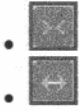


Exhibit S

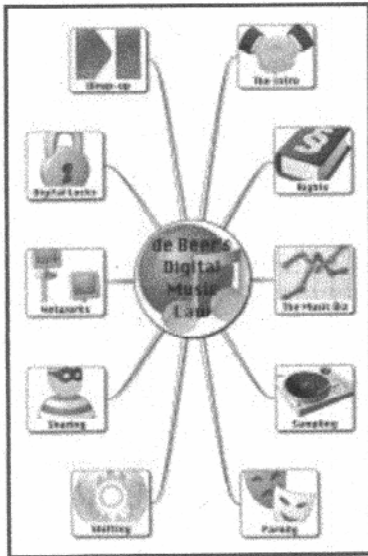
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Digital Music '08

Sharing



Hey, I'm gonna get you too
Another one bites the dust

Written by John Deacon

Performed by Queen

Recorded on The Game
(EMI-Electra, 1980)

About Me

I am an Associate Professor at the University of Ottawa's Faculty of Law. My expertise is in the area of technology and intellectual property law. [Read more ...](#)

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The RIAA and its IFPI sister organizations worldwide have sued tens of thousands of people alleged to have shared music on p2p networks. We'll study the process and **Podcasts** substance of these sorts of cases, including how file sharers are identified, when and where suits are filed, why they are almost my '08-'09 Property Law class are always settled and what might happen if available, you can : they're defended.

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Most of the cases are American, but we'll draw comparisons to developments in Canada, Europe, Asia and elsewhere. That makes it tough to pick the "must reads" for this lesson but I've given it a shot. I think the absolute best resource around on file-sharing law suits is Ray Beckerman's blog, "Recording Industry vs. the People," which contains the lesson's first essential reading. "How

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- [Pennsylvania defendant moves to dismiss complaint in SONY BMG Music v. Cloud 30 Oct 2008 | 1:26 am Recording Industry vs The People](#)
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the RIAA Litigation Process Works." (You can also consult their massive "Index of Litigation Documents" to get court documents for specific cases if you're digging deeper through the links below.) Also valuable is the EFF's page on "RIAA v. The People." This contains links to a sample RIAA claim notification and a sample settlement agreement. EFF even tells you how not to get sued for file sharing. But perhaps the EFF's best resource is this report on the effects of 5 years of RIAA lawsuits, which is the week's other must-read piece.

Now, here's a little more context. Lawsuits against p2p file sharers began around the time lower courts in the United States held that Grokster wasn't liable for the actions of its users. In search of a new way to deter file sharing, the industry went after individuals. Intuitively, it seems pretty stupid to sue your customers, doesn't it? Fred von Lohmann explains why in "Is Suing Your Customers a Good Idea?" law.com (29 September 2004). Justin Hughes, on the other hand, takes a different view in "On the Logic of Suing One's Customers and the Dilemma of Infringement-based Business Models" (2005) 20 Cardozo Arts & Ent. L. J.. If you can, look at both and let me know what you think.

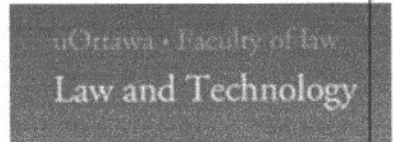
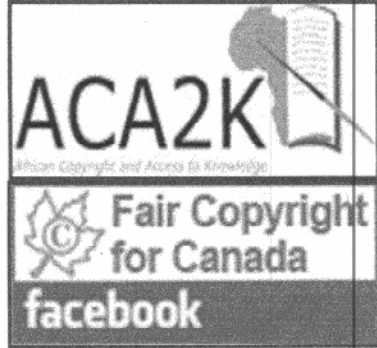
We'll also talk a bit about the growing body of empirical evidence about the harms of file sharing, or more accurately, the lack thereof. The latest study, prepared for the Government of Canada by 2 British-based economists, concludes that file sharers are the same people who buy CDs, and that the more people share music, the more they buy it.

Those in the industry with some common sense realize this. That's why we've seen the [Canadian Music Creators Coalition](#) come out against lawsuits against file sharers. Terry McBride of Nettwerk Music and his client Avril Lavigne have even publicly opposed a lawsuit against a young Texas girl accused of sharing Avril's music. But for now, the major labels still want to exterminate instead of embrace p2p file sharers. These broader contextual debates will come up again and again when we talk about new business models.

To get a little deeper into the technicalities of how these lawsuits work, we need to first understand how the RIAA used to get the information necessary to sue p2p users. They used to try using § 512(h) of the DMCA, which involved subpoenaing information from ISPs. They don't do this anymore because of the decision in [RIAA v. Verizon Internet Services](#), 351 F.3d 1229 (D.C. Cir. 2003), which is worth a quick look if you can find the time.

Nowadays, the RIAA uses federal civil procedures instead. Labels file suit against "John or Jane Does" and then bring motions for discovery of 3rd parties, i.e. the ISPs, or sometimes lately, a university. This way the RIAA obtains the Does' personal information, and uses that to substitute the real name of the defendant into the lawsuit (or discontinue the lawsuit against the Doc to avoid appellate scrutiny).

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Outside the U.S., courts have taken another view about the disclosure of personal information in circumstances like this. The most famous case is probably [BMG Canada Inc. v. John Doe](#), 2005 FCA 193.

The Canadian courts aren't alone. See what the Dutch are doing in cases such as [Foundation v. UPC Nederland](#) (District Court of Utrecht, Netherlands, 2005). This case was affirmed on appeal, and here's the English translation of the [appellate judgment](#).

If you want to explore the European approach in more detail, you'll have to learn about the [E.C. E-Commerce Directive 2000/31, Art. 15](#). A very noteworthy development in the EU occurred at the end of January '08 when the ECJ ruled on a Spanish case ([Productores de Música de España \(Promusicae\) v Telefónica de España SAU](#)) that EU law does not require ISPs to hand over subscribers' personal information to copyright owners claiming infringement. The [Times explains](#), though, that the ECJ ruling doesn't actually settle much, as member states can still protect copyright over privacy if the measures are proportional to the perceived harm.

Ok, but back to the US. Once a plaintiff has a p2p user's relevant info, how does a case proceed? From here the RIAA usually offers to settle the case. Cleverly, the non-negotiable settlement offer is priced just slightly below the cost of a defence attorney. So when the defendant goes to the lawyer, the lawyer says it would be cheaper to settle than defend. And because the RIAA files these cases pretty much pro forma, they've got little overhead and the marginal cost of each additional lawsuit is small. It is even possible that RIAA members have converted litigation into a nice little profit-making enterprise. Multiply the average settlement of US\$3750 by the minimum 30,000 suits that have been filed to get a sense of the revenues this litigation is generating for labels.

So far the few users who have tried to defend themselves haven't had much success. Some have tried to argue fair use, but that's gone nowhere: see [BMG Music v. Gonzalez](#). Some have tried to say that sharing isn't infringement, but courts haven't

bought that argument, on the basis that they don't understand the technology well enough to decide: see [Interscope v. Duty](#). Numerous other defence tactics have also been unsuccessful. If you thought erasing the evidence from your hard drive was one way to avoid liability, think again: see [Arista Records v. Tschirhart](#). And in the most famous cases of all, [RIAA v. Thomas](#), a Minnesota woman was ordered to pay \$220,000 for sharing 24 tracks, which she denied doing. In an unusual but understandable about-face, the judge in that case actually set aside the decision almost a year after it was issued because of the realization that simply offering to share files isn't illegal in the US ... infringement of the distribution right requires proof that someone actually downloaded an infringing file. Because of the importance of that issue, I'm sure we haven't heard the end of this case. One of the few other defendants to have some luck was in [Capitol Records v. Foster](#), where the RIAA lost and was ordered to pay the defendant Debbie Foster's costs for bringing a bogus suit.

I'd like to wrap up this lesson by asking whether or not you think these lawsuits are a justifiable use of judicial resources. It is an abuse of process, or simply copyright holders cleverly exercising all of the procedures available to them? If you feel that private parties are entitled to use the public justice system to these ends, would you feel the same way about the allocation of more state resources to combat p2p file sharing? That is, what role, if any, should the criminal law play in this area? Probably the best case to launch a discussion of that issue, and the last case we'll tackle this week, is the Hong Kong SAR criminal proceedings involving bittorrent seeder [Chan Nai-ming](#).

Last Updated (Tuesday, 28 October 2008)

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