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Record Labels, Federal Courts, and the FCC: Using Uncertainty in Communications Law to Fight Online Copyright Infringement

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RECORD LABELS, FEDERAL COURTS, AND THE FCC: USING UNCERTAINTY IN COMMUNICATIONS LAW TO FIGHT ONLINE COPYRIGHT INFRINGEMENT

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Illegal downloading continues to plague the music industry. Furthermore, the music industry has little to show for its significant investment in costly, labor-intensive copyright litigation. Federal courts have been increasingly unsympathetic to copyright holders, refusing to let substantial damages awards in several high-profile cases stand. In addition, the Southern District of New York recently ruled that YouTube should not be held liable for widespread copyright infringement on its site in spite of substantial evidence that YouTube had actual knowledge of the infringement. Meanwhile there is great uncertainty in the world of communications law. After the D.C. Circuit thwarted the Federal Communications Commission's ("FCC") efforts to stop Comcast from "throttling," or purposefully slowing, peer-to-peer file-sharing traffic on its network, the FCC drafted a new set of regulations for broadband providers. The new regulations have been challenged from every angle, and will likely be tied up in litigation for years. These legal developments have coincided with the availability of new, legal, online music services such as Spotify and Google Music. This Comment argues that music industry groups such as the Recording Industry Association of America should take advantage of the uncertainty in communications law and attempt to shift consumer behavior away from illegal downloading and toward legal online music services by engaging in a lobbying effort designed to convince Internet service providers to resume throttling peer-to-peer file-sharing services.

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I. INTRODUCTION

Illegal downloading of copyrighted content continues to plague the music industry.[1] A recent report commissioned by the British Recorded Music Industry estimates that over three-quarters of the music downloaded in the United Kingdom is obtained illegally.[2] Specifically, the report estimates that 7.7 million British consumers illegally downloaded a staggering 1.2 billion songs in 2010 alone.[3] A 2007 study conducted by the Institute for Policy Innovation estimates that global music piracy results in over $12 billion in economic damages on an annual basis, and a loss of over 70,000 jobs in the United States alone.[4]

Furthermore, it has become painfully clear that costly copyright litigation has been an ineffective weapon in the war against online piracy, yielding minimal results in several high-profile cases.[5] In *Sony BMG v. Tenenbaum*, Massachusetts District Court Judge Nancy Gertner held that a jury verdict of $675,000 against defendant Joel Tenenbaum for illegally downloading and sharing copyrighted songs was unconstitutionally excessive in light of the Due Process Clause of the United States Constitution.[6] The United States Court of Appeals for the First Circuit recently reversed Judge Gertner's decision, reinstating the original $675,000 jury verdict.[7] However, the First Circuit remanded the case back to the district court for consideration of common law remittitur, an issue that Judge Gertner declined to decide.[8] Accordingly, the copyright-holder-plaintiffs will likely face a

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1. *See, e.g.*, Press Release, British Recorded Music Indus., New BPI Report Shows Illegal Downloading Remains Serious Threat to Britain's Digital Music Future (Dec. 16, 2010), http://www.bpi.co.uk/press-area/news-amp3b-press-release/article/new-bpi-report-shows-illegal-downloading-remains-serious-threat-to-britains-digital-music-future.aspx.

2. Geoff Taylor, *Digital Music Nation*, *in* DIGITAL MUSIC NATION 2010: THE UK'S LEGAL AND ILLEGAL DIGITAL MUSIC LANDSCAPE 1 (Dec. 2010), *available at* https://bpi.co.uk/assets/files/Digital%20Music%20Nation%202010.pdf.

3. *Illegal Downloading in the UK on the Rise*, NME (Dec. 16, 2010), http://www.nme.com/news/various-artists/54283.

4. STEPHEN E. SIWEK, INST. FOR POLICY INNOVATION, THE TRUE COST OF SOUND RECORDING PIRACY TO THE U.S. ECONOMY 14 (Policy Report 188 Aug. 2007), *available at* http://www.ipi.org/IPI%5CIPIPublications.nsf/PublicationLookupFullTextPDF/51CC65A1D4779E408625733E00529174/$File/SoundRecordingPiracy.pdf?OpenElement.

5. *See, e.g.*, Sony BMG Music Entm't v. Tenenbaum, 721 F. Supp. 2d 85 (D. Mass. 2010); Capitol Records Inc. v. Thomas-Rasset, 680 F. Supp. 2d 1045 (D. Minn. 2010); Viacom Int'l Inc. v. YouTube, Inc., 718 F. Supp. 2d 514 (S.D.N.Y. 2010).

6. *Sony BMG Music Entm't*, 721 F. Supp. 2d at 121, *aff'd in part*, *vacated in part*, *rev'd in part*, 660 F.3d 487 (1st Cir. 2011).

7. Sony BMG Music Entm't v. Tenenbaum, 660 F.3d 487, 515 (1st Cir. 2011).

8. *Id.* at 491, 515.

choice between accepting a reduced award or enduring (and paying for) a new trial.[9]

Meanwhile, in *Capitol Records Inc. v. Thomas-Rasset*, three separate juries found Minnesota resident Jammie Thomas-Rasset liable for copyright infringement. However, District Court Judge Michael Davis refused to let the second jury's award stand, reducing a $1.92 million award to $54,000 on remittitur grounds.[10] A third jury verdict against Thomas-Rasset, awarding the plaintiffs $1.5 million in damages, is currently on appeal on constitutional grounds.[11] The result in *Tenenbaum* suggests that Thomas-Rasset's constitutional argument may find a receptive audience in federal court.

Furthermore, in *Viacom International Inc. v. YouTube, Inc.*, Judge Louis L. Stanton of the Southern District of New York dealt a potentially crushing blow to the copyright-holder plaintiffs.[12] Viacom brought suit against YouTube, alleging that "tens of thousands of videos on YouTube . . . were unlawfully taken from Viacom's copyrighted works without authorization."[13] Viacom argued that YouTube had actual knowledge of infringement, and that YouTube was "aware of facts or circumstances from which infringing activity [was] apparent"—so-called "red flag" infringement.[14] Viacom further argued that YouTube's awareness of this "red flag" infringement precluded YouTube from using the safe harbor of section 512(c) of the Digital Millennium Copyright Act as an affirmative defense.[15] Judge Stanton found Viacom's arguments unpersuasive, summarily dismissing them in a cursory opinion that effectively rendered the concept of "red flag" infringement a nullity.[16]

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9. *Id.*; *see also* Milton J. Valencia, *Court Upholds Fine in Music Download Case*, BOSTON.COM (Sept. 20, 2011), http://articles.boston.com/2011-09-20/news/30180976_1_appeals-court-joel-tenenbaum-district-court.

10. *Capitol Records Inc.*, 680 F. Supp. 2d 1045.

11. *Record Companies Plan Music Downloading Appeal*, BLOOMBERG BUSINESSWEEK (Aug. 22, 2011), http://www.businessweek.com/ap/financialnews/D9P9CPV03.htm.

12. *Viacom Int'l Inc.*, 718 F. Supp. 2d 514.

13. Memorandum of Law in Support of Viacom's Motion for Partial Summary Judgment on Liab. & Inapplicability of the Digital Millennium Copyright Act Safe Harbor Def. at 1, Viacom Int'l Inc. v. YouTube, Inc., 718 F. Supp. 2d 514 (S.D.N.Y. 2010) (No. 1:07-cv-02103).

14. *Id.*

15. *Id.* at 3–4.

16. *Viacom Int'l Inc.*, 718 F. Supp. 2d at 529; Ben Sheffner, *Viacom v. YouTube: A Disappointing Decision, but How Important?*, COPYRIGHTS & CAMPAIGNS (June 27, 2010), http://copyrightsandcampaigns.blogspot.com/2010/06/viacom-v-youtube-disappointing-decision.html.

Given this disheartening legal landscape, what is the best strategy for the music industry to employ in its perpetual fight against online piracy? Recent developments in communications law may provide an answer. In August 2008, the Federal Communications Commission ("FCC") issued an order declaring that Comcast's practice of throttling, or purposefully slowing or blocking peer-to-peer traffic, was impermissible.[17] Comcast filed suit, and in January 2010, the United States Court of Appeals for the District of Columbia Circuit declared that the FCC had failed to justify its exercise of ancillary jurisdiction under the Telecommunications Act when it sought to throttle traffic on BitTorrent, a popular peer-to-peer client.[18] Subsequently, the FCC adopted a report and order titled "In the Matter of Preserving the Open Internet Broadband Industry Practices" on December 21, 2010, which set forth three rules for broadband providers: (1) Transparency (requiring disclosure of network management practices); (2) No blocking (prohibiting blocking of lawful content); and (3) No unreasonable discrimination (prohibiting unreasonable discrimination in the transmission of lawful Internet traffic).[19]

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17. Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, 23 FCC Rcd. 13028, 13052 (2008) [hereinafter Formal Complaint].

18. Comcast Corp. v. F.C.C., 600 F.3d 642, 661 (D.C. Cir. 2010) (indicating that Comcast was specifically throttling traffic on BitTorrent, a popular peer-to-peer client). The Telecommunications Act was created with the express purpose of "regulating interstate and foreign commerce in communication by wire and radio." 47 U.S.C. § 151 (2011). However, the FCC has no express statutory authority to regulate the Internet. Accordingly, the FCC attempted to justify its order declaring Comcast's practice of throttling impermissible by relying on its ancillary jurisdiction, under which the FCC may issue regulations "reasonably ancillary" to an exercise of statutorily granted authority. *See, e.g.*, United States v. Sw. Cable Co., 392 U.S. 157 (1968).

19. The FCC explained the three rules as follows:

> i. Transparency: Fixed and mobile broadband providers must disclose the network management practices, performance characteristics, and terms and conditions of their broadband services;
> ii. No blocking: Fixed broadband providers may not block lawful content, applications, services, or non-harmful devices; mobile broadband providers may not block lawful websites, or block applications that compete with their voice or video telephony services; and
> iii. No unreasonable discrimination: Fixed broadband providers may not unreasonably discriminate in transmitting lawful network traffic.

Preserving the Open Internet Broadband Industry Practices, 25 FCC Rcd. 17905, 17906 (2010); *see also Net Neutrality Definition*, OXFORD ENG. DICTIONARY, http://www.oed.com/view/Entry/126280?redirectedFrom=net%20neutrality#eid236427655 (last visited Mar. 15, 2012) ("[T]he fact or principle of Internet service providers enabling access to all content and applications regardless of the source or destination, and without favouring [sic] or blocking particular formats, products, web sites, etc.").

The new FCC regulations have been criticized from various angles.[20] On the one hand, net neutrality proponents claim that the proposed regulations fall far short of President Obama's campaign promise to achieve true net neutrality.[21] On the other hand, Republicans, who generally oppose government intervention, have vowed to challenge the new FCC regulations during the next Congressional term.[22] In addition, lingering doubts about whether the FCC has statutory authority to regulate the Internet under Title I of the Telecommunications Act make future litigation over the new regulations virtually inevitable.[23] The only thing that can be said with any certainty is that, until all of the various challenges to the new FCC regulations are resolved, it appears impossible to know what the actual operative regulations are.[24] Accordingly, this article will argue that music industry groups such as the Recording Industry Association of America ("RIAA") should attempt to shift consumer behavior toward legal music services not by appealing to morality, ethics, or the law, but by using technology to make illegal downloading cumbersome and inconvenient. Specifically, this Comment will argue that the RIAA should engage in a lobbying effort to convince Internet Service Providers ("ISPs") to throttle peer-to-peer services such as BitTorrent, where a significant percentage of illegal downloading occurs.

Part II of the article discusses several recent high profile copyright cases and their adverse results. Part III of the article then discusses the current uncertainty in communication law regarding the FCC's ability to regulate peer-to-peer Internet traffic. Part III of the article additionally suggests that the RIAA engage in the aforementioned lobbying effort in order to indirectly steer consumers toward new services that provide legal options for downloading and streaming music.

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20. *Compare* Troy Wolverton, *New 'Net Neutrality' Rules Don't Go Far Enough*, TRIBLIVE (Jan. 2, 2011), http://www.pittsburghlive.com/x/pittsburghtrib/focus/s_716201.html#, *with* Brian Stelter, *F.C.C. Faces Challenges to Net Rules*, N.Y. TIMES, Dec. 22, 2010, at B1.

21. *See* Wolverton, *supra* note 20; *see also* Roy Mark, *Obama Promises Net Neutrality*, EWEEK (Oct. 30, 2007), http://www.eweek.com/c/a/Mobile-and-Wireless/Obama-Promises-Net-Neutrality (reporting that during the 2008 presidential campaign, then-candidate Barack Obama promised to appoint pro-net neutrality FCC commissioners if elected in order to ensure a "level playing field" on the Internet, such that the "speed with which and quality of" a user's downloads or links remained consistent regardless of the particular website a user chose to visit).

22. Stelter, *supra* note 20.

23. *See id.*; *Can the FCC Regulate the Internet?: Transcript*, ON THE MEDIA (Dec. 24, 2010), http://www.onthemedia.org/transcripts/2010/12/24/02 (transcribing an interview with FCC Commissioner Michael Copps about FCC's authority under Title I of the Telecommunications Act).

24. *Compare* Stelter, *supra* note 20, *with Can the FCC Regulate the Internet?: Transcript*, *supra* note 23.

II. THE PROBLEM: FEDERAL COURTS, COPYRIGHT INFRINGEMENT, AND THE INTERNET

A. Statutory Damages Cases

The Recording Industry Association of America officially abandoned the practice of directly suing consumers for illegal file-sharing in 2008.[25] However, two of the most widely known file-sharing lawsuits, *Capitol Records Inc. v. Thomas-Rasset*, and *Sony BMG v. Tenenbaum*, are still pending resolution.[26] In both cases, juries found the defendants liable for copyright infringement, awarding damages under the statutory damages provision of the Copyright Act.[27] However, judges in both cases have refused to allow damage awards that were within the statutorily mandated range.[28] Thus, the victories in these two cases have been somewhat hollow. While juries found defendants liable and were willing to award significant damages to the record label-plaintiffs, judges slashed these awards by as much as ninety-seven percent, suggesting implicit hostility towards plaintiffs in cases involving online copyright infringement.[29]

In *Sony BMG v. Tenenbaum*, several major record labels sued Joel Tenenbaum based on his use of the peer-to-peer file sharing application client Kazaa to illegally download and share thirty copyrighted songs.[30] A Massachusetts jury found Tenenbaum liable for copyright infringement, awarding the plaintiffs $675,000 in statutory damages, or $22,500 per song.[31] Though the damages award was well within the statutory range, Tenenbaum filed a motion challenging the size of the award on both common law and constitutional grounds.[32] The plaintiffs made it clear that they

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25. Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J. (Dec. 19, 2008), http://online.wsj.com/article/SB122966038836021137.html.

26. *See* Capitol Records, Inc. v. Thomas-Rasset, No. 06-1497 (MJD/LIB), 2011 U.S. Dist. LEXIS 85662 (D. Minn. July 22, 2011); Sony BMG Music Entm't v. Tenenbaum, 660 F.3d 487 (1st Cir. 2011).

27. Capitol Records Inc. v. Thomas-Rasset, 680 F. Supp. 2d 1045, 1061 (D. Minn. 2010); Sony BMG Music Entm't v. Tenenbaum, 721 F. Supp. 2d 85, 121 (D. Mass. 2010) *aff'd in part, vacated in part, rev'd in part,* 660 F.3d 487 (1st Cir. 2011).

28. *Sony BMG Music Entm't*, 721 F. Supp. 2d at 121; *Capitol Records Inc.*, 680 F. Supp. 2d at 1061.

29. Nate Anderson, *Judge Slashes "Monstrous" P2P Award by 97% to $54,000*, ARS TECHNICA (Jan. 22, 2010, 3:05 PM), http://arstechnica.com/tech-policy/news/2010/01/judge-slashes-monstrous-jammie-thomas-p2p-award-by-35x.ars.

30. *Sony BMG Music Entm't*, 721 F. Supp. 2d at 87.

31. *Id.*

32. *Id.* at 87–88.

would likely not accept a reduced award based on remittitur.[33] Accordingly, Judge Gertner dedicated most of her sixty-four page opinion to Tenenbaum's constitutional challenge.[34] After a lengthy analysis of punitive damages jurisprudence, Judge Gertner reached the questionable conclusion that the "guideposts" articulated by the Supreme Court in the seminal punitive damages case *BMW of North America, Inc. v. Gore*[35] could be properly applied to a statutory damages award under the Copyright Act.[36]

Judge Gertner held that the jury's award of $675,000 "cannot stand because it is 'so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.'"[37] Judge Gertner then decided, somewhat arbitrarily, that $2,250 per song "is the outer limit of what a jury could reasonably (and constitutionally) impose in this case."[38] Not surprisingly, the record labels have filed an appellate brief, arguing that Judge Gertner's analysis and conclusions are "hopelessly flawed," manifesting "hostility" toward the record labels based on the court's opinion that defendants like Tenenbaum were "comparatively venial offenders."[39]

The First Circuit recently reversed and remanded the case, reinstating the $675,000 damages award against Tenenbaum.[40] However, the court rejected all of Tenenbaum's substantive arguments, instead reversing Judge Gertner on the narrow basis that the court "declined to adhere to the doctrine of constitutional avoidance on the ground that it felt resolution of a constitutional due process question was inevitable in the case before it."[41] Accordingly, though the First Circuit reinstated the $675,000 damages award, it also remanded the case back to the district court with instructions to consider reducing the award on common law remittitur grounds (as opposed to Constitutional Due Process grounds).[42] In the likely event the dis-

33. *Id.* at 88.

34. *Id.*

35. BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) (holding punitive damages in a suit regarding undisclosed repairs to a vehicle would be excessive and thus violate due process, unless the defendant's conduct gave notice of such penalty, as measured by three "guideposts").

36. *Sony BMG Music Entm't*, 721 F. Supp. 2d at 103.

37. *Id.* at 116 (citation omitted).

38. *Id.* at 117.

39. Plaintiffs-Appellants/Cross-Appellees' Opening Brief at 24 n.5, Sony BMG Music Entm't v. Tenenbaum, 721 F. Supp. 2d 85 (D. Mass. 2010) (Nos. 10-1883, 10-1947, 10-2052) *aff'd in part*, *vacated in part*, *rev'd in part*, 660 F.3d 487 (1st Cir. 2011).

40. *Sony BMG Music Entm't*, 660 F.3d 487.

41. *Id.* at 508.

42. *Id.* at 515.

trict court does reduce the damages award, the plaintiffs will face the undesirable choice between a reduced damages award and a costly new trial.[43]

In *Capitol Records Inc. v. Thomas*, several major record labels sued Jammie Thomas-Rasset, a Minnesota resident,[44] who, like Joel Tenenbaum, engaged in illegal file-sharing using the computer software Kazaa.[45] A jury eventually found Thomas-Rasset liable for copyright infringement of twenty-four songs, awarding the plaintiffs $222,000, or $9,250 per song, in statutory damages.[46] Judge Michael Davis ordered a new trial sua sponte on the basis of a faulty jury instruction on the meaning of "distribution" under the Copyright Act.[47] Notably, Judge Davis dedicated the last section of the opinion to the size of the jury's $222,000 damages award,[48] an issue wholly irrelevant to granting a new trial. Judge Davis implored Congress to amend the Copyright Act and criticized the jury's $222,000 award, calling it "unprecedented and oppressive."[49]

On June 18, 2009, a second jury found Thomas-Rasset liable, this time awarding statutory damages in the amount of $80,000 per song, or $1.92 million in total.[50] Judge Davis noted that the record label-plaintiffs had "highlight[ed] valid reasons that Thomas-Rasset must pay a statutory damages award."[51] However, Judge Davis ultimately concluded that, despite plaintiffs' arguments "and the [c]ourt's deference to the jury's verdict, $2 million for stealing 24 songs for personal use is simply shocking."[52] Judge Davis ultimately concluded that the damages should be reduced from

43. *Id.* It is worth noting that during the damages phase of the district court trial, the Recording Industry Association of America made clear that it would not agree to any reduced figure. Valencia, *supra* note 9. Accordingly, it is reasonable to expect that a new trial will take place should the district court decide to reduce the damages award on remand from the First Circuit.

44. Ben Sheffner, *Third Thomas-Rasset Verdict: $1.5 million*, COPYRIGHTS & CAMPAIGNS (Nov. 3, 2010), http://copyrightsandcampaigns.blogspot.com/2010/11/third-thomas-rasset-verdict-15-million.html.

45. Capitol Records Inc. v. Thomas, 579 F. Supp. 2d 1210, 1212–13 (D. Minn. 2008).

46. *Id.* at 1227.

47. *Id.* at 1226–27.

48. *Id.* at 1227–28.

49. *Id.*

50. Capitol Records Inc. v. Thomas-Rasset, 680 F. Supp. 2d 1045, 1050 (D. Minn. 2010); *see also* 17 U.S.C. § 504(c)(2) (2006) (setting maximum statutory damages at $150,000 on the condition that the copyright owner is able to prove the infringement was committed willfully).

51. *Capitol Records Inc.*, 680 F. Supp. 2d at 1053.

52. *Id.* at 1054.

$1.92 million to a relatively paltry $54,000, or $2,250 per song—only three times the statutory damages minimum of $750 per infringement.[53]

On November 3, 2010, a third jury found Thomas-Rasset liable for copyright infringement, this time awarding $1.5 million, or $62,500 per song infringement, in statutory damages.[54] Thomas-Rasset has since challenged this judgment on constitutional grounds, asking for either a complete removal of the statutory damages award or a reduction of the damages "to an amount that this [c]ourt believes is constitutional."[55]

Judge Davis reduced the second damages award on common law remittitur grounds.[56] However, given his reaction to damages awards of $222,000 and $1.92 million,[57] it is reasonable to conclude that he will likely follow Judge Gertner's lead in the *Tennenbaum* decision, and reduce the $1.5 million award on constitutional grounds.

The *Tenenbaum* and *Thomas-Rasset* cases clearly illustrate the considerable difficulties that record labels face in federal courts. In *Sony BMG v. Tenenbaum*, Judge Gertner purportedly gave appropriate deference "'to legislative judgments concerning appropriate sanctions for' copyright infringement" and the jury's judgment before slashing the jury's damages award by eigthy-nine percent.[58] As noted above, while the First Circuit reversed Judge Gertner's decision,[59] it is likely that the plaintiffs will have to accept a reduced award or undergo a new trial. In addition, Judge Davis mentioned that he gave "deference to the jury's verdict" before reducing the jury's damages award of $1.92 million by ninety-seven percent.[60] It is difficult to reconcile claims of deference with such drastic action from the bench.

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53. *Id.* at 1056–57; 17 U.S.C. § 504(c)(1) ("[T]he copyright owner may elect . . . an award of statutory damages for all infringements involved in the action, with respect to any one work . . . in a sum of not less than $750 . . . .").

54. Sheffner, *supra* note 44.

55. Motion to Alter or Amend the Judgment and Renewed Motion for Judgment as a Matter of Law at 2, Capitol Records Inc. v. Thomas-Rasset, 680 F. Supp. 2d 1045 (D. Minn. 2010) (No. 06-cv-1497-MJD).

56. *Capitol Records Inc.*, 680 F. Supp. 2d at 1056–57.

57. *Capitol Records Inc.*, 579 F. Supp. 2d at 1227–28 ("Her status as a consumer who is not seeking to harm her competitors or make a profit does not excuse her behavior. But it does make the award of hundreds of thousands of dollars in damages unprecedented and oppressive."); *Capitol Records Inc.*, 680 F. Supp. 2d at 1054 ("[D]espite the combination of these justifications and the Court's deference to the jury's verdict, $2 million for stealing 24 songs for personal use is simply shocking.").

58. *Sony BMG Music Entm't*, 721 F. Supp. 2d at 89, 12 (quoting *BMW of N. Am., Inc.*, 517 U.S. at 583).

59. *Sony BMG Music Entm't*, 660 F.3d 487.

60. *Capitol Records Inc.*, 680 F. Supp. 2d at 1054, 1057.

B. Safe Harbor Under Section 512(c) of the Digital Millennium Copyright Act

Another recent high-profile copyright case, *Viacom International Inc. v. YouTube, Inc.*,[61] could make litigating against websites that turn a blind eye to rampant copyright infringement even more difficult. In this case, Viacom sued YouTube in a New York federal district court, seeking $1 billion in damages based on allegations that "tens of thousands of videos on YouTube, resulting in hundreds of millions of views, were taken unlawfully from Viacom's copyrighted works without authorization."[62] Viacom argued that YouTube was both directly and vicariously liable for blatant copyright infringement.[63] Viacom further argued that YouTube did not qualify for the safe harbors of section 512(c) of the Digital Millennium Copyright Act.[64]

Under section 512(c), a hosting website must remove infringing material in order to qualify for safe harbor from suit for copyright infringement.[65] This obligation is triggered if the host: (1) has actual knowledge of the infringement, or (2) is "aware of facts or circumstances from which infringing activity is apparent."[66] Judge Stanton relied heavily on legislative history in holding that YouTube did not have the requisite awareness of ongoing infringing activity to negate the application of section 512(c) of the Digital Millennium Copyright Act.[67] Specifically, Judge Stanton claimed that "[m]ere knowledge of prevalence of such [infringing] activity in general is not enough."[68]

Judge Stanton's conclusion is troubling for several reasons. First, as one commentator noted, it is almost impossible to know under his opinion "what would actually constitute such 'red flag' knowledge."[69] Second,

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61. Viacom Int'l Inc. v. YouTube, Inc., 718 F. Supp. 2d 514 (S.D.N.Y. 2010); *see* Edward Berridge, *Google Kicks Viacom in the Nadgers*, INQUIRER (June 24, 2010), http://www.theinquirer.net/inquirer/news/1687574/google-kicks-viacom-nadgers.

62. Memorandum of Law in Support of Viacom's Motion for Partial Summary Judgment on Liability and Inapplicability of the Digital Millennium Copyright Act Safe Harbor Defense at 1, Viacom Int'l Inc. v. YouTube, Inc., 718 F. Supp. 2d 514 (S.D.N.Y. 2010) (No. 1:07-cv-02103).

63. *Id.* at 38–46.

64. *Id.* at 47–66.

65. 17 U.S.C. § 512(c)(1)(C) (2006).

66. *Id.* § 512(c)(1)(A)(1)–(2).

67. *Viacom Int'l Inc.*, 718 F. Supp. 2d at 523–24.

68. *Id.* at 523.

69. Sheffner, *supra* note 16 ("The statute (and legislative history) clearly indicate that some form of knowledge beyond that imparted via DMCA notices qualifies as knowledge of 'facts or circumstances from which infringing activity is apparent,' thus triggering a site's takedown

Judge Stanton's opinion does little to explain why the mountain of evidence Viacom presented did not constitute "facts or circumstances from which infringing activity [was] apparent."[70] Viacom appealed Judge Stanton's decision.[71] However, much like the results in the *Tenenbaum* and *Thomas-Rasset* cases, Judge Stanton's decision in *Viacom* suggests that copyright-holder plaintiffs like Viacom and major record labels cannot look to the courts for sympathy in cases involving online copyright infringement.

III. THE SOLUTION: TAKING ADVANTAGE OF THE CURRENT UNCERTAINTY IN COMMUNICATIONS LAW

Given the above-referenced judicial skepticism,[72] the music industry will need to take a creative approach and implement alternative strategies in lieu of or in addition to litigation in order to continue its war against online piracy. Uncertainty in communications law may help provide one such strategy.

Net neutrality has been on the Federal Communications Commission's ("FCC") agenda since at least February 2004, when former Chairman Michael Powell gave a speech outlining what came to be known as the "Four Open Internet Principles."[73] According to a policy statement adopted by the FCC on August 5, 2005, consumers are entitled: (1) "to access the lawful Internet content of their choice;" (2) "to run applications

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obligation (on pain of losing the safe harbor). But after reading Judge Stanton's opinion several times, I simply have no idea what would actually constitute such 'red flag' knowledge.").

70. *Id.* (noting "[b]oth parties amassed, and cited, thousands of pieces of evidence" that the Court "barely mentioned . . . at all"). In its Statement of Undisputed Facts in Support of its Motion for Partial Summary Judgment, Viacom detailed a multitude of evidence demonstrating that YouTube had specific knowledge of infringement of Viacom works on YouTube's system, including: (1) acknowledgment of the popularity of clips of the television show *South Park* on YouTube; (2) e-mails from users regarding the unauthorized posting of clips of the television show *Chappelle's Show* on YouTube; and (3) an internal YouTube memo acknowledging that many clips of "well-known shows" including *Family Guy*, *South Park*, *The Daily Show with Jon Stewart*, and *Chappelle's Show* could be found on the site. Viacom's Statement of Undisputed Facts in Support of its Motion for Partial Summary Judgment on Liability and Inapplicability of the Digital Millennium Copyright Act Safe Harbor Defense ¶¶ 32, 59, 110, Viacom Int'l Inc. v. YouTube, Inc., 718 F. Supp. 2d 514 (S.D.N.Y. 2010) (No. 1:07-cv-02103); *see also* Naomi Jane Gray, *Where's the Beef? YouTube Opinion Lacks Heft*, SHADES OF GRAY (June 30, 2010), http://www.shadesofgraylaw.com/2010/06/30/wheres-the-beefyoutube-opinion-lacks-heft.

71. John Letzing, *Viacom Files Appeal in Google-YouTube Case*, MARKETWATCH.COM (Dec. 4, 2010, 10:10 AM), http://www.marketwatch.com/story/viacom-files-appeal-in-youtube-litigation-2010-12-03.

72. *See supra* Part II.

73. Stacey Higginbotham, *A Net Neutrality Timeline: How We Got Here*, GIGAOM (Dec. 21, 2010), http://gigaom.com/2010/12/21/a-net-neutrality-timeline-how-we-got-here/ (referring to a timeline detailing the evolution of the FCC's net neutrality policy).

and use services of their choice;" (3) "to connect their choice of legal devices that do not harm the network;" and (4) "to competition among network providers, application and service providers . . . [as well as] content providers."[74] These four principles "are subject to reasonable network management."[75]

On August 1, 2008, the FCC adopted a Memorandum Opinion and Order in response to complaints that Comcast was throttling peer-to-peer applications.[76] The FCC found that Comcast's practices "impede[d] Internet content and applications," and that such practices did not constitute reasonable network management, in violation of the 2008 Policy Statement.[77] Comcast responded with a lawsuit challenging the FCC's authority to regulate the Internet.[78] On April 6, 2010, Judge David S. Tatel of the District of Columbia Circuit issued an opinion holding that none of the eleven provisions of the Telecommunications Act cited by the FCC actually gave the agency the authority required to make and enforce these regulations.[79]

One month later, on May 6, 2010, FCC Chairman Julius Genachowski announced a plan to reclassify the "transmission component of broadband access service—and only this component—as a telecommunications service," under Title II of the Telecommunications Act.[80] However, the FCC abandoned this approach, instead adopting a report and order on December 21, 2010, by a 3-2 party-line vote, that asserts authority not through reclassification of broadband Internet, but through claims of ancillary jurisdiction reminiscent of the reasoning rejected by the District of Columbia Circuit in the *Comcast* decision.[81]

Substantively, the regulations are governed by three main principles: (1) transparency in network management practices; (2) no blocking of lawful content; and (3) no unreasonable discrimination in transmitting lawful network traffic.[82] These three principles are all subject to the "complemen-

74. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd. 14986, 14988 (2005).

75. *Id.* at 14988 n.15.

76. Formal Complaint, *supra* note 17.

77. *Id.* at 13052–53.

78. *See generally* Comcast Corp. v. F.C.C., 600 F.3d 642 (D.C. Cir. 2010).

79. *Id.* at 644.

80. FCC Chairman Julius Genachowski, *The Third Way: A Narrowly Tailored Broadband Framework* (May 6, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297944A1.pdf.

81. Preserving the Open Internet Broadband Industry Practices, 25 FCC Rcd. 17905 (2010).

82. *Id.* at 17936–56.

tary principle of reasonable network management."[83] However, the regulations are riddled with exceptions.[84] For example, the unreasonable discrimination rule does not apply to mobile broadband providers.[85] Furthermore, it is unclear from the regulations exactly what constitutes lawful or unlawful content.[86] In addition, the reasonability of network management practices will be determined "on a case-by-case basis, as complaints about broadband providers' actual practices arise."[87]

The FCC regulations have been attacked from all corners.[88] Net neutrality advocates such as Senator Al Franken have criticized them as "inadequate."[89] While Democratic FCC Commissioner Michael Copps reluctantly voted in favor of the new regulations, he believes that the FCC "could—and should—have gone further."[90] Critics on the right, including dissenting FCC Commissioners Robert M. McDowell and Meredith Baker, "vocally opposed the [regulations] as unnecessary and unjustified."[91] Vows from Congressional Republicans to "push back" and the inevitability of future litigation make it difficult to know with any certainty which regulations, if any, will survive.[92]

Accordingly, the Recording Industry Association of America ("RIAA") should take advantage of this uncertainty and engage in a lobby-

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83. *Id.* at 17906.

84. *See, e.g.*, *id.*

85. *See id.* at 17962.

86. *See, e.g.*, *id.*

87. Preserving the Open Internet Broadband Industry Practices, 25 FCC Rcd. 17905, 17952 (2010).

88. *See* Hiawatha Bray, *FCC OK's Internet Service Rules; Net Neutrality Backers, Foes Not Happy with Results,* BOS. GLOBE, Dec. 22, 2010, at 7; *see also* Stelter, *supra* note 20 (identifying parties with conflicting views on the FCC regulations).

89. Press Release, Al Franken, U.S. Senator from Minn., (Dec. 21, 2010), http://franken.senate.gov/?p=press_release&id=1246; *see also* Wolverton, *supra* note 20.

90. Preserving the Open Internet Broadband Industry Practices, 25 FCC Rcd. 17905, 18046 (2010) (concurring statement of FCC Commissioner Michael Copps).

91. Stelter, *supra* note 20; *see also* Robert M. McDowell, *The FCC's Threat to Internet Freedom*, WALL ST. J., Dec. 20, 2010, at A23; Peter Ferrara, *Net Neutrality Is Theft*, AM. SPECTATOR (Dec. 29, 2010), http://spectator.org/archives/2010 /12/29/net-neutrality-is-theft ("[W]ithout compelling reason, law or even politics on their side, on December 21, on a 3-2 party line vote, the FCC voted to impose its 'net neutrality' rules on the Internet."); Jonathan Gurwitz, *Net Neutrality is Anything but Neutral*, SAN ANTONIO EXPRESS-NEWS (Dec. 25, 2010), http://www.mysanantonio.com/opinion/ columnists/jonathan_gurwitz/article/Net-neutrality-is-anything-but-neutral-917994.php.

92. *Can the FCC Regulate the Internet?: Transcript*, *supra* note 23 (quoting Copps: "You're going to go to court no matter what you do around here. I've been at this place for ten years now and anything that we do, just about, ends up with some party dragging' [sic] you into court to, to contest it.").

ing effort designed to convince Internet service providers ("ISPs") nationwide to engage in exactly the sort of throttling of peer-to-peer traffic that resulted in the *Comcast* decision.[93] By slowing peer-to-peer traffic, the ISPs, in cooperation with the RIAA, could help indirectly shift consumers toward legal music services. As Google researchers have found, "'speed matters' on the Internet."[94] For example, slowing down the Google search results page by less than half of a second resulted in 0.2% to 0.6% fewer searches.[95] Furthermore, the longer users were exposed to delayed search results, the fewer searches they performed.[96] While use of the Google search engine and illegal file-sharing are hardly exact parallels, it is reasonable to assume that the general principle that speed affects conduct on the Internet is applicable to file sharing.

Consequently, significantly slowing down peer-to-peer traffic could have a tangible impact on online piracy. This is especially true given the ongoing developments in the online music market.[97] While Apple's iTunes Music Store is still the dominant online music retailer, Amazon.com has emerged as a competitor, "aggressively discounting whole albums," often selling albums by major artists for as little as $3.99.[98] In addition, other major online marketing developments have recently launched. More specifically, Google Music, a cloud-based service allowing users to purchase new music and store their preexisting collections online, launched on May 10, 2011.[99] Spotify, a cloud-based service wildly popular in Europe, was finally launched in the United States on July 14, 2011.[100] Additionally, Apple re-

93. *See* Formal Complaint, *supra* note 17 (noting Comcast's practice of "selectively target[ing] and interfer[ing] with connections of peer-to-peer (P2P) applications" without disclosing that practice to customers).

94. Jake Brutlag, *Speed Matters*, GOOGLE RES. BLOG (June 23, 2009), http://googleresearch.blogspot.com/2009/06/speed-matters.html; *see also About Andrew B. King, MSME*, WEBSITEOPTIMIZATION.COM, http://www.websiteoptimization.com/speed/about (last visited Mar. 15, 2012).

95. Brutlag, *supra* note 94.

96. *Id.*

97. *See, e.g.*, *Hello America. Spotify Here.*, SPOTIFY (July 14, 2011), http://www.spotify.com/us/about-us/press/hello-america-spotify-here; *Apple - iTunes - Everything You Need to Be Entertained*, APPLE, http://www.apple.com/itunes/ (last visited Mar. 15, 2012).

98. Ethan Smith & Geoffrey A. Fowler, *Amazon Can't Dent iTunes*, WALL ST. J., Dec. 17, 2010, at B1.

99. *See Google Set to Launch "Music Beta" Service Today (May 10)*, NME (May 10, 2011), http://www.nme.com/news/various-artists/56567; *see also Introducing Google Play*, GOOGLE PLAY, https://play.google.com/about/ (last visited Mar. 15, 2012) .

100. *See Hello America. Spotify Here.*, *supra* note 97.

leased its own cloud-based service on November 14, 2011.[101] Overall, consumers are likely to have an ever-expanding array of choices when it comes to legally obtaining music online.[102] If peer-to-peer traffic can be slowed significantly, it is all the more likely that some consumers who currently choose to engage in illegal file-sharing will instead explore legal alternatives. As noted above, an estimated 7.7 million British consumers were responsible for 1.2 billion illegal downloads in 2010 alone.[103] The number of illegal downloads in the United States is much higher.[104] While it may be impossible to stop all online piracy, this proposed lobbying effort would be worthwhile if even a small percentage of the millions of consumers illegally sharing billions of songs could be rerouted to legal options.

Of course, throttling peer-to-peer traffic could lead to another challenge brought by the FCC. However, an FCC challenge would take a significant amount of time to mount, especially given the challenges that FCC regulations are likely to face in the coming year.[105] Furthermore, even if the new regulations generally survive congressional and judicial scrutiny, there would be a myriad of issues to be litigated on a case-by-case basis. Some of these issues, such as what constitutes unlawful content and whether a particular network management practice is reasonable, may be well worth litigating. Even if it is ultimately determined that throttling peer-to-peer traffic is, in fact, impermissible, much ground would need to be gained in the significant period of time that would elapse before such a determination becomes final.[106] This process would play itself out over months and years.[107] Accordingly, the RIAA should act immediately in order to gain as much traction as possible in the war against online piracy.

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101. Sarah Perez, *iTunes Match Launches Today*, TECHCRUNCH (Nov. 14, 2011), http://techcrunch.com/2011/11/14/itunes-match-launches-today/.

102. *See, e.g.*, *Hello America. Spotify Here.*, *supra* note 97; *Apple - iTunes - Everything You Need to Be Entertained*, *supra* note 97.

103. *See Illegal Downloading in the UK on the Rise*, *supra* note 3.

104. INTERNATIONAL CHAMBER OF COMMERCE, ESTIMATING THE GLOBAL ECONOMIC AND SOCIAL IMPACTS OF COUNTERFEITING AND PIRACY, Annexe 1 (Feb. 2011), *available at* http://www.iccwbo.org/uploadedfiles/BASCAP/Pages/Global%20Impacts%20-%20Final.pdf (estimating that "around 20 billion songs are illegally downloaded by US consumers").

105. *See Can the FCC Regulate the Internet?: Transcript*, *supra* note 23 (quoting Copps: "You're going to go to court no matter what you do around here. I've been at this place for ten years now and anything that we do, just about, ends up with some party dragging' [sic] you into court to, to contest it.").

106. *See id.*

107. *See id.*

IV. CONCLUSION

Costly, time-consuming copyright litigation is simply no longer a viable strategy for the music industry.[108] Furthermore, there is significant uncertainty regarding what FCC-issued regulations regarding net neutrality, if any, the agency will be able to enforce.[109] Accordingly, the Recording Industry Association of America and major record labels would be wise to focus their efforts on lobbying ISPs to throttle peer-to-peer traffic. Doing so is a means of redirecting consumers who might otherwise engage in online copyright infringement to legal online music services that have recently materialized.[110] While it is impossible to completely eliminate online piracy in its entirety, such an effort could have a significant and positive impact on an entertainment industry devastated by its emergence.

108. *See supra* Part II.A.
109. *See supra* Part III.
110. *See id.*