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An International-Comparative Perspective on Peer-to-Peer File-Sharing and Third Party Liability in Copyright Law

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An International-Comparative Perspective on Peer-to-Peer File-Sharing and Third Party Liability in Copyright Law: Framing the Past, Present, and Next Generations' Questions

Guy Pessach*

ABSTRACT

In the last decade, the phenomenon of peer-to-peer file-sharing and its various legal aspects have been dealt with extensively by legal scholarship. The purpose of this Article is to take a closer inspection of several particular legal aspects that are related to peer-to-peer file-sharing as a comparative, social, economic, and cultural phenomenon. The Article begins by providing critical comparative analysis of distinct paradigms that different legal systems have offered regarding the question of third party liability for copyright infringements that occur through peer-to-peer file-sharing platforms. The Article then presents three focal policy considerations that should serve as copyright law's compass in the context of peer-to-peer file-sharing: (a) adopting a requirement of compliance between the legal liability of third parties and copyright law's exemptions and limitations regime; (b) striking a socially desired allocation of risk between positive and negative externalities that peer-to-peer file-sharing platforms tend to generate; (c) understanding the unique distributional concerns that are raised by legal regulation of peer-to-peer file-sharing platforms, especially when taking into account the nature of such platforms as a novel emerging speech resource that society has to decide upon its allocation. The last part of the Article focuses on some of the next generation legal questions that peer-to-peer networks are already beginning to give rise to, including the legal liability of internet service providers for managing peer-to-peer traffic through active caching and routing applications.

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I. INTRODUCTION

After a long wait, the phenomenon of peer-to-peer file-sharing has recently been addressed by a number of high courts around the globe: the U.S. Supreme Court decision in *Metro-Goldwyn-Mayer Studios Inc v. Grokster Ltd.*,¹ the federal court of Australia's decision in *Universal Music Australia Pty Ltd. v. Sharman License Holdings*

1. 125 S. Ct. 2764 (2005). Prior judicial decisions in the United States regarding the legality of peer-to-peer file-sharing software and platforms include *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004); *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). This Article is not intended to provide a comprehensive and detailed survey of the various legal aspects or judicial decisions that are related to the phenomenon of peer-to-peer file-sharing. That is an issue that has already been dealt with by extensive legal writing in the last few years. Rather, the Author's purpose is to highlight comparative legal aspects of peer-to-peer file-sharing, which thus far have been relatively ignored, and to add some novel perspectives on the law's desired approach regarding the operation of peer-to-peer file-sharing platforms.

Ltd.;² and two Canadian decisions, one of which is a decision of the Canadian Supreme Court that also includes several important statements with implications on the legality of file-sharing activities and the scope of third party liability in such circumstances.³

The purpose of this Article is twofold. The Article begins by providing a critical *comparative* analysis of these decisions and the distinct paradigms that different legal systems have offered regarding the question of third party liability for copyright infringements that occur through peer-to-peer file-sharing platforms. The Article then turns to develop several novel insights regarding the policy considerations that should serve as copyright law's compass in the context of peer-to-peer file-sharing and, more specifically, in the context of some of the next generation of legal questions that peer-to-peer platforms are already beginning to give rise to.

Parts II and III include an overall critical examination of recent judicial developments regarding third party liability for copyright infringements that take place through peer-to-peer file-sharing platforms. Part IV then presents and develops the Author's argument for a requirement of compliance between legal regimes of third party liability and copyright law's exemptions. The discussion begins by demonstrating the implications of different legal regimes of third party liability on the extent and degree that copyright law's exemptions and limitations could be effectively utilized. It continues by establishing a normative argument according to which any legal framework of third party liability must be shaped and adjusted in a manner that takes into account its implications on the vitality of copyright law's exemptions and limitations.

Parts V and VI offer two novel perspectives on peer-to-peer file-sharing platforms and the implications that different regimes of third party liability might have on society's communicative and technological environment. The first perspective highlights the potential influence that different regimes of third party liability might have on the allocation of risk between positive and negative externalities that peer-to-peer file-sharing platforms tend to generate. After focusing on positive spillovers that peer-to-peer platforms produce and the risks that broad third party liability imposes on such spillovers, the Article presents several considerations in support of a legal regime that places a higher degree of risk on the proprietary interests of copyright owners.

The second perspective develops the notion of peer-to-peer file-sharing platforms as a new evolving speech resource that society has to decide upon its allocation. It begins by developing the concept of

2. (2005) 220 A.L.R. 1.

3. Soc'y of Composers, Authors & Music Publishers of Can. v. Can. Ass'n. of Internet Providers, [2004] 2 S.C.R. 427; BMG Can., Inc. v. Doe, [2004] F.C. 241, *appeal filed*, [2005] F.C. 81.

speech resources and the unique distributional concerns that the allocation of legal entitlements in speech resources give rise to. The general observations regarding the allocation of entitlements in speech resources are then applied in the context of peer-to-peer file-sharing platforms, which are—it shall be argued—a prototype example for a new emerging speech resource.

As the Author will argue, both perspectives have direct implications on law's approach toward third party liability for copyright infringements that occur through peer-to-peer file-sharing platforms. The overall purpose in these two parts is twofold: first, to locate the question of third party liability for copyright infringement within a broader framework of policy considerations that are conjured up with the emergence of innovative technological devices and novel communication platforms. The second is to evaluate current legal approaches toward third party liability under this broader framework of policy considerations.

Part VII concludes by examining some of the next generation of questions of peer-to-peer platforms through the prism of the preceding discussion. The focus of examination will be the legal liability of internet service providers (ISPs) that use active caching and routing applications for managing efficiently peer-to-peer traffic—an issue that thus far has not been dealt with explicitly either by legislators or by courts. Based on policy considerations that were previously developed, this Article shall present an argument in support of limiting the liability of internet service providers that use active caching and routing applications, even if such applications involve reproduction and copying of files that are exchanged through peer-to-peer file-sharing platforms.

II. THE METRO-GOLDWYN-MAYER AND UNIVERSAL MUSIC AUSTRALIA DECISIONS

Both the U.S. Supreme Court's decision in *Metro-Goldwyn-Mayer* and the Australian federal court's decision in *Universal Music Australia* have dealt with similar file-sharing software that allows computer users to share electronic files through peer-to-peer networks. In both decisions, the courts ruled that actions taken by the producers of the file-sharing software might justify the imposition of third party liability for copyright infringement.⁴ Each decision, however, established its holding on a different argument, different factual merits, and a different standard of liability.

4. *Metro-Goldwyn-Mayer*, 125 S. Ct. at 2770; *Universal Music Austl.*, 220 A.L.R. at 116–17.

In *Metro-Goldwyn-Mayer*, the U.S. Supreme Court developed a theory of inducement for imposing secondary liability on third parties that produce and distribute devices capable of both infringing and non-infringing uses. According to the Court's decision, if a third party distributes such devices with the object of promoting copyright infringements, or if one takes other affirmative steps to foster copyright infringements, then this third party would be liable for acts of infringements by primary users of the devices, regardless of the fact that the device is also capable of lawful uses.⁵

The Court's inclination to consider the imposition of liability on third parties was, however, narrowly constructed as an additional layer on top of the already well-established components of secondary liability in U.S. copyright law (contributory liability and vicarious liability).⁶ The Court specifically emphasized the fact that nothing in its ruling overturned the judgment of *Sony Corp. of America v. Universal City Studios, Inc.*,⁷ which held that when a product is capable of substantial, non-infringing use its mere production and distribution do not impose secondary liability for third parties' infringing uses of it.⁸ Overall, *Metro-Goldwyn-Mayer* is a bounded precedent for imposing secondary liability on third parties that are involved in the production and distribution of devices and platforms for peer-to-peer file-sharing. The imposition of such liability would require direct evidence of actions promoting the use of the software

5. See *Metro-Goldwyn-Mayer*, 125 S. Ct. at 2779–80.

6. U.S. copyright law recognizes two basic forms of secondary liability: contributory infringement and vicarious infringement. Though the distinction between these two forms of secondary liability has not always been clear, the elements necessary for a finding of contributory infringement are generally considered to be: (1) direct infringement by a primary infringer, (2) knowledge of the infringement, and (3) material contribution to the infringement. The elements of vicarious infringement are: (1) direct infringement by a primary party, (2) a direct financial benefit to the defendant, and (3) the right and ability to supervise the infringers. In both cases, the element of direct infringement by a primary party is essential. With regard to vicarious infringement, direct financial benefit is also undisputed. For an elaboration of these two forms of secondary liability in U.S. copyright law, see *A & M Records, Inc.*, 239 F.3d at 1019–24.

7. 464 U.S. 417 (1984).

8. See *Metro-Goldwyn-Mayer*, 125 S. Ct. at 2782. There were two concurring opinions in *Metro-Goldwyn-Mayer*. The first was written by Justice Ginsburg and joined by Justices Rehnquist and Kennedy, and the second was written by Justice Breyer and joined by Justices Stevens and O'Connor. The two concurring opinions diverged on the interpretation of the Sony decision's applicability in circumstances where evidence was shown that a device's central and prominent use was for activities that constitute copyright infringement. According to Justice Ginsburg's concurring opinion, in such circumstances secondary liability should be imposed even where no evidence for promoting the use of the device for copyright infringement was shown. *Id.* at 2783–84. To the contrary, Justice Breyer's opinion stated that according to the Sony decision, even the distribution of a product that is used almost exclusively for infringing uses would not in itself impose secondary liability, as long as the device is capable of non-infringing uses. *Id.* at 2787.

for copyright infringement. Although such evidences did exist in *Metro-Goldwyn-Mayer*, one could speculate that in the future, producers and distributors of file-sharing software would be very cautious before taking any action or expression that relates the software with copyright infringement.

In *Universal Music Australia*, the federal court of Australia took a different path regarding the imposition of secondary liability on producers of file-sharing software.⁹ The court's ruling relied on Sections 101(1) and 101(1A) of the Australian Copyright Act, 1968. Section 101(1) imposes secondary liability of copyright infringement on someone who "authorizes" "the doing in Australia of, any act comprised in the copyright."¹⁰ Section 101(1A), as added to the copyright act in 2000, adds that:

In determining, for the purposes of subsection (1), whether or not a person has authorized the doing in Australia of any act comprised in a copyright subsisting by virtue of this Part without the license of the owner of the copyright, the matters that must be taken into account include the following: (a) the extent (if any) of the person's power to prevent the doing of the act concerned; (b) the nature of any relationship existing between the person and the person who did the act concerned; (c) whether the person took any other reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.¹¹

Based on these two Sections, the court found several "reasonable steps" that the defendants could have taken to significantly decrease the use of the file-sharing software for copyright infringements, including non-optional keyword and metadata filtering, which would prevent the display of search results with files whose particulars (title, artist, etc.) matched particulars of copyrighted sound recordings (such as those listed in the catalogues of record companies).¹²

In addition, the court rejected the defendants' attempt to use the safe-harbor of Section 112E of the Australian Copyright Act, which states that:

A person (including a carrier or carriage service provider) who provides facilities for making, or facilitating the making of, a communication is not taken to have authorized any infringement of copyright in an audio-visual item merely because another person uses the facilities so

9. It should be noted that the court's decision also mentioned and gave weight to several "inducement actions" for copyright infringement that were taken by the defendants. See *Universal Music Austl.*, 220 A.L.R. at 405. Nevertheless, as opposed to the *Metro-Goldwyn-Mayer* decision in the United States, this was only one of several elements and convictions in the court's reasoning. *Id.* at 98.

10. Copyright Act, 1968, § 101(1) (Austl.).

11. *Id.* § 101(1A).

12. *Universal Music Austl.*, 220 A.L.R. at 36.

provided to do something the right to do which is included in the copyright.¹³

In the court's view, Section 112E did not confer general immunity against a finding of authorization, and even a person who falls within the definitions of Section 112E may be held, for other reasons, to be an "authorizer" under Section 101(1A).¹⁴

Overall, *Universal Music Australia* represents an approach that is much more activist than the U.S. Supreme Court's decision in *Metro-Goldwyn-Mayer*. The Australian court adopted an approach imposing upon manufacturers and distributors of peer-to-peer file-sharing software a duty of care to adopt standards and mechanisms for the prevention of copyright infringement.¹⁵ The court's interpretation of Section 101(1A) and Section 112E of the Australian Copyright Act implemented a negligence-type rule that holds third parties liable for their failure to take steps that are economically reasonable precautions to prevent the harm of copyright infringements.¹⁶ Indeed, the bedrock of Section 101(1A)'s explicit language made it relatively easy for the Australian court in choosing this path.

Nevertheless, as a common law, judge-made doctrine, the U.S. doctrine of secondary liability also has the potential of being shaped under a negligence-type rule and not only according to factors such as knowledge, control, the extent of non-infringing uses, and actions of inducement.¹⁷ Yet the U.S. Supreme Court has chosen the latter option, and it seems that it is not just the formal absence of specific presumptions of "authorization," such as those of Section 101(1A) of the Australian Copyright Act, that have led the U.S. Court to construct a different understanding what third party liability stands for in the context of peer-to-peer file-sharing. In addition, the U.S. approach also seems to rely on a different legacy, one that significantly weighs the side effects of secondary liability, including: (1) the fear that copyright owners would gain control over new and still developing technologies¹⁸ and (2) the chilling effect that the

13. Copyright Act, 1968, § 112E (Austl.).

14. *Id.*

15. *Universal Music Austl.*, 220 A.L.R. at 99.

16. For an economic argument regarding the influence that negligence-type rules should have on the construction of secondary liability in copyright law, see generally William Landes & Douglas Lichtman, *Indirect Liability for Copyright Infringement: An Economic Perspective*, 16 HARV. J.L. & TECH 395 (2003).

17. See *supra* note 6; see also Landes & Lichtman, *supra* note 16, at 405. Moreover, among the rights granted to copyright owners within the U.S. Copyright Act is the exclusive right to authorize others to exercise the various other rights that arise under the grant of copyright. Copyright Act, 17 U.S.C. § 106 (2002). Hence, there is also a legislative anchor (though maybe unintentional) to rely on when attempting to establish a standard of negligence for secondary liability of copyright infringement.

18. See generally Randal C. Picker, *Copyright as Entry Policy: The Case of Digital Distribution*, 47 ANTITRUST BULL. 423 (2002).

imposition of liability on third parties might have on non-infringing activities that rely on and use the same devices.¹⁹

The following Parts will elaborate on these considerations, but the main point for the current comparison between the two decisions is the following: once taking into account the above-mentioned considerations, a negligence rule that seeks to impose liability on the party that would be most efficient in preventing copyright infringements (as well as in spreading the costs of avoiding the negative externalities of a pending activity) is no longer a conclusive rule.²⁰ It still remains an open question, however, whether in the long run, a negligence-type rule, such as the one that was adopted in Section 101(1A) of the Australian Copyright Act and applied in *Universal Music Australia* would be interpreted in a manner that takes into account and internalizes the same considerations that have guided the U.S. Supreme Court in *Metro-Goldwyn-Mayer*.

At the practical level, the differences between the two decisions are significant. *Metro-Goldwyn-Mayer* virtually shields producers and distributors of file-sharing software from secondary liability unless copyright owners bear the burden of providing evidence on actions of inducement to copyright infringements that were taken by third parties. On the other hand, the negligence standard of *Universal Music Australia* has far-reaching potential implications for third party liability. One cannot ignore the possibility that the court's interpretation of Section 101(1A) would be likewise applicable to internet service providers, who have the capabilities of taking reasonable steps to either prevent or avoid copyright infringements that peer-to-peer file-sharing activity involve.

The filtering and screening mechanisms that the Australian federal court had practically obliged producers of file-sharing software to implement in order to avoid legal liability are likewise affected and are operated by internet service providers. Hence, unless an internet service provider could shelter under a specific statutory safe-harbor that would exempt it from secondary liability, according to *Universal Music Australia* there are potential risks of secondary legal liability. As for the mere transmission of materials through a network controlled or operated by an internet service provider, the current safe-harbors of Section 512(a) of the American Digital Millennium Act²¹ and Articles 12 and 15 of the European Directive on

19. See, e.g., *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*, 125 S. Ct. 2764, 2792–96 (2004) (Breyer, J., concurring).

20. The basic presumption in this context is that the imposition of secondary liability on a central intermediary, such as the producer of file-sharing software, saves enforcement costs of suing a large number of end-users who are conducting the primary infringement activity. Likewise, such a step enables internalization of the costs of infringement through the intermediary, either by preventing the infringing activity or by channeling it to legally licensed activities.

21. See Digital Millennium Copyright Act, 17 U.S.C. §§ 103, 1201 (2000).

Electronic Commerce²² seem to provide such a shelter. Nevertheless, as will be further explained in Part VII *infra*, it is an open question whether current safe-harbors would be applicable in the context of peer-to-peer traffic management solutions, such as active caching and routing applications, that are already being used by some internet service providers in order to utilize bandwidth consumption and manage efficiently peer-to-peer traffic.²³

III. THE PRIMARY LIABILITY OF END-USERS, STATUTORY LICENSEES, AND LEVY SCHEMES

A. *The Primary Liability of End-Users*

Despite the differences between the two decisions, one thing *Metro-Goldwyn-Mayer* and *Universal Music Australia* have in common is the somewhat far-reaching assumption regarding the primary liability of end-users who employ peer-to-peer file-sharing software to download copyrighted materials. A prerequisite for imposing secondary liability is a direct infringement by a primary infringer. In analyzing secondary liability, both decisions presumed that overall the use of file-sharing software by end-users for the

22. Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, 2000 O.J. (L 178) 1 [hereinafter Electronic Commerce Directive].

23. At this stage, it is worth emphasizing the narrow interpretation that the Australian federal court in *Universal Music Australia* gave to the safe-harbor of Section 112E. See *supra* text accompanying notes 13–14. As already mentioned, this Section states that the mere provision of facilities for making, or facilitating the making of, a communication, which has been used for copyright infringement, should not be taken as an “authorization” for copyright infringement. *Id.* With regard to this Section, the court had explicitly stated that even if the mere provision of such facilities should not be counted as “authorization,” other actions that are taken by the same person, who falls within Section 112E, might still impose on him liability as an “authorizer” according to Section 101(1A). *Id.* This approach of the Australian court is another reason why the decision in *Universal Music Australia* might shuffle some of the parameters regarding liability of internet service providers for peer-to-peer file-sharing activity; at least when it is proven that by taking reasonable steps, such as filtering and screening techniques, the internet service provider could have blocked unauthorized transmission of copyrighted files. One major problem of such an approach is the chilling effect that it might impose on internet service providers: in order to avoid the risk of legal liability, internet service providers will tend to use filtering and screening techniques that over protect the system and thus have a side-effect of blocking non-infringing materials as well. See Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 CARDOZO ARTS & ENT. L.J. 345, 399–410 (1995). This point will again be addressed in *infra* Part V, discussing the influence of different third party liability regimes on the allocation of risk between positive and negative externalities.

purpose of downloading copyrighted materials should be regarded as a primary infringement of copyright.²⁴ Neither *Metro-Goldwyn-Mayer* nor *Universal Music Australia* include any attempt to distinguish between legitimate and illegitimate downloads of copyrighted materials through peer-to-peer file-sharing platforms.²⁵

As for the Australian case, this approach might be explained by the fact that the Australian Copyright Act has no general exemption with regard to private copying, except Section 111's very limited exemption regarding direct recording of television and radio broadcasts for the purpose of time-shifting.²⁶ Likewise, the Australian fair dealing defense, in Sections 103A-103C of the Australian Copyright Act, is limited only to the purposes of "criticism or review," "reporting news," and "research or study"²⁷—a fact that also narrows the potential scope of legitimate downloads of copyrighted materials through peer-to-peer file-sharing platforms. As for the U.S. Supreme Court's decision, however, the above-mentioned approach is a little more surprising when one takes into account the legacy of the *Sony* decision.

As already mentioned,²⁸ *Metro-Goldwyn-Mayer* relied extensively on the ruling in *Sony* while emphasizing that the newly introduced inducement theory served as an additional top layer that followed and adhered to the contours of the *Sony* decision.²⁹ Yet the *Metro-Goldwyn-Mayer* Court gave no weight or reference to the fact that in *Sony*, the use of home-video tapes by end-users for purposes of recording copyrighted works was classified as legitimate fair use under Section 107 of the Federal Copyright Act.³⁰

Indeed, this aspect of the majority's opinion in *Sony* has been criticized, and moreover, lower courts that have dealt with primary liability of end-users for unauthorized file-sharing of copyrighted materials have also rejected the argument that such an activity is protected under the fair use exemption.³¹ Yet given the *Sony* precedent, the Supreme Court's approach in *Metro-Goldwyn-Mayer* regarding this matter raises some doubts. A discussion regarding the interface fair use file-sharing platforms is entirely absent from the Court's decision in *Metro-Goldwyn-Mayer*. Hence, one cannot ignore

24. *Metro-Goldwyn-Mayer*, 125 S. Ct. at 2778; *Universal Music Austl. Pty Ltd. v. Sharman License Holdings Ltd.* (2005) 220 A.L.R. 1, 97–101.

25. See generally *Metro-Goldwyn-Mayer*, 125 S. Ct. 2764; *Universal Music Austl.*, 220 A.L.R. 1.

26. Copyright Act, 1968, § 111 (Austl.).

27. *Id.* §§ 103A–103C.

28. See *supra* note 8.

29. *Metro-Goldwyn-Mayer*, 125 S. Ct. at 2782.

30. Copyright Act, 17 U.S.C. § 107 (2005); see also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 447456 (1984).

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

the implicit assumption of the Court that for the purposes of analyzing third party liability, all private copying of copyrighted works by people who use file-sharing software cannot be classified as fair use. Such an assumption seems misguided for several reasons.

Once going down the chain of liability and focusing on primary liability of end-users, each particular case of an end-user must be examined according to its unique merits, including the nature, scope, and scale of copying (including of copyrighted materials) that took place. To the contrary, the courts' approaches both in *Metro-Goldwyn-Mayer* and *Universal Music Australia* included an implied analysis according to the following line of thought: presumably, a significant extent of the file-sharing activity that takes place falls outside of the fair use exemption. Therefore, when a court examines the imposition of secondary liability on the producers of file-sharing software, the court's overall hypothesis should be that when it comes to copyrighted materials, a primary infringement took place.

Interestingly, this approach rests on a rule that is opposite to the *Sony* rule of secondary liability. In *Sony*, a substantial amount of non-infringing uses by primary users was enough to provide manufacturers of copying devices with de facto immunity from secondary liability.³² In the file-sharing decisions, however, courts had practically presumed the opposite: a substantial amount of infringing uses by primary users was enough for analyzing the secondary liability of file-sharing software producers under the presumption that at least with regard to copyrighted materials, the activity of end-users, as a whole, constituted primary infringements of copyright.³³

Being aware of this element, the reading of *Universal Music Australia* becomes even more troubling. Recall that the court had required the defendants to filter and screen out files that by their names and meta-data were presumed to be files with copyrighted works.³⁴ One cannot overlook the unjustified presumption that *in all*

32. *Sony*, 464 U.S. at 456.

33. See generally *Metro-Goldwyn-Mayer*, 125 S. Ct. 2764; *Universal Music Austl. Pty Ltd. v. Sharman License Holdings Ltd.* (2005) 220 A.L.R. 1.

34. See *Universal Music Austl.*, 220 A.L.R. at 7.

Continuation of the Kazaa Internet file-sharing system (including the provision of software programs to new users) shall not be regarded as a contravention of order 4 if that system is first modified pursuant to a protocol, to be agreed between the infringing respondents and the applicants, or to be approved by the Court, that ensures either of the following situations: (I): that: (a) the software program received by all new users of the Kazaa file-sharing system contains non-optional key word filter technology that excludes from the displayed blue file search results all works identified (by titles, composers' or performers' names or otherwise) in such lists of their copyright works as may be provided, and periodically updated, by any of the applicants; and (b) all future versions of the Kazaa file-sharing system contain the said non-optional key word filter technology; and (c) maximum pressure is placed on existing

circumstances the downloading of a copyrighted file would fall outside the fair dealing defense. Even within the Australian structure of a “close” fair dealing defense that is bounded by a limited number of purposes, this assumption seems overly broad. Thus, for example, end-users could download copyrighted materials for purposes of research, study, criticism, or review, each and every case according to its own merits.

More broadly, it is questionable whether the standard of negligence that was imposed by the Australian court fully took into consideration the fact that at least in some circumstances, the downloading of copyrighted works with the assistance of file-sharing software might be sheltered under one of copyright law’s exemptions and limitations. If secondary liability is aimed at capturing activities that provide means and tools for primary infringements, there is no justification for imposing a duty of care on producers of file-sharing software when it comes to non-infringing uses of copyrighted materials. Moreover, one could even claim the opposite: when taking into account users’ rights, there should be a *reverse duty of care* to enable legitimate downloads of copyrighted materials.³⁵

As for the U.S. context, this sweeping approach toward primary liability of end-users is partially curbed by the relatively high burden that the *inducement theory* sets as a prerequisite for imposing secondary liability on third parties.³⁶ In the Australian context, however, the situation is more complicated due to the accumulation of: (1) a generalized assumption regarding the primary liability of end-users who download copyrighted materials and (2) a negligence-type rule that sets the standard for secondary liability. These two holdings together might lead to a *de facto* strict liability rule that prevents the use of file-sharing software for legitimate downloads of copyrighted works.

This last point also illustrates one major conceptual drawback in making third party liability doctrines a central legal source for regulating peer-to-peer file-sharing of copyrighted materials: copyright law’s third party liability doctrines are preconditioned on the imposition of direct liability on a primary infringer—in the

users, by the use of dialogue boxes on the Kazaa website, to upgrade their existing Kazaa software program to a new version of the program containing the said non-optional key word filter technology; or (II) that the TopSearch component of the Kazaa system will provide, in answer to a request for a work identified in any such list, search results that are limited to licensed works and warnings against copyright infringement and that will exclude provision of a copy of any such identified work.

Id.

35. For a similar view, though not in the context of file-sharing, see generally Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J.L. & TECH. 41 (2001).

36. *Metro-Goldwyn-Mayer*, 125 S. Ct. at 2780–83.

context of peer-to-peer file-sharing—an end-user.³⁷ This structure of legal liability suffers from two potential faults. First, it precludes the possibility of imposing liability on central “third party” gatekeepers—intermediaries and manufacturers—without having the need to couple such liability together with the imposition of direct-primary liability on end-users. A second fault is the fact that, as mentioned above, in order to impose legal liability (and, therefore, duty of care) on third parties that govern and control the downloading activity of many end-users, courts are driven to implement generalized and overbroad assumptions regarding primary liability of end-users.

One challenge that courts have ignored thus far is how to create a “secondary” liability regime without coupling it together with the imposition of liability on an end-user as a primary infringer. Once departing from the conjuring up between the liability of central intermediaries, such as file-sharing software producers, and the liability of end-users, the imposition of liability on third parties could be constructed differently: not as a tool for preventing what is seemingly a mass accumulation of particular primary infringements by end-users, but rather as a flexible vessel for internalizing the various benefits, detriments, and values that peer-to-peer file-sharing activity tends to generate.

By presenting this proposal, the Author is not ignoring the risk that once giving up a requirement for primary infringement, third parties might be exposed to unwarranted, broad legal liability. This in turn would generate over-deterrence and with it excessive levels of monitoring and filtering practices that undermine the benefits and positive externalities of peer-to-peer file-sharing activities. Part IV *infra* will further elaborate the argument for a requirement of compliance between third party liability regimes and the imperative of copyright law’s exemptions and limitations. Nevertheless, once aware of such hazards, the imposition of liability on third parties could be culminated rightfully without suffering from the defaults that dependence on primary liability of end-users tends to generate.

Indeed, under the current structure of a common law-based secondary liability regime, adjusting such a framework would require major transformations in our understanding of what “secondary” liability means. Another option, which will be discussed in the following Section, is the implementation of statutory (compulsory) licenses and levy schemes that at least in some aspects imitate the logic of the above-mentioned proposal, while translating it into a framework of statutory exemptions for private copying.

37. For a similar argument, though from another perspective, see Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1379–81 (2004).

B. *Statutory Compulsory Licenses and Levy Schemes – Lessons from the Canadian Experience*

In recent important works, both Neil Netanel and William Fisher have proposed that the enforcement of copyright with regard to peer-to-peer file-sharing platforms should be enforced ex-post through a system of mandatory levies that would come together with a statutory exemption for private and non-commercial copying of copyrighted materials through peer-to-peer file-sharing platforms.³⁸ Such a scheme would function as a form of blanket compulsory license, authorizing copying under a specific exemption for private and non-commercial copying, in exchange for set fees that would be allocated between copyright owners.³⁹

Both proposals rest on a framework that is well established in European countries, such as Germany,⁴⁰ as well as in Canada.⁴¹ In fact, levies designed to provide equitable remuneration to copyright owners for the private copying of their works have been part of the law in many European countries since long before the digital age.⁴² Even in the United States, there is the precedent of the Audio Home Recording Act of 1992 (AHRA), which provides for a levy to be charged on all blank digital audio media and digital audio recorders, with the revenue to be allocated among music copyright owners.⁴³ The AHRA has not seen much use, but that is because the digital audio recording systems covered by the Act never caught on.⁴⁴

38. See WILLIAM FISHER, *PROMISES TO KEEP: TECHNOLOGY LAW AND THE FUTURE OF ENTERTAINMENT* ch. 6 (2004); Neil W. Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J. L. & TECH. 1, 36 (2003).

39. FISHER, *supra* note 38, at ch. 6; Netanel, *supra* note 38, at 36.

40. For an illuminating survey and analysis of the private copying exemption and the levies system in Germany, see Kateruna Gaita & Andrew F. Christie, *Principle of Compromise? Understanding the Original Thinking Behind Statutory License and Levy Schemes for Private Copying*, INTELL. PROP. Q. 422 (2004). For a comparative survey and analysis of other European countries, see generally P. BERNT HUGENHOLTZ, LUCIE GUIBAULT & SJOERD VAN GEFFEN, *THE FUTURE OF LEVIES IN A DIGITAL ENVIRONMENT: FINAL REPORT* (2003), available at <http://www.ivir.nl/publications/other/DRM&levies-report.pdf>. As the authors of this document indicate, levies designed to provide equitable remuneration to copyright owners for private copying of their works have been part of the law in many European nations since before the digital age, often covering photocopying and “home taping” of music. *Id.* at 10–13.

41. See Fara Tabatabai, *A Tale of Two Countries: Canada's Response to the Peer-to-Peer Crises and What it Means for the United States*, 73 FORDHAM L. REV. 2321, 2334–36 (2005).

42. See PAUL GOLDSTEIN, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE* 312–13 (2001).

43. 17 U.S.C. §§ 1004–07 (2004).

44. See *id.* § 1001(3).

A digital audio recording device is any machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with

A full discussion regarding the pros and cons of compulsory licensing levy schemes for peer-to-peer file-sharing exceeds the scope of this Article.⁴⁵ The discussion in the following paragraphs will be limited to a few comments of comparison between a compulsory licensing levy scheme, such as the one offered by the Canadian copyright system, and the other option of third party liability as it was already described in previous Parts.

In 1997, the Canadian parliament added sections to the Canadian Copyright Act which legalized private copying.⁴⁶ The private copying exemption in Article 80(1) of the Canadian Copyright Act specifically allows for the copying of musical works onto “audio recording medium” for the private use of the person making the copy.⁴⁷ The Canadian Copyright Act defines in Article 79 “audio recording medium” as any media “onto which a sound recording may be reproduced, and that is of a kind ordinarily used by individual consumers for that purpose.”⁴⁸ To compensate artists for lost royalties due to private copying, Article 82 of the Copyright Act requires all manufacturers and importers of blank audio recording media sold in Canada to pay a levy.⁴⁹ According to Articles 83-85 of the Copyright Act, the Canadian Copyright Board is responsible for setting the levy rate.⁵⁰ The money from this levy then goes to collecting societies for the benefit of eligible authors, makers, and performers.⁵¹

The Canadian levy system in its current form was legislated before the phenomenon of peer-to-peer file-sharing emerged. Yet, as the decision of the first instance federal court in *BMG Canada*⁵² demonstrates, at least according to some views, this levy system could have a major impact on the embrace of an approach in which neither the downloading nor the uploading of copyrighted musical works

or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use, except for—(A) professional model products, and (B) dictation machines, answering machines, and other audio recording equipment that is designed and marketed primarily for the creation of sound recordings resulting from the fixation of nonmusical sounds.

Id.

45. For such a discussion, see Lemley & Reese, *supra* note 37, at 1406–10; Netanel, *supra* note 38, at pt. IV.

46. Copyright Act, R.S.C., ch. 24 (1997) (Can.).

47. *Id.* at art. 80(1).

48. *Id.* at art. 79.

49. *Id.* at art. 82.

50. *Id.* at arts. 83–85.

51. *Id.* at art. 84.

52. *BMG Can., Inc. v. Doe*, [2004] F.C. 241, 260. Nevertheless, as the following paragraphs will illustrate, the court of appeals’ decision in that case was much more cautious in its approach regarding the legality of peer-to-peer file-sharing. See generally *BMG Can., Inc. v. Doe*, [2005] F.C. 81.

through peer-to-peer file-sharing platforms would constitute illegal activity.

In *BMG Canada*, the Canadian Recording Industry Association (CRIA) brought an action against five Canadian ISPs to compel disclosure of the identities of twenty-nine customers who allegedly engaged in file-sharing of copyrighted works.⁵³ One of the criteria for granting such relief was that the applicant must establish a prima facie case against the alleged wrongdoer. The federal court determined that the downloading of a song for personal use fell within the private copying exemption in Article 80(1) of the Canadian Copyright Act.⁵⁴ The court then stated that the uploading of a musical file through a peer-to-peer file-sharing platform did not constitute infringement either.⁵⁵ Although under the Canadian Copyright Act an individual may be found liable for direct infringement for “authorizing” the reproduction of a copyrighted work,⁵⁶ the court refused to classify the making available of a musical file for downloading as an act of “authorization.”⁵⁷ Based on a previous decision of the Canadian Supreme Court,⁵⁸ the court observed that “authorization” requires a degree of intent as well as a requirement that a person has sanctioned, approved, and countenanced copyright infringement—conditions that in the court’s view, were not met in the context of uploading a file through a peer-to-peer file-sharing platform.⁵⁹ Then, drawing on the Canadian Supreme Court’s holding in *CCH Canadian Ltd. v. Law Society of Upper Canada*,⁶⁰ the court added that there is

[no] real difference between a library that places a photocopy machine in a room full of copyrighted material and a computer user that places a personal copy on a shared directory linked to a P2P service. In either case the preconditions to copying and infringement are set up but the element of authorization is missing.⁶¹

In a similar manner, the court refused to classify the uploading stage as an infringement of copyright owners’ “right of distribution” according to Article 27(2)(b) of the Canadian Copyright Act.⁶² The court’s opinion in this context was that an act of “distribution” does not occur merely by placing copyrighted music files in a shared directory where other file-sharers could access them. Rather,

53. *BMG Can.*, [2004] F.C. at 243.

54. *Id.* at 259.

55. *Id.* at 259–61.

56. See Copyright Act, R.S.C., ch. C-42, art 3(1) (1985) (Can.).

57. *BMG Can.*, [2004] F.C. at 260.

58. See *Muzak Corp. v. Composers, Authors and Publishers Ass’n of Can.*, [1953] 2 S.C.R. 182, 193.

59. *BMG Can.*, [2004] F.C. at 192.

60. [2004] S.C.R. 339, 379.

61. See *BMG Can.*, [2004] F.C. at 260.

62. *Id.* at 261.

distribution requires some positive act by the uploading user, such as sending out copyrighted songs or advertising that they were available for downloading.⁶³

Overall, the federal court's decision sets a good example for a system that operates under a *shadow background rule* that exempts private copying from the risk of copyright infringement while compensating copyright owners through a levy system. Such a system seems to do more than just shield individuals from being liable for downloading copyrighted works through peer-to-peer file-sharing software. In addition, based on the implied logic that secondary liability is preconditioned upon a primary infringement, such a framework also has the tendency of driving courts toward a narrow interpretation of the legal sources through which the liability of third parties is determined.⁶⁴ The court of appeals in *BMG Canada*, however, had a different understanding of the potential legal liability for peer-to-peer file-sharing under Canadian copyright law.

63. See *id.* at 260–61. It should be mentioned that the court's reasoning in this context was based on the fact that the current Canadian Copyright Act does not give a copyright holder the exclusive right to make his or her work available to the public. See *id.* Hence, in the absence of such a right, a person who uploads music does not violate any of the creator's exclusive rights. Although the World Intellectual Property Organization Copyright Treaty (WCT), which Canada signed in 1997, includes a "making available" right, Canada has yet to ratify the WCT. World Intellectual Property Organization Copyright Treaty art. 6, Dec. 20, 1996, 36 I.L.M. 69, available at http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html [hereinafter WCT]. Thus, it does not currently form any part of the Canadian Copyright Act, making file-sharing legal under Canadian copyright law.

64. To exemplify the manner in which such an approach functions, it is worth emphasizing two additional facts that are relevant to fully understand the court's decision and its potential implications. The first is that, basically, the right of distribution according to Article 27(2)(b) of the Canadian Copyright Act, as well as the right to authorize a reproduction of a copyrighted work according to Article 3(1), could be infringed, even if the downloading of a musical file for private use is exempted from copyright infringement under Article 80. With regard to the stage of uploading files onto a peer-to-peer file-sharing system, *BMG Canada* did not deal with common law-based contributory and vicarious liability that is legally preconditioned on the existence of a primary infringement. Rather, the decision analyzed the components of "authorization" and "distribution" as distinct and independent potential sources for establishing primary copyright infringement by the act of "uploading" copyrighted files to the peer-to-peer file-sharing system. See generally *BMG Can.*, [2004] F.C. 241. The second point refers to the fact that according to Article 80(2)(b) of the Canadian Copyright Act, the exemption for private copying does not apply if the private copying was done for the purpose of "distribution," "whether or not for the purpose of trade." Copyright Act, R.S.C., ch. 24 (1997) (Can.). Both facts emphasize the broad range of options that the Canadian court had in deciding the merits of legal liability for peer-to-peer file-sharing activity. Literally, someone downloading or uploading a copyrighted file through a peer-to-peer distribution network could have been found liable for copyright infringement according to the above-mentioned relevant Articles in the Canadian Copyright Act. Yet, the federal court treated the exemption for private copying as its compass in determining the contours of legal liability for file-sharing of copyrighted materials.

The decision of the federal court in *BMG Canada* was appealed by the record companies.⁶⁵ Although the court of appeals upheld the federal court's decision and dismissed the appeal, it did so solely based on determinations that focused on the privacy concerns that the case had raised.⁶⁶ With regard to the question of whether the downloading and uploading of copyrighted files through a peer-to-peer file-sharing network constitutes copyright infringement, the court of appeals' approach was much more cautious than the federal court's approach.

The court of appeals declined to conclude within the preliminary stages of the action whether copyright infringements indeed took place.⁶⁷ Notwithstanding this refusal, the decision in the appeal still includes several remarks that support findings that both downloading and uploading of copyrighted files through a peer-to-peer file-sharing network might constitute copyright infringements.⁶⁸ For one, the court of appeals had questioned whether peer-to-peer file-sharing indeed involves reproduction on an *audio recording medium* and therefore could shelter the exemption for private copying according to Article 80(1) of the Canadian Copyright Act.⁶⁹ In addition, the court of appeals questioned whether in the context of peer-to-peer file-sharing the act of private copying had not been done "for the purposes of distribution" and therefore, under Article 80(2)(b) the exemption for private copying would no longer apply.⁷⁰ Lastly, the court of appeals doubted the federal court's interpretation of the terms "authorization" and "distribution" while raising the possibility that these terms were broad enough to capture within them actions that make copyrighted materials available for downloading through peer-to-peer networks.⁷¹

When taking into account the different directions taken by the federal court and the court of appeals, the Canadian experience might teach one lesson: by itself a levy scheme provides no magic solutions for the dilemmas that peer-to-peer file-sharing platforms raise, at least as long as the exemption for private copying and the levy scheme have been established prior to the emergence of peer-to-peer file-sharing. This observation should not come as a surprise because in itself a mere formal existing framework of a levy scheme does not provide answers to the various policy questions that the phenomenon of file-sharing raises.

65. See *BMG Can., Inc. v. Doe*, [2005] F.C. 81, 83.

66. *Id.* at 83–85.

67. *Id.* at 85–86.

68. See *id.* at 106–09.

69. *Id.* at 107–08.

70. *Id.*; see also *supra* note 64 (discussing Article 80(2)(b)).

71. *BMG Can.*, [2005] F.C. at 108.

Moreover, in some aspects, the *binary* nature of an exemption for private copying, as a zero-sum formula, might also be seen as an obstacle for using such a scheme as a framework for regulating peer-to-peer file-sharing activity. The two extreme solutions of full primary liability or full primary immunity are not malleable enough to take into account the delicate distinctions between different circumstances of copying and the different parties that are involved in the process of peer-to-peer file-sharing. The remaining Parts of the Article will inspect more closely several particular instances that are related to peer-to-peer file-sharing as a social, economic, and cultural phenomenon and, by doing so, will highlight at least part of the complicated web of considerations that should be taken into account in this context.

IV. ADJUSTING A REQUIREMENT OF COMPLIANCE BETWEEN THIRD PARTY LIABILITY REGIMES AND COPYRIGHT LAW'S EXEMPTIONS AND LIMITATIONS

Third party liability regimes for primary copyright infringements inherently raise the question of compliance with copyright law's exemptions and limitations. By their purpose and nature, third party liability regimes are intended to regulate the activity of end-users. Therefore, ideally, third party liability should be imposed only in circumstances when the primary use of copyrighted material is classified as an infringing use rather than a use that is protected under one of copyright law's exemptions and limitations.⁷² Any broader liability of third parties would interfere with the limitation and burden uses that are socially desirable, for instance where according to an economic cost-benefit analysis it should have been permitted.⁷³

A requirement of compliance of third party liability regimes and copyright law's exemptions and limitations calls to attention several features that are associated with the imposition of such liability. First, there is the chilling effect that tends to come along with the imposition of third party liability. Third party liability is likely to have a deterrent effect under which in order to avoid the risk of legal liability, as well as decrease their information and enforcement costs,

72. One could claim, however, that while distinguishing between infringing and non-infringing uses is very costly, some generalizations must be made, even as a cost that is imposed either on copyright owners or on the rights of users and the public in general. As *infra* Part V will further outline, this is a choice that should be guided by weighing and allocating the risk between positive and negative externalities that peer-to-peer file-sharing platforms tend to generate.

73. See generally Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1982).

third parties would impose restrictions on legitimate file-sharing of copyrighted materials.⁷⁴

Indeed, one can assume that at least to some extent, third parties, such as software producers, might also compete over the provision of peer-to-peer platforms that enable risky uses—those that bear a higher exposure to legal liability and that also impose costs of distinguishing between lawful and unlawful uses. Yet, as some scholars have argued convincingly,⁷⁵ in the context of intermediaries such as internet service providers, the likelihood for robust competition is relatively minor for two main reasons: first, the limited significance of monitoring as a factor for consumers in choosing an internet service provider, and secondly, the high transaction costs that would be involved in negotiating the degree of monitoring and its pricing.

Another related feature is the positive externalities that peer-to-peer file-sharing platforms tend to generate that are not internalized either by end-users or by third parties on whom contributory liability is imposed.⁷⁶ There are many advantages and social utilities that file-sharing platforms generate, both in terms of inducing technological innovation and in terms of enabling the production and distribution of diversified content portfolios, including content that otherwise would not have been produced and distributed, such as educational, documentary, and political materials. Since such activities are characterized by significant positive externalities, the legal risk that third party liability generates could have direct implications on the prevention of such uses, especially if distinguishing between legitimate uses of such kinds and infringing uses is a process that imposes costs on third parties.

Another central attribute of third party liability regimes, at least in the context of peer-to-peer file-sharing, is the fact that they are usually based on generalized proximity rules rather than on an ad hoc examination of each and every particular case according to its factual merits. Judicial determinations with regard to both the nature of uses that file-sharing platforms enable and the implications that different third party liability regimes might have, are based on proximity rules rather than on findings of fact with regard to each and every particular case.

74. See Landes & Lichtman, *supra* note 16, at 406.

75. See generally Assaf Hamdani, *Who's Liable for Cyberwrongs?*, 87 CORNELL L. REV. 901 (2002).

76. Positive and negative externalities occur when the impacts of a product overreach the direct effects of its production and consumption and therefore influence many individuals, as well as society at large. A related instance of positive and negative externalities refers to circumstances in which direct users of a product internalize only some parts of its benefits or costs or when problems of collective action frustrate the ability of a fragmented bundle of users to signal and acquire their desired products.

The prior discussion regarding *Universal Music Australia* and *Metro-Goldwyn-Mayer* sets a good example for the manner in which such proximity rules operate: in both cases, when determining the legal liability of third parties, the courts relied on a certain set of generalized assumptions. In *Universal Music Australia*, the court had an implicit generalized, though unjustified, assumption that a primary infringement occurs whenever copyrighted materials are exchanged through the file-sharing platform, and therefore such files should be identified and then blocked by the software filtering and screening mechanisms. On the other hand, in *Sony* and later in *Metro-Goldwyn-Mayer*, the U.S. Supreme Court's assumption was that at least some of the files exchanged through the peer-to-peer file-sharing platform were non-infringing uses. The subsequent conclusion was that in itself, the production and distribution of file-sharing platforms should not impose legal liability for indirect copyright infringement.⁷⁷ In both cases, however, it was *generalized proximity rules* that navigated the courts in their rulings.⁷⁸

Rather than merely reflecting reality, such proximity rules also have normative and therefore constitutive implications on the nature of uses that peer-to-peer file-sharing platforms occupy. As in many other instances, through their determinations and assumptions regarding the implications and characteristics of peer-to-peer platforms, courts are not only reflecting reality but are also constructing and shaping the contours of future file-sharing activities.⁷⁹ Therefore, the design of such proximity rules must include a *normative imperative* to consider and thus enable compliance between third party liability regimes and copyright law's exemptions and limitations. A normative imperative becomes a compelling necessity in a digitized environment where the implications of third party liability regimes tend to be translated directly into technological measures that third parties adopt to save themselves from legal liability. When such technological measures are constructed without compliance with copyright law's exemptions and limitations, one can expect that the design and structure of peer-

77. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd*, 125 S. Ct. 2764, 2780 (2005).

78. Justice Breyer's concurring opinion in *Metro-Goldwyn-Mayer* also sets a good example for how different proximity rules can influence the design of third party liability regimes: Justice Breyer's opinion emphasized both the diverse variety of non-infringing uses that flourish through file-sharing platforms and the legal uncertainty, as well as chilling effect, that a broad liability rule would cause. *Id.* at 2790–91, 2793 (Breyer, J., concurring). Once relying on such proximity rules, Justice Breyer's understanding of third party liability was very mindful of the need for compliance between copyright law's exemptions and limitations and the legal liability that is imposed on third parties. *Id.*

79. For a similar but more generalized argument, see generally Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management,"* 97 MICH. L. REV. 462 (1998–1999).

to-peer file-sharing platforms would not reflect the balancing schemes that copyright law implements.

An example for such circumstances could be found again in the Australian case of *Universal Music Australia*. Once the court imposed a generalized duty to implement technological measures such as non-optional keyword and metadata filtering mechanisms on producers of file-sharing software,⁸⁰ one could expect that the design of future peer-to-peer platforms would also block legitimate uses of copyrighted materials. Moreover, in a digital environment, even if courts did not detail the scheme through which third parties should comply with their legal duties, any third party liability would be expected to have its imprint on the design of file-sharing software and consequently the manner in which it would regulate the activities and liberties of its users.⁸¹

In several respects, the call for compliance between copyright law's exemptions and legal regimes of third party liability resembles another emerging digital concern: the call for compliance between digital rights management systems and copyright law exemptions and limitations.⁸² A major concern surrounding digital rights management (DRM) systems, as well as technological protection measures in general, is overextension of DRM protection in a manner that overrides copyright's limitations and exemptions. By using either technological measures or contractual protection schemes (in many circumstances along with reliance on statutory prohibitions against the circumvention of the technological protection measures through which the copyrighted work is packaged⁸³), DRM systems shrink and

80. *Universal Music Austl. Pty Ltd. v. Sharman License Holdings Ltd.* (2005) 220 A.L.R. 1, 5, 59.

81. In this context, the notions of software as regulation and code as regulation have been widely recognized and developed in the last decade. See LAWRENCE LESSIG, *CODE AND OTHER LAW OF CYBERSPACE* 89 (1996) (discussing the constraining effect of code and software on behavior in cyberspace); James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177, 177 (1997) (expressing a "preference for technological solutions to hard legal issues on-line"); Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553, 554-55 (1998) (arguing that "[t]echnological capabilities and system design choices impose rules on participants").

82. For an excellent comparative analysis of this issue, see generally Stefan Bechtold, *Digital Rights Management in the United States and Europe*, 52 AM. J. COMP. L. 323 (2004). See also Jacqueline D. Lipton, *Solving the Digital Piracy Puzzle: Disaggregating Fair Use from the DMCA's Anti-Device Provisions*, 19 HARV. J.L. & TECH. 112 (2005).

83. On the international level, such provisions may be found in two treaties adopted in 1996 under the aegis of the World Intellectual Property Organization (WIPO). Article 11 of the WCT, which went into force on March 6, 2002, outlaws the circumvention of effective technological measures used by copyright owners to protect their works. WCT, *supra* note 63, at art. 11. A similar provision protecting performers and producers of phonograms may be found in Article 18 of the WIPO Performances and Phonograms Treaty (WPPT), which went into force on May 20, 2002. World Intellectual Property Organization Performances and Phonograms Treaty art. 18, Dec.

set aside the domain that is governed and empowered by copyright law's exemptions and limitations.

Concerns over such developments have been discussed extensively by scholars,⁸⁴ and at least in a few countries, such as Australia and European countries, legislatures have taken some statutory steps in this direction.⁸⁵ Most legislatures have attempted

20, 1996, 36 I.L.M. 87, available at http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html. In the United States, Congress enacted complex anti-circumvention regulations as part of the DMCA of 1998. See Digital Millennium Copyright Act, 17 U.S.C. §§ 1201-05 (2004). The DMCA arranges its anti-circumvention provisions along two dimensions. First, it distinguishes between technological protection measures that "control[] access to a work" (access control) and measures that "protect[] right[s] of the copyright owner" (usage control). *Id.* §§ 1201-02. Secondly, it distinguishes between the actual circumvention of technological protection measures and preparatory activities, in particular the production and distribution of tools that can be used to circumvent such measures. *Id.* § 1201(b). Whereas the DMCA prohibits the actual circumvention and preparatory activities in regard to access control technologies, it only targets preparatory activities in regard to usage control technologies. *Id.* §§ 1201-02. In the European Union, the most important anti-circumvention regulation may be found in the Copyright Directive of 2001, which had to be implemented by the Member States of the European Union by December 22, 2002. Directive 2001/29/EC of the European Parliament and of the Council Directive of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L167) 8–9 [hereinafter Copyright Directive]. Article 6(1) of this Directive prohibits the actual circumvention of any "effective" technological measure that is used by the rights holders of any copyright or neighboring right to protect their works. *Id.* Article 6(2) prohibits a wide range of preparatory activities, including the production, distribution, promotion, or "possession for commercial purposes" of devices that "have only a limited commercially significant purpose or use other than to circumvent" or are at least "primarily designed . . . [to enable] the circumvention" of technological protection measures. *Id.* In general, the anti-circumvention regulations of Article 6(1) and (2) provide a very broad protection of DRM systems.

84. See, e.g., Bechtold, *supra* note 82, at 359–81 and the sources cited therein (discussing overextension of DRM protection); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 359–60 (1999) (arguing that the control access provisions of the DMCA are "problematic" because "they can prevent access to information whether or not the information's producer has a legal right to control it"); Burk & Cohen, *supra* note 35, at 42, 48 (submitting that DRM has the potential to confer a degree of control over access to and use of digital content that goes well beyond the rights given by copyright law).

85. See Bechtold, *supra* note 82, at 365–81. One such example is Section 116A(4) of the Australian Copyright Act of 1968, which declares that the statutory prohibition regarding the circumvention of technological protection measures that protect copyrighted material do not apply

in relation to the making or importing of a circumvention device: (a) for use only for a permitted purpose relating to a work or other subject-matter that is not readily available in a form that is not protected by a technological protection measure; (b) for the purpose of enabling a person to supply the device or to supply a circumvention service, for use only for a permitted purpose.

Copyright Act, 1968, § 116A(4) (Austl.).

to set limits and boundaries on the use of technological measures and DRM systems as a mechanism for extending control over copyrighted materials with regard to legitimate actions that shelter under an exemption such as the fair use defense.⁸⁶

It could be argued that a similar approach should be advocated when courts are required to decide the scope and boundaries of legal liability that third parties should bear regarding their involvement in the production, distribution, and facilitation of peer-to-peer file-sharing platforms and devices. Theoretically and normatively, this would mean that the legal liability of third parties should be limited to circumstances in which reproduction of copyrighted materials is not protected by one of copyright law's exemptions and limitations. Practically, however, it would be very difficult and costly to implement such a distinctive parameter with a high degree of accuracy, mostly because third parties do not regularly obtain the information that would enable them to identify prospective uses of copyrighted materials that are being downloaded. Moreover, as already explained, peer-to-peer file-sharing platforms are characterized by the fact that they simultaneously facilitate the activity of numerous individuals—a fact that practically leaves no choice other than relying on policy-based proximity rules.

Consequently, any steps in the direction of compliance between liability of third parties and copyright law's exemptions and limitations require a policy-based decision regarding the allocation of risk between the interests of copyright owners on the one hand and the interests of users and the general public on the other hand. This last issue is the focus of the next Part.

V. PEER-TO-PEER FILE-SHARING: ALLOCATING THE RISK BETWEEN COMPETING INTERESTS AND POSITIVE AND NEGATIVE EXTERNALITIES

Peer-to-peer file-sharing platforms constitute an arena that coordinates and regulates communicative activities of many individuals. Like in many other contexts, different legal regimes of third party liability have both direct and indirect impacts on the various interests as well as positive and negative externalities that peer-to-peer file-sharing platforms implicate. Listing all the interests and externalities that peer-to-peer file-sharing platforms are associated with would be impossible. It is, however, important to note that as will be further explained, such a list includes much more than just the private pecuniary interests of copyright owners or the public interest in promoting technological innovation (as such an interest is

86. *Id.*

embodied in innovative technological devices that are capable of “substantial non-infringing uses”).⁸⁷

Peer-to-peer file-sharing platforms are for one thing a central resource—in many aspects a *public good*—through which individuals are able to distribute and obtain information, creative works, communicative materials, and a large variety of other intangible resources that have a social value.⁸⁸ In many instances such resources might not have been available in traditional modes of content distribution, such as those based on a relationship between the content producer/distributor and consumers. This is not only because of the fact that peer-to-peer file-sharing platforms decrease, spread, and fragmentize the costs of distributing and obtaining intangible content among many individual users, but also because peer-to-peer platforms reconstruct social control over the means of distributing creative and informational goods—a point that will be further addressed in the following Part.

Turning to another related aspect, peer-to-peer file-sharing platforms also tend to generate a significant amount and range of positive externalities. One example is the potential political enhancing function of bottom-up distribution capabilities of informational materials that otherwise would not be distributed through more traditional channels of communication. Another example is the long-term cultural impacts that exposure to diverse creative materials through peer-to-peer platforms might have on individuals. More generally, peer-to-peer file-sharing platforms cover a very wide range of autonomy-based social benefits that serve free speech values with regard to both speakers and recipients of content and information.⁸⁹

87. This consideration is well known as the legacy of *Sony*. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984); see *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*, 125 S. Ct. 2764, 2777–78 (2005) (citing *Sony* for the doctrine of substantial non-infringing use).

88. See Brett M. Frischmann, *Peer-to-Peer Technology as Infrastructure: An Economic Argument for Retaining Sony's Safe Harbor for Technologies Capable of Substantial Non-infringing Uses*, 52 J. COPYRIGHT SOC'Y USA 329, 329 (2005) (arguing that “socially valuable non-infringing uses should be recognized as substantial”).

89. *Id.* at 339–41. The link between diversity and freedom of speech as a constitutional value relates both to democratic-political aspects of free speech and to free speech as the bedrock of individual autonomy. In both aspects, freedom of speech establishes not just the rights of speakers but also the rights of the audience—the recipients, who rely on diversified, robust, and pluralistic expressive activity. The democracy-based defense of free speech is famously associated with Alexander Meiklejohn. See generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948). For autonomy-based accounts, see generally Joseph Raz, *Free Expression and Personal Identification*, 11 OXFORD J. LEGAL STUD. 303 (1991); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972). See also Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 37–43 (2002) (arguing that copyright law should be

As previous Parts have already indicated, different legal regimes of third party liability impose different risks on each of the various interests and externalities that peer-to-peer file-sharing platforms involve. The broader the liability of third parties, the higher the risk (or phrased differently, the lower the chances) of the fulfillment and internalization of social benefits, such as those mentioned in the preceding paragraph, that peer-to-peer file-sharing platforms tend to generate. On the other hand, the narrower the liability of third parties, the higher the risks of abridgment with regard to the pecuniary interests of copyright owners. Undermining the ability of copyright owners to impose legal liability on central and efficient gatekeepers, such as producers of file-sharing software or internet service providers, would undoubtedly have an impact on the prevention of infringing activities. On the other end of the spectrum, third parties that are facing extensive legal liability would be inclined to increase precautions regardless of the costs of setting aside socially beneficial aspects of peer-to-peer platforms—aspects that are far from being fully internalized by such “self-interested” third parties.

Another lesson from the discussion thus far is the fact that any allocation of risk between the various competing interests that are at stake would have to be based, at least to some extent, on generalized proximity rules rather than on fact specific ad-hoc allocation. Regulators and courts thus face a “tragic choice” dilemma when deciding the scope and nature of third parties’ legal liability for unauthorized peer-to-peer file-sharing of copyrighted materials. The advancement and protection of some interests must come at the expense of jeopardizing countervailing interests. It is important to add, however, that the dilemma courts and legislatures are facing in the context of peer-to-peer file-sharing platforms is different than the dilemma that they would face in other contexts of third party liability for copyright infringements, mostly because the interests and social benefits that peer-to-peer platforms involve are different from those in other instances of copyright infringements. Different scales are therefore required to rightfully assess the appropriate allocation of risk between the various interests that arise with third party liability for peer-to-peer file-sharing copyright infringements.

There are various approaches one could take regarding the question of which of the competing interests should bear the higher risk of being undermined and infringed as a result of the third party legal liability regime chosen. On one side stand legal systems, such as the British system,⁹⁰ that perceive and emphasize the nature of

subordinate to the freedom of imagination implicitly guaranteed by the Constitution as enforced by federal courts).

90. See generally *Ashdown v. Telegraph Group Ltd*, [2001] EWCA Civ 1142 (U.K.), available at http://www.hmcourts-service.gov.uk/judgmentsfiles/j677/civil_ashdown.htm (discussing the conflict between freedom of speech and copyright after

copyright as a proprietary right aimed to protect the private pecuniary interests of copyright owners. These legal systems would be willing to place a significant share of the legal risk on the various positive externalities and public-oriented interests that peer-to-peer file-sharing platforms tend to generate.⁹¹ On the other side of the ocean, legal systems such as the U.S. system emphasize the regulatory and public nature of copyright as a mechanism whose sole purpose is advancing the public interest in a robust and diversified creative environment.⁹² Such copyright systems would accommodate much more easily a higher risk of abridgement on proprietary interests of copyright owners. *Sony* and *Metro-Goldwyn-Mayer* are perfect examples of this willingness of the U.S. legal system, as opposed to the approach that was implemented by the federal court of Australia in *Universal Music Australia*.

Reality, however, becomes slightly more complicated once a copyright system aims to be based on a complex and diversified set of values and goals that integrates both public-oriented goals and respect for the private interests of copyright owners. With regard to such a framework, there are no clear-cut recipes as to the desired allocation of risk between the various competing interests.

There is, however, one consideration that might support a narrow approach to the legal liability of third parties: that is, an approach that places a higher degree of risk on copyright owners while establishing a fertile ground for supporting and advancing the various positive spillovers and beneficial externalities that derive from the activity of peer-to-peer file-sharing platforms. This consideration is the differential and preferential ability of copyright

the enactment of the British Human Rights Act 1998, while emphasizing that copyright law is based on recognizing and respecting the private interests of creators and copyright owners, including the status of such rights and interests as part of the constitutional right to private property (under the first protocol of the European Convention of Human Rights as implemented by the British Human Rights Act)).

91. *But see* Robert Danay, *Copyright vs. Free Expression: The Case of Peer-to-peer File-sharing of Music in the United Kingdom*, INT'L J. COMM. L. & POL'Y, Autumn 2005, at 2 (presenting the view that, under Article 10 of the European Convention on Human Rights as implemented by the British Human Rights Act, peer-to-peer music file-sharing should be permitted, at least partially, within the British copyright law). This approach, however, does not seem to reflect the views of courts in the United Kingdom.

92. *See generally* Pamela Samuelson, *Copyright and Freedom of Expression in Historical Perspective*, 10 J. INTELL. PROP. L. 319 (2003). There are, of course, numerous scholarly works regarding this matter, as well as the fact that at least in some aspects, even U.S. copyright law has been partially influenced by author-based theories (e.g., the important work of Professor Jane Ginsburg of Columbia Law School). Nevertheless, overall, U.S. copyright laws, including its constitutional merits, are based mostly on a regulatory public-oriented paradigm of copyright law. *See generally* RAY L. PATTERSON & STANLEY LINDBERG, *THE NATURE OF COPYRIGHT – A LAW OF USER'S RIGHTS* (2004) (discussing focus of U.S. law on legal rights of individuals to use copyrighted materials).

owners in overcoming risks that a narrow legal regime of third party liability exposes them to, as opposed to the very limited chances of overcoming the potential social losses that are associated with broad legal liability of third parties. This last point requires further explanation.

Many social benefits of peer-to-peer file-sharing platforms are positive spillovers—ricochets that are generated by the overall operation of such platforms.⁹³ Consequently, it is probable that any burdens and limitations on such social benefits, including limitations that derive from broad legal liability of third parties, would not be fully internalized. Since the main issue at stake is unfulfilled positive externalities, one can expect that many of the people who engage in peer-to-peer file-sharing activities will not have the required incentives to invest resources in developing mechanisms that would supplement and complement elements that are no longer protected under a legal regime that imposes broad legal liability on third parties.

Take, for example, circumstances in which file-sharing is used for permitted uses of copyrighted materials—such as fair use—or otherwise lawful dissemination of informational and creative materials. In a legal regime that imposes liability on third parties, many of these uses will be abridged and undermined. This is not only because of the chilling and deterrent effects third parties would face but also because of the different long-term dynamics in building the design and architecture of peer-to-peer file-sharing platforms: under a broad legal regime of third party liability, the structure, design, and technological architecture of peer-to-peer file-sharing platforms is expected to have a much stronger tendency toward commercialized “walled-gardens” models—those that follow the demands of a legal regime with broad requirements of copyright compliance. The crucial point is, however, that given the low commercial viability of the above-mentioned social benefits, there is a small chance that individuals, who until now have benefited from the windfall of positive spillovers that unregulated (commercialized) file-sharing platforms generate, would be willing to invest time, resources, and

93. See Frischmann, *supra* note 88, at 332. Frischmann develops a theory of infrastructure resources which have three main characteristics: (1) these are resources that generate value when used as inputs into a wide range of productive processes; (2) the outputs from these processes are often public and non-market goods that generate positive externalities that benefit society; and (3) managing infrastructure resources in an openly accessible manner may be socially desirable when it facilitates these downstream activities. *Id.* Accordingly, Frischmann's main conclusion is that once taking into account the positive externalities and spillovers of infrastructure resources, the law should adopt a legal regime with relatively broad open access and usage rights to such resources and thus enable internalization of their “demand-side” attributes. Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917, 956 (2005).

coordination costs in culminating the design of file-sharing platforms to re-optimize socially desired uses, especially under circumstances of facing potential risks of third party legal liability.⁹⁴

Copyright owners, on the other hand, are situated in a different framework of incentives that better enables them to overcome at least some of the risks to which an opposite legal regime of narrow third party liability might expose them. Since copyright owners suffer direct financial losses from copyright infringements that occur through peer-to-peer file-sharing platforms, copyright owners are incentivized to invest efforts and resources in the prevention of such infringements. Overall, copyright owners do internalize the risks to which a legal regime of narrow third party liability exposes them because they are direct bearers of the financial harms that such a legal regime tends to create for them. Consequently, even if their ability to enforce legal liability on third parties is limited, copyright owners would still attempt to enforce their rights against end-users as well as invest resources in digitally protecting their copyrighted materials, for example, through anti-circumvention devices. Narrowing the legal liability of third parties would indeed impose some difficulties and costs on copyright owners.⁹⁵ Yet, as opposed to

94. By presenting this approach, the Author does not diminish the contribution of recent writings regarding the efficiency of common-based peer production frameworks for the production and dissemination of informational works. See, e.g., Yochai Benkler, *Coase's Penguin, or, Linux and the Nature of the Firm*, 112 YALE L.J. 369 (2002). Nevertheless, the normative background and shadow-rules, including that of third party legal liability for copyright infringements, would determine society's ability to fully utilize and benefit from the prospects that such new frameworks of information production offer.

95. It should be mentioned, however, that there is contradictory evidence regarding the impact of unauthorized file-sharing of copyrighted materials on the financial interests of copyright owners. Likewise, contradictory evidence is apparent regarding the question of whether restrictions on peer-to-peer file-sharing would indeed advance the goal of securing a just reward for creators and copyright owners. First, there are some doubts as to the accuracy of the assertion that file-sharing extensively reduces traditional music sales. Secondly, even to the extent that file-sharing could be tied to such a decline, the nature of corporate media industry as a business that relies heavily on using the same media product in as many secondary and derivative markets as possible also raises some doubts of the pros and cons of unauthorized file-sharing of copyrighted materials. From this perspective, cultural tastes that are shaped and constructed through peer-to-peer file-sharing leverage and increase the demand for ancillary and related media products, such as live performances, merchandizing, and others. For such arguments, including empirical data that supports them, see generally Stan J. Liebowitz, *Pitfalls in Measuring the Impact of File-sharing*, 51 CESIFO ECON. STUD. 435 (2005) (U.K.), available at <http://cesifo.oxfordjournals.org/cgi/reprint/51/2-3/435>; Eric S. Boorstin, *Music Sales in the Age of File Sharing*, <http://www.cs.princeton.edu/~felten/boorstin-thesis.pdf> (last visited Nov. 16, 2006); Felix Oberholzer-Gee & Koleman Strumpf, *The Effect of File Sharing on Record Sales An Empirical Analysis*, June 2005, http://www.unc.edu/~cigar/papers/FileSharing_June2005_final.pdf; Martin Peitz & Patrick Waelbroek, *The Effect of Internet Piracy on CD Sales: Cross-Section Evidence*, Nov. 2003, http://www.merit.unimaas.nl/epip/papers/waelbroeck_paper.pdf.

the social interests that peer-to-peer file-sharing platform involve, copyright owners are expected to internalize, confront, and deal with various risks to their private interests.⁹⁶

Once taking into account this disparity between the risks that copyright owners would face under a narrow legal regime of third party liability, on one hand, and the risks that public and social interests would face under a broad legal regime of third party liability on the other hand, one could claim that the latter option should be disfavored. Indeed, such an approach involves a political priority of the public and social interests that peer-to-peer file-sharing platforms advance, even at the cost of risking the private pecuniary interests of copyright owners. However, as the next Part will illustrate, further support for such priority-setting comes from a broader constitutional viewpoint which perceives peer-to-peer file-sharing platforms as a novel emerging *speech resource*.

VI. PEER-TO-PEER FILE-SHARING PLATFORMS AS A NEW EMERGING SPEECH RESOURCE: DISTRIBUTIVE CONCERNS

Thus far, the discussion has analyzed peer-to-peer file-sharing activity through the prism of various competing interests and concerns that are at stake. This Part attempts to offer an additional perspective that focuses on the nature of peer-to-peer file-sharing platforms as a new emerging speech resource.

The term “speech resources” aims to capture the notion that communicative, expressive, and creative activities require and rely on unique (speech) resources such that together enable the creation, production, and distribution of finalized media products as well as other types of informational works. The various layers that together construct a communicative-speech activity—the content layer, the physical layer, and the layer of distribution—all comprise resources that are both unique and essential for effective communicative and speech activities—producing, distributing, and obtaining informational and creative works.⁹⁷

96. Seemingly, the above-mentioned approach raises the question of moral hazard, that is the increased risk of peer-to-peer copyright infringements, because third parties who have “caused” and contributed to the copyright infringements do not suffer the full (or any) consequences of such a loss. Yet, this argument ignores the fact that, likewise, a legal regime of broad third party liability would generate a parallel (though reversed) moral hazard, only this time with regard to the positive externalities and overall social benefits that peer-to-peer file-sharing platforms tend to generate. In other words, since on both sides of the equation there are interests that deserve some protection, the question is not one of moral hazard but rather of allocation of risk between the competing interests.

97. The distinction between the various layers is based on the work of Yochai Benkler. See Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures*

Occasionally, one could locate instances in which law identifies and regulates speech resources, especially ones such as the spectrum of airwaves for television and radio broadcasts. Yet these speech resources seem to represent only a tip of the iceberg when one attempts to locate the whole variety of speech resources that exist, particularly in a communicative environment that is highly based on technological components. Thus, for example, informational products that are outcomes of data-mining processes,⁹⁸ are increasingly becoming essential speech resources for obtaining effective audience attention (or phrased differently: effective access to audiences),⁹⁹ as well as both predicting and shaping tastes and preferences of audiences.

Another example for primary speech resources that thus far have been relatively veiled are technological developments with direct implications on the various layers through which communicative, creative, and speech activities are being constructed and executed. As will be argued below, peer-to-peer file-sharing software and platforms are paradigmatic examples for innovative technological developments that practically reconstruct both the physical layer and the distribution layer of communicative and speech activities. Other instances of technological developments that have generated new emerging speech resources are, for example, email protocols or

of Regulation Toward Sustainable Commons and User Access, 52 FED. COMM. L. J. 561, 562 (2000). Benkler distinguishes between the physical layer, the logical layer, and the content layer. *Id.* The Author prefers the distinction between the content layer, the physical layer, and the layer of distribution to effective audience attention. It seems that the logical layer, which deals with computer code that governs the production and distribution of digital content, is a component that might apply to each of the three central layers of communicative activity: the content layer, the physical later, and the layer of distribution.

98. Simply put, “data-mining” refers to computed processes for the collection, storage, and analysis of information and data regarding the identity, characteristics, consumption habits, as well as many other parameters of individuals and their activities. It includes information obtained through the internet and other digitized platforms for communicative and consumer-based activities, such as video-on-demand or the purchasing of creative content through cellular platforms. See generally Tal Z. Zarsky, *Mine “Your Own Business!”: Making the Case for the Implications of the Data Mining of Personal Information in the Forum of Public Opinion*, 5 YALE J. L. & TECH. 1 (2002–2003).

99. The phrase “effective audience attention” (or “effective access to audiences”) emphasizes the fact that from a substantive perspective, the essential question regarding speech resources and their allocation is this: when taking into account all elements that compose and influence the allocation of speech powers, are there certain categories of entities or individuals who gain priority in reaching the attention of the audience? Such an analysis implements a realistic legal practice of scrutinizing actual effects rather than formal ones. This approach was developed and applied in the context of the First Amendment by Owen Fiss and later analyzed and defined directly through the prism of legal realism jurisprudence by Jack Balkin. See Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1424–25 (1986); Jack M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 407–14 (1990).

hyperlink technologies that enable linking between different web pages, including techniques such as framing and inline linking.¹⁰⁰ Such technologies could and should be characterized as speech resources because of their direct impact on the ability of both speakers and audiences to engage in communicative, creative, and speech activities, all in a manner and to an extent that were not possible through preceding channels and platforms of communication.

A full and in-depth analysis of speech resources' attributes and their regulation by law exceeds the limited scope of this Article. For purposes of this Article, two observations regarding speech resources should be emphasized. First, by their nature, speech resources tend to confront society and regulators with distributive questions and dilemmas regarding their allocation. Stated differently, speech resources raise distributional concerns regarding control over them and the legal regime that should govern the allocation of legal entitlements in speech resources. The meaning of the term "distributional concerns" in this context, however, should not be misconceived as dealing with mere distribution of economic resources; rather, the issue at stake is the allocation of *constitutional-type* resources, such as those that are directly related to freedom of speech and underlying values and therefore demand egalitarianism with regard to the allocation of legal entitlements in speech resources.¹⁰¹

100. See, e.g., *Kelly v. Arriba Soft Corp.*, 280 F.3d 934, 945–46 (9th Cir. 2002) (discussing the use of framing and inline-linking techniques with regard to copyrighted materials while classifying such actions as an infringement of copyright owners' exclusive right of public display), *withdrawn*, 336 F.3d 811 (9th Cir. 2003); Niva Elkin-Koren, *Let the Crawlers Crawl: On Virtual Gatekeepers and the Right to Exclude Indexing*, 26 DAYTON L. REV. 180, 180 (2001) (discussing search engines as one such technological development).

101. For a related, though narrower, discussion, see Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1546–47 (2005) (distribution of expressive opportunities). Surprising as it might be, if one sets aside the unique issue of campaign finance, neither courts nor scholarly literature have dealt extensively with concerns regarding the initial allocation of speech resources and the normative principles that should govern the allocation of legal entitlements in speech resources. Most current discussion focuses either on the rights of speakers or on audience-reception theories, that is, theories regarding the rights of individuals as recipients to have effective access to diversified, robust, and pluralistic expressive activities as a prerequisite for advancing both individual autonomy and democratic values. For a critical survey of such approaches and their historical-legal roots, see Jack M. Balkin, *Commentaries: Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 50–55 (2004). Although such approaches to freedom of speech and their theoretical foundations are expected to have distributive implications, the notion of speech resources and questions regarding their initial allocation are missing within current paradigms of free speech. The Author's basic argument in this context is that a more salient awareness of the notion of speech resources and the distributive concerns that they raise would improve legal practices of allocating and regulating speech resources toward a more egalitarian and just framework, all in a manner that better fulfills the justifications and goals of free speech.

A related point worth emphasizing is the fact that either explicitly or implicitly, society—through law in particular—is constantly making choices and determinations that facilitate control over speech resources as well as over the ability to access and use speech resources. Such choices are implemented and reflected not only through direct regulation of speech resources and control over them (e.g., telecommunication and broadcasting regulation) but also implicitly through private law legal regimes, such as property law. The latter form, however, requires a closer inspection to expose its role in regulating speech resources. Copyright law is a paradigmatic illustration for a private law mechanism that, among other things, allocates control over original creative works—speech resources—that together construct prominent shares of what is practically the content layer.¹⁰²

A second observation refers to the *dynamic* nature of speech resources, that is, the fact that from time to time, innovative, communicative, and technological developments tend to create new types of speech resources which offer additional, alternative, and in many circumstances, more effective frameworks for creative and communicative activities.¹⁰³ Peer-to-peer file-sharing platforms represent a paradigmatic example for a new speech resource that implicates and transforms all three central layers of communicative activity.

As for the physical layer, peer-to-peer file-sharing software and end-to-end diffused networks of communication that the software constructs are essentially a new physical-logical platform for both delivering and receiving informational works. Similar observations could be made with regard to the layer of distribution (the layer that affects and controls the means for effective audience attention as well as access to informational works). File-sharing platforms and the networks they assemble empower new channels for both distributing and obtaining creative materials, informational works, and a variety of other intangible works. The significance of these new networks of

102. The interface of copyright and freedom of speech has been widely researched in the last decade. Several scholars have emphasized the manner in which copyright law functions as a form of regulation of speech activities. Copyright law does this by implicating the differential ability of distinct individuals and groups to access and use copyrighted materials. See, e.g., Benkler, *supra* note 84, at 357 (claiming that copyright laws regulate society's information production and exchange process); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 12–26 (2001) (discussing copyright's constraints on free speech); Rubinfeld, *supra* note 89, at 5–12 (demonstrating the existence of conflicts between copyright law and the First Amendment).

103. This notion was first observed by Harold Innis. See HAROLD A. INNIS, *THE BIAS OF COMMUNICATION* (1951). The chapter in Innis' book, "Technology and Public Opinion in the United States," *id.* at 156–89, which represents most of his ideas in this context was a revision of a paper presented at the University of Michigan on April 19, 1949. *Id.* at 156 n.1.

distribution lies not only in lowering the costs of distribution and obtaining informational works but also in the fact that peer-to-peer platforms provide new means for distributing and obtaining informational works, thus eliminating economic and technological barriers that so far have prevented many individuals from taking an active and effective role in the production, distribution, and acquisition of informational works.

Peer-to-peer file-sharing platforms are, therefore, a new emerging speech resource whose allocation, or more specifically, the entitlement to access, use, and benefit from the prospects of this new emerging speech resource, must be decided by society. One could easily understand the advantages—from a freedom of speech perspective—of an egalitarian, bottom-up regime that encourages decentralized and democratized visions of individuals using peer-to-peer platforms as their gate for communicative and creative activities, including the reception of diversified informational works. The important point for the present discussion is that law affects the ability to utilize and benefit from this new, emerging speech resource, not only through direct regulation of the ability to use it, but also through its shadow and surrounding private law regimes, including third party liability for copyright infringements that take place through peer-to-peer file-sharing platforms.

As previous Parts of this Article have already shown, different third party liability regimes influence both the architecture of peer-to-peer networks and the design of software that governs the facilitation of data and information within such networks. Thus, distinctive designs and architectures differently affect the ability of groups and individuals to utilize the empowering prospects of peer-to-peer file-sharing platforms as a new emerging and extremely effective speech resource.

From this perspective, broad third party liability generates undesirable consequences, mostly because it is a catalyst toward the enclosure of peer-to-peer file-sharing platforms and the platforms' subordination to scrutinized gate-keeping governance. Instead of a network of networks that communicate one with the other, society would face zones of segregated networks, where networks for the distribution of copyrighted materials would be governed and controlled according to the same traditional speech hierarchy and hegemony of corporate media.¹⁰⁴ Moreover, given the network

104. See Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 VAND. L. REV. 1879, 1904–11 (2000) (discussing the existence of a “speech hierarchy” between, on one hand, media conglomerates and, on the other hand, individuals and non-commercialized entities). Netanel convincingly demonstrates how copyright law serves as a mechanism that leverages the hegemony of corporate media in obtaining audience attention and shaping the tastes, preferences, and demand for media products. *Id.*

economy attributes¹⁰⁵ that characterize media markets and communicative spheres, zones of segregated networks would be expected to have direct, negative distributional consequences. Peer-to-peer platforms would no longer be able to utilize and leverage their egalitarian potential of decreasing barriers and costs for democratized and decentralized effective speech activities by individuals (both as speakers and as recipients of informational works). Instead, due to their preferential ability in attracting and shaping audience attention,¹⁰⁶ most traffic and consumer demand would be channeled to corporate media networks, while killing softly the effective viability of networks with alternative content.

To summarize, allocation of entitlements in speech resources raises distributive concerns as an integral part of such processes. Indeed, one cannot ignore the Janus-faced nature of many speech resources as resources that are both constitutional-type goods and proprietary-based resources. As opposed to an egalitarian (proclaimed) virtue of free speech, the latter attributes lean toward processes of distribution that are based on market mechanisms. Such mechanisms give considerable weight to reliance interests of those who have invested resources and efforts in the production of certain speech resources. A full and in-depth discussion of these complexities exceeds the scope of this Article. As already mentioned in Part V, different traditions of free speech and political philosophies would lead to different outcomes for such tensions. Yet, regardless of the weight that different value-based and political approaches would deem to give to the above-mentioned distributional concerns, one

105. Network economy, or networks effects, describe economic circumstances of increasing return to the scale of demand. See generally Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424, 424–25 (1985). Elsewhere, the Author has coined and discussed the term “cultural network effects” as referring to the fact that with regard to media products, in many cases, the value of a media product for each individual is derived, at least partially, by its centrality and significance for other individuals. The desirability of a media product derives, in part, from the fact that other individuals experience it as well. A cultural network effect relies on the fact that in many circumstances, subject to changing conditions and variables, individuals’ attention and preferences for media products are affected and influenced by the products’ popularity and consumption by others. Hence, when speaking of effective audience attention as a precondition for a substantial, and not just formal, execution of speech powers, the issue is not just getting the attention of many separate individuals; the issue is getting the attention of a cluster of individuals who, together and by their interactions, might treat someone’s media product as a desirable and unifying good. Mediated cultural competition is about gaining preference for one’s media product as social glue, which produces a hue of solidarity around it. Guy Pessach, *Copyright Law as a Silencing Restriction on Noninfringing Materials: Unveiling the Scope of Copyright Diversity Externalities*, 76 S. CAL. L. REV. 1067, 1085 (2003).

106. See generally Mark S. Nadel, *How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing*, 19 BERKELEY TECH. L.J. 785 (2004).

general imperative still remains: the adjustment of private law regimes, including copyright law and third party liability in particular, must take into account their overall—direct and implicit—distributive implications on the ability of both individuals and groups to access, use, and rely on new emerging speech resources such as peer-to-peer file-sharing platforms and content that is available through them.

At least for those who support broad and decentralized distribution of speech resources, this is one more argument for limiting and narrowing third party liability for peer-to-peer copyright infringements.

VII. NEXT GENERATION QUESTIONS: ISPs' LIABILITY FOR MANAGING PEER-TO-PEER TRAFFIC

The purpose of this Part is to apply the policy considerations that were set forth previously to some of the next generation questions that peer-to-peer platforms are already beginning to give rise to. More specifically, this Part addresses the question of ISPs' liability for their involvement in managing and facilitating copyrighted data and other informational works as such materials are distributed through peer-to-peer platforms. The focus will be on two technological applications that are already being used by ISPs: routing and active caching. Thus far, the legal aspects of these applications have not been analyzed and discussed. The following paragraphs briefly describe the manner in which these two applications function and then examine the questions they raise with regard to the legal liability of ISPs.

Several empirical studies show that data transmitted through peer-to-peer file-sharing networks consists of approximately 60-70% of the overall broadband bandwidth that is consumed by end-users.¹⁰⁷ This aggressive consumption of network resources by peer-to-peer technologies attracts the attention of ISPs. It requires ISPs to come up with solutions that provide better facilities for both controlling and managing efficiently the traffic of data through such platforms.¹⁰⁸

For ISPs, the provision of efficient solutions to the burden that peer-to-peer traffic imposes on their networks is a compelling need,

107. For examples of such surveys, see CACHELOGIC, P2P IN 2005 STUDY, http://www.cachelogic.com/home/pages/studies/2005_06.php (last visited Nov. 17, 2006); CISCO SYS., MANAGING PEER-TO-PEER TRAFFIC WITH CISCO SERVICE CONTROL TECHNOLOGY (2005), http://www.cisco.com/application/pdf/en/us/guest/products/ps6150/c1244/cdcont_0900aecd8023500d.pdf [hereinafter CISCO SYS.].

108. See CISCO SYS., *supra* note 107, at 2-3 (commenting that ISPs have developed solutions to accommodate the increased use of peer-to-peer file-sharing networks).

not only because of the financial cost of aggressive bandwidth consumption (especially in the context of transnational data transmissions), but also because the commercial requirement to maintain consumers' satisfaction from the surfing (and the downloading) experience that ISPs provide.¹⁰⁹

Accordingly, in the last decade, several technological applications have been developed to provide better tools for diagnosing, analyzing, and managing peer-to-peer traffic. Such applications enable identification of peer-to-peer traffic according to the various protocols that different peer-to-peer file-sharing software use and then management of the traffic of data that is transmitted through the use of these protocols.¹¹⁰ Among several applications that have been developed, two technological solutions—routing and active-caching—give rise to interesting and novel questions regarding the legal liability of ISPs.

Routing applications, such as the ones provided by Sandvine-Intelligent Broadband Networks,¹¹¹ concentrate on minimizing bandwidth consumption by routing (directing) peer-to-peer traffic to the least cost network path. Peer-to-peer routing solutions are a hardware-software integrated system that operates in two stages: in the first stage, the system tracks and retains data on the most popular files and on previous end-users (more specifically, internet protocol addresses) who have downloaded these files.¹¹² Then, at the second stage, when another user searches a file by using file-sharing protocol, the ISP routing solution directs this user to the nearest other end-user who has the relevant file and thereby enables the uploading of the requested file through the shortest and most economized path.¹¹³

Active Caching solutions, such as the ones provided by CacheLogic-Advanced Solutions for P2P Networks,¹¹⁴ are an

109. See *id.* at 3–4 (stating that Cisco's business solutions alleviate the challenges associated with increased bandwidth consumption and maintaining customer satisfaction).

110. For example, Cisco's advanced service control technology provides a combined hardware and software solution for managing peer-to-peer traffic. *Id.*

111. Sandvine Homepage, <http://www.sandvine.com/> (last visited Nov. 17, 2006); see also Sandvine, Peer-to-Peer Element: Optimizing P2P Traffic in Your Network, http://www.sandvine.com/products/p2p_element.asp (last visited Nov. 17, 2006) [hereinafter Peer-to-Peer Element] (describing the product PPE 8200).

112. See Peer-to-Peer Element, *supra* note 111 (describing the process).

113. *Id.*

114. CacheLogic Homepage, <http://www.cachelogic.com> (last visited Nov. 17, 2006). CacheLogic describes one of its products, Cachepliance, as follows:

The Cachepliance product range has been specifically designed to reduce transit, access and last mile traffic volumes by dramatically reducing the amount of repetitive/duplicate P2P traffic traversing Service Provider networks. . . . The principle is simple: Cachepliance(s) are located on a Service Provider's network and monitor P2P file transfers. If a file being transferred is

advanced and sophisticated version of routing applications. In addition to the above-mentioned two functions, an active caching application does one more function: it enables the ISP to cache¹¹⁵ files that are exchanged through peer-to-peer protocols.¹¹⁶ These files are then stored on a server based on their popularity.¹¹⁷ Subsequently, when an end-user searches a specific file, if the file exists on the caching server, the user's request will be routed to the caching server from which the upload stage will take place.¹¹⁸ Basically, both traffic management applications are "color blind" in the sense that they are applied to non-infringing files that are exchanged through the system.¹¹⁹ However, given the popularity of exchanging copyrighted materials through peer-to-peer platforms, logically such files are expected to be most of the files that are cached and routed to by the applications.

There is no concrete evidence regarding the scope and scale of ISPs that are utilizing applications such as the ones described above. This fact might not be surprising given the legal liability questions that such applications might raise. One can still presume, however, that given the aggressive consumption of bandwidth by peer-to-peer applications, ISPs are bound to rely on some peer-to-peer traffic management solutions, including those described above. As set forth in the following paragraphs, there are also several policy considerations that support the classification of such applications as legal under the prism of copyright law.

From a positive law perspective, routing, on one hand, and active caching solutions, on the other hand, raise different questions of legal liability. Mere routing applications do not involve an act of reproduction or copying by the ISP.¹²⁰ Therefore, mere routing solutions do not fall under the category of actions that might give rise

already held in the cache, the connection to the P2P subscriber serving the file is intercepted and the file is served from the cache on the Service Provider's network. If the file being transferred is not held in the cache, the Cachepliance allows the transfer to take place and simultaneously saves a copy of the file to the cache. In this way it quickly builds up a library of the most popular files.

CacheLogic, Products: P2P-Management, <http://www.cachelogic.com/home/pages/products/cachepliance.php> (last visited Nov. 17, 2006) [hereinafter Products: P2P-Management].

115. As outlined in the following paragraph, the term "cache" or "caching" is commonly used, including by legislators, as a term for describing a temporary storage of material on a system or network controlled or operated by or for ISPs. See, e.g., 17 U.S.C. § 512(b) (2005) (mentioning system caching). Yet in the case of active caching solutions, such as the ones described in the main text, it is questionable whether such actions follow the requirement of *temporary* storage.

116. See, e.g., Products: P2P-Management, *supra* note 114 (describing process).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

to direct liability for copyright infringement by ISPs. Nevertheless, at least according to some views, routing applications might still expose internet providers to the risk of third party liability. One such view is expressed in *Universal Music Australia*¹²¹ by the federal court of Australia, discussed in Part II.

Recall that according to the Australian approach, third parties are obliged—by a statutory duty of care—to take “reasonable steps” that would significantly decrease the use of file-sharing software for copyright infringements.¹²² Such steps include non-optional keyword and metadata filtering, which would prevent the display of search results with files whose particulars (title, artist, etc.) matched particulars of copyrighted sound recordings (such that are listed in the catalogues of record companies).¹²³ When one applies this standard of care to routing applications, it seems that at least according to the Australian approach ISPs that use routing applications for managing peer-to-peer traffic are obliged to adjust these applications in ways that would block and filter the trafficking of copyrighted materials. As this Part will argue, this outcome is undesirable, yet it also seems an unavoidable conclusion according to *Universal Music Australia*. Routing solutions such as those previously described are being implemented and used by ISPs precisely because of their abilities to scrutinize files’ traffic through peer-to-peer platforms and then route requests for files to the nearest other end-user who has already obtained the requested file.¹²⁴ Yet the same applications could likewise be used to block or filter files identified by their name or metadata as files that contain copyrighted materials. Once again, there are far-reaching potential implications of the Australian approach regarding third party liability.

Active caching solutions are even more hazardous for ISPs. Basically, caching solutions, as they are implemented by ISPs, involve reproduction and copying of files, including those that contain copyrighted materials, into the cached files.¹²⁵ Hence, absent a statutory exemption, such copying would expose ISPs to the risk of copyright infringement claims. Both the United States’ and the European Community’s copyright legislation includes specific exemptions from liability to copyright infringement with regard to the

121. *Universal Music Austl. Pty Ltd. v. Sharman License Holdings Ltd.* (2005) 220 A.L.R. 1, 88.

122. *Id.* at 5.

123. *See, e.g., Peer-to-Peer Element*, *supra* note 111 (describing the routing product PPE 8200).

124. *See, e.g., Products: P2P-Management*, *supra* note 114 (describing process for the product *Cachepliance*).

125. *See, e.g., SANDVINE, MEETING THE CHALLENGE OF TODAY’S EVASIVE P2P TRAFFIC: SERVICE PROVIDER STRATEGIES FOR MANAGING P2P FILESHARING* 6–7 (2004), http://www.sandvine.com/products/p2p_element.asp (follow “Whitepaper” hyperlink) (describing risks associated with utilizing network caching).

caching of copyrighted materials by ISPs.¹²⁶ Indeed, these exemptions were legislated before the phenomenon of peer-to-peer file-sharing had emerged.¹²⁷ One could also speculate whether these exemptions were intended to cover circumstances other than the caching of content from websites that were voluntarily made accessible to the public by their owners. Nevertheless, this current legislative framework still justifies further analysis, both at the formal level and regarding the policy question of whether exempting ISPs from legal liability in this context is indeed desirable.

Section 512(b) of the United States' DMCA¹²⁸ states that an ISP shall not be liable for infringement of copyright by reason of the *intermediate and temporary* storage of material on a system or network controlled or operated by or for the service provider. To fall under the exemption, the ISP must comply with three main conditions: (1) the copyrighted material must have been made available online by a person other than the service provider; (2) the copyrighted material must have been transmitted by that person through the system or network to another person; and (3) the storage must have been carried out through an automatic technical process for the purpose of making the material available to users of the system or network who, after the material was transmitted, had requested access to the material from the person who had made it available.¹²⁹ Section 512(b)'s exemption is further conditioned upon the obligation of the ISP to remove from the cache server any material that was claimed to be infringing material,¹³⁰ as well as an

126. See Digital Millennium Copyright Act, 17 U.S.C. § 512(b) (2004) (stating United States exemption); Electronic Commerce Directive, *supra* note 22, at art. 13 (stating European Community's exemptions).

127. Compare § 512 (showing that amendment was added in 1998) with *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 125 S. Ct. 2764, 2780 (2005) (discussing peer-to-peer file-sharing for the first time).

128. See § 512(b).

129. In addition, to fall under the caching exemption, Section 512(b) requires that the ISP comply with rules concerning the refreshing, reloading, or other updating of the copyrighted material that were "specified by the person that made the material available online," as long as such rules are in accordance with a "generally accepted industry standard data communications protocol for the system or network through which that person makes the material available," and the material was not used by that person to "prevent or unreasonably impair the intermediate storage to which this subsection applies." § 512(b)(2)(B).

130. More specifically, Section 512(b)(2)(E) states that:

[I]f the person described in paragraph (1)(A) makes that material available online without the authorization of the copyright owner of the material, the service provider responds expeditiously to remove, or disable access to, the material that is claimed to be infringing upon notification of claimed infringement as described in subsection (c)(3), except that this subparagraph applies only if (i) the material has previously been removed from the originating site or access to it has been disabled, or a court has ordered that the material be removed from the originating site or that access to the material on

obligation to condition access to the cached materials upon the terms, conditions, and fees that were imposed by the provider of such materials.¹³¹

Similar provisions are also included in the law of the European Community. Article 13 of the European Directive on Electronic Commerce,¹³² entitled "Caching," determines that an ISP shall not be liable for the automatic, intermediate, and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that: (1) the provider does not modify the information; (2) the provider complies with conditions on access to the information; (3) the provider complies with rules regarding the updating of the information, specified in a manner widely recognized and used by the industry; (4) the provider does not interfere with the lawful use of technology, widely recognized and used by the industry, to obtain data on the use of the information; and (5) the provider acts expeditiously to remove or disable access to the information it has stored upon obtaining actual knowledge that the information at the initial source of the transmission has been removed from the network, that access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.¹³³ A related law is Article 5 of the Copyright in the Information Society Directive,¹³⁴ which exempts from liability for copyright infringement temporary acts of reproduction which are transient or incidental and an integral and essential part of a technological process whose sole purpose is to enable: (1) a transmission in a network between third parties by an intermediary, or (2) a lawful use of a work or other subject matter to be made, with no independent economic significance.¹³⁵

A close reading of the caching exemptions in the United States and the European Community reveals that the "content provision" model, which was before both legislatures, was mainly a model of unilateral top-down provision of content through publicized websites,

the originating site be disabled; and (ii) the party giving the notification includes in the notification a statement confirming that the material has been removed from the originating site or access to it has been disabled or that a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled.

§ 512(b)(2)(E). Section 512(c)(3) outlines the requirements of notification according to which an ISP is obliged to remove material that is proclaimed to be infringing material. § 512(c)(3).

131. § 512(b)(2)(D).

132. Electronic Commerce Directive, *supra* note 22, at art. 13.

133. *Id.*

134. Copyright Directive, *supra* note 83, at art. 5 (outlining the harmonization of certain aspects of copyright and related rights in the information society).

135. *Id.*

rather than the diffused and decentralized end-to-end model of peer-to-peer platforms. Given this background, one can see that all current caching exemptions focus on a prohibition of caching content already identified as infringing and therefore removed from its originating location on the web—a requirement that seems totally ineffective and maybe even irrelevant in the context of file-sharing through diffused peer-to-peer platforms. Nevertheless, the literal text of both exemptions is still such that they might be applicable in the context of peer-to-peer active caching solutions. Questions like whether active peer-to-peer caching should be classified as an act that fulfills the requirement of “intermediate and temporary storage” are interpretive questions that could be approached from different directions, including one that would support broad application of current caching exemptions. Although the Author does not pretend to offer a scrutinized inspection of each and every condition within current caching exemptions and their applicability in the context of peer-to-peer active caching, he does put forward the following argument.

If courts would take into account the policy considerations that were set forth in previous Parts of this Article, they would liberally and broadly interpret and apply current caching exemptions, including in the context of active caching applications for managing peer-to-peer traffic. The same considerations also support a conclusion that mere routing applications should not expose ISPs to the risk of third party liability, even if such applications are commonly used to redirect users that are seeking and attempting to download files with copyrighted materials.

This last argument requires further explanation. Overall, there is wide consensus regarding the efficiency of caching mechanisms and their contribution in facilitating and improving consumption and management of network resources.¹³⁶ Traditional caching mechanisms, however, have relied profoundly on two assumptions. The first assumption is that in most cases, there is at least an implied consent of web sites for identical caching of their webpages, mostly because many web sites that are accessible to the general public benefit from increased audience attention to their content. In this context, caching functions as a mere mirror of the originating website. The second assumption is that if and when infringing materials are identified, the main issue at stake would be removing them from their originating website and, only then, a consequent updating and identical removal from the cached materials.

Neither presumption seems valid in the context of active caching that supports and manages peer-to-peer file-sharing. The first presumption, the implied consent of copyright owners, is inapplicable

136. See, e.g., SANDVINE, *supra* note 125, at 6–7 (describing risks associated with utilizing network caching).

because in most cases, files that are exchanged through peer-to-peer platforms do not originate from publicized web sites that are open to the general public.¹³⁷ Likewise, the second assumption is not applicable because peer-to-peer platforms do not have one central node—the web site—from which the infringing content is taken; rather, within peer-to-peer platforms, the same content could be accessible—and therefore it could be cached from—many different end-users. This fact makes almost obsolete the requirement that infringing materials removed from originating websites, would have to be removed from their cached mirrors. Realistically, active-caching applications cache files that individuals download by using file-sharing protocols and not files that are *statically* located elsewhere.¹³⁸

These observations seemingly cut against a broad exemption for active caching, at least whenever ISPs are provided by copyright owners with lists of files that consist of infringing materials. One might also argue that such an interpretation should be applied to existing statutory caching exemptions in order to adjust them to the new technological and communicative characteristics of an end-to-end networked environment. Such an approach also has parallels with the paradigm that guided the Australian court in *Universal Music Australia*.

But, on the other hand, there are several policy considerations that might support a more liberal and flexible approach to legitimizing active caching of peer-to-peer file-sharing: active caching applications could be conceived as an integral module of peer-to-peer file-sharing platforms, but instead of being part of the software, such applications are components that are added by ISPs who control and manage broadband bandwidth and other network resources of the physical layer. Under this view, there seems to be no justification to subject ISPs and active caching applications to legal liability that is broader than the legal liability that producers and distributors of file-sharing software are subject to. From this standpoint, active caching solutions are basically just a “patch” that improves the efficiency and data transmission capabilities of peer-to-peer file-sharing platforms. Hence, the same legal regime that applies to file-sharing software should apply with regard to this additional patch also, and as this Article has shown, there are several arguments in support of narrowing and limiting the legal liability, including that of third

137. Jesse M. Feder, *Is Betamax Obsolete?: Sony Corp. of America v. Universal City Studios, Inc. in the Age of Napster*, 37 CREIGHTON L. REV. 859, 862–63 (2003–2004) (explaining peer-to-peer file-sharing platforms).

138. *Id.*: see also Niva Elkin-Koren, *Making Technology Visible: Liability of Internet Service Providers for Peer-to-Peer Traffic*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y, 16, 37–41 (2006) (demonstrating the bounded limits of the DMCA, as technological specific legislation, to regulate later technological developments, such as peer-to-peer file-sharing platforms).

parties, for copyright infringements that occur through peer-to-peer file-sharing platforms.

More specifically, imposing legal liability on ISPs with regard to active caching applications is bound to have significant chilling and deterrence effects on actions ISPs take in facilitating and managing peer-to-peer traffic. Assuming that all ISPs would be exposed to the same degree of legal risk, any limitation on their ability to implement active caching solutions would tend to affect all ISPs similarly. The expected outcome would be the imposition of a legal restraint that prevents ISPs from competing over the efficiency of using their network resources for file-sharing activities. Active caching solutions would no longer be applied, and due to legal barriers regarding their implementation, ISPs would no longer have to compete over the efficiency of their data transmission in this context.

Overall, the main disadvantage that such a scenario creates is the transformation of peer-to-peer platforms into an inferior and disadvantaged speech resources. Imposing legal obstacles on the ability of ISPs to use active caching solutions would drive peer-to-peer platforms into being a second-rate speech resource. Peer-to-peer platforms would face difficulties in competing with other, more established speech resources, many of them already controlled by corporate media.

Hence, from a standpoint that emphasizes broad, decentralized, and democratized distribution of speech resources among society's individuals, there is a strong *institutional* argument for legitimizing active caching applications. Such mechanisms appear to be crucial for the long-term development and viability of peer-to-peer platforms as alternate speech resources with all the distributive and social advantages they encompass.¹³⁹

Moreover, one cannot ignore the fact that one unavoidable outcome from prohibiting and limiting active caching applications could be a strong inclination toward the commercialization and enclosure of advanced peer-to-peer platforms—those that would be legally able to apply active caching solutions. In a manner similar to the one described in Part VI *supra*, subordinating active caching to the exclusive rights of copyright owners could be a catalyst toward an architecture of segregated networks in which the dominant networks are those for the distribution of popular copyrighted materials.¹⁴⁰ These networks are expected to be governed and controlled according to the same traditional speech hierarchy and hegemony of corporate media, while other alternative networks would be set aside. Indeed, the approach proposed here has its costs: legalizing active caching applications increases the risk of copyright infringements through

139. See *supra* Part VI.

140. See Elkin-Koren, *supra* note 138, at 68–70.

peer-to-peer platforms. Nevertheless, on the whole this cost might be justified, at least from a perspective that emphasizes the social benefits of peer-to-peer platforms as a new emerging speech resource with strong distributive advantages.

Thus far, courts have not had an opportunity to decide the legality of active caching applications. There is, however, one important decision of the Canadian Supreme Court that might support the approach described above. In *SOCAN*,¹⁴¹ among other issues, the Canadian Supreme Court was asked to decide the legality of music-files' caching by ISPs.¹⁴² Although the decision has no direct reference to or discussion of circumstances of peer-to-peer file-sharing, it is still a decision with several important points.¹⁴³

Prior to the supreme court's decision, the Canadian federal court had held that if an ISP creates a cache of copyrighted materials, even for purely technical reasons, liability for copyright infringement could be imposed on the ISP.¹⁴⁴ The supreme court overruled the decision and explicitly protected the ability of ISPs to deploy innovative technologies, such as caching, that improve the internet's efficiency.¹⁴⁵ More specifically, ISPs were privileged from liability for copyright infringement under Section 2.4(1)(b) of the Canadian Copyright Act, which exempts from liability a "person whose only act in respect of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter."¹⁴⁶

In reaching its decision, the supreme court emphasized the "public interest in encouraging intermediaries who make telecommunications possible to expand and improve their operations without the threat of copyright infringement."¹⁴⁷ The court added that "to impose copyright liability on intermediaries would obviously

141. *Soc'y of Composers, Authors & Music Publishers of Can. v. Can. Ass'n of Internet Providers*, [2004] 2 S.C.R. 427.

142. *Id.* at 431.

143. Moreover, the factual merits of the case are unique because rather than dealing with the question of liability for caching as unauthorized reproduction, the issue was whether ISPs should be regarded as "communicating the copyrighted work to the public" and therefore according to Section 2.4(1)(b) of the Canadian Copyright Act, should be obliged to pay statutory royalties to collecting societies of authors and creators. *Id.* at 468, 472-73.

144. *Id.* at 448.

145. *Id.* at 472-73.

146. *Id.* at 444, 478. The Section 2.4(1)(b) exemption applies only with regard to the right of communicating a copyrighted work to the public. Yet, as already mentioned in *supra* note 143, this was the sole framework of discussion within the court's decision. Although there was no reference to or discussion of the compliance of caching practices with the exclusive right of reproduction, the court did cite caching exemptions from other countries—the United States and the European Community—that refer to the right of reproduction. *See* 2 S.C.R. at 458-59.

147. *See id.* at 430.

chill that expansion and development” and that “the creation of a ‘cache’ copy, after all, is a serendipitous consequence of improvements in Internet technology, is content neutral, and . . . ought not to have any legal bearing on the communication between the content provider and the end user.”¹⁴⁸ “Caching” the court added, “is dictated by the need to deliver faster and more economic service, and should not, when undertaken only for such technical reasons, attract copyright liability.”¹⁴⁹

SOCAN could, therefore, represent an approach that weighs and takes into account some of the central considerations that support a liberal and flexible approach toward caching applications. One could only hope, therefore, that this approach will be adopted in cases that deal directly with active caching applications that are implemented in the context of peer-to-peer file-sharing.¹⁵⁰

VIII. SUMMARY

Throughout this critical-comparative analysis, this Article has shown the distinct paradigms and standards of third party liability that different legal systems—including the U.S., Australian, and Canadian systems—have adopted and implemented thus far in the context of peer-to-peer file-sharing platforms. In addition, the Article has presented several novel insights regarding the policy considerations that should guide courts and legislatures when dealing with third party liability for copyright infringements that occur through peer-to-peer file-sharing platforms. In this context, the Article has added three arguments in support of narrowing and limiting the liability of third parties.

The first argument has focused on the normative imperative for a requirement of compliance between legal liability of third parties and copyright law’s exemptions and limitations regime. According to

148. *Id.* at 472–73.

149. *Id.* at 473.

150. It is worth noting, however, that after *SOCAN* was decided in June 2005, the Canadian government introduced Bill C-60, An Act to Amend the Copyright Act, 1st Sess., 38th Parliament, 53–54 Elizabeth II (2004–2005), available at <http://www2.parl.gc.ca/HousePublications/Publication.aspx?pub=bill&doc=C-60&parl=38&ses=1&language=E&File=24>, which among other issues, includes new statutory provisions regarding caching and related matters. Section 31.1 of the bill determined that providers of network services do not infringe copyright solely by providing the technology that enables the telecommunication or reproduction of a work. *Id.* § 31.1. Section 31.1(2) adds that caching is also covered by this immunity provision. To qualify for the caching provision, however, network providers must meet three conditions: (a) they do not modify the content; (b) they respect any limitations established by the person who posted the content; and (c) they do not interfere with lawful access to usage data related to it. Overall, this proposal parallels current U.S. and European Community caching exemptions that have previously been described. *Id.* § 31.1(2).

the second argument, positive externalities and spillovers that peer-to-peer platforms tend to generate further support a legal regime that places a higher degree of risk on the proprietary interests of copyright owners. Lastly, the Article has introduced the notion of peer-to-peer file-sharing platforms as a new emerging speech resource that society has to decide how to allocate. The Article has shown that once aware of this aspect of peer-to-peer file-sharing platforms, the case for narrowing and limiting the legal liability of third parties becomes even stronger. The contribution and normative significance of the above-mentioned framework was then exemplified in the contexts of active caching and routing applications that ISPs use for efficient management of peer-to-peer traffic. As Part VII observed, there are several convincing arguments in support of limiting the liability of ISPs that use such applications, even if they involve reproduction and copying of copyrighted files that are exchanged through peer-to-peer file-sharing platforms.
