claims to be the inventor of certain P2P features, such as "swarming," that Plaintiffs claim LW implemented. *Id.*

QTrax is another P2P company authorized by Plaintiffs, despite <span style="background:black;color:white">REDACTED</span>

<div style="background:black;color:white;text-align:center">REDACTED</div>

<span style="background:black;color:white">              </span> (SoF ¶ 135). Tellingly, QTrax professes to be "the world's first free and legal P2P music download network." SoF ¶ 134. On its website, QTrax claims that it has the blessing of every major record label in the world, and is freely authorized to allow its users to download music over their P2P networks.[18] *Id.*

### G.    *Use Of P2P By Major Labels*

News reports have revealed that Plaintiffs themselves (or their authorized agents) use programs like LimeWire as a kind of Nielsen rating system, tracking the popularity of downloaded works and using that information to guide their decisions about which bands to sign and which CDs to promote. *BigChampagne Is Watching You*, Wired Magazine, Issue 11.10, Oct. 2003, *available* at http://www.wired.com/wired/archive/11.10/fileshare_pr.html. SoF ¶ 136. Plaintiffs also use P2P programs to target regions of the country for promotion when a band or artist is particularly popular in that region and to persuade radio stations in those regions to play their songs. *Id.* All indications are that this form of distribution will continue to gain in popularity as P2P and digital rights management technologies develop. Already, a

<div style="background:black;color:white;text-align:center">REDACTED</div>

<span style="background:black;color:white">              </span> (SoF ¶¶ 137, 138).

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[18]    Despite Plaintiffs' claims that P2P, and specifically the Gnutella network, lacks noninfringing uses, in the past, <span style="background:black;color:white">REDACTED</span> . SoF ¶ 135.

**H.**     *Promoting New TV Through P2P*

Viacom-owned cable network Spike has even put one of its shows on open P2P networks for free distribution in order to attract potential viewers, using it as a viral marketing mechanism. SoF ¶ 139.

**I.**     *Other Noninfringing Uses*

Even the United States armed forces have recognized the benefits and cost efficiencies of P2P networks. "America's Army" is a free combat video game produced by the United States Army in an attempt to attract young recruits. Seth Schiesel, *On Maneuvers With The Army's Game Squad*, N.Y. Times, February 17, 2005, at G1. (SoF ¶ 140). The video game is so popular that it is believed to be more effective at delivering the Army's messages than the millions of dollars in advertising spent by the Army. *Id.* Not surprisingly, the Army has distributed the video game on P2P networks like LimeWire. Aliya Sternstein, *Gnutella Wants You*, Forbes Magazine, Nov. 10, 2003, *available* at http: // www.forbes.com/forbes/2003/1110/077sidebar_print.html SoF ¶ 141.[19] It is also available via LW's MagnetMix service. SoF ¶ 164.

Additionally, academic institutions are beginning to look to P2P networks to further their educational mission. For example, the Berklee College of Music has initiated a program called "Berklee Shares" to make many of the school's music lessons available to the public for free through P2P networks. Katie Dean, *Teaching Music Traders A Lesson*, Wired News, Nov. 12, 2003, *available* at http://www.wired.com/entertainment/music/news/2003/11/61173 SoF ¶ 143. In addition to

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[19]     The armed forces are also utilizing P2P technology on the battlefield itself. *See* Paul Rubens, *Army Tactics Are The Business*, Financial Times, Nov. 26, 2003, *available* at http://www.groove.net/pdf/armytactics.pdf (discussing Army's use of P2P technology and how businesses could similarly utilize the technology); SoF ¶ 142.

providing the public with access to the resources and knowledge of the school, Berklee Shares has also benefited the school by increasing awareness of its programs and faculty and increasing revenues. Press Release, Berklee College of Music, *File Sharing Works for Berklee College of Music,* May 18, 2004, *available* at http://www.berkleeshares.com/press/pressrelease2 (SoF ¶ 144).

Peer-to-peer networks are also being utilized by individuals to express and disseminate their political views to as many people as possible and to provide the public with access to a vast assortment of government information and political speech. *See* Kim Zetter, *Downloading ForDemocracy*, Wired News, July 19, 2004, *available* at http://www.wired.com/politics/law/news/2004/07/64237 (discussing the www.outragedmoderates.org website, which contains hundreds of government and court documents and makes them available for download through P2P networks) (SoF ¶ 145). One website includes links to numerous government documents such as the 9/11 Commission Report, all seventeen of the accompanying staff statements, and the actual testimony of many principal staff members from the Clinton and Bush administrations. *See* http://www.outragedmoderates.org/HowtoUseP2PNetworks.html (SoF ¶ 146). Although these public documents are available from other sources as well, the nature of P2P technology makes it much easier—and quicker—to access and view the documents, many of which are quite lengthy and otherwise difficult to locate. *Id*. LimeWire users can find various items of significance, such as the Constitution, the Declaration of Independence, Martin Luther King's "I Have a Dream" speech, and the works of William Shakespeare(SoF ¶¶ 165-168).

Recordings of oral arguments before the Supreme Court are being digitized and made available on P2P networks. *See Download Top Supreme Court Hits!*, CBSNews.com, Aug. 6, 2003, *available* at http://www.cbsnews.com/stories/2003/08/06/tech/main567017.shtml (SoF ¶ 147). Indeed, the oral argument from the *Sony* case that is at the heart of this very matter is now readily accessible. *See The Oyez Project, Sony Corp v. Universal City Studies*, 464 U.S. 417 (1984), *available* at http://www.oyez.org/cases/1980-1989/1982/1982_81_1687/ (SoF ¶ 148).

People living in countries under totalitarian regimes that censor "unpatriotic" or "inappropriate" websites will increasingly be able to circumvent that censorship and access information from anywhere in the world using P2P technology. *See New Technology May Foil PRC Attempts At Censorship Effort*s, The China Post, March 12, 2003, *available* at http://chinapost.com.tw/print/35737.htm (noting that Internet users in mainland China are unable to access information directly from websites on subjects such as Taiwan, democracy, Tibet, Falun Gong, and major news sites such as CNN and BBC) (SoF ¶ 149); Heather Green, *The Underground Internet*, Business Week, Sep. 15, 2003, at 80 (discussing Freenet-China, a Mandarin language version of a widely used P2P network that enables users to access news and websites, such as CNN.com, that the Chinese government censors) (SoF ¶ 150). Among the documents that have been shared on P2P networks in China are the Tiananmen Papers, a compilation of the transcripts from 1989 meetings among Chinese leaders in the aftermath of the student protests. *See* Jennifer Lee, *Grass-Roots War Heats Up Against Government Web Blocks*, Chicago

Tribune, Oct. 14, 2002, at 4 (SoF ¶ 151).[20]  And while P2P technology may not provide a foolproof method for avoiding government censorship, it will certainly be much more difficult for totalitarian states to stifle the flow of information on P2P networks than to block a handful of centralized websites.

The First Amendment embodies "'[o]ur profound national commitment to the free exchange of ideas.'"  *Ashcroft v. ACLU,* 535 U.S. 564, 573 (2002) (citation omitted). The Supreme Court's decision in *Sony* reflected a similar commitment when it held that traditional notions of secondary liability for copyright infringement should not be used to deny law-abiding individuals access to valuable tools for sharing information and ideas simply because others may use those tools for improper purposes.  Despite a changing technological environment, the same principle applies with equal force here.

In light of these facts, Plaintiffs cannot seriously dispute that LW's P2P technology has numerous, current significant noninfringing uses and vast possibilities for future development.  As explained by Justice Breyer:

> And that is just what is happening.  Such legitimate noninfringing uses are coming to include the swapping of: *research information* (the initial purpose of many peer-to-peer networks); public domain files (*e.g.,* those owned by the Prelinger Archive); *historical recordings and digital educational materials* (*e.g.,* those stored on the Internet Archive); *digital phones* (OurPictures, for example, is starting a P2P photo-swapping service); *"shareware" and "freeware"* (*e.g.,* Linux and certain Windows software); *secure license music and movie files* (Internet MediaWorks, for example, protects licensed content sent across P2P networks); *news broadcasts, past and present* (the BBC Creative Archive lets users "rip, mix and share the BBC"); *user-created audio and video files* (including "podcasts" that may be distributed through P2P software); *and all manner of free "open content" works collected by Creative Commons* (one can search for Creative Commons material on Streamcast).

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[20]  One of the P2P systems being used in China is called the "Six/Four System," which refers to the date of the Tiananmen Square massacre on June 4, 1989.  *See* Jim Rapoza, *Six/Four: The Internet Under Cover,* Eweek from ZDWire, March 6, 2003, *available* at http://eweek.com/c/a/Past-Reviews/SixFour-The-Internet-Under-Cover (SoF ¶ 152).