruling granting the motion of the defendants (Grokster and Morpheus) for summary judgment in a suit for injunctive relief.⁸⁷ The networks have a high incentive to challenge the suits since a finding of liability could foreclose their ability to do business.⁸⁸ Unlike the users, the networks have a viable defense with a greater likelihood of success. The RIAA bases its claims against the networks on its interpretation of the judge-made law of contributory infringement—a legal theory that remains uncertain in the context of P2P file sharing networks.⁸⁹

III. HOW THE RIAA CAN IMPLEMENT A RICO SUIT

The RIAA's strategy, oversimplified, has been to fight hundreds of easy cases against easy opponents and a few tough cases against tough opponents.⁹⁰ It would have been a better strategy for the RIAA to combine

84. *In re: Aimster Copyright Litigation*, 334 F.3d 643, 645 (7th Cir. 2003).

85. Ted Bridis, *Music Group Files 80 More Lawsuits Against Downloaders*, USATODAY.COM (Oct. 30, 2003), at http://www.usatoday.com/tech/news/2003-10-30-riaa-80-more_x.htm (stating that defendants have settled for amounts ranging from \$2,500 to \$7,500).

86. *United States v. Moran*, 757 F. Supp. 1046, 1050 (D. Neb. 1991).

87. *MGM Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1033 (C.D. Cal. 2003).

88. *See* 17 U.S.C. § 502(a) (2000) (granting courts the power to issue "temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.").

89. *Compare Grokster*, 259 F. Supp. 2d at 1036 (holding that "liability for contributory infringement accrues where a defendant has actual—not merely constructive—knowledge of the infringement at a time during which the defendant materially contributes to that infringement.") with *Aimster*, 334 F.3d at 650 (holding that Aimster's willful blindness of its users' direct infringement was a sufficient state of mind for imposing liability).

90. *See infra* Part III.B.1.a. (users sued for civil copyright infringement are subject to a strict liability standard); *see also* *MGM Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1036 (C.D. Cal. 2003); *In re: Aimster Copyright Litigation*, 334 F.3d 643, 650 (7th Cir. 2003) (The lack of concordance between the *Grokster* and *Aimster* decisions demonstrates the difficulty in

large numbers of users together in single suits, to reduce its burden of proof in suits against networks, and to select the most hospitable jurisdiction to hear its claims.

The RIAA could have achieved this if it had filed civil RICO claims against all defendants. Although Congress enacted RICO as a tool to fight organized crime, plaintiffs have employed it against a variety of legitimate organizations.⁹¹ Even music copyright holders have used RICO in at least one suit against a P2P network.⁹² Although no court ever heard the issue, the band Metallica included RICO in its lawsuit against Napster in 2000.⁹³

A. *Issues That Must be Resolved to Keep the RIAA From Worrying*

Two complicated issues effect whether or not RICO may constitute a beneficial solution for the recording industry. The first is whether the RIAA can tailor the loosely woven fabric of P2P networks—together with their users—to fit an “enterprise” within the meaning of the RICO Act.⁹⁴ In cases such as *Napster* and *Grokster*, courts have been forced to grapple with the problem of applying copyright law to infringement wrought by new developments in technology. Similarly, if the RIAA employs RICO, courts must determine whether an enterprise can be defined as much by the design of software as the conduct of those who use it. There is no precedent for showing that a virtual community of anonymous individuals can satisfy the definition of an enterprise. However, case law has shown that courts are inclined to interpret this requirement liberally.⁹⁵

The second issue is whether courts would be granting too much power to plaintiffs by allowing them to employ RICO. The Act mandates treble damage and attorney fee awards.⁹⁶ Courts established that joint and

applying both the contributory and vicarious liability standards, and the staple article of commerce doctrine, to P2P networks.)

91. Tower C. Snow, Jr. & David Ledecy, *Recent Developments in RICO Litigation*, 378 PLL/Lit 847, 852 (1989).

92. *Metallica v. Napster Inc.*, No. 00-0391 (Compl.) (C.D. Cal. filed Apr. 13, 2000); see also Jon Zahlaway, *Napster Reaches Agreement With Metallica, Dr. Dre Following Latest Shut-Down Order*, LIVEDAILY.COM (July 12, 2001), at <http://livedaily.com/news/3335.html> (stating that Metallica dropped its RICO claims as part of a settlement with Napster).

93. See *id.*

94. 18 U.S.C. § 1961(4) (2000) (defining “enterprise” as any “individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity”).

95. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 498 (1985) (citing Pub. L. 91-452, § 904(a), 84 Stat. 947) (stating that the statute shall be “liberally construed to effectuate its remedial purposes”).

96. 18 U.S.C. § 1964(c) (2000).

several liability should be applied to all of the defendants within the same enterprise.⁹⁷ A RICO enterprise comprised of P2P file sharers could conceivably include thousands of primary and secondary violators. These two fringe benefits of RICO could create a monstrous liability against those defendants that have the misfortune of not being judgment-proof. The question raised by such liability is whether Congress anticipated this result when it redefined criminal copyright infringement and added this crime to RICO's list of predicate offenses, or whether the conflict between these laws was unintentional. An excessively large liability may influence a court to find that it cannot expand copyright protections to P2P activity without a clear mandate from Congress.⁹⁸

Even if Congress foresaw inequitable effects, astronomical judgments against defendants for committing minimal infringements may be unconstitutional. Recently, the Supreme Court has struck down excessive punitive damage awards⁹⁹ and civil forfeitures,¹⁰⁰ signaling a trend limiting awards grossly disproportionate to the conduct.

There is no accurate way to calculate how these issues will be resolved because there are no precedents in the application of RICO to P2P activity to base predictions. It is left to the copyright owners and the RIAA to find an answer in court.

B. Establishing Civil RICO Liability in the Case of P2P File Sharing

If the RIAA decides to employ RICO against P2P users or networks, it will need to prove four elements to establish a violation of the Act. Plaintiffs must show: (1) "two or more predicate offenses"; (2) the existence of an "enterprise"; (3) "a nexus between the pattern of racketeering activity and the enterprise"; and (4) an injury to business caused by the first three elements.¹⁰¹ While the meanings of terms such as "enterprise" and "pattern" are vaguely defined in the statute,¹⁰² there is no lack of case law to further delineate them. The precision of these definitions is tempered by the fact that different judicial circuits often

97. See *United States v. Caporale*, 806 F.2d 1487, 1507 (11th Cir. 1986).

98. See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984); *United States v. LaMacchia*, 871 F. Supp. 535, 544 (D. Mass. 1994) (expressing judicial reluctance to expand copyright law without the unambiguous direction of Congress).

99. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1520 (2003).

100. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) (overturning the forfeiture of \$357,144 for a violation of a reporting offense punishable by a fine of \$5,000).

101. *VanDenBroeck v. CommonPoint Mortgage Co.*, 210 F.3d 696, 699 (6th Cir. 2000).

102. See 18 U.S.C. § 1964(4), (5) (For example, the definition of a "pattern of racketeering activity" includes little substance beyond "at least two acts of racketeering activity . . .").

maintain their own distinct versions.¹⁰³ This is not a detriment for plaintiffs. In the case of P2P file sharing, where defendants are scattered all over the nation, plaintiffs have the rare opportunity for unfettered forum shopping since jurisdiction is available in any district where one of the defendants resides.¹⁰⁴

1. Proving the Predicate Acts

The RICO Act requires, at minimum, proof of two predicate acts within ten years of each other in order to establish a pattern of racketeering activity.¹⁰⁵ In the context of P2P, the first step in establishing a RICO violation would be proving at least two acts of criminal copyright infringement.

a. Elements of Criminal Copyright Infringement

In civil copyright infringement litigation, defendants are subject to a strict liability standard,¹⁰⁶ with certain caveats such as a “fair use” defense.¹⁰⁷ Under the civil infringement standard, “anyone who violates any of the exclusive rights of the copyright owner” is liable for infringement.¹⁰⁸ While criminal copyright infringement requires a more rigorous effort to prove its elements,¹⁰⁹ this does not create insurmountable obstacles for plaintiffs in P2P infringement cases as long as they select the

103. See Teresa Bryan et al., *Racketeer Influenced And Corrupt Organizations*, 40 AM. CRIM. L. REV. 987, 995 n.60 (2003) (demonstrating the nine different forms that circuit courts of appeal have developed to define the “continuity plus relationship” test for proving a pattern of racketeering activity; see also *id.* at 999–1000 (stating that the circuits have not adopted a uniform definition of “enterprise”).

104. See *Tafflin v. Levitt*, 493 U.S. 455, 460 (1990) (In addition to the district courts, state courts retain the authority to adjudicate civil RICO claims.); see also Bryan, *supra* note 103, at 987 n.1 (Furthermore, thirty-two states have adopted their own “little RICO” statutes. Although plaintiffs may take advantage of the “little RICO” statutes in these states, or concurrent jurisdiction in all state courts, these concerns are beyond the scope of this comment.).

105. 18 U.S.C. § 1961(5) (2000).

106. *United States v. Moran*, 757 F. Supp. 1046, 1050 (D. Neb. 1991).

107. 17 U.S.C. § 107 (2000).

108. *Id.* § 501(a).

109. *Id.* § 506(a) (“Criminal infringement—Any person who infringes a copyright willfully either — (1) for purposes of commercial advantage or private financial gain, or (2) by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000, shall be punished as provided under § 2319 of title 18, United States Code. For purposes of this subsection, evidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish willful infringement.”).

most prolific users as defendants.

To establish that a copyright infringing act is criminal, the plaintiff has the burden of proving that: (1) the plaintiff had valid copyrights for the music uploaded or downloaded;¹¹⁰ (2) which were infringed;¹¹¹ (3) by the defendant acting willfully; and (4) that the infringing activity was either “for purposes of commercial advantage or private financial gain, *or* [was effected] by the reproduction or distribution, including by electronic means” of copyrighted recordings valued at more than \$1,000.¹¹² It is important to note that Congress, in the No Electronic Theft (“NET”) Act,¹¹³ changed the fourth element (as emphasized above), from the conjunctive to the disjunctive.¹¹⁴ Thus, it is not required to prove both the purpose of the infringement *and* that the value of the infringed works exceeded \$1,000. It is enough to show one or the other, as long as the infringement was willful.

b. Willfulness

Assuming that the RIAA can satisfy the first two elements by demonstrating that defendants infringed copyrights, it will then encounter a more difficult test proving the third element—acting willfully.¹¹⁵ There is no definition of willfulness within the Copyright Act itself although the term is included in the definitions of both criminal and civil

110. *See id.* § 410(c) (stating that registration is prima facie evidence of the validity of a copyright); *see also id.* § 411(a) (permitting no action for infringement until the copyright is registered).

111. *Id.* § 501(a). Infringement is defined, in part, as “a violation of any of the exclusive rights of the copyright owner.” When one P2P user downloads unlicensed music from another, they have committed four acts of infringement. The users have violated both the sound recording and musical work rights, and the transfer is an unlawful reproduction and distribution of each right. *Id.* § 106(1), (3); *see id.* § 102 (a)(2), (7).

112. *See* § 506(a) (alteration from original) (emphasis added).

113. Pub. L. No. 105-147, 111 Stat. 2678 (1997).

114. *See* NIMMER, *supra* note 37, at (A)(1).

115. *See* Declan McCullagh, *House Panel Approves Copyright Bill*, CNET NEWS.COM (March 31, 2004) at <http://news.com.com/2100-1028-5182898.html> (A House of Representatives committee has approved the “Piracy Deterrence and Education Act” which would amend the Copyright Act to facilitate enforcement of copyright infringement by P2P users.); *see also* Piracy Deterrence and Education Act, (March 30, 2004) available at <http://www.publicknowledge.org/content/legislation/hr4077/attachment>, p. 14–15. (Among the provisions of the bill is an “enhancement” of criminal copyright infringement (proposed as 17 U.S.C. § 506(a)(3)) which would reduce the level of intent required to prove criminal infringement by means of electronic distribution from “willfully” to “reckless disregard.” If enacted, the obstacle of proving willfulness, described in this section, will be eliminated, making a civil RICO suit against users less doubtful.)

infringement.¹¹⁶ The Supreme Court has recognized the word's equivocal meaning, describing willful as "a word of many meanings, its construction often being influenced by its context."¹¹⁷

Prior to the NET Act, interpretations of "willfulness" varied among the circuit courts. The majority held that willfulness meant "the act was committed by a defendant voluntarily, with knowledge that it was prohibited by law, and with the purpose of violating the law."¹¹⁸ Under this view, a defendant's constructive (rather than specific) knowledge of unlawful infringing acts was sufficient.¹¹⁹ As an example, a defendant's failure to observe and comply with a legible copyright notice while opening a software container is evidence of willfulness.¹²⁰ In contrast, the minority view required only proof of intent to copy to show willfulness.¹²¹

The NET Act helped to clarify this issue by specifically stating that reproduction or distribution in itself is not sufficient to prove willfulness, specifically rejecting the minority view.¹²² It also softened the majority view that required proof of a specific purpose to infringe. NET Act co-sponsor Rep. Howard Coble stated that "proof of the defendant's state of mind" was not required to show willfulness.¹²³ Instead, it was sufficient to prove that "the defendant acted with reckless disregard of the rights of the copyright holder."¹²⁴ Willfulness, he stated, could also be proven contextually—"inferred from the facts and circumstances of each case."¹²⁵

This all boils down to two minimum requirements to show willfulness—the plaintiff must show that defendants: (1) had at least a constructive knowledge of their infringement; and (2) that they nonetheless acted with reckless disregard of the rights of the copyright holder. In a suit against a P2P user, plaintiffs can show constructive knowledge by proving that the user had possessed CDs that had valid copyright notices, and that

116. 17 U.S.C. § 504 (c)(2) (2000) (increasing civil statutory damages up to \$ 150,000 where the defendant acted willfully). See also *id.* § 506(a).

117. See *Spies v. United States*, 317 U.S. 492, 497 (1943).

118. See, e.g., *United States v. Cross*, 816 F.2d 297, 300 (7th Cir. 1987); *Moran*, 757 F. Supp. at 1049.

119. See *United States v. Manzer*, 69 F.3d 222, 227 (8th Cir. 1995).

120. *Id.*

121. See *United States v. Backer*, 134 F.2d 533 (2d Cir. 1943); see also *United States v. Taxe*, 380 F. Supp. 1010 (C.D. Cal. 1974), *aff'd*, 540 F.2d 961 (9th Cir. 1976).

122. See § 506(a).

123. 143 CONG. REC. H 9884 (Nov. 4, 1997).

124. *Id.*

125. *Id.* But cf. 143 CONG. REC. S 12689 (Nov. 13, 1997) (Remarks of Sen. Orrin Hatch: "Although there is ongoing debate about what precisely is the 'willfulness' standard in the Copyright Act—as the House Report records—I submit that in the LaMacchia context 'willful' ought to mean the intent to violate a known legal duty.").

the user disregarded those notices by ripping songs into MP3 files and moving them into a P2P directory. Plaintiffs can demonstrate reckless disregard contextually, as a matter of volume. While inadvertent or infrequent infringement is not a criminal act,¹²⁶ evidence of 1,000 P2P transactions by one user is likely a sufficient showing of a defendant's reckless disregard.

A defendant might still invoke the "I didn't know it was illegal" defense to defeat willfulness. Although ignorance of the law is typically not a viable defense in a criminal prosecution,¹²⁷ this is not always true with respect to complex statutory schemes normally regulated by civil or administrative law.¹²⁸ In *United States v. Moran*,¹²⁹ for example, the defendant, who ran a video rental store, rented copies of his videos while safekeeping the originals.¹³⁰ He claimed a good faith belief that this practice was not copyright infringement as long as he did not rent both the copy and the original.¹³¹ The court held that Moran did not infringe willfully because he had a good faith belief that this was a legal practice.¹³²

While defendants, as in *Moran*, may plead their ignorance of the law as a defense, two factors will weigh against P2P users who try to convince a jury that their good faith ignorance was reasonable. First, ever since the *Napster* litigation began in 2000,¹³³ the illegality of P2P infringement and the RIAA's battle against users and networks have received a considerable amount of publicity.¹³⁴ It would be hard to believe that anyone using a P2P network today is completely ignorant of the illegality of exchanging copyrighted files. A jury would likely be skeptical of the credibility of such claims. The second factor is volume. The more P2P files transacted,

126. See § 506(a) (copying must occur during any 180-day period and the works copied must total a retail value of \$1,000).

127. *Bryan v. United States*, 524 U.S. 184, 195 n.21 (1998).

128. See *id.* at 194 (stating that "highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct" were exceptions to the rule and required specific knowledge that defendant's conduct was unlawful). See also *Cheek v. United States*, 498 U.S. 192, 203-04 (1991) (The Supreme Court held that a good faith misunderstanding of the tax code negates willfulness but that this was a question of fact for the jury. "[T]he more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the . . . laws.").

129. 757 F. Supp. 1046 (D. Neb. 1991).

130. See *id.* at 1047.

131. See *id.*

132. See *id.* at 1052.

133. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

134. See *id.* at 1025 (In its decision, even the Ninth Circuit commented on the effects of the publicity surrounding P2P litigation.).

the less likely a jury will discover any innocence. And, since the RIAA has an opportunity to choose the most willful defendants from a great pool of P2P users, it will most likely succeed in proving this element.

c. Commercial Advantage or Private Financial Gain

The fourth element of criminal copyright infringement requires plaintiffs to establish either that defendants possessed a punishable purpose, or that they caused damages exceeding the threshold amount.¹³⁵ A P2P user's purpose is chargeable when a defendant willfully infringes copyrights "for purposes of commercial advantage or private financial gain."¹³⁶ It is not necessary that the defendant actually realize a profit from the activity.¹³⁷ The NET Act amended § 101 of the Copyright Act to define "financial gain" as "receipt, or *expectation of receipt*, of anything of value, including the receipt of other copyrighted works."¹³⁸ Some P2P networks include *quid pro quo* functionality that demonstrates the expectation of receipt of other works. For example, Kazaa limits a user's ability to download files if the user fails to upload a sufficient quantity of files.¹³⁹ Users upload MP3 files with the expectation of downloading new files. This type of functionality that enforces a "good neighbor" policy provides plaintiffs with ample evidence that P2P users infringe copyrights for private financial gain.

d. Minimum Retail Value of \$1,000

As an alternate to proving purpose, plaintiffs can plead that defendants reproduced or distributed recordings worth more than \$1,000.¹⁴⁰ Specifically, the statute requires proof of "the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total

135. See 17 U.S.C. § 506(a). *But see* McCullagh, *supra* note 115 (A House of Representatives committee approved the "Piracy Deterrence and Education Act" which would amend the Copyright Act to facilitate enforcement of copyright infringement by P2P users. Among other things, the bill would criminalize P2P activity by one that offers 1,000 or more works for distribution without needing to prove the works' value.).

136. *Id.* § 506(a)(1).

137. *Cross*, 816 F.2d at 301.

138. Pub. L. No. 105-147, 111 stat. 2678 (emphasis added).

139. Kazaa, The Guide, The Glossary, Participation Level, at http://www.kazaa.com/us/help/glossary/participation_ratio.htm (last visited Feb. 19, 2004) ("Basically, the more . . . files you share, and are uploaded from you, the better your downloading performance will be.").

140. 17 U.S.C. § 506(a)(2).

retail value of more than \$1,000.”¹⁴¹ Meeting this threshold requirement obviates the need to show a financial motive. It also can reduce plaintiff’s burden as long as the defendant transferred enough copyrighted files to exceed this dollar amount with room to spare. Legitimate music downloading sites such as Apple’s iTunes generally price files at around one dollar per song.¹⁴² Thus, over one thousand transactions would be required to reach the criminal threshold.

The problem for plaintiffs employing the threshold dollar requirement is that the amount can be susceptible to attack. Defendants may exclude from their sum any files reproduced or distributed that are arguably a fair use or are not copyrightable.¹⁴³ This includes files in the public domain, files downloaded repeatedly, files legally owned by users,¹⁴⁴ files not successfully downloaded or not operable,¹⁴⁵ and spoof files uploaded by the RIAA as part of its attempt to derail the P2P networks.¹⁴⁶ This could allow defendants to reduce the total retail value below \$1,000 to negate criminality. Thus, the best targets in this category are P2P users that have downloaded well in excess of one thousand MP3 files.

2. The Existence of an Enterprise

After showing a sufficient number of predicate acts, plaintiffs must prove that there was a nexus between the pattern of racketeering activity and the RICO enterprise.¹⁴⁷ The Act defines “enterprise” as including “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”¹⁴⁸ Because P2P users are not a legal entity and not a union, the “associated in fact” enterprise is most fitting. The Supreme Court has defined this as a “group of persons associated together for a common purpose of engaging in a course of conduct.”¹⁴⁹ There are three requirements. An association in fact “(1) must be an ongoing

141. *Id.* § 506(a)(2).

142. iTunes, Music Store, at <http://www.apple.com/itunes/store/> (last visited Feb. 23, 2004) (“just 99¢ per song”).

143. 17 U.S.C. § 107.

144. See *Aimster*, 334 F.3d at 652–53 (stating in dicta that downloading a copy of a CD that is legally owned may be a fair use).

145. § 107 (showing factors determining a fair use).

146. See David Segal, *A New Tactic in the Download War*, WASH. POST, Aug. 21, 2002 at A1, available at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A42239-2002Aug20¬Found=true>.

147. *VanDenBroeck*, 210 F.3d at 699.

148. 18 U.S.C. § 1961(4).

149. *United States v. Turkette*, 452 U.S. 576, 583 (1981).

organization, (2) its members must function as a continuing unit, and (3) it must be separate from the pattern of racketeering activity in which it engages.”¹⁵⁰

There is considerable disagreement among the federal circuit courts over the definition of enterprise, but all require that it must have some sort of organizational structure,¹⁵¹ “however loose-knit.”¹⁵² Structure is the quality “that separates ‘organized’ from ‘disorganized’ crime.”¹⁵³ “[T]here need not be much structure, but the enterprise must have some continuity and some differentiation of the roles within it.”¹⁵⁴ Thus, in *United States v. Ellison*, the court held that a white supremacist group had sufficient structure to be a RICO enterprise because the leader had the authority to assign members to specific jobs and direct their activities.¹⁵⁵

The hierarchical, organizational structure of P2P networks such as Kazaa is evident on their websites.¹⁵⁶ At the top level is the network itself.¹⁵⁷ Before users may use the network, they must agree to the terms that the network establishes in an End User License Agreement (“EULA”).¹⁵⁸ The networks also establish a hierarchy of users, determined by a number of factors. Kazaa manages its network by automatically designating some users as supernodes to act as go-betweens in transactions between users.¹⁵⁹ In *MGM Studios, Inc. v. Grokster, Ltd.*, the court found that the use of supernodes by Grokster, which used Kazaa software, created “a two-tiered organizational structure.”¹⁶⁰ Kazaa also establishes a

150. *Frank v. D’Ambrosi*, 4 F.3d 1378, 1386 (6th Cir. 1993).

151. Bryan et al., *supra* note 103, at 1000–01.

152. *Bachman v. Bear, Stearns & Co.*, 178 F.3d 930, 932 (7th Cir. 1999).

153. Gerard E. Lynch, *RICO: The Crime of Being A Criminal, Parts III & IV*, 87 COLUM. L. REV. 920, 974 (1987).

154. *Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 645 (7th Cir. 1995).

155. *United States v. Ellison*, 793 F.2d 942, 950 (8th Cir. 1986).

156. Kazaa, *The Guide, The Glossary, Participation Level*, KAZAA.COM at http://www.kazaa.com/us/help/glossary/participation_ratio.htm (last visited Feb. 19, 2004) (establishing six participation levels: low, medium, high, guru, deity, and supreme being).

157. Kazaa, *The Guide, End User License Agreement*, KAZAA.COM at <http://www.kazaa.com/us/terms.htm> (last visited Feb. 19, 2004) (explaining how users cannot use the software without agreeing to the networks’ terms).

158. *Id.*

159. Kazaa, *The Guide, The Glossary, Participation Level, Supernodes*, KAZAA.COM at <http://www.kazaa.com/us/help/glossary/supernodes.htm> (last visited Feb. 19, 2004) (“[U]sers with the fastest Internet connections and the most powerful computers are automatically designated as Supernodes.” Users search requests are sent through supernodes which maintain indexes of available files). In *MGM Studios, Inc. v. Grokster, Ltd.*, the court found that the use of supernodes by Grokster, which used Kazaa software, created “a two-tiered organizational structure.”

160. 259 F. Supp. 2d 1029, 1040 (C.D. Cal. 2003).

association formed by a specific P2P network and its users, this definition would not defeat the triad, for this association is neither the network nor the users by themselves.

Moreover, this characterization of the enterprise would satisfy a requirement of the majority of circuit courts that the enterprise must be something different from the pattern of infringing activity.¹⁶⁹ This distinction is shown by the fact that there are both infringing and noninfringing uses of the network. Kazaa, for example, makes available “[l]icensed files, including computer games, music, videos and software applications”¹⁷⁰ Ironically, the P2P networks may be offering these legitimate applications in an attempt to avoid contributory infringement liability by showing that they are, like a videocassette recorder, a staple article of commerce capable of substantial noninfringing uses.¹⁷¹ However, these same noninfringing uses provide RICO plaintiffs with the evidence required to show that the enterprise is separate and distinct from the pattern of racketeering activity.

The problem with employing this definition of the RICO enterprise is that it is theoretical and defies proof in fact, leaving it vulnerable to challenge. It describes a virtual enterprise where all users are connected to each other through traceable P2P activity such as uploads, downloads and searches. In reality, there may be no practical way to sort through the millions of file sharing transactions and prove that there is only one enterprise of Kazaa users, or that each node on the network has some sort of interconnection to each other node. Even if plaintiffs produced evidence linking file transfers (directly or through intermediaries) between one hundred users, this would not prove that all Kazaa users are connected through any number of degrees of separation.

However, plaintiffs can show sufficient evidence to infer that only a single enterprise of P2P sharing exists. The P2P software applications begin operating by connecting a new user to others that are already using

169. Bryan et al., *supra* note 103, at 1002 n.109 (stating that every circuit except the second and eleventh has adopted the view that a RICO enterprise must be separate and distinct from the pattern of racketeering activities); *see also Turkette*, 452 U.S. at 583 (“While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The ‘enterprise’ is not the ‘pattern of racketeering activity’; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved”).

170. Kazaa, *Sharman Networks Launches Kazaa v2.5*, KAZAA.COM, at http://www.kazaa.com/us/news/2.5_launch.htm (last visited Feb. 19, 2004).

171. *See Sony*, 464 U.S. at 442 (holding that such a staple article of commerce is immune from liability for contributory copyright infringement).

hierarchy among users based on their contribution to other users.¹⁶¹ Kazaa gives extra network privileges to users that give (by uploading) more than they take (by downloading).¹⁶² The organization of the network, including the differentiation of the roles between the network, supernodes, uploaders, and downloaders, may be enough evidence of structure to separate it from those conspiracies of equal offenders that would not fall under RICO jurisdiction.

The “ongoing relationship” requirement for an association in fact requires proof that unlicensed file transfers between users on Kazaa occur more often than sporadically, and pose a threat of continued infringement activity.¹⁶³ With millions of users completing transfers daily, this will be simple to establish.¹⁶⁴ Evidence that users regularly use the network is proof that they act as a continuing unit, the second requirement of an association in fact.¹⁶⁵ RIAA spokespersons stated that the users it has sued exchanged an average of more than 1,000 copyrighted files.¹⁶⁶ This is sufficient evidence to prove that the users are a continuing unit.

However, it would be a mistake to classify Kazaa as a RICO enterprise if it is also a defendant.¹⁶⁷ The nexus required by RICO’s third element is a relationship between three different parts: defendant, enterprise, and pattern of racketeering activity.¹⁶⁸ If the enterprise is also a defendant, there can only be a nexus between two parts. Thus, plaintiffs cannot define the enterprise as the individual users, the P2P network, or the pattern of activity by itself. Any of these options would defeat the triad relationship. However, if the plaintiffs characterize the enterprise as the

161. Kazaa, *The Guide, The Glossary, Participation Level*, KAZAA.COM at http://www.kazaa.com/us/help/glossary/participation_ratio.htm (last visited Nov. 8, 2003) (establishing six participation levels: low, medium, high, guru, deity, and supreme being).

162. *Id.*

163. *See* H. J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 243 (1989) (“The continuity requirement is . . . satisfied where it is shown that the predicates are a regular way of conducting defendant’s ongoing legitimate business . . . , or of conducting or participating in an ongoing and legitimate RICO ‘enterprise.’”).

164. *See* Piracy Deterrence and Education Act, (March 30, 2004) available at http://www.publicknowledge.org/content/legislation/hr4077/attachment_p_2 (The proposed bill includes Congressional findings that over two million users of the most popular P2P system, assumedly Kazaa, are online at any time, and that users of all P2P networks exchange over two billion digital media in an average month.).

165. *Id.*

166. Associated Press, *Music Industry Settles 52 Lawsuits*, CBSNEWS.COM (Sep. 30, 2003), at <http://www.cbsnews.com/stories/2003/09/30/tech/main575823.shtml>.

167. Trustees of Boston Univ. v. ASM Communications, Inc., 33 F. Supp. 2d 66, 73 (D. Mass. 1998) (stating that an overwhelming number of courts have held that the “person” engaging in the pattern of racketeering activity must be an entity distinct from the “enterprise”).

168. *See id.*; *see also* Bryan et al., *supra* note 103, at 991.

that network.¹⁷² Thus, new users cannot initiate a separate enterprise of interconnected file sharing activity without first connecting to an existing enterprise. Unless the software application provides some method to operate without first connecting to existing users, each new user must join the same network that the first two users originated. Acceptance of this theory may require a jury to make a leap of faith. In a criminal RICO case where the prosecutor's burden is to prove a violation beyond a reasonable doubt,¹⁷³ the leap may be too far. However, civil RICO claims only require a preponderance of the evidence.¹⁷⁴ There should be enough evidence to meet this standard. Yet, if plaintiffs fail with this definition of a virtual enterprise, they can fall back on an alternative pleading of an enterprise of users that are interconnected in fact.¹⁷⁵

3. Nexus Between the Pattern of Racketeering Activity and the Enterprise

Before determining whether there is a nexus between the pattern of racketeering activity and the enterprise, it is necessary to verify that such a pattern exists. As stated above, the statutory minimum number of acts needed to establish a pattern of racketeering activity is two.¹⁷⁶ However, "while two acts are necessary, they may not be sufficient" since "two of anything do not generally form a 'pattern.'"¹⁷⁷ Further, a mere showing of multiple predicate acts is "insufficient to prove a pattern."¹⁷⁸ To demonstrate a pattern, plaintiffs must prove relatedness and continuity: "that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity."¹⁷⁹

Factors that show evidence of relatedness include whether the predicate acts involve "similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."¹⁸⁰ The millions of acts of P2P copyright infringement are far from being isolated events. Plaintiffs can

172. See Wu, *supra* note 64, at 721.

173. Fleischhauer v. Feltner, 879 F.2d 1290, 1296 (6th Cir. 1989) (stating that the preponderance of the evidence standard of proof was appropriate in civil RICO cases).

174. *Id.*

175. See Roeder v. Alpha Indus., Inc., 814 F.2d 22, 28–29 (1st Cir. 1987) (holding that a pleading describing the enterprise as each of the defendants "individually, collectively and in any combination" was sufficient to plead the enterprise in the alternative).

176. 18 U.S.C. § 1961(5).

177. *Sedima*, 473 U.S. at 496 n.14.

178. Kenda Corp. v. Pot O'Gold Money Leagues, Inc., 329 F.3d 216, 233 (1st Cir. 2003).

179. H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 239 (1989).

180. *Id.* at 240.

prove the other factors by showing the similarity of each infringing act: creating an MP3 file from a copyrighted song, then uploading the file, and allowing it to be downloaded by another user. The infringing acts of P2P users are also related if the users participate through non-isolated, repeated, and similar acts of uploading and downloading.¹⁸¹ These acts are related further by their dependency on each other. Files must be uploaded (infringing on distribution rights)¹⁸² before they can be downloaded (infringing on reproduction rights).¹⁸³ Two actors must work together with a similar purpose in mind to complete the transaction. This will satisfy the “relatedness” test.

The Supreme Court has suggested ways of proving the continuity requirement.¹⁸⁴ For example, it might be shown “that the predicates are a regular way of conducting [the P2P network] defendant’s ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO ‘enterprise.’”¹⁸⁵

P2P networks have both infringing and noninfringing purposes and hold themselves out to be legitimate businesses. The infringing uses of P2P enhance the revenue derived from noninfringing usage. Kazaa, for example, earns income from advertising on its sharing application, and from selling an “ad free” version of the application.¹⁸⁶ The more content available, infringing and noninfringing, the more revenue the company will earn.¹⁸⁷ Plaintiffs can argue that infringing files are a substantial part of the regular way that P2P networks conduct business. Further, P2P users regularly participate in this business by uploading and downloading infringing files. Plaintiffs should easily succeed in showing that a pattern of racketeering exists.

After establishing an enterprise and a pattern, plaintiffs must relate both of these to the defendant in order to establish the necessary nexus.¹⁸⁸ Section 1962 (a), (b), and (c) of the RICO Act define three types of

181. *See id.* (detailing factors that determine “relatedness”).

182. *See* 17 U.S.C. § 106(3).

183. *See* 17 U.S.C. § 106(1).

184. *See id.* at 241–43.

185. *Id.* at 243.

186. Kazaa, *About Us, News, ‘KAZAA PLUS’ Launched*, KAZAA.COM (Aug. 28, 2003), at http://www.kazaa.com/us/news/kazaa_plus.htm (last visited Mar. 31, 2004).

187. *See generally* Amy Harmon, *Marketers Try to Turn Web Pirates Into Customers*, N.Y. TIMES, Nov. 2, 2002, at C1 (discussing how unauthorized downloads are being used as a vehicle to sell legitimate material).

188. *VanDenBroeck*, 210 F.3d at 699.

relationships that are considered prohibited activities.¹⁸⁹ The first prohibits investment from racketeering activity in any enterprise that affects interstate commerce.¹⁹⁰ The second prohibits any person from acquiring an interest in any enterprise affecting interstate commerce through racketeering activity.¹⁹¹ The third, § 1962(c), is the most applicable to P2P file sharing. It provides that:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.¹⁹²

This provision can be broken down into two parts. First, the defendant must be a person employed by or associated with the enterprise. The second part is more complex. The Supreme Court labored to discern the meaning of § 1962(c) in *Reves v. Ernst & Young*¹⁹³ and concluded that “one is not liable under that provision unless one has participated in the operation or management of the enterprise itself.”¹⁹⁴ Under the “operation or management” test,¹⁹⁵ liability is not limited to those with primary responsibility within the enterprise but extends to all who have “some part in directing the enterprise's affairs.”¹⁹⁶ Nor is liability limited to upper management, but also reaches “lower rung participants in the enterprise who are under the direction of upper management” and “others ‘associated with’ the enterprise who exert control over it.”¹⁹⁷

Reves presents problems for P2P plaintiffs in developing an effective litigation strategy. If both the users and the networks are alleged to be principals in the enterprise, then the users may fail the “operations or management” test. Networks, not users, are upper management. It is the networks that design the operation of the P2P application software in a manner that provides the incentives and security measures that facilitate

189. 18 U.S.C. § 1962 (a)–(c) (2000). The fourth subsection, § 1962(d), defines the separate offense of conspiracy and will be discussed below within Part 4.

190. § 1962(a).

191. § 1962(b).

192. § 1962(c).

193. *Reves v. Ernst & Young*, 507 U.S. 170 (1993).

194. *Id.* at 183 (developing the “operation or management test” after retreating to the Congressional Record, case law, law review articles, and a dictionary).

195. *Id.* at 179.

196. *Id.* (emphasis added).

197. *Id.* at 184.

copyright infringement.¹⁹⁸ Users act independently and not under the direction of upper management, and it would be difficult to show how individual users exert any control over the network. However, if plaintiffs allege that the users are the only principals while networks are liable secondarily, then there is less disagreement that the users are operating or managing the enterprise. Since the illicit business of the RICO enterprise is copyright infringement, users are conducting the affairs of the enterprise by unlawfully exchanging copyrighted material. This would show that users pass the *Reves* test but still leaves the plaintiffs with the task of proving the secondary liability of the networks.

4. Secondary Liability for Civil RICO Violations

Secondary violators of the RICO Act are just as liable for damages as primary violators.¹⁹⁹ If secondary liability provides an easier path to a court victory, there is no reason not to pursue it. Depending on the facts and circumstances of a defendant's involvement with the enterprise, allegations of conspiracy to violate the RICO Act or aiding and abetting a RICO violation may provide such a route. This is true for proving the liability of both P2P networks and their users, but the focus here is on the networks.

a. Conspiracy to Violate RICO

P2P plaintiffs will find that conspiracy is the easiest path to finding the networks liable for a RICO violation. Congress codified a separate offense in § 1962(d) that prohibits conspiring to violate any of the other provisions of § 1962: (a), (b), or (c).²⁰⁰ There are essentially two required elements: agreement and knowledge.²⁰¹ There is no requirement that conspirators directed the affairs of the enterprise, i.e., that they pass the *Reves* "operations or management" test.²⁰² There is also no requirement to prove that the conspirator committed a predicate act.²⁰³ There is not even a need to prove that anyone ever consummated a predicate act since

198. See *infra* Part III.B.4.b.

199. See 18 U.S.C. § 2(a) (2000) (aiding and abetting); § 1962(d) (conspiring to violate the RICO Act.).

200. § 1962(d); see also *Salinas v. United States*, 522 U.S. 52, 63 (1997) (holding that there is no "overt act" requirement).

201. See *United States v. Rastelli*, 870 F.2d 822, 828 (2d Cir. 1989).

202. See *Bryan*, *supra* note 103, at 1009.

203. See *Smith v. Berg*, 247 F.3d 532, 537-38 (3d Cir. 2001).

conspiracy is an inchoate offense.²⁰⁴ It is the “distinct evil” of the act of conspiring that creates liability.²⁰⁵

The agreement to commit a predicate act need not be formal or express but may instead be only tacit.²⁰⁶ It can be an agreement to facilitate the commission of a predicate act or an agreement to “facilitate only some of the acts leading to the substantive offense.”²⁰⁷ Similarly, the knowledge requirement is very liberal. A RICO conspiracy only requires knowledge of the “general nature of the enterprise and that the enterprise extends beyond his individual role.”²⁰⁸

Plaintiffs can use a conspiracy theory to find networks liable for RICO violations. In P2P enterprises, there are both formal agreements and tacit agreements. Users make formal agreements with P2P networks through acceptance of a EULA.²⁰⁹ Despite any disclaimers within these agreements regarding copyright infringement, the networks should reasonably know why users agree to EULA terms. The false piety of the disclaimers is obvious—the networks provide the necessary lip service as its users read the “warnings,” wink back, and click the agreement.

The most important reason for using the conspiracy cause of action is that it only requires the network to understand the general nature of the RICO enterprise. Networks must be well aware of the substantial infringing uses of their networks. If the RIAA claims that networks have conspired to violate RICO, it will avoid the constructive knowledge versus specific knowledge controversy between the *Aimster* and *Grokster* decisions. The RIAA will only need to prove the barest form of constructive knowledge, greatly reducing its burden of proof.²¹⁰

204. See *United States v. Crockett*, 979 F.2d 1204, 1209 (7th Cir. 1992).

205. *Salinas*, 522 U.S. at 65.

206. See *Rastelli*, 870 F.2d at 828.

207. *Salinas*, 522 U.S. at 65.

208. *Rastelli*, 870 F.2d at 828.

209. See, e.g., Kazaa, *The Guide, End User License Agreement*, KAZAA.COM, at <http://www.kazaa.com/us/terms.htm> (last visited Feb. 19, 2003).

210. See *Aimster* 334 F.3d at 649–50 (The Seventh Circuit, interpreting the *Sony* and *Napster* decisions, held that *Aimster*’s willful blindness of its users’ direct infringement, i.e., constructive knowledge, was a sufficient state of mind for imposing liability); see *Grokster*, 259 F. Supp. 2d at 1036 (The Ninth Circuit, also interpreting the *Sony* and *Napster* decisions, held that “liability for contributory infringement accrues where a defendant has actual—not merely constructive—knowledge of the infringement at a time during which the defendant materially contributes to that infringement.” Compare two requisite levels of knowledge with that required in a RICO action: plaintiffs must only show that the P2P network understood the general nature of the enterprise.).

b. Aiding and Abetting

Another way to establish the secondary liability of networks is to show that they have aided and abetted a RICO violation. Courts have taken three different approaches in applying aiding and abetting to RICO. The premise of the first approach is that it was Congress' intent that RICO would not supersede other federal laws.²¹¹ Since the federal aiding and abetting statute (defining one who aids or abets as a principal) is applicable to all crimes against the United States,²¹² it must be applicable to RICO.²¹³ In the few courts that adhere to this view, plaintiffs would only need to prove that a P2P network aided and abetted a RICO violation by a user.

In contrast, the second approach argues that a RICO aiding and abetting violation cannot be valid because Congress did not include it when it codified the separate RICO offense of conspiracy.²¹⁴ Through rules of statutory construction, the inclusion of conspiracy charges meant the exclusion of aiding and abetting.²¹⁵ Further, the Supreme Court, in *Reves*, indicated that aiding and abetting is not applicable to a violation of § 1962(c).²¹⁶

The third and most tenable approach is that aiding and abetting is applicable for RICO purposes, but limited to the predicate acts.²¹⁷ Since the federal aiding and abetting statute applies to all offenses against the United States, including criminal copyright infringement,²¹⁸ aiding and abetting such offenses is as much a predicate act as operating as the principal.²¹⁹ Seemingly, this would permit application of aiding and abetting to criminal copyright infringement.

211. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(b), 84 Stat. 947 (1970) ("Nothing in . . . [RICO] shall supersede any provision of Federal, State or other law imposing criminal penalties or affording civil remedies . . .").

212. 18 U.S.C. § 2(a) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.").

213. *United States v. Marino*, 277 F.3d 11, 29 (1st Cir. 2002) ("Aiding and abetting liability is inherent in every federal substantive crime.").

214. *See* Pa. Ass'n of Edwards Heirs v. Righenour, 235 F.3d 839, 843 (3d Cir. 2000); *see also In re Mastercard Int'l Inc.*, 132 F. Supp. 2d 468, 494-95 (E.D. La. 2001).

215. *See* *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 418 (1998).

216. *Reves*, 507 U.S. at 178 (stating in dicta that "within the context of § 1962(c), 'participate' appears to have a narrower meaning" than aiding and abetting).

217. *See In re Am. Honda Motor Co.*, 958 F. Supp. 1045, 1058 (D. Md. 1997); *see also Aetna Casualty Sur. Co. v. P & B Autobody*, 43 F.3d 1546, 1560 (1st Cir. 1994) (interpreting § 1961, the list of crimes defined as predicate acts, to include aiding and abetting).

218. *See United States v. Sachs*, 801 F.2d 839, 841 (6th Cir. 1986) (affirming convictions for aiding and abetting criminal copyright infringement under the federal aiding and abetting statute, 18 U.S.C. § 2(a)).

219. *Am. Honda*, 958 F. Supp. at 1058.

Plaintiffs in jurisdictions that have adopted this theory must also prove that the defendants pass the “operations or management” test.²²⁰ This should not be a high hurdle, as networks in every sense operate and manage the enterprise; they have a role in directing its affairs, and they exert control over it.²²¹

Having established that aiding and abetting could be a viable cause of action in some jurisdictions, it is necessary to examine its meaning. Under 18 U.S.C. § 2(a),²²² plaintiffs must prove “that [the defendant] became associated with a criminal venture and participated in this venture.”²²³ Association requires that the defendant shared the same intent as the principal.²²⁴ Participation requires the defendant to have “engaged in some affirmative conduct designed to aid the venture.”²²⁵

RICO aiding and abetting case law shows that intent may be proved by a reasonable inference that defendants intend the natural and probable consequences of their intentional acts or conscious omissions.²²⁶ Under this approach, plaintiffs can establish a P2P network’s intent requirement by showing specific acts of the network’s designers to promote copyright infringement, such as developing its software in a manner to shield the network and its users from civil copyright infringement liability, developing “security” measures to prevent infringers detection, and designing features that encourage users to supply content of any sort.²²⁷

Napster, with a centralized index-server, was a more efficient and stable system than second and third generation systems.²²⁸ Yet these centralized functions gave Napster too much control over its users’

220. *See id.* at 1059.

221. *See supra* Part III.B.3 (stating that the networks design the software in a manner that provides incentives and security measures to facilitate copyright infringement); *see also* Kazaa, End User License Agreement, *supra* note 209 (stating that Sharman Networks, Kazaa’s manufacturer, maintains the right to grant users the ability to use the network, to restrict the users conduct relative to the use of the software, and to terminate that ability if users do not abide by the provisions of Kazaa’s license agreement). Lest there be any doubt that Kazaa exercises control over its network, the company filed suit against the RIAA claiming that it had violated the EULA and infringed on Kazaa’s copyright of its software. *See* Associated Press, *Makers of Kazaa Swing Record Labels*, (Sep. 24, 2003), available at <http://www.cnn.com/2003/TECH/biztech/09/24/kazaa.sues.ap/index.html>.

222. 18 U.S.C. § 2(a).

223. *United States v. Vasquez*, 953 F.2d 176, 183 (5th Cir. 1992).

224. *Id.*

225. *Id.*

226. *United States v. Graham*, 858 F.2d 986, 992 (5th Cir. 1988).

227. *See* Wu, *supra* note 64, at 717.

228. *See id.* at 728.

infringement, leaving it vulnerable to secondary infringement liability.²²⁹ There is no reason to decentralize functions that improve network efficiency other than to avoid liability.²³⁰

In addition, P2P networks have added “security” functions that are further measures to safeguard users from liability. Examples include using proxy servers to hide user addresses,²³¹ and disabling functions that had allowed investigators to discover all of the files in a user’s sharing folder.²³² Additionally, the promotion of *quid pro quo* policies that restrict users who do not upload enough content, further promotes the illicit aims of the enterprise. These policies ensure that there is an ample supply of downloadable content. While these policies may seem to be license-neutral, consider what sources of unlicensed content (e.g., copyrighted music on CD) compared to legal content (e.g., works in the public domain on CD) might be available to an average user to upload. The networks must have known that the natural and probable consequences of their features and system design would promote the infringing acts of their users.

The same acts that show a network’s intent also demonstrate that the networks “engaged in some affirmative conduct designed to aid the venture.”²³³ Hence, it also establishes proof of the participation element.

c. The Staple Article of Commerce Doctrine Does Not Apply to Aiding and Abetting or Conspiring to Violate the RICO Act

In *Sony Corp. of America v. Universal City Studios, Inc.*,²³⁴ the Supreme Court borrowed the “staple article of commerce” doctrine from the Patent Act’s statutory definition of contributory infringement²³⁵ and applied it to copyright contributory infringement.²³⁶ This doctrine immunizes parties that distribute products from claims of contributory infringement, where the products provide a means for others to infringe but are also “capable of substantial noninfringing uses.”²³⁷ For example, the

229. *See id.* at 731–34.

230. *Id.*

231. Press Release, Morpheus.com, New Morpheus™ 3.3 File-Sharing software Increases Advanced Security and Privacy Protection (Aug. 26, 2003) available at http://www.streamcastnetworks.com/08_26_03_morph33.html.

232. Kazaa, Privacy, *Respecting Your Privacy - Privacy Protection Tools*, at http://www.kazaa.com/us/privacy/respecting_your_privacy.htm (last visited Nov. 10, 2003).

233. *Vasquez*, 953 F.2d at 183.

234. 464 U.S. 417 (1984).

235. *See id.* at 440 (citing 35 U.S.C. § 271(c) (2000) of the Patent Act).

236. *Id.* at 442.

237. *Id.*

Court found that Sony was not liable for the infringing activity of those that owned their videocassette recorders because the machines were capable of both infringing uses and substantial noninfringing uses.²³⁸ In extending the doctrine from patent law to copyright law, the Court justified its reliance by citing the similar purpose of both areas to strike a balance between the right 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."²³⁹

Defendants used this doctrinal defense in two P2P contributory infringement cases; it was unsuccessful in *A&M Records v. Napster, Inc.*,²⁴⁰ but later succeeded in *MGM Studios, Inc. v. Grokster*.²⁴¹ Despite this history of application in P2P suits, it would be difficult to extend the "staple article of commerce" doctrine further to afford protection under RICO due to its dissimilar calculus of liability and RICO's competing interest of fighting organized crime.

If a court were to turn again to patent law, it would find that the "staple article of commerce doctrine" only appears in the definition of contributory infringement at § 271(c) and not in the separate action, under § 271(b), of aiding and abetting an infringement.²⁴² This has been interpreted to mean that the doctrine does not apply to aiding and abetting.²⁴³ Likewise, there is no basis for applying the doctrine to a conspiracy claim, as courts have not recognized a conspiracy cause of action for patent infringement.²⁴⁴ Thus, a court could not justify, as the Supreme Court did in *Sony*, transplanting patent law into the realm of copyright.

Second, the purpose of RICO, a measure designed to eradicate organized crime,²⁴⁵ upsets the balance struck between protecting the

238. *Id.* at 456.

239. *Id.* at 442.

240. 239 F.3d 1004, 1020 (9th Cir. 2001).

241. 259 F. Supp. 2d 1029, 1036 (C.D. Cal. 2003).

242. 35 U.S.C. § 271(b) (defining a separate cause of action for aiding and abetting: "Whoever actively induces infringement of a patent shall be liable as an infringer.").

243. *Calhoun v. State Chemical Mfg. Co.*, 153 F. Supp. 293, 301 (N.D. Ohio 1957) (stating that § 271(c), cited in *Sony*, "exempts the seller of staple articles of commerce from liability for contributory infringement. . . [but] no such exemption from liability is granted to one who actively induces the infringement.").

244. *ENM Co. v. Transformer Mfrs., Inc.*, 195 U.S.P.Q. (BNA) 144 (N.D. Ill. 1977) (holding that "there is no statute in the Federal laws concerning patents which give rise to a cause of action for 'conspiracy.'").

245. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922-23, ("It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal

copyright holder's monopoly and the rights of those engaging in unrelated areas of commerce.²⁴⁶ The desire, in our society, to permit access to the noninfringing uses of P2P file sharing may not override both the need of protecting copyrights and the necessity of fighting organized crime. Before a court can simply transplant a carefully drawn doctrine of civil copyright infringement into such a far-reaching statute as RICO, it must first cautiously consider the criminal and civil implications, both within and without the context of P2P. Since there is no justification from patent law for establishing a new application of the doctrine, it is doubtful that a court would permit defendants to use it as a defense.

5. Damages to Business Caused by the Enterprise's Activity

Any person or persons have standing to assert a RICO claim in a district court if they were "injured in [their] business or property by reason of a violation of § 1962."²⁴⁷ The injury must be one caused by specific RICO predicate acts²⁴⁸ of racketeering rather than by the pattern of racketeering activity.²⁴⁹ In the case of conspiracy liability, plaintiffs must prove damages caused by predicate acts; it is not sufficient to show damages caused by the conspirator's overt acts.²⁵⁰ Plaintiffs must show both cause-in-fact and proximate cause.²⁵¹

The RIAA can establish causation and injury by showing that, but for the actions of the networks, individuals associated with the enterprise would not have uploaded or downloaded copyrighted files, thus violating the exclusive rights of RIAA associates. This would constitute evidence of specific harm by specific acts of copyright infringement. There is also general evidence that P2P activity caused \$700 million dollars of lost sales to the recording industry.²⁵² To show proximate cause, plaintiffs may assert that the risk of infringement was a foreseeable consequence of defendants' actions.

prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.").

246. *Sony*, 464 U.S. at 442.

247. 18 U.S.C. § 1964(c).

248. *See Sedima*, 473 U.S. at 497 ("Any recoverable damages occurring by reason of a violation of § 1962(c) will flow from commission of the predicate acts.").

249. *Id.* at 495 ("We are initially doubtful about a requirement of a 'racketeering injury' separate from the harm from the predicate acts.").

250. *Beck v. Prupis*, 529 U.S. 494, 505 (2000).

251. *See Holmes v. Sec. Investor Protection Corp.*, 503 U.S. 258, 272–75 (1992).

252. Jay Lyman, *Forrester Report Says Downloads Will Replace Discs*, *TechNewsWorld* (Sep. 3, 2003) at <http://www.technewsworld.com/perl/story/31490.html> (citing independent study by Forrester Research).

C. *Learning to Love RICO: The Benefits of Using Civil RICO in P2P Litigation*

In addition to the reduced burden of proof discussed above, RICO affords a number of other legal benefits. First, the RICO Act includes special procedural rules that supplement the Federal Rules of Civil Procedure.²⁵³ It provides nationwide service of process, eliminating the need to show a defendant's minimum contacts with any particular state.²⁵⁴ Although service of process may not be performed outside the United States, foreign corporations with agents within the borders may be served here.²⁵⁵ Venue is proper in any district where any defendant may be found, where it has an agent, or where it transacts business.²⁵⁶ Since the RIAA may select defendants from among millions of P2P users, it is likely that there is a potential defendant in every federal district. This provides plaintiffs with an unrestrained opportunity for forum shopping. The RIAA could select any district court in any circuit where it is most likely to get a favorable ruling on its most contentious issues. There is no need to show the minimum contacts of defendants in a RICO suit and subject matter jurisdiction is available in any federal court²⁵⁷ or in state courts, which have concurrent jurisdiction.²⁵⁸

Second, RICO has special awards for compensation. In place of punitive damages, RICO grants successful plaintiffs treble damages.²⁵⁹ On top of this, RICO requires the mandatory payment of reasonable attorney's fees and court costs to the winning party.²⁶⁰ Without RICO, these awards in copyright infringement cases are merely discretionary.²⁶¹

Third, P2P plaintiffs may join as a defendant any person who is a member of the RICO enterprise or related to the enterprise as an

253. See Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(b), 84 Stat. 947 ("Nothing in . . . [RICO] shall supersede any provision of Federal, State or other law imposing criminal penalties or affording civil remedies.").

254. See 18 U.S.C. § 1965(a) (2000); see also *Wichita Fed. Sav. & Loan Ass'n v. Landmark Group, Inc.*, 674 F. Supp. 321, 325 (D. Kan. 1987) (interpreting § 1965(a) as providing nationwide service of process).

255. *Shaw v. Rolex Watch U.S.A., Inc.*, 745 F. Supp. 982, 987 (S.D.N.Y. 1990).

256. § 1965(a) ("Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.").

257. See *id.*

258. See *DuBroff v. DuBroff*, 833 F.2d 557, 562 (5th Cir. 1987).

259. 18 U.S.C. § 1964(c).

260. *Id.*

261. 17 U.S.C. § 505 (2000).

accomplice or co-conspirator.²⁶² This allows for a very large number of defendants. A suit against users of Kazaa, for example, has the potential of including millions of defendants.²⁶³ Such joinder will greatly reduce costs for the RIAA because it avoids litigating hundreds of separate cases spread throughout the nation by combining all suits into a single action.²⁶⁴ One way of dealing with the sheer enormity of that suit is through a defendant class action suit.²⁶⁵ Although users may opt out of the class,²⁶⁶ by doing so they may be leaping from the frying pan into the fire, for the RIAA can then sue each escapee separately for copyright infringement claiming greater damages. The plaintiff has a very low burden of proof in simple infringement cases against P2P users²⁶⁷ so there is no advantage to dodging the class except perhaps to avoid the effects of joint and several liability.

In *United States v. Caporale*, the court held that “[j]oint and several liability is not only consistent with the [RICO’s] statutory scheme, but in some cases will be necessary to achieve the aims of the legislation.”²⁶⁸ The general rule for joint and several liability is that, “[e]ach of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm.”²⁶⁹

Applying this to P2P, each upload of a file and each successive

262. See *United States v. Diaz*, 176 F.3d 52, 103 (2d Cir. 1999) (holding that joinder of codefendants involved in activities related to the RICO enterprise was proper if it tended to show the existence of the enterprise).

263. See *Download.com*, at <http://download.com.com/3101-2001-0-1.html?tag=pop> (last visited Nov. 10, 2003) (showing that the Kazaa Media Desktop, one of several Kazaa user applications, had been downloaded 293,497,945 times through November 10, 2003).

²⁶⁴ See *BMG Music v. Does 1–203*, (order) (case no. 04-650) (E.D. Pa. Mar. 5, 2004) available at http://www.eff.org/IP/P2P/RIAA_v_ThePeople/JohnDoe/20040305_EDPA_Order.pdf (The court ordered severance of the RIAA’s suit against 203 P2P user defendants due to improper joinder); see also Electronic Frontier Foundation, *RIAA v. The People*, EFF.ORG at <http://www.eff.org/IP/P2P/riaa-v-thepeople.php> (detailing the various lawsuits in which the RIAA is attempting joinder of large groups of Doe defendants, and providing copies of the relevant court documents for each suit).

265. FED. R. CIV. P. 23(a) (This rule permits members of a class to sue or be sued if: “(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.”).

266. See *id.* § 23(c)(3) (providing an opportunity for individual class members to exclude themselves prior to approval of a class settlement).

267. See 17 U.S.C. § 501.

268. *United States v. Caporale*, 806 F.2d 1487, 1507 (11th Cir. 1986) (applying joint and several liability in a criminal RICO forfeiture case); see also *Fleischhauer*, 879 F.2d at 1301 (applying joint and several liability in a civil RICO suit).

269. RESTATEMENT (SECOND) OF TORTS § 875 (1979).

download is an infringement and hence, a divisible injury. Normally, joint and several liability would not apply.²⁷⁰ However, joint and several liability would apply in RICO suits. All defendants participate in the enterprise that is “responsible for the RICO violations; awarding damages separately between each plaintiff and defendant is inconsistent with the nature of the injury [defendants] inflict[] and brings about a danger of multiplying damages before they are trebled.”²⁷¹ Since it is the enterprise, as opposed to the individual defendants, that cause injuries, each injury is caused by one entity making it indivisible, and thus, joint and several liability applies. Where the enterprise caused the damages, plaintiffs need not demonstrate that any individual caused any particular injury.²⁷² This makes proof of causation much simpler in what might otherwise be an unmanageable case.

Fourth, RICO possesses an important cognitive advantage over copyright infringement—the difference between describing P2P activity as “racketeering” or as “sharing.” The subtext of one is malevolent while the other is courteous. Judges and juries will be strongly affected by this difference and less likely to give “racketeers involved with organized crime” the benefit of doubt that they might give to “people sharing files.” This cognitive difference will enhance the already intimidating threat of a RICO claim and make defendants more likely to settle cases quickly.

Finally, one other possible benefit of a RICO claim is worth discussing. In subsequent suits, plaintiffs may be able to invoke issue preclusion against those who were defendants in earlier RICO actions. Issue preclusion is a judge-made doctrine that precludes a party from arguing an issue that was “actually litigated” and decided in a prior suit, as long as the party to be estopped had a full and fair opportunity to litigate the issue.²⁷³ For example, if the RIAA establishes in one suit that a P2P network like Kazaa and one set of 100 Kazaa users are a RICO enterprise, the RIAA might not have to prove that issue again in a new suit against Kazaa users. Instead, the RIAA would only need to prove the defendants’ relationship to the previously established RICO enterprise.

The constitutional problem with such use of issue preclusion is that the new defendants had no opportunity to be heard in the first suit since they were not parties to that action. However, a court may allow such

270. See generally *id.* (Because each of several downloads of a single sound recording cause separate, divisible injuries of infringement to the copyright holders, joint and several liability would not be applicable between those that downloaded the file.).

271. *Fleischhauer*, 879 F.2d at 1301.

272. See *id.* at 1300–01.

273. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326–27 (1979).

preclusion if it follows the questionable doctrine of virtual representation.²⁷⁴ Under virtual representation, a court may permit issue preclusion against a nonparty who was so well “represented by others that his interest received actual and efficient protection.”²⁷⁵ The test is whether: (1) the original parties were adequately represented; (2) the interests of the non-parties were the same as those of the original parties; (3) the substantive right of each was the same though different remedies were available; and (4) the relief granted to the original plaintiffs would not have changed character if the non-parties had been parties to the action.²⁷⁶

Basically, the plaintiffs would need to show that the favorable result in the first suit would not have been any different had the new defendants been parties to it. To do this, the plaintiffs in the first suit should select the most egregious infringers as defendants (including the networks) so as to guarantee that those defendants have at least as much at stake as defendants in a subsequent suit. If plaintiffs can show that the original defendants were adequately represented and that they vigorously litigated the enterprise issue, plaintiffs may succeed and avoid the need to prove a major part of their case. In this way, plaintiffs would greatly reduce the length, complexity, and cost of subsequent actions. Moreover, defendants in those later suits would be much more likely to settle, reducing plaintiff’s burden further.

D. Disadvantages of the Civil RICO Strategy

It would be incomplete to discuss the benefits of RICO without mentioning its shortcomings when compared to civil copyright infringement litigation. First, civil copyright infringement allows for injunctive relief,²⁷⁷ whereas under RICO it is only available in some jurisdictions.²⁷⁸ RICO does not specifically grant *private* equitable relief.²⁷⁹

274. See *Holden v. Marietta Corp.*, 185 F. Supp. 2d 656, 658 (N.D. Miss. 2001).

275. *Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist.*, 750 F.2d 731, 741 (9th Cir. 1984) (quoting *Rynsbarger v. Dairymen’s Fertilizer Coop., Inc.*, 72 Cal. Rptr. 102, 107 (Cal. Ct. App. 1968)).

276. See *Sondel v. Northwest Airlines, Inc.*, 56 F.3d 934, 939 (8th Cir. 1995).

277. 17 U.S.C. § 502(a) (2000) (“Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of § 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.”).

278. See *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1081–82 (9th Cir. 1986) (discussing the disagreement between courts on this issue).

279. See 18 U.S.C. § 1964(a) (granting the district courts the power to provide injunctive relief but not specifying if it is available to both the Attorney General and private parties).

and circuit courts are split as to whether it is applicable.²⁸⁰ The issue was before the Supreme Court in *Scheidler v. NOW, Inc.* in 2002, but the Court dismissed the RICO claim without reaching the issue.²⁸¹ An injunction would allow plaintiffs to bar P2P networks from distributing their software within the United States, seemingly a great benefit to plaintiffs. Yet, this may not stop a network from operating, for networks like Kazaa maintain that even they do not have the power to prevent individuals from using its application.²⁸² Nonetheless, the *eventual* result of blocking distribution of the software to new users would be the same as an injunction. In the trendy world of P2P file sharing, once a network stops growing (by acquiring new users) and begins losing ground to competitors, “its demise becomes a self-fulfilling prophecy.”²⁸³

Second, a civil RICO case against a P2P network and a large number of its users poses what appears to be a logistical nightmare in terms of case management. The RIAA must prove many more elements against many more defendants than it is currently litigating in simple copyright actions.²⁸⁴ Yet, the RIAA has the financial backing of the major recording companies so as to be able to undertake a major, complex suit such as this.²⁸⁵

A third potential problem is that the plaintiffs would need to base their RICO suit on so many indispensable questions of fact and law that the result might be as fragile as a house of cards. If they fail on one element, they could lose everything. Even if the RIAA succeeds, there would be no lack of ammunition for appellate sharpshooters. Many of the legal elements required to prove RICO liability have never been applied to P2P technology, leaving such application open to judicial discretion. Although plaintiffs are free to shop for the most favorable forum, there may be no single jurisdiction that would find for the plaintiffs on each necessary element. Conceptually, the most important question is whether RICO is at all applicable to the facts of P2P file sharing—whether P2P users are

280. See *Nat'l Org. for Women, Inc. v. Scheidler*, 267 F.3d 687, 698 (7th Cir. 2001), *rev'd on other grounds* (permitting equitable relief); see also *Motorola Credit Corp. v. Uzan*, 202 F. Supp. 2d 239, 244 (S.D.N.Y. 2002); but *c.f. Religious Tech. Ctr.*, 796 F.2d at 1082 (disallowing injunctive relief).

281. *Scheidler v. Nat'l. Org. for Women, Inc.*, 537 U.S. 393, 397 (2003) (dismissing the predicate Hobbs Act claim which invalidated the RICO claim).

282. See *Wu*, *supra* note 64, at 735; *MGM Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1041 (C.D. Cal. 2003) (stating that both Grokster and Morpheus can continue to operate even if the companies closed their doors).

283. *Sandvine*, *supra* note 66, at 5.

284. See *Bryan, et al.*, *supra* note 103.

285. See *MacMillan*, *supra* note 11.

racketeers. Not all courts would accept the definition of enterprise discussed in Part III.B.2., nor find a sufficient structure to the organization. The plaintiffs also would need to prove the willfulness of the individual defendants,²⁸⁶ which may be an equally difficult task.

Many of the other issues discussed above have lesser importance to the overall suit. It is not necessary to establish a defendant class; this is just a matter of convenience and economics for the plaintiffs. Similarly, plaintiffs would best place the doctrine of virtual representation on their wish list. Overall, a RICO strategy is not without problems or complexities, but properly executed it can provide a successful approach to fighting P2P copyright infringement.

D. How RICO Would Have Benefited Plaintiffs in Current Lawsuits

1. *MGM v. Grokster*

On October 2, 2001, Metro-Goldwyn-Mayer Studios and twenty-seven other entertainment companies filed suit for damages and injunctive relief for copyright infringement against three P2P companies using FastTrack systems.²⁸⁷ A year and a half after the suit was filed, the court ruled that the defendants were not liable for either contributory infringement or vicarious liability.²⁸⁸ Citing *Napster*,²⁸⁹ the *Grokster* court held that the “defendants are liable for contributory infringement only if they (1) have specific knowledge of infringement at a time at which they contribute to the infringement, and (2) fail to act upon that information.”²⁹⁰ Additionally, the defendants must be shown to have “engaged in personal conduct that encourages or assists the infringement.”²⁹¹ Although the defendants had ample, actual knowledge of past copyright infringements,²⁹² and were generally aware that many, if not most, of their users infringed, there was no evidence that they had that knowledge at a time when they

286. See *supra* Part III.B.1.b.

287. See, *MGM Studios, Inc. v. Grokster, Ltd.*, (compl.), available at Electronic Frontier Foundation, http://www.eff.org/IP/P2P/MGM_v_Grokster/20011002_mgm_v_grokster_complaint.pdf; see also *Grokster*, 259 F. Supp. 2d at 1031–33 (C.D. Cal. 2003) (The only relevant defendants remaining are Grokster, which still uses a branded version of the Kazaa user application, and Streamcast Networks, whose application, Morpheus, utilizes the Gnutella network.).

288. See *Grokster*, 259 F. Supp. 2d at 1031.

289. See *Napster*, 239 F.3d 1004.

290. *Grokster*, 259 F. Supp. 2d at 1036.

291. *Id.* (quoting *Napster*, 239 F.3d at 1019).

292. *Id.*

could have acted to stop it.²⁹³

The conduct necessary for contributory infringement must be material, substantial, and have a direct relationship with the infringing act.²⁹⁴ Unlike Napster, which provided the site and facilities for infringement²⁹⁵ through its centralized servers, neither Grokster nor Morpheus provided such services.²⁹⁶ The court held that there was no evidence of the type of conduct necessary for liability.²⁹⁷

It is easy to see the contrast between the rule of law for contributory infringement in *Grokster* and that for a RICO conspiracy. Conspiracy's two elements, agreement and knowledge,²⁹⁸ can be proven on *Grokster's* facts. Both Grokster and Morpheus had actual knowledge of the substantial infringing use of their software.²⁹⁹ A RICO conspiracy only requires knowledge of the "general nature of the conspiracy and that the conspiracy extends beyond [the defendant's] individual role."³⁰⁰ It is not necessary to have actual knowledge of any specific unlawful act.³⁰¹ The *Grokster* defendants had the general knowledge required at the time they entered into EULA contracts with users.³⁰² Even though *Grokster* was well aware that users would infringe, the company nevertheless agreed to allow them to use the software. Whether the EULA included any conditions that barred users from committing infringement is inconsequential. Conspiracies are "characterized by secrecy,"³⁰³ and such a condition only enhances the conspirator's mission to hide its plot. Here, the natural consequences of the agreement are reasonably foreseeable, unlawful acts of copyright infringement. This is the type of accord that qualifies as a tacit agreement to commit a predicate RICO act. All that is required is an agreement for Grokster to "facilitate only some of the acts leading to the substantive offense."³⁰⁴ Providing users with a license and ability to use the software is an act that facilitates the substantive offense.

More facts are necessary to prove network liability under aiding and abetting. The first element, participation, requires the network to have

293. *Id.* at 1037.

294. *Id.* at 1042.

295. *Id.* at 1041.

296. *See id.*

297. *Grokster*, 259 F. Supp. 2d at 1043.

298. *Rastelli*, 870 F.2d at 828.

299. *Grokster*, 259 F. Supp. 2d at 1035–36.

300. *Rastelli*, 870 F.2d at 828.

301. *Id.*

302. *Grokster*, 259 F. Supp. 2d at 1038.

303. *United States v. Pinkerton*, 328 U.S. 640, 644 (1944).

304. *Salinas v. United States*, 522 U.S. 52, 65 (1997).

taken some affirmative steps to aid the venture rather than simply allowing it to flourish.³⁰⁵ It may be enough to have simply marketed the software. Without new users, the network (and thus, the RICO enterprise) quickly dies. Hence, marketing and distributing the software is “affirmative conduct designed to aid the venture.”³⁰⁶

The second element of association requires that the defendants share the same illicit purpose as the principal.³⁰⁷ Since the purpose is infringement, specific acts made by the software designers to promote copyright infringement tend to prove this purpose. In addition, plaintiffs can show that the profits derived from infringing activity provided a motive for the networks to encourage the purpose of infringement. This motive along with acts taken to promote infringement, show that the networks shared the same illicit purpose as the principal infringers.

Whether or not the RIAA could have proved aiding and abetting, there is ample evidence that it could have succeeded in a conspiracy claim. However, the RIAA would first have had to establish proof of direct infringement through claims against the network’s users.

2. Suits Against Individual Users

Conduct that satisfies criminal copyright infringement is not required to establish RICO liability against an individual. It is only necessary for the RIAA to prove that at least two individuals violated the criminal statute in order to establish the pattern of racketeering activity.³⁰⁸ Other users may then be found liable based on: (1) their association with the enterprise, established by loading the P2P client software on their computer; (2) their conduct or participation in the enterprise, shown by evidence of uploading or downloading copyrighted material;³⁰⁹ or (3) their use of the P2P software if it facilitated the infringement and affected the enterprise.³¹⁰ Plaintiffs can demonstrate this by inference from the interdependent relationship between uploading and downloading in a P2P network.

Alternatively, the RIAA has the option of using secondary liability theories in suits against users. While this reduces the RIAA’s burden of proof, it does not reduce the defendant’s liability. For aiding and abetting, users can become associated with the criminal venture by downloading an

305. See *supra* Part III.B.4.b.

306. *Vasquez*, 953 F.2d at 183.

307. *Graham*, 858 F.2d at 992.

308. 18 U.S.C. § 1961(5).

309. *Id.* § 1962(c).

310. *Akin v. Q-L Invs., Inc.*, 959 F.2d 521, 533–34 (5th Cir. 1992).

infringing file, assuming that they have the same intent as the person that uploaded it. Uploading files demonstrates affirmative conduct designed to aid the venture.

As was the case with networks, conspiracy imposes a lighter burden on plaintiffs. Uploading files is a tacit agreement with all other users permitting them to copy the infringing files provided in a sharing folder.³¹¹ Knowledge of the general nature of the network as an open avenue for free copyrighted files is the only other requirement.³¹²

Individual defendants who may have considered defending themselves against the RIAA's suits for civil copyright infringement would be more likely to settle a civil RICO suit. Defendants risk treble damage awards and, if found liable, would have to pay reasonable attorney's fees.³¹³ In suits joining multiple defendants, the stakes mount for challengers with deep pockets because of joint and several liability. Defendants with money will pay for codefendants who are judgment-proof. The teenagers and college students who heavily populate the P2P user world³¹⁴ are not the ideal candidates for judgment collections.

The RIAA's encouragement of good faith settlements³¹⁵ exacerbates the problems of potential challengers by raising the ante in a court fight. Consider the following hypothetical situation. After establishing in a prior suit that infringing users of Kazaa form an enterprise, the RIAA initiates a new RICO lawsuit with claims against 110 users for the nominal amount of \$550,000 (\$5,000 each if tried separately). If the first 100 settle for \$2000 each, the remaining ten will be liable for the \$350,000 left unpaid by those that settled. Among the ten challengers, only two are not judgment-proof. If they lose in court, those two will be responsible together for paying \$340,000 for their codefendants. Now, multiplying that figure by three for the treble damage award and adding the RIAA's attorney fees, their liability rises to well over \$1 million. Anyone with both assets and common sense will quickly settle rather than attempt a defense. This is more than an incentive to settle; it borders on coercion.

If defendants decide that they must go to court, they would be facing racketeering charges rather than copyright infringement. The negative connotation associated with involvement in organized crime is bound to produce a cognitive difference if not in a defendant's willingness to settle,

311. See, e.g., *Salinas*, 522 U.S. at 65.

312. See *Rastelli*, 870 F.2d at 828 (2d Cir. 1989).

313. 18 U.S.C. § 1964(c).

314. In re: *Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003).

315. *Associated Press*, *supra* note 166..

then in a jury's inclination to find for the plaintiffs.³¹⁶ A jury award of any amount will immediately add on liability for all co-parties plus attorney fees. As a result, an award for one dollar could cost a defendant one million. Users are likely to settle as soon as they can to avoid this.

E. The Problem With Using the Bomb to Control Your Termite Situation

Although the million-dollar judgment against a person who may have caused less than a hundred dollars worth of actual injury seems grossly unfair, it is hard to fit such a round peg squarely into the constitutional limits of either excessive fines or punitive damages. Nevertheless, the height of such an inequity may give an appellate court a better view to see such an action as fitting one or the other well enough.

The first issue is whether recent holdings limiting punitive damage awards from juries could be applicable to RICO awards. The Third Circuit has held that RICO's treble damages and mandatory attorney's fees awards are punitive although there is considerable debate on this issue.³¹⁷ The Supreme Court has stated in dicta that RICO's treble damages have a "remedial function,"³¹⁸ without denying that they also function punitively. The Court also noted that it has "placed different statutory treble-damages provisions on different points along the spectrum between purely compensatory and strictly punitive awards."³¹⁹ Clarifying this recently, the Court stated that "treble damages have a compensatory side, serving remedial purposes *in addition to* punitive objectives."³²⁰

Although treble damage awards are, at least in part, punitive, they are not excessive by themselves.³²¹ Courts properly impose punitive damages to serve the legitimate purposes of deterring unlawful conduct and punishing culpable actors.³²² The question is whether a legitimate purpose

316. *But cf. Sedima*, 473 U.S. at 492 (stating the Supreme Court's view that the stigma of being named a racketeer "leaves no greater stain than do a number of other civil proceedings.").

317. *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 914 (3d Cir. 1991); *but c.f. E. Thomas Sullivan, Antitrust Regulation of Land Use: Federalism's Triumph Over Competition, The Last Fifty Years*, 3 WASH. U. J.L. & POL'Y 473, 506 (discussing the dispute over whether treble damage awards are punitive or compensatory).

318. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 241 (1987) (discussing the treble damages in the RICO Act).

319. *Id.* (quoting *PacificCare Health Sys. v. Book*, 123 S. Ct. 1531, 1535 (2003)).

320. *Cook County v. United States ex rel. Chandler*, 123 S. Ct. 1239, 1246 (2003) (emphasis added).

321. *See BMW of N. Am. Inc. v. Gore*, 517 U.S. 559, 581–82 n.33 & 34 (1996) (using RICO's treble damages as an example of awards that bear a reasonable relationship between compensatory and punitive awards).

322. *See Campbell*, 123 S. Ct. at 1519.

is served by imposing what may be viewed as joint and several *punishment*. It is one thing to hold a member of a RICO enterprise liable for the injuries caused by the others. It is another thing to hold one person liable for the punishment meant for their cohorts. It is a far different thing to hold someone liable for others' punishment if that individual has no notice of the extent of their liability.

Awarding treble damages in this context may invoke constitutional issues of fairness and equity, as it is well established that "a person [must] receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."³²³ This concern is addressed by the Due Process Clause of the Fourteenth Amendment, which proscribes "the imposition of grossly excessive or arbitrary punishments on a tortfeasor."³²⁴ This clause mirrors that of the Fifth Amendment, which is applicable to federal, rather than state, laws.³²⁵ Thus, a grossly excessive or arbitrary punishment imposed by a federal court would similarly violate the due process rights of the defendant.

The first inquiry in determining whether a punitive award is excessive is to see whether the legislature had a legitimate purpose.³²⁶ The question here is whether Congress had a legitimate interest in holding P2P users jointly and severally liable for the trebled damages caused by other P2P users within the same RICO enterprise. The laws needed to link P2P activity to RICO (the Anticounterfeiting Consumer Protection Act of 1996³²⁷ and the NET Act of 1997³²⁸) were enacted before Napster and P2P file sharing were invented.³²⁹ Thus, it is hard to say that Congress had any intention of creating a law to combat something that did not yet exist. Although, plaintiffs may fail this first step, courts are very deferential in determining congressional intent.³³⁰ It may suffice to hypothesize that Congress intended to criminalize a type of similar activity—downloading

323. *Gore*, 517 U.S. at 574.

324. *Campbell*, 123 S. Ct. at 1519–20.

325. U.S. CONST. amend. V (No person shall "be deprived of life, liberty, or property, without due process of law . . ."); see also *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (stating that the parallel clauses within the Fifth and Fourteenth Amendments operate analogously).

326. *Gore*, 517 U.S. at 568.

327. Pub. L. No. 104-153, § 3, 110 Stat. 1386 (1996) (adding criminal copyright infringement, 18 U.S.C. § 2319, to the list of RICO predicate offenses found at 18 U.S.C. § 1961(1)(B)).

328. Pub. L. No. 105-147, 111 Stat. 2678 (1997) (criminalizing infringement activity that had no profit motive).

329. See *Sandvine*, *supra* note 66, at 2.

330. See, e.g., *Sedima* 473 U.S. at 501.

files from a warez site—and that P2P is merely a more sophisticated version of this type.

The next step is to determine whether the award is so arbitrary and excessive in relation to the interests it serves that the award violates due process.³³¹ In *State Farm v. Campbell*,³³² the Supreme Court set forth three criteria for making this determination: “(1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.”³³³

The first and most important factor, reprehensibility,³³⁴ clearly weighs in favor of the defendant in P2P cases. In such a case, the harm caused was not physical, the conduct did not threaten the health or safety of others, the target was not vulnerable, and though the conduct involved repeated actions, there was no malicious intention to injure the recording industry.³³⁵ A full analysis of all factors would belabor the point that plaintiffs would be hard-pressed to sustain a large award against a minor infringer.

It may also be possible to attack such an award as a violation of the Excessive Fines Clause of the Eighth Amendment.³³⁶ “[A] punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant’s offense.”³³⁷ That clause’s primary purpose has “always been considered . . . to be directed at the method or kind of punishment imposed for the violation of criminal statutes.”³³⁸

In order to invoke this clause, which would seem to apply only to criminal proceedings, the defendant must demonstrate such a close correlation between RICO civil remedies and criminal prosecutions that it would warrant stretching the Eighth Amendment to cover a civil suit. Alternatively, defendants may show that RICO civil suits fall under the “state action” doctrine by arguing that there is government endorsement of

331. *Gore*, 517 U.S. at 568.

332. 123 S. Ct. 1513 (2003).

333. *Id.* at 1520.

334. *Id.* at 1521.

335. *Id.* (explaining the factors in determining reprehensibility).

336. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

337. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) (overturning the forfeiture of \$357,144 for a violation of a reporting offense punishable by a fine of \$5,000).

338. *Powell v. Texas*, 392 U.S. 514, 531–32 (1968).

private discriminatory acts³³⁹ or that the plaintiffs in these suits are taking on the traditional role of government.³⁴⁰

In support of such a position, defendants may argue that Congress intended the civil remedies of RICO to be an extension of the government's overall scheme to fight organized crime.³⁴¹ The same conduct that creates civil liability also creates criminal liability. Thus, if the government were to impose grossly excessive fines against minimally culpable perpetrators, their actions might well be unconstitutional.

If defendants succeed in establishing that the Eighth Amendment is applicable to civil RICO suits, they can proceed with the same arguments as in the due process analysis, above. Courts consider the same three criteria to determine whether a punitive award is excessive under the Eighth Amendment as under the Due Process Clause.³⁴² Although neither argument is a close fit with the circumstances of this hypothetical case, the inequity could be so great that it would persuade a court to lean further than normal to seek justice.

Perhaps, a stronger argument for defendants is that Congress did not intend P2P activity to be a RICO predicate crime. Congress made copyright infringement a RICO predicate act in 1996 to fight counterfeiting.³⁴³ It amended the Copyright Act to criminalize activity on warez sites in 1997.³⁴⁴ Two years later, Napster launched and introduced the concept of P2P file sharing.³⁴⁵ Congress could not have intended harsh criminal and civil penalties to apply to something that had not yet been conceived.

Courts have been reluctant to expand protections under copyright law

339. See *Reitman v. Mulkey*, 387 U.S. 369, 375 (1967); *but cf.* *Moose Lodge v. Irvis*, 407 U.S. 163 (1972) (holding that state endorsement of a facially neutral law that is discriminatory in practice does *not* implicate state action).

340. See, e.g., *Morse v. Republican Party of Va.*, 577 U.S. 186, 271 (1996).

341. *Sedima*, 473 U.S. 487 (quoting U.S. Representative Steiger speaking on the merits of RICO's proposed treble damage remedy, "the availability of such a remedy would enhance the effectiveness of title IX's prohibitions."). Hearings on S. 30, and Related Proposals, before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess., 520 (1970); see also *Sedima*, at 488 (stating the view of RICO sponsor Senator McClellan that the treble damages "provision would be 'a major new tool in extirpating the baneful influence of organized crime in our economic life.'" 116 CONG. REC. 25190 (1970).

342. See *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 440 (2001) (stating that the same analysis is used in *Bajakjian* as in *Gore*).

343. See Anticounterfeiting Consumer Protection Act, Pub. L. No. 104-153, § 3, 110 Stat. 1386 (1996) (adding criminal copyright infringement, 18 U.S.C. § 2319, to the list of RICO predicate offenses found at 18 U.S.C. § 1961(1)(B)); see also MELVILLE & DAVID NIMMER, NIMMER ON COPYRIGHT § 15.05.(B).

344. No Electronic Theft (NET) Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997).

345. See *supra* Part II.C.

without a clear mandate from Congress.³⁴⁶ Such an expansion of copyright protection upsets the balance between granting artists an incentive to create works and the primary objective of copyright law which “lie[s] in the general benefits derived by the public from the labors of authors.”³⁴⁷ This reluctance is especially resolute when courts are dealing with new technologies.³⁴⁸ Thus, before applying existing laws to P2P cases, a court may require a more searching inquiry into the intent of Congress.

A weak link in the plaintiff’s case exists where Congress is most vague, leaving room for judicial interpretation. The definition of “willful,” the state of mind required for the predicate act of criminal copyright infringement,³⁴⁹ is a case in point. Since Congress did little to delineate the requirements for acting willfully, courts may require more, such as the defendant’s knowledge that the activity was not just infringement, but criminal.³⁵⁰ A lesser burden could impermissibly expand the protections of the Copyright Act in an area where courts are without the capacity to determine Congressional intent.

IV. CONCLUSION

Civil RICO is a viable cause of action in the recording industry’s fight against P2P copyright infringement. Chief among the many benefits the RIAA would enjoy by using RICO is a reduced burden to prove P2P networks’ liability. Currently, the RIAA may be too wedded to its strategy to consider using RICO. But, mounting expenses or courtroom defeats may provide justification to change its course. Specifically, if the RIAA should lose its appeal against Grokster, it should file a RICO claim based on new instances of copyright infringement. The RIAA should also employ RICO in the future against other P2P networks.

RICO also permits a much more efficient system for the RIAA to battle P2P users. It can unite large numbers of suits into one, select any

346. See, e.g., *Sony*, 464 U.S. at 431; *LaMacchia*, 871 F. Supp. at 544.

347. *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127–28 (1932).

348. *LaMacchia*, 871 F. Supp. at 544.

349. 17 U.S.C. § 506(a); see also *supra* Part III.B.1.b.

350. 143 CONG. REC. S12689 (Nov. 13, 1997) (Remarks of Sen. Orrin Hatch regarding the interpretation of “willful” within the proposed NET Act: “I am also relying upon the good sense of prosecutors and judges. Again, the purpose of the bill is to prosecute commercial scale pirates who do not have commercial advantage or private financial gain from their illegal activities. But if an overzealous prosecutor should bring and win a case against a college prankster, I am confident that the judge would exercise the discretion that he or she may have under the Sentencing Guidelines to be lenient. If the practical effect of the bill turns out to be draconian, we may have to revisit the issue.”).

forum, and wield a big stick to force settlements. However, the RIAA should act prudently and within limits. Plaintiffs should not be so encouraged by the ease with which defendants settle that they start aiming their RICO suits beyond the most egregious violators whose conduct might warrant the severe penalties. Large judgments against moderate users resulting from the combined effects of joint and several liability, treble damages, and mandatory attorney fee awards could produce great inequities. Judgments could be so unfair that they would violate constitutional bounds or lead courts to increase the plaintiffs' burden of proof.

The RIAA may have invested too much time, effort, and money in its current strategy to change course in midstream. This is not true of the Motion Picture Association of America ("MPAA"). The movie industry recently decided to begin preparing lawsuits against file sharers.³⁵¹ MPAA President Jack Valenti has cited research showing that P2P users illegally download 350,000 to 750,000 movies every day in the U.S. alone.³⁵² The MPAA should implement the most effective and efficient litigation strategy by exploiting the rich benefits of civil RICO.

*Phillip Stuller**

351. Patrick Goldstein, *Is Hollywood Failing to See the Big Picture?*, L.A. Times.com (Nov. 9, 2003) at <http://www.latimes.com/business/la-na-piracy9nov09,1,4377118.story>.

352. *Id.*

* Thanks to professors Christopher N. May, Laurie L. Levenson, Arnold I. Siegel, and Robert C. Lind for their help and guidance. Special thanks to my family for teaching me how to use the English language effectively, especially when making arguments, and for showing me the importance of a graduate degree: Judge Erwin L. Stuller, Arlene Stuller, MA, Susan Frank, Esq., and Joan Giglione, PhD. This Comment is dedicated to my loving wife, Sindy Beekman, who suffered while I wrote this and is entitled to whatever joy she may find from seeing her name in print.

