

UC Berkeley

Boalt Working Papers in Public Law

Title

A Quick and Inexpensive System for Resolving Digital Copyright Disputes

Permalink

<https://escholarship.org/uc/item/90b3f8np>

Author

Lemley, Mark

Publication Date

2004-03-24

University of California, Berkeley
School of Law
Public Law and Legal Theory Research Paper Series

A Quick and Inexpensive System for Resolving
Digital Copyright Disputes

Mark A. Lemley
UC Berkeley, Boalt Hall
And
R. Anthony Reese
University of Texas at Austin, School of Law

This paper can be downloaded free of charge from the
Social Science Research Network at:
<http://ssrn.com/abstract=525682>

A Quick and Inexpensive System for Resolving Digital Copyright Disputes¹

Mark A. Lemley² & R. Anthony Reese³

We have argued elsewhere that peer-to-peer (p2p) file sharing poses significant new challenges to the enforcement of copyright law.⁴ Copyright owners' initial response to these challenges – to try to shut down the technologies that facilitate file sharing – is bad for society. We suggested that it would be preferable to lower enforcement costs for copyright owners by making dispute resolution by copyright owners against direct infringers quick and cheap, so that copyright owners would be more inclined to pursue such direct infringers instead of suing innovators.⁵ While enforcement costs are likely always to be too great to allow pursuit of every infringer, lower costs would allow for enforcement against *more* infringers, increasing any given

¹ (c) 2004 Mark A. Lemley & R. Anthony Reese. This article is adapted from a portion of our article "Stopping Digital Copyright Infringement Without Stopping Innovation," which will appear in vol. 56 of the *Stanford Law Review* in June 2004.

² Elizabeth Josslyn Boalt Chair in Law, Boalt Hall, University of California at Berkeley; of counsel, Kecker & Van Nest LLP.

³ Thomas W. Gregory Professor of Law, University of Texas School of Law; special counsel, Morrison & Foerster LLP.

Thanks to Jean Camp, Lorrie Cranor, Susan Crawford, Stacey Dogan, Terry Fisher, Paul Goldstein, Rose Hagan, Raymond Ku, Doug Laycock, Christopher Leslie, Doug Lichtman, Lydia Loren, Glynn Lunney, David McGowan, Neil Netanel, David Nimmer, Michael Page, Gigi Sohn, Peter Swire, Ragesh Tangri, Rebecca Tushnet, Fred Yen and attendees at a lecture at Santa Clara University School of Law, a conference at Cardozo Law School, and a workshop at the University of North Carolina for comments on the ideas in this paper or our companion one.

Kecker & Van Nest represents a number of innovators currently involved in litigation adverse to the content industries, including some of the parties in cases discussed in this article. Morrison & Foerster represents a number of companies currently involved in litigation alleging indirect liability by innovators, including some of the parties in cases discussed in this article. Thus, we wish to make it even more clear than usual that our opinions are our own, do not represent those of our firms or our clients, and are not based on confidential information obtained in any litigation.

⁴ Mark A. Lemley & R. Anthony Reese, *Stopping Digital Copyright Infringement Without Stopping Innovation*, 56 *Stan. L. Rev.* __ (forthcoming June 2004).

⁵ *Id.* at __.

infringer's chance of being sued.⁶ In this article, we explain how such a dispute resolution system might work, and propose a draft amendment to the copyright act to implement the system. We have annotated our draft statute to highlight some of the issues our proposal raises.

Is it possible to make such dispute resolution quick and cheap? Traditional arbitration is neither. There is, however, an online model in the Uniform Dispute Resolution Policy (UDRP) for Internet domain name trademark disputes,⁷ which has resolved over 10,000 domain name trademark disputes in 3 years, at a cost of \$1200-\$1500 each and an average resolution time of little more than a month.⁸ The UDRP is an alternative dispute resolution system that allows trademark owners to bring complaints that a domain name registrant has in bad faith registered and used a domain name identical or confusingly similar to the owner's trademark. These complaints are considered by expert panelists through accredited private providers of dispute resolution services. The system is designed to resolve only straightforward cases of bad-faith cybersquatting, and to reserve for the court system difficult factual and legal disputes between parties with competing and arguably legitimate claims to the same domain name.⁹ For those straightforward cases of cybersquatting, there are unlikely to be significant factual or legal disputes that need resolving. A panelist given the basic facts can make a decision fairly quickly.

⁶ Lunney, *supra* note **Error! Bookmark not defined.**, at 852 ("Even if suing every private copier remained impractical, an increase in the number of enforcement actions would increase the risk of a lawsuit for each private copier.").

⁷ On the UDRP as a model for institutional design, see Lawrence Helfer & Graeme Dinwoodie, *Designing Non-National Systems: The Case of the Uniform Dispute Resolution Policy*, 43 *Wm. & Mary L. Rev.* 141 (2001); Andrew F. Christie, *The ICANN Domain Name Dispute Resolution System as a Model for Resolving Other Intellectual Property Disputes on the Internet* (working paper 2002).

⁸ For a list of decisions, see <http://www.icann.org/cgi-bin/udrp/udrp.cgi>.

⁹ It has been abused in some instances, however, by trademark owners using it in dubious cases, and panels have sometimes granted relief to complaining trademark owners on claims that arguably fall outside the limited scope of the UDRP. [CITES.]

Like the UDRP, a copyright dispute resolution system, if properly conceived, could target straightforward conduct that is unlikely to have legitimate justifications, such as high-volume uploading of copyrighted works to p2p networks. Assertion of a plausible factual or legal dispute – evidence suggesting that the works in question weren't copyrighted, or weren't copied, or that the use is fair – should result in denial of the copyright owner's claim without prejudice to her ability to bring a lawsuit where such legal and factual issues can be fully explored.

Our analogy to the UDRP will raise some people's hackles. The UDRP has some serious structural problems. It lacks important due process protections such as an administrative appeal, a fair system for assigning panelists, and a penalty for overreaching by complainants.¹⁰ But these problems can be solved in the copyright context by learning from the problems with the UDRP. A digital copyright dispute resolution process could select judges in a fair and balanced way. It could permit an administrative appeal. And it could impose some sanction on frivolous or bad-faith claims made by copyright owners.¹¹

There are two fundamental differences between the factual setting of the UDRP and the digital copyright cases a dispute resolution panel would likely be called upon to resolve. First, the domain name at stake in the UDRP is ultimately under the control of ICANN. As a result, a

¹⁰ For detailed discussion of these problems, see A. Michael Froomkin, *ICANN's "Uniform Dispute Resolution Process": Causes and (Partial) Cures*, 67 *Brook. L. Rev.* 605 (2002); Michael Geist, *Fair.com? An Examination of the Allegations of Systematic Unfairness in the ICANN UDRP*, 27 *Brook. J. Int'l L.* 903 (2002); Kenneth L. Port, *Trademark Monopolies in the Blue Nowhere*, 29 *Wm. Mitchell L. Rev.* 1091 (2002); Elizabeth G. Thornburg, *Fast, Cheap, and Out of Control: Lessons from the ICANN Dispute Resolution Process*, 6 *J. Sm. & Emerging Bus. L.* 191 (2002).

¹¹ For suggestions of similar changes to the UDRP itself, see Froomkin, *Causes and Cures*, *supra* note __, at __; Port, *supra* note __, at 1117-22; Orion Armon, *Is This as Good as It Gets? An Appraisal of ICANN's Uniform Dispute Resolution Policy (UDRP) Three Years After Implementation*, 22 *Rev. Litig.* 99, 138 (2002) (proposing that complainants should be required to post a small bond to be forfeited to the defendant if they are found to have acted in bad faith in filing the complaint).

UDRP panelist does not have to collect money or property from a losing domain name registrant; she merely needs to instruct ICANN to transfer ownership of the domain name to the trademark owner. There is no similar control over digital copyright infringers. A copyright system therefore needs a substitute sanction and enforcement mechanism, such as an award of money damages or a reliable way to remove infringing material or the infringer herself from the network.

Second, the UDRP is imposed by ICANN on all registrars, who impose it by contract on all registrants. It requires contracts with and reliable identification of users. There is no central authority that contracts with Internet users generally. Binding Internet users to a p2p copyright dispute resolution system by contract would require them to contract with their ISPs or with providers of specific services, and there is no entity akin to ICANN that has contracts with all the ISPs and could impose this contracting requirement on them. As a result, the dispute resolution system we propose would be imposed by statute as part of copyright law.

We suggest that Congress amend the copyright statute to provide that in a certain category of cases of copyright infringement over p2p networks, a copyright owner would have the option to choose to enforce her copyrights *either* by pursuing a civil copyright infringement claim in federal court *or* by pursuing a claim in an administrative dispute resolution proceeding before an administrative law judge in the Copyright Office.

Consistent with the original intent of the UDRP, the administrative proceeding would be available only for relatively straightforward claims of copyright infringement. To start, the process should be available only against those alleged to have uploaded copyrighted works to a p2p network and thus made them available for downloading by others.¹² Making a copyrighted

¹² While we anticipate that administrative infringement claims will primarily involve the uploading of musical recordings, the procedure would also be available in cases involving other types of copyrighted works, and we

work available for any other person to copy is much more likely to constitute copyright infringement than is any individual instance of downloading, where the downloader's act of reproduction might well be excused as fair use or by some other defense. The potential for justifiable instances of downloading means that keeping the dispute resolution procedure streamlined would require a focus on much less defensible acts of uploading.¹³

Even with respect to uploading, the potential that an uploader's conduct might be noninfringing is likely to be inversely proportional to the number of works uploaded and made available. Someone who has uploaded only 1 or even 10 copyrighted works may well be engaged in copyright infringement, but she is less clearly infringing than someone who has uploaded 1000 or even 100 works. In order to restrict the dispute resolution process to conduct that is fairly clearly infringing, the process should be available only in cases where evidence shows that the person targeted has uploaded at least one copy of at least 50 copyrighted works to a p2p network during any 30-day period.¹⁴

A copyright owner whose claim comes within the scope of the administrative procedure would have to put forth a prima facie case of copyright infringement. The copyright owner would need to show that it has sought to register copyrights in the works in question.¹⁵ In

suspect that owners of copyright in motion pictures and software might be particularly likely to use the system. *See* Heingartner, *supra* note ____ (reporting that 88 percent of files on p2p networks are music and video, with the remaining 12 percent including "software and 'everything else'").

¹³ The proposed European Union Intellectual Property Rights Enforcement Directive as approved by the European Parliament in March 2004 similarly distinguishes between uploading and downloading music "in good faith" for one's own use. [CITE TO COME; Parliament's version not yet posted.]

¹⁴ Admittedly, any threshold can be gamed, and it may be that everyone will upload only 49 songs in order to avoid liability under our administrative regime. But even stopping high-volume uploading would be a partial victory for copyright owners, and if it was not enough they could always bring lawsuits.

¹⁵ This constitutes compliance with the registration requirement for suit, which technically requires only an attempt to register and a negative response from the Copyright Office. 17 U.S.C. § 411(a). For works whose registrations are available in the online database of the U.S. Copyright Office, the copyright owner might only be required to provide the title of the work, the name of the author, the name of the copyright claimant, and the date and number of registration, rather than a copy of the actual certificate.

addition, the copyright owner would need to provide a sworn statement that it owns the copyright (or the relevant exclusive right) in the works identified. Next, the complainant would have to provide evidence that the works complained of were available for downloading from a particular IP address at a particular date and time. Such evidence could consist of, for example, screen shots showing the availability of files and a sworn statement that the copyright owner determined that the titles listed were actually available and were actually copies of the copyrighted works.

Finally, the copyright owner would need to provide evidence showing that the particular IP address in question was, at the time in question, assigned to the person against whom the dispute is brought. This would normally be shown through evidence obtained from the ISP that controls the address. In the civil suits brought so far, the information identifying the alleged uploader has been generally obtained by using a subpoena process provided for under the OSP safe harbor provisions added to the Copyright Act by the DMCA.¹⁶ Section 512(h) allows any copyright owner to request a U.S. district court clerk to issue a subpoena to any online service provider to identify an alleged infringer. The use of that provision has been quite controversial. As a matter of statutory interpretation, the text is ambiguous as to whether its provisions apply to every online service provider or only to providers engaged in certain kinds of activities. The D.C. Circuit recently held that section 512(h) does not apply at all to Internet service providers that merely provide conduit services under section 512(a), a category that includes the ISPs that are likely to know the identity of file sharers.¹⁷ Constitutional concerns have also been raised over the fact that copyright owners can obtain subpoenas from the court clerk when no actual

¹⁶ 17 U.S.C. § 512(h).

¹⁷ *RIAA v. Verizon Internet Services*, 351 F.3d 1229 (D.C. Cir. 2003).

litigation under the supervision of a judge is in fact pending in that court (or, indeed, in any court).¹⁸ These concerns are heightened by the fact that the real target of the subpoena—the alleged infringer who is to be identified by the OSP—may not even be aware of the subpoena in order to attempt to challenge the copyright owner’s right to the information before her identity is disclosed.

Whatever ultimately happens in the current challenges to the DMCA’s subpoena provisions,¹⁹ the dispute-resolution process we propose depends on copyright owners being able to identify the individuals engaged in high-volume uploading. We would prefer for this to occur under somewhat greater supervision than currently provided for in Section 512. Our process would allow copyright owners to file a claim against a particular unidentified alleged uploader. Once the copyright owner provided evidence of the registration of its copyright claims, and of the availability of its works at a particular IP address at a specific time, the tribunal could authorize the issuance of a subpoena in aid of the existing proceeding ordering the ISP to identify the customer who was using that address at that time.²⁰ This would provide at least some supervision to ensure, before an ISP is ordered to disclose the identify of its customers, that the

¹⁸ See, e.g., *Pacific Bell Internet Servs. v. RIAA*, __ F.Supp.2d __ (N.D. Cal. 2003) (procedural ruling on a suit challenging the constitutionality of the 512(h) subpoena provision).

¹⁹ The ruling by the D.C. Circuit has not prevented the RIAA from continuing to pursue lawsuits against high-volume uploaders. In January and February 2004, several consolidated “John Doe” lawsuits were filed alleging copyright infringement occurring at particular IP addresses. After filing the suits, the plaintiffs have sought subpoenas against the ISPs controlling those IP addresses, in order to identify the particular person using those addresses. See John Borland, *RIAA steps up file-trading suits*, CNET NEWS.COM, Feb. 17, 2004, available at <http://news.com.com/2100-1027-5160262.html>; John Schwartz, *Music Industry Returns to Court, Altering Tactics on File Sharing*, N.Y. TIMES, Jan. 22, 2004, p. C1, C8. At least one court has ruled that a consolidated suit naming a couple hundred “John Does” is improper and that copyright owners must file a separate suit against each individual “John Doe” alleged to infringe, thus raising the cost of court enforcement efforts even more, given the \$150 filing fees required for each case in at least one district court. Katie Dean, *One File Swapper, One Lawsuit*, WIRED.COM, Mar. 8, 2004, available at <http://www.wired.com/news/digiwood/0,1412,62576,00.html>.

²⁰ This would essentially replicate in the administrative process the procedures being used by the RIAA in identifying infringers after the D.C. Circuit limited the availability of subpoenas under section 512(h).

party seeking the identification is a copyright owner with a prima facie claim of copyright infringement by the customer. In addition, it may be advisable to require the ISP to notify the customer whose identity is sought and give that person a short period to appear if she wishes to challenge the subpoena.

Once the copyright owner has established this prima facie claim of infringement and identified the uploader, the uploader would have the opportunity to rebut or defend against the claim. In order to keep the process streamlined and focused on straightforward cases of infringement, the tribunal should reject, without prejudice, any claim by a copyright owner that presents plausible legal or factual issues as to the uploader's liability. For example, a plausible claim of mistaken identification of the assignment of an IP address might be shown where the copyright owner alleges that a person uploaded works at a particular IP address using Windows-based software, but where the person accused of uploading can show that she only uses an Apple computer incapable of running the software she is alleged to have used.²¹ Resolution of such disputes is better handled in an ordinary court proceeding, and the tribunal should have the power simply to dismiss such claims without prejudice to a civil suit on the same grounds.

In addition to this general authority for the decision-maker to reject claims that do not involve fairly clear cases of infringement, it may be useful for the statute to specify certain cases that the decision-maker *must* reject. A prime example would be a claim involving the uploading only of works that are out of print and unavailable from the copyright owner. Those circumstances may present the strongest argument in favor of finding that uploading works to a

²¹ See *supra*, note **Error! Bookmark not defined.** But see John Borland, *Macintosh users join Kazaa network*, CNET NEWS.COM, Nov. 19, 2003, available at <http://news.com.com/2100-1027-5109645.html> (noting release of new software enabling Macintosh users to download from, and in some cases upload to, p2p networks originally available primarily to users of Windows computers).

p2p network constitutes fair use.²² While this fair use argument is not clearly correct, there is a strong policy reason to permit sharing of otherwise unavailable works, and the fair use argument is at least sufficiently plausible that it should be considered and resolved in the first instance by a court, rather than by the administrative dispute-resolution process. Similarly, if the person accused of uploading can show that the works were made available simultaneously with substantial comment or criticism, the potential for the accused to make out a viable fair use claim would counsel for court resolution of the case.²³

For the process to work, however, the administrative law judge must be able actually to resolve clear cases of infringement by uploaders. If every uploader against whom a claim was filed could simply assert a defense and have the claim dismissed, the system would never succeed.²⁴ Thus, an uploader must provide evidence to support a claim of, for example, mistaken identity or uploading only out-of-print works. The uploader should also be required to swear to her factual claims under penalty of perjury. In addition, there may be certain legal defenses that should not be resolved by the dispute resolution procedure but that also should not result in the claim simply being dismissed. For example, an uploader might claim that the

²² Cf. Michael J. Madison, *A Pattern-Oriented Approach to Fair Use* [draft at 4] (working paper 2003) (suggesting that courts have erroneously concluded that p2p file sharing can never be fair use).

²³ Another type of claim that should be rejected from the administrative procedure would be one involving the uploading of unpublished and confidential documents. In late 2003, copies of internal memoranda by employees of Diebold, a company that produces electronic voting equipment, began circulating on the Internet. Those who had found and circulated the memos did so because they believed the memos showed problems with the company's voting systems that raised questions about whether those systems should be adopted. Diebold responded by claiming infringement of its copyright in the memos and threatening action against, among others, ISPs who provided connection and storage services to those posting the memos. See John Schwartz, *File Sharing Pits Copyright Against Free Speech*, N.Y. TIMES, Nov. 3, 2003, p. C1. While it is not clear that the dispute involved any postings to p2p networks, it is quite easy to imagine the documents finding their way onto such a network, raising the possibility of a claim under our proposed dispute resolution system. The streamlined process we propose is not the place to resolve the difficult questions involved in these types of cases involving unpublished confidential copyrighted material, which may often involve privacy and free-speech issues.

²⁴ One defendant in such a suit has counterclaimed under RICO, claiming that a pattern of suing people and then agreeing to settle with them was an act of racketeering. See *Recording Industry Countersued*, N.Y. TIMES, Feb. 19, 2004, at C9. Such far-fetched claims should not gum up the works of the administrative tribunal.

copyright owner is engaged in copyright misuse and is therefore not entitled to enforce the copyrights until the misuse has been purged. Or the uploader might claim that the copyrights are unenforceable because of alleged fraud in registering the works as works made for hire; with respect to sound recordings, the question of whether those recordings can qualify as works made for hire has been controversial.²⁵ Because these are complicated issues that should be resolved in court rather than in the dispute-resolution process, and because allowing the mere assertion of such a defense to take a claim outside the dispute resolution process would threaten to make impossible to hear any claims, an alternative is required. We propose that if such defenses are raised in the dispute resolution process, the tribunal should decline to decide the defenses, proceed to consider all other aspects of the case, and if it awards a decision against the uploader, stay its decision for 30 days to allow the uploader time to bring a declaratory judgment suit in court asserting the defenses. An uploader who seriously wishes to pursue these defenses would be able to do so in the proper forum for considering them, but mere assertion of the defense in the administrative forum would not eliminate consideration of the administrative dispute.

In order to make the results of the administrative proceedings as consistent and fair as possible, initial decisions should be subject to an administrative appeal to a panel of administrative judges. This would allow for an additional layer of review, but in a somewhat streamlined format. Any party that was dissatisfied with the outcome of a complaint on appeal would then have the option of bringing the dispute to a district court for review. In order to

²⁵ Many sound recording copyright owners have represented the works they registered as works made for hire. Congress changed the statute to make specially commissioned sound recordings expressly eligible to be works for hire in 1999, but reversed the change in 2000, leaving open the question of whether commissioned sound recordings qualify as works made for hire under some other category of work. 17 U.S.C. § 101; Pub. L. No. 106-113, § 1000(a)(9), 113 Stat. 1501 (1999); Pub. L. No. 106-379, § 2(a)(1), 114 Stat. 1444 (2000). For a detailed discussion of the issues, see David Nimmer & Peter S. Menell, *Sound Recordings, Works for Hire, and the Termination-of-Transfers Time Bomb*, 49 J. COPYRIGHT SOC'Y 387 (2001); David Nimmer, Peter S. Menell, & Diane McGimsey, *Preexisting Confusion in Copyright's Work-for-Hire Doctrine*, 50 J. COPYRIGHT SOC'Y 399 (2003).

discourage groundless appeals, a party that brings an unsuccessful appeal could be required to pay the costs of the appeal.

The administrative dispute resolution procedure we propose would provide a quicker, lower-cost alternative for copyright owners to enforce their rights against individual infringers on p2p networks. To be effective, the process must be streamlined. Both parties should have an opportunity to present evidence and argument online, but there should not be face-to-face argument or discovery of the sort that exists in civil litigation, and judges should be obliged to issue a short decision within two months after the case is submitted. While this may sound like an unrealistic goal to those whose experience is with the expensive, drawn out system of civil litigation in the United States, the success of the UDRP in resolving over ten thousand domain name disputes in the last four years suggests that the goal of quick and cheap resolution is workable. Provided the copyright arbitration system avoids the obvious mistakes of the UDRP – systematic bias of judges, lack of an administrative appeal, and a tendency to resolve difficult questions best left for the courts²⁶ -- it should prove an attractive alternative to litigation for copyright owners without being unfair to accused infringers.

Making the procedure attractive to copyright owners as an alternative to criminal or civil infringement suits and to suits against facilitators will also require that the procedure provide an adequate remedy. We suggest that the process provide two types of remedies: monetary relief and the official designation of a losing uploader as an infringer.

Monetary penalties should be sufficiently large that the possibility of having uploading challenged in the administrative procedure serves to deter others from engaging in large-scale

²⁶ On these shortcomings, see, e.g., A. Michael Froomkin, *ICANN's "Uniform Dispute Resolution Process": Causes and (Partial) Cures*, 67 *Brook. L. Rev.* 605 (2002); Michael Geist, *Fair.com? An Examination of the Allegations of Systematic Unfairness in the ICANN UDRP*, 27 *Brook. J. Int'l L.* 903 (2002).

uploading. As noted above, the existing maximum penalties available in civil actions under the statutory damage regime seem likely to provide far in excess of the penalties needed to have a deterrent effect. It seems likely that in cases involving the uploading of 50 or more works, a penalty in the magnitude of \$250 per work infringed would have a strong deterrent effect.²⁷ Someone who uploaded 1,000 songs—the threshold used by the RIAA in its initial lawsuits—would face \$250,000 in liability. While statutory damages could provide an award that is 120 times greater, even the \$250,000 award from the administrative tribunal would likely be beyond the ability of most uploaders to pay, suggesting that the higher award is not needed. Even someone who just met the administrative threshold of uploading 50 works would face \$12,500 in liability. The potentially lesser deterrent effect of the lower penalty would be offset by the increased likelihood that any particular uploader would face enforcement action, since the administrative procedure would make enforcement quicker, cheaper, and easier and would allow copyright owners to bring claims against greater numbers of uploaders. The fact that when the RIAA did in fact begin to sue uploaders in court, it settled with many of them for only a few thousand dollars despite the higher cost of litigation suggests that the RIAA was satisfied with the deterrent effect of even these low penalties.²⁸ That belief seems justified; even a few hundred lawsuits have significantly reduced the incidence of copyright infringement over p2p networks.²⁹ Making enforcement more likely but the penalties less draconian may also blunt

²⁷ In the administrative procedure, each particular song (in the case of music infringement) seems to be the appropriate unit on which to assess the penalty. The Copyright Act's statutory damage provisions have generated some uncertainty as to whether the song or the CD is the appropriate "work" to use as the basis for calculating damages per work infringed. See 17 U.S.C. § 504(c).

²⁸ See Cynthia L. Webb, *Settling in With the RIAA*, WASHINGTONPOST.COM, Sep. 30, 2003, available at <http://www.washingtonpost.com/ac2/wp-dyn/A21601-2003Sep30?language=printer> (reporting settlements in 52 of 261 initial RIAA lawsuits against p2p users, with payments ranging from \$2,500 to \$10,000).

²⁹ cite 50% drop studies

criticism that the RIAA is unfairly singling out particular individuals for doing what countless others have gotten away with.

While an uploader must have uploaded at least 50 works in order to be subject to the dispute resolution procedure, any actual monetary award imposed on the uploader would of course include only those works owned by the complaining copyright owner or owners. Still, copyright owners have an incentive to cooperate in bringing a single complaint, sharing the costs of each administrative adjudication, and receiving an award for their particular works.³⁰ This should decrease the likelihood that an uploader would have to face repeated claims from multiple copyright owners based on the same course of conduct. Indeed, the recording industry's first wave of lawsuits against uploaders appears to have operated this way, with all of the affected major record labels joining in a single action against particular downloaders. {{{To the extent that the possibility of multiple claims against a single uploader based on the same course of conduct remains a concern, the procedure could be available only if the uploader has made available on a p2p network 50 copyrighted works of the complaining copyright owners. This would provide an incentive for copyright owners to cooperate in bringing a single suit, since in many cases it may well be that an uploader will have made available too few works owned by any one copyright owner to allow an individual copyright owner to pursue a claim, but still have uploaded enough works so that a claim can be brought if the copyright owners do so jointly.}}}

³⁰ A related issue arises when more than one person owns overlapping rights in the same copyright. For a description of how this often occurs, see Mark A. Lemley, *Dealing With Overlapping Copyrights on the Internet*, 22 U. Dayton L. Rev. 547 (1997); Loren, *Untangling*, *supra* note __. This situation is particularly common with respect to music recordings, which typically involve separate copyrights in a musical composition and a sound recording, generally owned by different parties. See R. Anthony Reese, *Copyright and Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions*, 55 U. MIAMI L. REV. 237, 240-41 (2001). We would address this problem by permitting any copyright owner whose rights are infringed to file a complaint, but permitting only one such complaint per defendant per work. In other words, just as joint owners of copyright each have the right to exploit the work subject to an accounting to their co-owners for profits, any of the owners can bring an administrative claim, but once a claim has been brought regarding an act of infringement, other owners can't file a new complaint against the same uploader for the same acts, and they would have to seek a share of their

Copyright owners would, of course, have to enforce administrative awards against uploaders. In some cases, no doubt, the losing uploader would voluntarily comply with the award to the extent she is able to do so. In other cases, the copyright owner might need to go to court in order to execute on the administrative award. While this might entail some expense, levying on a judgment is often simpler and cheaper than litigating a case to judgment in the first place. And the copyright owner's burden of executing a judgment against an infringer should not be significantly different in the case of an administrative award than in that of a court judgment of infringement.

An uploader against whom a copyright owner brings a successful claim would also be officially designated by the ALJ as a copyright infringer. This designation is important because it has consequences for the safe harbors for OSPs provided for under the DMCA. The DMCA grants safe harbors to OSPs only if they have in place and reasonably implement a policy for terminating the accounts of "repeat infringers" in appropriate circumstances³¹ No one seems to know what makes one a "repeat infringer," however.³² Copyright owners have read the term broadly, to include anyone who is the subject of two allegations of infringement made by a copyright owner to an ISP under the DMCA, and possibly even anyone who has posted two or more allegedly infringing works at one time.³³ It seems wrong, though, to say that one is an

compensation from the recovering copyright owner.

³¹ 17 U.S.C. § 512(i)(1)(A).

³² On the ambiguities in the meaning of the DMCA, see David Nimmer, *Appreciating Legislative History: The Sweet and Sour Spots of the DMCA's Commentary*, 23 *Cardozo L. Rev.* 909 (2002).

³³ On these interpretations, see Ian C. Ballon & Keith M. Kupferschmid, *Third Party Liability Under the Digital Millennium Copyright Act: New Liability Limitations and More Litigation for ISPs* at 6-7 (working paper). The district court in *Napster* held that there was a genuine issue of fact as to whether Napster had in fact adopted an effective policy for terminating repeat infringers, but did not itself decide what the term meant. *A&M Records v. Napster*, 2000 U.S. Dist. 6243, at *28 (N.D. Cal. 2000). For criticism of this broad interpretation of the term "repeat

infringer merely by virtue of receiving a cease and desist letter, which content owners have been sending with reckless abandon and which need not even meet the standards of Rule 11.³⁴ The other extreme – that one is not an infringer until adjudicated so by a court, and so repeat infringers must be sued and lose twice – seems equally unworkable. The administrative procedure provides a middle ground, by allowing a relatively quick determination by a neutral third party that an individual is in fact an infringer. Keying the termination obligation to an ALJ's finding would protect the due process rights of those wrongfully accused of infringement without rendering the repeat infringer provision altogether ineffective.

If an uploader was twice the subject of a successful complaint in the administrative process, then the uploader would qualify as a “repeat infringer.” As a result, an ISP that wanted to remain eligible for the benefits of the safe harbors would need to stop providing service to that uploader. The most obvious application of this provision in the p2p context would be to centralized p2p service providers, such as the original Napster, who can exclude individual users from participation in their networks.³⁵ This ability to exclude could provide an effective sanction against a user found to be a repeat infringer. Of course, most p2p networks today are

infringer,” see NIMMER ON COPYRIGHT § 12B.02[B][2] & n.54; David Nimmer, *Puzzles of the Digital Millennium Copyright Act*, 46 J. COPYRIGHT SOC'Y 401, 452 n.244 (1999).

³⁴ For example, copyright owners have sent cease and desist letters to students posting book reports about copyrighted books and to people who have the misfortune to share the last name of a musician. [cites from PBP brief]. Surely a recidivist writer of Harry Potter book reports is not a “repeat infringer” merely because Scholastic sends two mistaken cease and desist letters. See also Jennifer Bretan, *Harboring Doubts About the Efficacy of §512 Immunity Under the DMCA*, 18 *Berkeley Tech. L.J.* 43, 62-63 (2003) (discussing the obligation to terminate repeat infringers and the Catch-22 imposed if doing so is used as evidence of the right and ability to control a network).

³⁵ In the case of Napster, for example, because the system operated by maintaining a centralized directory of files available on users' computers, users had to connect to Napster's centralized directory in order to locate other users and their files. As a result, Napster was in a position to screen users when they attempted to connect and to select which users could or could not access the directory.

more decentralized than Napster was (though it is unclear to what extent that is because decentralization is a technologically superior alternative and to what extent it is because of court decisions on the indirect copyright liability of centralized systems.)³⁶ But being designated a repeat infringer would have serious consequences for participants in decentralized p2p networks as well. Because the requirement to terminate repeat infringers applies to all of the safe harbors, even an ISP that does nothing more than provide Internet connectivity would not be able to keep the repeat-infringing uploader as a customer. While the uploader might simply switch to another service provider, that provider would be similarly obligated to terminate the uploader's service. As a consequence, the uploader might not be able to obtain Internet access (or other Internet services covered by the safe harbors). Even if the uploader is successful in switching accounts, doing so involves losing an existing email address and therefore imposes a substantial cost on the uploader.

Given the increasing importance of online activity in our society, the possibility of losing Internet access should provide an additional deterrent to potential high-volume uploaders. At the same time, we should be concerned about the possibility that some substantial number of people might be denied online access entirely.³⁷ It is possible that ISPs will arise that are willing to forego the benefits of the safe harbors and face potential copyright infringement liability in order to provide service to repeat infringers; presumably those ISPs will charge higher costs to compensate them for the risk that their repeat-infringing subscribers will again engage in

³⁶ See, e.g., Tim Wu, *When Code Isn't Law*, 89 Va. L. Rev. 679 [draft at 106, 140] (2003) (arguing that distributed p2p networks evolved as a reaction to the success of legal challenges to centralized p2p networks). The popularity of Napster during its heyday suggests that centralized p2p networks may well be viable technological and business models in the absence of the prospect of liability for all infringing use by network users.

³⁷ This concern might be alleviated somewhat by the fact that the termination obligation only applies to *repeat* infringers, so that denial of online access would occur where an individual was determined by the administrative process to have engaged in large-scale infringement, and then subsequently engaged in such conduct a second time.

infringement and the ISP will be held liable for that infringement. It also seems possible, however, that those designated as repeat infringers by the administrative process would simply be unable to obtain any Internet service at all; it is by no means clear that some ISPs would choose to take the risk of foregoing the safe harbor. We are not certain that even someone who has twice engaged in egregious uploading should be permanently barred from the Internet. It may well be that the designation as a repeat infringer, or the requirement for ISPs to terminate repeat infringers' accounts, should carry some time limitation, so that after, for example, five years, a repeat infringer could again become a customer of Internet services without the provider of those services losing the benefit of the safe harbor.

A final consideration is the cost of the administrative dispute-resolution proceedings. While these costs should be significantly lower than those of litigation because of the streamlined, and perhaps largely online nature of the proceedings, there will still be costs to be paid. In order to encourage copyright owners to pursue this process rather than court actions, and to enhance the deterrent value of successful claims against high-volume uploaders, the costs of a successful infringement claim could be assessed against the infringing uploader. In many cases, perhaps, the uploader will be unable to pay the full amount of the award against her even before costs are added, so there may be many cases in which copyright owners will not be able to recover costs from the infringer. Nonetheless, the possibility of recovering the costs of the claim (as well as the fact that in such a situation, those costs, where not practically recoverable, are likely to be lower than the equally unrecoverable costs of a civil suit) should help encourage copyright owners to pursue claims in the administrative tribunal. By the same token, unsuccessful copyright owners should be obligated to pay the accused infringer's costs. Awards of costs are routine in civil litigation; the fact that the UDRP imposed no penalty whatsoever on

unsuccessful and even bad-faith allegations of infringement is one of its shortcomings.³⁸

We believe that the dispute resolution procedure we have proposed would make it possible for copyright owners to obtain effective relief against individuals engaged in relatively egregious acts of copyright infringement without the costs and delay of litigation, while at the same time reducing the potentially enormous penalties facing the few high-volume uploaders targeted by lawsuits seeking to generate deterrence. Some people may still have concerns about the harshness of the penalties -- both in dollar amounts and in “exile” from the Internet -- possible under the system we propose. One way to alleviate that concern would be to make the system prospective—to apply it only to acts that occur after a date specified in the legislation establishing the system.³⁹ The publicity that has accompanied the controversies over music on p2p networks, and that would no doubt accompany the enactment of the dispute-resolution system we propose, would serve to put everyone on notice that moderate- to high-volume uploading is infringing activity and could result in severe penalties. Because copyright owners

³⁸ See Froomkin, *Cures*, *supra* note ____.

³⁹ This might relieve one specific concern about the harshness of the penalties: the concern that some high-volume uploaders may have acted unknowingly, since in some instances p2p software automatically makes every file downloaded by a user available for uploading by other users. In some cases, this automatic sharing appears to be a default setting when the software is installed. As a result, a user might do nothing more than install p2p software and download files and yet be engaged without her knowledge in high-volume uploading. (Of course, such an uploader would still be liable for copyright infringement, since the statute penalizes both knowing and unknowing infringement, *see supra* note ____, though the amount of statutory damages awarded against the unknowing uploader might be smaller.)

Given the widespread publicity over suits against individuals for uploading, making harsh penalties for high-volume uploading in an administrative system prospective rather than retrospective should provide sufficient notice to encourage most people to check their system settings so that those who upload large numbers of works are likely to be doing so knowingly. Indeed, in the wake of the RIAA’s first lawsuits, P2P United, a group representing several major p2p software providers, announced a code of conduct that would involve providers modifying their software to include warnings against copyright infringement, to make uninstalling the software easier, and to help enable parents to prevent children from sharing files. *Song-Swap Networks Unveil Code of Conduct*, WASHINGTONPOST.COM, Sep. 30, 2003. Alternatively, the administrative process might be limited to instances in which the complaining copyright owner notified an individual of her p2p uploading activities and those activities continued after the notification.

have seemed more concerned about trying to cut off infringing activity on p2p networks than in actually collecting monies for all or most acts of past infringement, a system that operates prospectively may sufficiently address their most significant concerns.⁴⁰

The administrative dispute resolution system that we propose is flexible enough to be part of a number of different approaches to the problem of copyright infringement on p2p networks. The system could serve, as we have suggested, as a substitute for holding p2p providers liable for infringement committed by their users; indeed, Congress could provide, in enacting such a system, that providers would not be liable for user infringements if the network is capable of substantial noninfringing use. The system would also serve, in most cases, as a substitute for civil or criminal enforcement against infringers on p2p networks, not because civil or criminal suits would be unavailable but because administrative proceedings would be less costly and more efficient. Even if the existing legal rules governing secondary liability in the peer-to-peer context are not changed, the administrative system may be important. Under the caselaw at the moment, centralized systems such as those in *Napster* and *Aimster* would have a high burden to police infringement on their networks to avoid liability, while producers of software for decentralized systems, such as those at issue in *Grokster*, would not face liability for their products. While these rules are likely to make centralized systems infeasible, decentralized systems are likely to flourish, and copyright owners will need to target their enforcement efforts at direct infringers. Our proposed administrative system would reduce the cost of those efforts for copyright owners, and would substantially reduce the potential penalty for the direct infringers who are pursued. The system could also be part of an approach that imposed levies to compensate

⁴⁰ Of course, so long as the statute of limitations has not expired, litigation would be available to those copyright owners who do wish to try to recover monetarily for previous infringements on p2p networks.

copyright owners. If a levy is mandated, it would authorize all uses of p2p networks in return for the levy payments, and there would be no need for the system we propose. But if a levy were adopted on an opt-in basis, only customers of ISPs or other providers that had paid the levy would be immune from suit, and our administrative remedy could be used for the remaining disputes.

Similarly, the administrative system could be part of a filtering approach. Despite our skepticism about the potential for filtering,⁴¹ a viable technology might emerge for filtering unauthorized uses of copyrighted material on p2p networks. Given concerns about technological mandates, particularly mandates of any particular firm's technology, Congress might prefer not to require that every p2p software developer or every ISP adopt specific filtering technology. Congress might instead strongly encourage the use of filters by granting immunity from copyright infringement actions to those using p2p software or networks that incorporate the filters. To make the incentive effective, the threat of enforcement against those committing copyright infringement on unfiltered networks would need to be realistic, and far more enforcement actions could likely be pursued under a streamlined administrative system than in court.

A final approach in which our proposed administrative system might also be useful is voluntary collective licensing for using music in p2p networks. The Electronic Frontier Foundation (EFF) has proposed such a system.⁴² The proposal envisions virtually all music copyright owners voluntarily forming a licensing collective that would offer a blanket license for p2p dissemination of their works on a per-person, per-month basis and that would distribute the

⁴¹ See text accompanying note **Error! Bookmark not defined.**, *supra*.

⁴² ELECTRONIC FRONTIER FOUNDATION, A BETTER WAY FORWARD: VOLUNTARY COLLECTIVE LICENSING OF MUSIC FILE SHARING, February 2004.

license fees to copyright owners. The proposal envisions that users would have an incentive to take the license in order to avoid the legal threat of otherwise being sued for infringement⁴³ and that copyright owners would continue to be able to bring enforcement actions against p2p users who do not take a license. Our proposed administrative system would offer copyright owners a realistic possibility of enforcing against large numbers of unlicensed p2p users, thus increasing the incentive for individuals to buy a blanket p2p license.⁴⁴

⁴³ *Id.* at 2 (“[T]hose who today are under legal threat will have ample incentive to opt for a simple \$5 per month fee.”).

⁴⁴ The major performance rights collective licensing societies, ASCAP and BMI, use civil infringement actions to stop public performances of their works by those who refuse to buy a license, and thus deter others from unlicensed public performances. The number of potentially unlicensed public performers, though, is much smaller than the number of potentially unlicensed p2p music users, suggesting that a streamlined administrative proceeding would be more useful than court actions in sanctioning the latter.

§ 514. Administrative Infringement Proceedings

(a) **Scope.** A copyright owner may elect to proceed under this section in lieu of filing suit under section 501(b) against a respondent if the respondent is accused of making copyrighted works accessible to the public⁴⁵ by uploading such a work⁴⁶ to a peer-to-peer computer network or its equivalent.⁴⁷ This section shall not apply to any claim of violation of rights under section 106A. An election to proceed under this section shall preclude resort to remedies under section 501 with respect to the particular respondent and the particular course of conduct alleged in a proceeding under this section.

(b) Elements of Claim.

(1) *Copyright Owner's Burden.* A copyright owner satisfies its burden of proving infringement under this section if it shows that it is the owner of the right to reproduce a copyrighted work in which a claim of copyright has been registered,⁴⁸ that the respondent has uploaded that work to a peer-to-peer computer network or its equivalent, and that the same respondent has made available at least 50 different copyrighted works⁴⁹ over a peer-to-peer

⁴⁵ We intentionally avoid using the term “distribution” because of concerns about its meaning. *See, e.g.*, Mark A. Lemley, *Dealing With Overlapping Copyrights on the Internet*, 22 U. Dayton L. Rev. 547 (1997); Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 Wm. & Mary L. Rev. 1245 (2001); R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. Rev. 577 (2003); R. Anthony Reese, *The Public Display Right: The Copyright Act's Neglected Solution to the Controversy Over RAM “Copies,”* 2001 U. Ill. L. Rev. 83.

⁴⁶ The intent of this section is to provide a cause of action against individuals who upload files, and not to cover Internet service providers or other services that facilitate access to those files.

⁴⁷ While we have drafted this statute with the current state of p2p technology in mind, we are well aware that technology is dynamic. It is impossible to predict how those networks will change in the future. Our goal is to avoid the problems of section 512, which was drafted in 1998 but rapidly became outdated because it did not consider p2p technology at all.

⁴⁸ Producing a registration certificate should be sufficient evidence to show ownership of a copyright absent a straightforward claim of fraud on the Copyright Office. *See* 1 PAUL GOLDSTEIN, COPYRIGHT, § 3.12.3 (2d ed. 1996 & 2004) at 3:131 (“Courts will invalidate or decline to enforce a copyright only in situations where the applicant knowingly withheld or misstated information in its application and the Copyright Office might have rejected the application had it known of the omitted or misstated information.”) For many works there may be a credible claim of such fraud based on the fact that many sound recording copyright owners have represented the works they registered as works made for hire, allegedly in order to try to avoid the author’s right to terminate the assignment under 17 U.S.C. § 203. Congress changed the statute to make specially commissioned sound recordings expressly eligible to be works for hire in 1999, but reversed the change in 2000. 17 U.S.C. § 101; Pub. L. No. 106-113, § 1000(a)(9), 113 Stat. 1501 (1999); Pub. L. No. 106-379, § 2(a)(1), 114 Stat. 1444 (2000). We think a claim of fraud on the Copyright Office in these circumstances presents sufficiently complex factual issues that it should be resolved by a court, not in the administrative proceedings.

⁴⁹ Works must be registered to qualify. (They needn’t be works owned by the same person, however, or small copyright owners would be unable to take advantage of the administrative process.) This is consistent with the current statutory requirement that a claim copyright in any U.S. work must be registered as a prerequisite to a civil suit for infringement. 17 U.S.C. § 411(a). The registration requirement in the administrative proceeding applies both to U.S.-origin and foreign-origin works. We do not believe that this will raise problems under our international obligations, as the remedy we’re providing here is over and above anything required by Berne or TRIPs and therefore it seems unlikely that the bar on formalities would apply. Further, because we require registration for U.S. works, our proposal shouldn’t run afoul of any national treatment requirement. In any event, this requirement would

computer network or its equivalent in any 30-day period. Any claim against a respondent must be filed within three years after the uploading took place.

(2) *Defenses.* The Copyright Office shall reject a complaint under this section if the respondent presents substantial evidence⁵⁰ that (a) the respondent did not in fact upload the works that the copyright owner relied upon in subsection (1); (b) the works that the copyright owner relied upon in subsection (1) have in the past been distributed by or under the authority of the copyright owner⁵¹ but are currently out of print and no longer available to the public; or (c) the respondent's conduct may be justified under section 107 of the Copyright Act.⁵² Respondents who wish to raise other defenses may do so by challenging the final decision on the complaint in court.

(c) **Process**

(1) A complaint under this section shall be filed with the Copyright Office, and shall be decided by an administrative law judge (ALJ) in that office.⁵³

(2) Complainants may file with the complaint a legal argument for liability and whatever evidence may be relevant to the resolution of the dispute. Respondents may file a response within 60 days after service of the complaint including legal argument against liability and whatever evidence may be relevant to the resolution of the dispute. Complainants may file a reply within 30 days. The Copyright Office shall promulgate regulations permitting the online filing of complaints, arguments, and evidence. Written testimonial evidence shall be provided under penalty of perjury.

(3) If a complainant has reason to believe that it has a cause of action against

seem to be no more inconsistent with our international obligations than imposing registration as a prerequisite for statutory damages and attorney's fees, and the statute at least appears to impose that requirement for both U.S. *and* foreign works.

⁵⁰ Substantial evidence is less than the preponderance of the evidence that would be required to prove such a defense in a civil proceeding. The defenses listed in these section raise factual disputes, and we don't want these difficult factual issues to be resolved in an administrative proceeding without the benefit of discovery or testimony.

⁵¹ The goal of this section is to create a defense to the administrative proceeding for those who disseminate out-of-print works that are not otherwise commercially available. Such situations may raise more plausible claims that the respondent is engaged in fair use, and those claims should be resolved by a court, not in the streamlined dispute resolution proceeding. At the same time, our intent is not to provide a defense to those who copy works before publication, as has happened with some music and movies on p2p networks. Thus, only works that have already been commercially released by or under the authority of the copyright owner but have then gone out of print are properly the subject of this defense.

⁵² We have intentionally excluded copyright misuse and fraud on the copyright office. These are legitimate defenses to a copyright claim, but depend on factual circumstances that should be resolved in court, not in an administrative proceeding.

⁵³ The current statutory provisions on the Copyright Office give the Librarian the power to appoint the Register "together with the subordinate officers and employees of the Copyright Office," which presumably provide sufficient authority to employ ALJs. Alternatively, a bill currently pending in Congress, HR 1417, proposes eliminating Copyright Arbitration Royalty Panels and replacing them with three Copyright Royalty Judges. Our ALJs could perhaps be hired under the same statutory authority as the Copyright Royalty Judges.

an individual under this section, but cannot discover the identity of that individual, it may file a complaint without specifying the identity of the respondent. If the ALJ concludes after reviewing the complaint and supporting evidence that it is likely the complainant will satisfy its burden of proof, the ALJ may issue a subpoena to any online service provider that provides the unnamed respondent with online access.⁵⁴ The subpoena shall require the provider to disclose to the complainant the identity of the respondent. The time required to respond to the subpoena shall be sufficient to permit the provider to disclose the subpoena to its subscriber and for either the provider or the subscriber to challenge the subpoena in court. Except as provided in this subsection, neither party shall be entitled to conduct discovery in an action under this section.

(4) Proceedings under this section will be decided upon the written record. The ALJ shall issue a written decision within 60 days after the last day for the complainant to file a reply brief. A party dissatisfied with the decision of the ALJ may appeal the decision within the Copyright Office. An appeal shall be heard by a panel of three ALJs, not including the judge who wrote the original decision, and shall otherwise be subject to the same procedures and substantive standards described in this section. A party dissatisfied with an appellate decision, or a party dissatisfied with ALJ's decision who chooses to forego an administrative appeal, may file a suit in any federal district court seeking review of that decision under Title 17 within 30 days after the decision complained of. Such judicial review shall be de novo, and may include any argument that could be raised in a copyright suit under section 501 of this title, but a copyright owner complaining of an adverse decision who prevails in court will be limited to the remedies available under this section.

(d) **Remedies**

(1) *Monetary fines.* A respondent found liable under this section shall pay to the complainant \$250 per copyrighted work owned by the complainant and shown to have been infringed.

(2) *Designation as infringer.* A finding of infringement under this section shall constitute a legal determination that the respondent is an “infringer” for purposes of 17 U.S.C. § 512(i)(1)(A). Only a determination by a court or the ALJ shall be relevant for purposes of that section.⁵⁵

(3) The losing party in any proceeding under this section shall pay the costs of the prevailing party. A party that files an unsuccessful appeal shall pay the prevailing party its attorneys fees in defending the appeal, if any.⁵⁶

⁵⁴ Our intent here is to cover any online service provider, including those who provide merely “conduit” access under 17 U.S.C. § 512(k)(1)(A). Existing subpoena provisions in the Digital Millennium Copyright Act do not reach such ISPs. *RIAA v. Verizon Internet Services*, 351 F.3d 1229 (D.C. Cir. 2003).

⁵⁵ One implication of the way this section is worded is that outside of p2p networks or their equivalent, which are covered by the administrative procedure, only court determinations would be relevant to whether someone is a repeat infringer for other § 512 safe harbors (such as storing infringing material on a user's Web page at the user's direction or transmitting it over a conduit).

⁵⁶ Under this section, the award of costs is automatic. The award of attorney's fees is automatic, but only against a party that lost both before the ALJ and on appeal.

(e) **Effective Date.** A proceeding under this section shall consider only acts of infringement that occur after the effective date of this section.