

A QUICK AND INEXPENSIVE SYSTEM FOR RESOLVING PEER-TO-PEER COPYRIGHT DISPUTES*

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We have argued elsewhere that peer-to-peer (p2p) file sharing poses significant new challenges to the enforcement of copyright law.¹ Copyright owners' initial response to these challenges – trying 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 facilitating innovators.² In this article, we explain how such a dispute resolution system might work and propose a draft amendment to the Copyright Act to implement this system, with annotations 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)

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‡ 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 representation.

¹ Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345 (2004).

² *Id.* at 1351.

for Internet domain name trademark disputes implemented by the Internet Corporation for Assigned Names and Numbers (ICANN),³ which resolved about 7,500 domain name trademark disputes in its first four years, at a cost of \$1200-\$1500 each and an average resolution time of a little more than a month.⁴ 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 reserves to the court system difficult factual and legal disputes between parties with competing and arguably legitimate claims to the same domain name.⁵ 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. 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 were not copyrighted, or not 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 some important procedural due process protections, such as an administrative appeal, a fair system for assigning panelists, and a penalty for overreaching by complainants.⁶ But these problems can be solved

³ 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* (2002) (unpublished manuscript, on file with authors).

⁴ For a list of decisions, see Internet Committee for Assigned Names and Numbers, Search Index of Proceedings Under the Uniform Domain-Name Dispute-Resolution Policy, at <http://www.icann.org/cgi-bin/udrp/udrp.cgi> (last visited Jan. 31, 2005). The cost figure is for the price charged by the dispute resolution provider.

⁵ 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. See Michael Geist, *Fair.com? An Examination of the Allegations of Systematic Unfairness in the ICANN UDRP*, 27 BROOK. J. INT'L L. 903 (2002) (collecting examples).

⁶ We consider these to be important protections whether or not they would be re-

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in the copyright context by learning from the UDRP experience. A digital copyright dispute resolution process could select judges in a fair and balanced® way. It could permit an administrative appeal and impose some sanction on frivolous or bad-faith claims made by copyright owners.⁷

There are, however, two fundamental differences between the factual setting of the UDRP and the digital copyright cases a dispute resolution panel would 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 successful UDRP complainant does not have to collect money or property from a losing domain name registrant; the UDRP panel merely needs to instruct ICANN to cancel the domain name registration or 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, such as an award of money damages or a reliable way to remove infringing material or the infringer herself from the network, and an enforcement mechanism.

Second, the UDRP is imposed by ICANN on all domain name 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 Internet Service Providers (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 have to 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 enforce her copyrights *either* by pursuing a civil copyright infringe-

quired by the Constitution's due process clause. 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); Geist, *supra* note 5, at 903; Kenneth L. Port, *Trademark Monopolies in the Blue Nowhere*, 28 WM. MITCHELL L. REV. 1091 (2002); Elizabeth G. Thornburg, *Fast, Cheap, and Out of Control: Lessons from the ICANN Dispute Resolution Process*, 6 J. SMALL & EMERGING BUS. L. 191 (2002).

⁷ For suggestions of similar changes to the UDRP itself, see Froomkin, *supra* note 6, at 688; Port, *supra* note 6, 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).

ment 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, thus making them available for downloading by others.⁸ Making a copyrighted work available for other people 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.

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 one or even ten copyrighted works may well be engaging in copyright infringement, but she is less clearly infringing than someone who has uploaded 100 or 1000 works. In order to restrict the dispute resolution process to conduct that is fairly clearly infringing, the process should be available only when a copyright owner's evidence shows that the person targeted has uploaded at least fifty copyrighted works during any thirty-day period.⁹

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 complaining party would need to show that it had registered claims of copyright in the works in question and provide a sworn statement that it still owns the copyright (or the relevant exclusive rights) in the works identified.¹⁰ Next, the complainant would have to provide evidence that

⁸ 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 suspect that owners of copyright in motion pictures and software might be particularly likely to use the system.

⁹ Admittedly, any threshold can be gamed, and it may be that everyone will upload only forty-nine 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, with potential ordinary statutory damage awards ranging from \$36,750 to \$1.47 million for uploading forty-nine works.

¹⁰ 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,

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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 Internet Protocol (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 copyright infringement suits initially brought by recording companies against users of p2p networks, the information identifying the alleged uploader was obtained by using a subpoena process provided for under the ISP safe harbor provisions added to the Copyright Act by the Digital Millennium Copyright Act (DMCA).¹¹ 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. Courts have now consistently held that section 512(h) does not apply at all to ISPs 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.¹² Constitutional concerns have also been raised over the fact that copyright owners can obtain subpoenas from the court clerk when no actual litigation under the supervision of a judge is pending in that court (or, indeed, in any court).¹³ These concerns are heightened by the fact that the real target of the subpoena—the alleged infringer who is to be identified by the ISP—may not even be aware of the subpoena and may therefore be unable to challenge the copyright owner's right to the information before her identity is disclosed.

The dispute resolution process we propose depends on copyright owners being able to identify the individuals engaged in high-

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.

¹¹ 17 U.S.C. § 512(h) (2000).

¹² *Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs.*, 351 F.3d 1229 (D.C. Cir. 2003); *In re Charter Communications, Inc. Subpoena Enforcement Matter*, 393 F.3d 771 (8th Cir. 2005).

¹³ *Pac. Bell v. Recording Indus. Ass'n of Am., Inc.*, No. C03-3560 SI, 2003 WL 2282662 (N.D. Cal. Nov. 26, 2003).

volume uploading. We would prefer for this to occur under somewhat greater supervision than currently provided for in section 512(h). 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 administrative judge 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.¹⁴ This would provide at least some supervision to ensure, before an ISP is ordered to disclose the identity of its customers, that the 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, or at least permit, 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 administrative judge 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.¹⁵ Resolu-

¹⁴ This would essentially replicate in the administrative process the procedures being used by the Recording Industry Association of America (RIAA) to identify infringers in the wake of circuit court decisions limiting the availability of subpoenas under Section 512(h) against ISPs that merely serve as conduits for copyrighted material. The recording industry has filed "John Doe" lawsuits alleging copyright infringement occurring at particular IP addresses and then subpoenaed the ISPs controlling those IP addresses to identify the particular person using those addresses. See John Borland, *RIAA Steps Up File-Trading Suits*, CNET NEWS.COM (Feb. 17, 2004), at <http://news.com.com/2100-1027-5160262.html>.

¹⁵ At least two of the RIAA's first 261 suits filed in September 2003 led to claims of mistake and, in one case, dismissal of the complaint. See, e.g., Katie Dean, *Fan to RIAA: It Ain't Me, Babe*, WIRED NEWS (Oct. 15, 2003), at http://www.wired.com/news/digiwood/0,1412,60814,00.html?tw=WN_culthead_6; John Schwartz, *She Says She's No Music Pirate. No Snoop Fan, Either.*, N.Y. TIMES, Sept. 25, 2003, at C1 (reporting the RIAA's dismissal of suit against sixty-six year-old Sarah Ward and noting that Ms. Ward's computer is a Macintosh, while the Kazaa software she was alleged to have used did not run on that platform at the time). But cf. John Borland, *Macintosh Users Join Kazaa Network*, CNET NEWS.COM (Nov. 19, 2003), available at <http://news.com.com/2100-1027-5109645.html> (noting the release of

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tion of such factual disputes is better handled in an ordinary court proceeding, and the administrative judge 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 administrative judge 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 judge *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 p2p network constitutes fair use. While this fair use argument is not indisputably correct, there are strong policy reasons to permit sharing of otherwise unavailable works,¹⁶ 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 in conjunction 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 and mandatory rejection of the administrative claim.¹⁷

For the process to work, however, it must be able to actually resolve clear cases of infringement by uploaders. If every uploader against whom a claim was filed could simply assert a defense and

new software enabling Macintosh users to download from, and in some cases upload to, p2p networks originally available primarily to users of Windows computers). To reduce the risk that a defendant would falsely assert such a claim, factual statements by parties to the administrative process should be made under penalty of perjury.

¹⁶ For a discussion of such policy reasons in the context of the right of the owner of a copy or phonorecord of a work to redistribute it without the copyright owner’s permission, see R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577, 592-610 (2003).

¹⁷ Another type of claim that should be rejected from the administrative procedure would be one involving the uploading of unpublished and confidential documents for reasons of public discussion or commentary. 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 *Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195 (N.D. Cal. 2004). 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 in addition to strong fair use claims. See *id.*

have the claim dismissed, the system would never succeed.¹⁸ Thus, an uploader must provide evidence to support a claim of, for example, mistaken identity or uploading only out-of-print works. 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 and the copyright owner relegated to a civil infringement suit. For example, an uploader might claim that the 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.¹⁹ 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 it impossible to hear any claims in the process, an alternative is required. We propose that if such defenses are raised in the dispute resolution process, the administrative judge should decline to decide the defenses, proceed to consider all other aspects of the case, and if she awards a decision against the uploader, stay her decision for thirty 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 prevent that forum's consideration of the 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.

¹⁸ 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 dispute resolution system.

¹⁹ With respect to sound recordings, the question of whether those recordings can qualify as works made for hire has been controversial. 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, without expressly resolving the question of whether commissioned sound recordings qualify as works made for hire under some other category of work. 17 U.S.C. § 101 (2004); 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 these issues, see David Nimmer & Peter S. Menell, *Sound Recordings, Works for Hire, and the Termination-of-Transfers Time Bomb*, 49 J. COPR. SOC'Y 387 (2001); David Nimmer, Peter S. Menell & Diane McGimsey, *Preexisting Confusion in Copyright's Work-for-Hire Doctrine*, 50 J. COPR. SOC'Y 399 (2003).

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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 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. The decisionmaker's job should be relatively straightforward: rejecting claims that do not fit within the system's requirements or that involve plausible disputes of law or fact that are better resolved in court, and determining whether the plaintiff has proved its charges of infringement. The judges should be obliged to issue a short written 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 7500 domain name disputes in the last several years suggests that the goal of quick and cheap resolution is workable. Provided the copyright dispute resolution 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 courts²⁰ – 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 against p2p uploaders and to suits seeking to impose secondary liability against facilitators of p2p networks will also require that the process provide an adequate remedy. We suggest that it provide two types of remedies: monetary relief and the official designation of an unsuccessful defendant 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 uploading. The existing maximum penalties available in civil actions under

²⁰ See, e.g., Froomkin, *supra* note 6 and Geist, *supra* note 5 for a discussion of these shortcomings.

the statutory damage regime seem likely to provide far in excess of the penalties needed to have a deterrent effect.²¹ It seems likely that in cases involving the uploading of fifty or more works, a penalty in the magnitude of \$250 per work infringed would have a strong deterrent effect.²² Someone who uploaded 1000 songs – the threshold used by the Recording Industry of America (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 process 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 fifty 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 a greater number of uploaders. The fact that when the RIAA has sued uploaders in court, it has settled with many of them for only a few thousand dollars, despite the higher cost of litigation as compared to our administrative process, suggests that the RIAA was satisfied with the deterrent effect of even these low penalties.²³ Making enforcement more likely, but the penalties less draconian, may also blunt 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 fifty works in order to be subject to the dispute resolution procedure, any actual

²¹ Any copyright infringer can be held liable for statutory damages in lieu of actual damages at the plaintiff's sole election, so long as the work was registered before the infringement begins or within three months of publication. 17 U.S.C. §§ 504(c), 412 (2004). Those statutory damages normally range from \$750 to \$30,000 per work infringed, though the court can lower the amount to \$200 per work for innocent infringers and raise it to \$150,000 per work for willful infringers. *Id.* § 504(c). A defendant who has infringed 100 copyrighted songs and is assessed the maximum ordinary statutory damages would owe \$3 million.

²² 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) (2004). 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.

²³ *See* John Borland, *New RIAA File-Swapping Suits Filed*, CNET NEWS.COM (Mar. 23, 2004), available at <http://news.com.com/2100-1027-5177933.html> (reporting more than 400 settlements of RIAA lawsuits, with payments averaging \$3000); Cynthia L. Webb, *Settling in with the RIAA*, WASHINGTONPOST.COM (Sept. 30, 2003), 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 \$2500 to \$10,000).

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monetary award imposed on the uploader would, of course, only include those works owned by the complaining copyright owner or owners. Copyright owners therefore 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.²⁴ 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.²⁵

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 an administrative judge's award. While this might entail some expense, enforcing a judgment is usually simpler and cheaper than litigating a civil case to judgment in the first place. And the copyright owner's burden of executing on 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. The formal procedures for enforcing judgments (as well as the costs of doing so) vary by state and range from ineffectual to fairly draconian. Enforcement can involve measures such as garnishing the defendant's wages and placing liens on her property, though many high-volume uploaders

²⁴ 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); Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673 (2003). 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 could 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 coowners 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 compensation from the recovering copyright owner.

²⁵ 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 fifty 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 an uploader may well have made available too few works owned by any one copyright owner to allow an individual copyright owner to pursue a claim, but will still have uploaded enough works so that a claim can be brought if the copyright owners act jointly.

may be college students or young people with limited wages and property available to satisfy a judgment through such measures. But even where executing on an administrative infringement judgment proves difficult or expensive, copyright owners can notify credit reporting agencies of the unpaid judgment. This relatively inexpensive step may make it more difficult or costly for the infringer to obtain a credit card, an auto loan, or a home mortgage – giving even an uncollectible infringement award some deterrent effect among high-volume uploaders who enjoy or look forward to a middle-class lifestyle.

The dispute resolution process would also offer an important form of nonmonetary relief. An uploader against whom a copyright owner brings a successful claim would also be officially designated by the administrative decision as a copyright infringer. This designation is important because it has consequences for the safe harbors for ISPs provided under the DMCA. The DMCA grants safe harbors to ISPs only if they have in place and reasonably implement a policy for terminating the accounts of “repeat infringers” in appropriate circumstances.²⁶ No one seems to know what makes one a “repeat infringer,” however.²⁷ 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.²⁸ It seems wrong, though, to say that one is an infringer merely by virtue of receiving a cease and desist letter, which some content owners have been sending with reckless abandon and which need not even meet the standards of Rule 11 of the Federal Rules of Civil Procedure.²⁹ In-

²⁶ 17 U.S.C. § 512(i)(1)(A) (2000).

²⁷ See David Nimmer, *Repeat Infringers* 52 J. COPR. SOC'Y 167 (2005). On the ambiguities in the meaning of the DMCA more generally, see David Nimmer, *Appreciating Legislative History: The Sweet and Sour Spots of the DMCA's Commentary*, 23 CARDOZO L. REV. 908 (2002).

²⁸ 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* 6-7 (2004) (unpublished manuscript, on file with authors). 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*, No. C99-5183 MPH, 2000 WL 1009483, at *6 (N.D. Cal. July 26, 2000).

²⁹ 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 of sharing the last name of a musician. See Dave Farber, *RIAA Apologizes to Penn State for Confusing Usher with Prof. Usher*, at <http://www.interesting-people.org/archives/interesting-people/200305/msg00117.html> (last visited Jan. 31, 2005); Associated Press, *Music Industry Sues for Names of Copyright Violators* (Oct. 3, 2002), available at <http://www.foxnews.com/story/0,2933,64771,00.html> (documenting cease and desist letter sent to a child who wrote a book report about Harry Potter). Surely a recidivist writer of Harry Potter book reports is not a “repeat infringer” merely because Scholastic mistakenly sends two cease and desist

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deed, those courts that have considered this argument have generally, though not uniformly, rejected it.³⁰ The other extreme – that one is not an infringer until adjudicated so by a court, requiring repeat infringers to be sued to final judgment and lose twice – seems equally unworkable.³¹ 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 administrative 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, that can exclude individual users from participation in their networks.³² 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 more decentralized than Napster was.³³ But being designated a repeat infringer would have serious consequences for participants in de-

letters. *See also* Jennifer Bretan, *Harboring Doubts About the Efficacy of § 512 Immunity Under the DMCA*, 18 BERKELEY TECH. L.J. 43, 62-67 (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).

³⁰ *See* Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090 (W.D. Wash. 2004). *Contra* Perfect 10, Inc. v. CCBill LLC, 340 F. Supp. 2d 1077 (C.D. Cal. 2004) (concluding that the receipt of two notices of infringement required termination).

³¹ The *Corbis* court sought to create some middle ground by requiring that it be clearly evident that the charge of infringement was correct. Specifically, it held:

Actual knowledge of blatant, repeat infringement cannot be imputed merely from the receipt of notices of infringement. Instead, there must be additional evidence available to the service provider to buttress the claim of infringement supplied by the notices. Here, Corbis provides no additional evidence that was available to Amazon that would have led Amazon to conclude that Posternow was a blatant, repeat infringer.

351 F. Supp. 2d at 1105-06.

³² 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.

³³ While p2p technology has in recent years shifted away from centralized services, it is not clear how much of that shift has been driven by the technical superiority of decentralized services and how much is due to the legal liability imposed by *Napster* on operators of centralized p2p services. *See, e.g.*, Tim Wu, *When Code Isn’t Law*, 89 VA. L. REV. 679, 685 (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 sug-

centralized 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 once put on notice of the subscriber's status as a repeat infringer. As a consequence, the uploader might not be able to obtain Internet access (or other Internet services covered by the safe harbors).

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 a substantial number of people might be denied online access entirely. 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 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 harbors.

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 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

gests 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.

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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 process. Similarly, unsuccessful copyright owners should in appropriate circumstances 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.³⁴

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.³⁵ The publicity

³⁴ See Froomkin, *supra* note 6. Appropriate circumstances would include complaints that are rejected because the works involved are not available from the copyright owner or are disseminated by the uploader for purposes of commentary or criticism.

³⁵ This might relieve one specific concern about the harshness of the penalties: the concern that some high-volume uploaders may have acted unknowingly, since some p2p software automatically makes every file downloaded by a user available for uploading by other users. In some instances, as with BitTorrent, 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 numerous 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, though the amount of statutory damages awarded against the unknowing uploader might be smaller. One who commits copyright infringement is civilly liable regardless of the mental state with which she acts. See *Lipton v. Nature Co.*, 71 F.3d 464 (2d Cir. 1995); Dane S. Ciolino & Erin A. Donelon, *Questioning Strict Liability in Copyright*, 54 *RUTGERS L. REV.* 351 (2002); R. Anthony Reese, *Innocent Copyright Infringement* (2005) (unpublished manuscript, on file with authors).

Given the widespread publicity over suits against individuals for uploading, making harsh penalties for high-volume uploading prospective in an administrative system 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

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 most people on notice that moderate- to high-volume uploading is usually an infringing activity and could result in severe penalties. Because copyright owners have seemed more concerned about trying to cut off infringing activity on p2p networks than actually collecting money for all or most acts of past infringement, a system that operates prospectively may sufficiently address their most significant concern.³⁶

Copyright owners have sued facilitators of p2p networks because it is cheaper and easier for them than suing direct infringers. Cheaper and easier does not necessarily mean more efficient, however. Suing technological innovators whose products facilitate direct infringement imposes substantial social costs on both legitimate users of those products and on innovation, costs that the copyright owners do not have to bear. A better approach is to change the economics of targeting direct infringers. One way to do this is to subject direct infringers to a relatively low-cost, quick administrative enforcement system. Recent experience with such a system in the Internet domain name context suggests both that it is workable and that careful attention must be paid to process concerns in its design. This approach is not perfect. And it will not stop the demand for digital content, and so will not work unless accompanied by a serious, sustained effort by copyright owners to offer digital content online in legal form. But this approach is better than either quashing innovation by expanding the scope of indirect liability or doing nothing in the face of rampant digital copyright infringement.

doing so knowingly. 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.

³⁶ Of course, so long as the statute of limitations has not expired, litigation would be available to those copyright owners who wish to try to recover monetarily for previous infringements on p2p networks.

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APPENDIX – DRAFT STATUTE

§ 514. ADMINISTRATIVE INFRINGEMENT PROCEEDINGS

(a) SCOPE. A copyright owner may elect to pursue administrative resolution of a claim of copyright infringement 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 public³⁷ by uploading such a work³⁸ to a peer-to-peer computer network or its equivalent.³⁹ This section shall not apply to any claim of violation of rights under section 106A. An election to proceed under this section shall be made by filing a complaint in the Copyright Office pursuant to regulations established by the Register, and shall preclude resort to remedies under sections 502 to 505 with respect to the particular respondent and the particular course of conduct alleged in a proceeding under this section, unless the complaint is dismissed without prejudice.

(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,⁴⁰ that the respondent has uploaded that work to a peer-to-peer computer network

³⁷ 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, 556-59 (1997); Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245, 1249 (2001); R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577, 611-14 (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, 122-38 (2001).

³⁸ The intent of this section is to provide a cause of action against individuals who upload files, and not to cover ISPs or other services that facilitate access to those files.

³⁹ 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.

⁴⁰ 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, at 3:131 (2d ed. 2004) (“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 her assignment of copyright in those works 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.

or its equivalent, and that the same respondent has, in any 30-day period, made available over a peer-to-peer computer network or its equivalent at least 50 different copyrighted works for which registration has been made.⁴¹ 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 filed under this section if the respondent presents substantial evidence⁴² that (a) the respondent did not in fact upload the works that the copyright owner relied upon in subsection (1); (b) copies or phonorecords of 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 owner⁴³ but are currently out of print and no longer generally available to the public;⁴⁴ or (c) the respondent's conduct is likely to be justified under section 107 of the Copyright Act. In any proceeding in which the respondent raises a defense that the copyrights in issue are not enforceable due to copyright misuse or fraud on the Copyright Office in regis-

⁴¹ Works must be registered to qualify. As drafted, they need not be works owned by the same person, however, or small copyright owners would be unable to take advantage of the administrative process. As noted above, however, it may be desirable to discourage multiple complaints against the same respondent based on the same course of conduct by requiring that the 50-works requirement count only works of the complaining copyright owner or owners, and to allow only one complaint against a respondent based on any single act of uploading, even if there are multiple works or multiple copyright owners involved.

The registration requirement is consistent with the current statutory requirement that a claim of copyright in any U.S. work must be registered as a prerequisite to a civil suit for infringement. 17 U.S.C. § 411(a) (2000). 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. The remedy we are providing here is over and above anything required by the Berne Convention or the TRIPs Agreement, and therefore, it seems unlikely that the bar on formalities would apply. Further, because we require registration for U.S. works, our proposal should not run afoul of any national treatment requirement. In any event, this requirement would 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 appears to impose that requirement for both U.S. *and* foreign works.

⁴² 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 this section raise factual disputes, and we do not want these difficult factual issues to be resolved in an administrative proceeding without the benefit of discovery or testimony.

⁴³ 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.

⁴⁴ Our intent is to cover works that are not generally available to the public through normal commercial exploitation. The fact that used copies are available on a secondary sale or rental market would not make the work "generally available" under this subsection.

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tering the works, the Copyright Office shall have the authority to decline to consider the defense, issue a decision on all other aspects of the proceeding, and stay any decision against the respondent for 30 days to allow the respondent to present the defense to a court as provided in subsection (c) (4). Respondents who wish to raise other defenses may do so by challenging the final decision of the Copyright Office in court as provided in subsection (c) (4).

(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.⁴⁵

(2) Complainants may file with the complaint a legal argument for liability and whatever evidence may be relevant to the resolution of the dispute. Within 60 days after service of the complaint, respondents may file a response, 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, responses, replies, arguments, and evidence.

(3) If a complainant has reason to believe that it has a cause of action against 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.⁴⁶ 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.

⁴⁵ The current statutory provisions on the Copyright Office give the Librarian of Congress the power to appoint the Register “together with the subordinate officers and employees of the Copyright Office,” and presumably provide sufficient authority to employ ALJs. Alternatively, our ALJs could perhaps be hired under statutory authority similar to that provided to employ the Copyright Royalty Judges who replaced the Copyright Arbitration Royalty Panels under the Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, § 5(c), 118 Stat. 2362 (2004), codified at 17 U.S.C. § 801 *et seq.*

⁴⁶ Our intent here is to cover any ISP, including those who provide merely “conduit” access under 17 U.S.C. § 512(k)(1)(A). As discussed above, courts have construed existing subpoena provisions in the DMCA not to reach such ISPs.

(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. 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 ALJ 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 the ALJ's decision who chooses to forego an administrative appeal, may file a suit in federal district court seeking review of that decision under Title 17 within 30 days after the issuance of the decision complained of. Such judicial review shall be de novo, 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.⁴⁷

(3) The losing party in any proceeding under this section shall pay the costs of the prevailing party. A party that files an unsuccessful administrative appeal under subsection (c)(4) shall pay the prevailing party its attorney's fees in defending the appeal, if any.⁴⁸

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

⁴⁷ 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 the § 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).

⁴⁸ 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.