

Gutenberg seeks to convert to digital form and widely distribute over the Internet many different types of media. SoF ¶ 61. Many of Project Gutenberg's files are presently made available on Gnutella and can be found using LimeWire. SoF ¶ 11. LimeWire allows more decentralized (and less expensive) distribution of Project Gutenberg's eBooks and music. *Id.* at ¶ 12.

## 2. Internet Archives

Peer-to-peer networks also play an integral role in the efforts of the Internet Archive. The Internet Archive is an attempt to create an "Internet library" to offer permanent digital access to historical collections, many of which are no longer available through traditional publishers. SoF ¶¶ 66-80.

The amount of material available through the Internet Archive is enormous. The Internet Archive currently hosts 947,472 books and music, software and video items. SoF ¶ 81. Approximately ten terabytes of data is downloaded from the Internet Archive each day. *Id.* This is the equivalent of 2 million MP3 songs being downloaded each day. *Id.*

Much of the Internet Archive is text-based material, but both the number and percentage of audio and video files are increasing rapidly as are downloads of such files. For example, Prelinger Archives, a for-profit company,<sup>16</sup> has assembled over 60,000 advertising, educational, industrial, documentary, and amateur films produced between 1903 and 1990. SoF ¶ 82. Approximately 60% of its holdings are in the public domain;

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Melville; *Ulysses* by James Joyce; *The Scarlet Letter* by Nathaniel Hawthorne; *Grimm's Fairy Tales* by Jacob and Wilhelm Grimm; *The Adventures of Sherlock Holmes* by Sir Arthur Conan Doyle; *Roget's Thesaurus* by Peter Mark Roget; *Don Quixote* by Miguel de Cervantes Saavedra; *The Prince* by Niccolo Machiavelli; *The Adventures of Huckleberry Finn* by Mark Twain; *On the Origin of Species* by Charles Darwin; *The Art of War* by Sun Tzu; and *An Inquiry into the Nature and Causes of the Wealth of Nations* by Adam Smith. A complete list of the current collection can be found at the Project Gutenberg Internet site, located at <http://gutenberg.org/dirs/GUTINDEX.ALL>.

<sup>16</sup> Prelinger Archives furnishes stock footage for the motion picture industry, television networks, software publishers, educational media producers, advertising agencies, and artists and non-profit organizations. SoF ¶ 183.

it owns the copyright in approximately 5% of its holdings. *Id.* Over 1,900 of the company's important public domain files, which physically reside in the Library of Congress, have been digitized and made available through the Internet Archive. Prelinger Archives profits from providing access to its archives, even when its materials are in the public domain, and it welcomes redistribution by users of the LimeWire software. SoF ¶¶ 83-95.

### 3. Creative Commons

Creative Commons is a nonprofit corporation that enables artists and authors to mark their creative work with the freedoms that they intend the work to carry. Through a site on the World Wide Web, <http://creativecommons.org>, creators are invited to choose a copyright license to attach to their own creative work. That license reserves some rights to the author, or copyright holder, while granting other rights to the public. SoF ¶169. A copyright holder can choose whether to authorize commercial use of the licensed content, whether to permit derivative use of the licensed content, and, if derivative use is allowed, whether to require that works that build upon the licensed work also be made available under a similarly free license. *Id.* These licenses then travel via Internet hyperlinks with the copyrighted content, helping others to know, and to rely upon, the freedoms they secure. *Id.*

In the two and a half years since Creative Commons launched its licensing project, more than 10,000,000 objects have been marked with Creative Commons licenses according to Yahoo! Search. *Id.* The vast majority (75%) reserve to the copyright owner commercial rights to the content, while authorizing the public to use the work for noncommercial purposes. Almost 65% grant derivative rights, though half of

those condition that grant upon the requirement that the derivative works be licensed under a similarly free license. And about 2% purport to dedicate their work to the public domain. *Id.*

**B. Musicians and Artists**

Even musicians and artists, some of whom argue that they have been most affected by the improper uses of P2P networks, have turned to P2P technology as a cost-effective mechanism to gain wider distribution of their works. For example, some up-and-coming musicians who do not have a large record label promoting their work rely on P2P technology to create a “buzz” among listeners. See Chris Nelson, *Upstart Labels See File Sharing as Ally, Not Foe*, N.Y. Times, Sept. 22, 2003, at C1 (SoF ¶ 100).

Established artists are also using P2P technology for commercial purposes. See Katie Dean, *Winwood: Roll With P2P, Baby*, Wired Magazine, July 9, 2004, available at <http://www.wired.com/entertainment/music/news/2004/07/64128> (discussing how Steve Winwood’s release of one track on P2P networks caused sales of his album to increase up to eight times in some regions) (SoF ¶ 101). Some well-known musicians even encourage their fans to share recordings of live shows on P2P networks to spur attendance at concerts, which are their main source of income (as opposed to royalties). See Neil Strauss, *File-Sharing Battle Leaves Musicians Caught in Middle*, N.Y. Times, Sept. 14, 2003, at A1 (SoF ¶ 102).

Other artists are actually releasing their content unrestricted over the Internet. Dissatisfied with the music labels, the band Nine Inch Nails left UMG last year and experimented with self-distribution on the web, including their release of the album *Ghosts*. SoF ¶ 103. Even the new president of Plaintiff EMI’s digital unit found the

experiment “fascinating.” SoF ¶ 104. Nine Inch Nails has also released its new album, *The Slip*, on its website for free. SoF ¶ 155. At least one track can be found using LimeWire. *Id.* Additionally, the Internet Archive provides access to authorized recordings of over 20,000 live performances by more than 850 artists such as Hank Williams III, Maroon5, the Grateful Dead, and Vanessa Carlton. SoF ¶ 107. *See also* SoF ¶¶ 97-89 (discussing other available content on the Internet Archive as well as the ability to find it using LimeWire).<sup>17</sup> Free live band performances can be found at [www.nugs.net](http://www.nugs.net) and [www.vidablue.net](http://www.vidablue.net), with some of the same songs also being available by using LimeWire. SoF ¶¶ 156, 157. Internet sites [www.jamendo.com](http://www.jamendo.com) and [www.converse.com](http://www.converse.com) make works available for free, also with copies available using LimeWire. SoF ¶¶ 158-160.

C. *LW's Magnet Mix*

Since August 2003, LW has maintained a service known as MagnetMix. SoF ¶ 108. MagnetMix is a service that allows content owners, such as independent labels, software developers and musicians, to distribute their content over the Gnutella network. *Id.* This service distributes independent works over the Internet, including the Gnutella network. *Id.*; *see also* SoF ¶ 160. Since MagnetMix’s creation, hundreds of artists and other content owners have submitted their content for distribution via MagnetMix. SoF ¶ 108.

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<sup>17</sup> Given these marketing advantages, it is not surprising that a December 2004 report based on a survey of over 2,700 artists and musicians concluded that “across the board, artists and musicians are more likely to say that the internet has made it possible for them to make more money from their art than they are to say it has made it harder to protect their work from piracy or unlawful use.” SoF ¶¶ 105, 106.

**D. Authorized Media**

LimeWire also provides a technology for wide and economical distribution of authorized media content. Peer-to-peer networks provide content owners with distinct business advantages over alternate online distribution technologies. SoF ¶ 109. Peer-to-peer technologies allow more cost-effective distribution of a greater selection of content to a wider audience. *Id.* By using P2P file-sharing networks, bandwidth cost is spread among millions of Internet users rather than placing it all on the original distributor. *Id.*

It is precisely because P2P networks reduce costs that some content providers are increasingly relying on them to distribute their products. *See, e.g.,* James Pearce, *Lindows Offers Software For Free Over P2P*, CNET News.com, Jan. 30, 2004, available at [http://news.cnet.com/Lindows-offers-software-for-free-over-P@P/2100-7344\\_3-5150931.html?tag=st.rm](http://news.cnet.com/Lindows-offers-software-for-free-over-P@P/2100-7344_3-5150931.html?tag=st.rm) (discussing how a company is lowering costs and seeking to attract new customers by distributing its Linux-based operating system software over P2P networks). SoF ¶ 129. The cost savings are, in turn, passed on to the consumer; indeed, because the distribution costs are so much lower, some companies are offering their products for free via P2P networks. *Id.* Examples of these companies abound.

Skype, for example, is the first Internet telephony technology to use P2P distributed computing. SoF ¶ 110. Skype relies on P2P networks, not only for completing telephone calls, but also for distributing its telephony software. *Id.* GridNetworks is an Internet television delivery service that enables content owners to deliver programming to broadband Internet users utilizing a “one-to-many” delivery control model. SoF ¶ 111. Abacast is a company utilizing technology combining P2P delivery with the features of a central server or unicast delivery which is known as “Hybrid P2P.” SoF ¶¶ 121-122.

Without P2P technology, Abacast would not be possible. SoF ¶ 123. As a result of P2P technology, Abacast can insure the quality of data delivery. *Id.* If one server goes down, users can be rerouted to another peer group immediately, allowing Abacast to correct data transmission problems in real time. *Id.*

Yet another company, NFA Group Inc. d/b/a BuyDRM, provides a digital rights platform called KeyOS to its customers allowing them to “market, monetize and monitor their services using peer to peer ‘P2P’ technology.” SoF ¶ 161. Peer-to-peer technology allows BuyDRM’s customers to acquire new customers in a safe manner and it provides a global audience allowing BuyDRM’s customers to expand their client base. SoF ¶¶ 162, 163. BuyDRM’s customers could not reach the large audience necessary to remain competitive without P2P technology. *Id.* Examples of BuyDRM customers include Brand Asset Digital which markets its digital media products by using KeyOS to seed digital media content onto P2P networks; Ellusionist, which delivers pay-per-view content to magicians worldwide; and QTrax which uses KeyOS to enable customers to discover, download, and listen to free music using the Gnutella network. *Id.*

Another innovative company, RazorPop, Inc., developed and distributes TrustyFiles, P2P software similar to LimeWire. SoF ¶ 124. TrustyFiles allows a user to access multiple P2P networks including Gnutella and BitTorrent. *Id.* RazorPop’s P2P Street Team is a program that enables artists such as Grammy Award-winning artist Sananda Maitreya (f/k/a/ Terence Trent D’Arby) to distribute music and video throughout the P2P file sharing networks. SoF ¶¶ 124-126.

A leader in P2P-based communications, information, entertainment, and social networking services, Raketu Communications, Inc., has proprietary P2P services that

utilize distributive peer nodes in a network environment to significantly reduce costs, improve quality and reliability, and decrease security risks. SoF ¶ 127. Raketu allows free calls to other Raketu users, free calls to land and cellular phones, free calls from phone-to-phone, file transfers, instant messaging, off-line messaging, and distribution and viewing of P2P-based streaming content (web TV). *Id.* Without P2P technology, Raketu could not be competitive in the current marketplace. SoF ¶ 128. Simply put, “P2P technology promotes innovation and better quality products in the technology marketplace.” SoF ¶¶ 128, 129.

Other examples of innovative P2P technology include Joost, an on-line video platform delivering high-quality, full-screen, professionally produced video content to users on a free ad-supported basis using P2P technology (SoF ¶ 112); Pando Networks, Inc. which distributes P2P software that makes downloading, streaming, and sharing large media files fast and easy (SoF ¶ 113); and Jun Group, LLC, an Internet marketing company that utilizes P2P technology (SoF ¶ 112). The pioneering Jun Group creates branded music, video, sports, and game programming which it delivers to consumers using P2P networks. SoF ¶¶ 114-120. Jun Group also: (1) created the first music video program featuring major artists Ne-Yo and Jay-Z that was distributed over P2P networks for Coca-Cola. (SoF ¶ 114); *see also*, pages from [www.jungroup.com](http://www.jungroup.com) (SoF ¶ 120); (2) released a previously unavailable song and two videos from Steve Winwood over P2P networks (SoF ¶ 115); (3) released five previously unavailable tracks from recording artists Kevin Martin and HiWatts over P2P networks, three tracks from Lake Trout, and footage from “Starting Over,” a daytime television program (SoF ¶¶ 116-118); and (4)

released The Scene, Jun Group's first original P2P series (SoF ¶ 19). These items have been downloaded millions of times. *Id.*

**E. Permitted Distribution of Computer Software**

Another significant noninfringing use of LimeWire is the authorized distribution of computer software. Many software developers grant express, blanket authorizations for redistribution of their software. This is true for several categories of software developers: (1) developers of "freeware" who are happy for their works to have wide distribution; (2) developers of "ad-ware" software products, in which advertising is embedded in entertaining content intended for widespread distribution; and (3) developers of software that rely upon distribution of "evaluation," "shareware" or "demo" versions that are distributed for free on a trial basis to stimulate sales of full-featured software. One example is WinZip, one of the most popular software titles in the world. See [www.winzip.com/elicense.htm](http://www.winzip.com/elicense.htm) (SoF ¶ 131). WinZip redistribution is expressly authorized by the WinZip license agreement. *Id.* Another example is <http://distribution.openoffice.org/p2p/magnet.html> which specifically provides a magnet link for downloading Open Office software via LimeWire and other P2P clients. SoF ¶ 132.

**F. Distribution Of Content By So-Called "Legitimate" P2P Companies**

Peer-to-peer technology is currently being utilized by at least two companies that have been authorized to distribute content by Plaintiffs. One company, iMesh, which claims to be the longest-standing P2P file-sharing company, indisputably uses P2P technology to allow its users to download authorized content, some for free and others for payment via a subscription model or a per download fee. SoF ¶ 133. Ironically, iMesh