

SYMPOSIUM

LEGAL REFORM: THE ROLE OF PUBLIC INSTITUTIONS AND LEGAL CULTURE*

COOPER: It is a great to pleasure to welcome you to this very special event. We are here for a symposium for the California Western School of Law International Law Journal, in collaboration with the International Law Society, the International Legal Studies Program, the Center for Creative Problem Solving and Proyecto ACCESO, a leading training program which builds the rule of law in Latin America. My name is James Cooper and I am an Assistant Dean here at the law school, where I also direct Proyecto ACCESO.

The topic for today's symposium is Legal Reform: The Role of Public Institutions and Legal Culture. Over the last couple of years, I [had] the great pleasure of working with so many people who have helped consolidate democratic governance in their respective countries. Some of them are here today to talk about legal reform and the important roles that legal cultures and legal institutions play in the reform process. Today we are going to hear from many different speakers from different parts of the legal sector on different continents. Honorable James Stiven, a U.S. Magistrate Judge, will open our symposium with his thoughts on the rule of law and the foundations that are required to be faithful to it.

Next we will also hear from Professor Arthur Campbell of California Western School of Law who will explore the changing landscape of IP protection—specifically copyright. Professor Robert Bohrer of California Western School of Law will comment on the presentation and then add his own thoughts concerning the area of biotechnology, an arena that both the United States and Chile have not begun to fully regulate, let alone harmonize regulations across the hemisphere. As Professor Bohrer will attest, the legal culture in the U.S., as in the developing world, is still working through the details of

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how to best navigate through the moral issues that the evolving world of biotechnology presents. Claudio Pavlic, Chile's former National Public Defender, will then speak to us about one of the great U.S. inventions that have been exported internationally—a robust public defense system. This critical legal institution has been one of the newest additions to the Chilean governance landscape. As part of the transition to more oral, open, and participatory judicial procedures in criminal law, the Chilean government created a defenders office and prosecutors office—two crucial pieces to the adversarial system which requires a move away from an interactive judge controlling the investigation stage, judgment, and sentencing stages. To create such an institution from whole cloth, in the aftermath of a seventeen-year dictatorship is quite a feat. Claudio Pavlic will speak to that challenge. He is followed by Professor Laurence Benner of California Western School of Law who will talk about the creation of the Ombudsman Commission in Papua New Guinea. Professor Benner served as the legal counsel to the new office in the 1970s and assisted the commission's work through the dynamics and pressures of confronting official corruption, uncovering government inefficiencies, and creating accountability practices. Professor Ruben Garcia of California Western School of Law will comment on the presentations of Claudio Pavlic and Professor Benner and provide his own reflections about the role that legal cultures and legal institutions play in emerging democracies and in our very own. Dean Steven Smith of California Western School of Law will close this symposium with his thoughts about the rule of law in democratic societies.

Before we start, I would like to take this special moment to thank Joe Przyuski and his team from the International Law Journal for their support and Marlene Blas, John Lancaster, and all the people here at California Western School of Law for assisting in this event. I extend a special welcome to Professor William Aceves' class on Comparative Law and thank him for all his support in making this symposium a success. Let me go no further before I introduce the Honorable James Stiven who is a judge with the U.S. Magistrate Court, here in San Diego. Judge Stiven was a civil trial lawyer, specializing in commercial litigation. He also served as member of the House of Delegates of the American Bar Association for twelve years and was the Chair of the ABA Section on Individual Rights and Responsibilities. He was appointed a Magistrate Judge of the United States District Court in August 1996. And in that capacity, he presides over civil and criminal trials and other proceedings, motion hearings and settlement conferences. He presently serves on the Magistrate Judge's Executive Board

for the U.S. Ninth Circuit and the Board of San Diego County Judges Association. He has been a wonderful supporter of this law school, serves on our Board of Trustees, and has traveled to Chile with Proyecto ACCESO to train judges, prosecutors and defenders in our post-graduate program on legal reform. Please welcome Judge James Stiven.

STIVEN: Well thank you Jamie very much for that fine introduction. I am here to welcome all of you, both the participants and speakers as well as those of you who are attending this symposium. I am really here to welcome you and to encourage you all in the work that is represented by the organizations that are sponsoring this particular symposium. As Jamie indicated in my introduction, I am actually here in dual capacity, both as a Federal Judge sitting in this Federal District Court, and as a member of the Board of Trustees of California Western School of Law. Also, as Jamie mentioned, I was fortunate enough to participate in the certificate program in Santiago, Chile this past spring.

As a Federal Judge, I applaud the efforts of our speakers and all of you who are here to expand and strengthen the rule of law throughout Latin America and other countries of the world. As a Federal Judge, every day I deal with cases and problems that are brought into our court, involving issues relating to International Human Rights, International Trade and the protection of intellectual property rights world wide. My job as a judge is easier if litigants, lawyers and judges have a better understanding of the diverse cultures, as well as a greater appreciation for the application of the rule of law world wide; and also an appreciation for the availability of effective mechanisms for dispute resolutions in countries throughout the world.

As a Trustee of California Western School of Law, I also applaud this symposium today and those of you who are participating because it affords to the members of our faculty, to the Dean and people like myself, and all of you, an opportunity to interact and hear from talented and committed lawyers, teachers and judges, from Latin America and from other countries. It is essential that we can meet together and share our mutual thoughts and ideas [on] the concept of judicial reform and spreading the rule of law throughout the world. I also applaud the programs sponsoring this organization because they also afford to students in this law school an opportunity to meet with teachers, lawyers, and judges from other countries, to study abroad and also to participate in internship programs working for public agencies, government agencies or law firms or related organizations in other counties in the world. In fact, I am lucky enough right now to have as

one of my current law clerks serving with me, a 2004 graduate of California Western School of Law. She had the good fortune of spending the last winter quarter as an extern working for the law department of Deloitte in Santiago, Chile. Those kinds of experiences add to your richness as students in this law school, but we are all served by that opportunity to mix with other cultures and to learn from them and share what we have with other cultures so that we might help expand the rule of law.

Again I welcome you; I hope this conference proves informative and useful for all of you. I look forward to the opportunity to working with our speakers in the future, and perhaps with some of the students who are here as well.

COOPER: Thank you so much Judge Stiven. It gives me great pleasure to introduce Professor Arthur Campbell. He, too, has been a trial attorney and during the turbulent 1970s not an easy thing to do—representing both the government and anti-war defendants. He taught at Georgetown, George Washington, Howard, Catholic, and American Universities. He is the author of the *Law of Sentencing*, which is considered the national authority and cited over two hundred times in judicial opinions and law reviews. Professor Campbell is an avid sportsman, a former rugby player, boxing champion and now polo player. And as a poet, he is very much a proponent of intellectual property rights and the rights of the author. He is going to be talking about the changes in legal culture that have been affected by the recent lawsuits media companies have launched against individuals and some of the controversies concerning the recording industry and music piracy. Professor Arthur Campbell.

CAMPBELL: Thank you Jamie. You added polo. That was not on the original bio from which you were quoting; that is a passion in my extra-curricular life.

Turning to copyright piracy, the only claim I have to originality in this area is on that two-page handout most of you have in front of you—that little discussion on the paradoxes of copyright piracy.¹ That is an overview of my thoughts on the history and direction of the nuts and bolts of piracy—or you might say the cutlasses and belaying pins.

I am going to discuss the nine most recent cases in the copyright area, and tell you where our courts stand in terms of stopping copyright piracy on the Internet—which, as a bottom line, means not very solidly. And let us see if we can discern why the judicial solution is

1. For a copy of this monograph, please see the Appendix to this transcript.

not very effective from the various positions American courts have taken.

As the judiciary has recognized, by use of the Internet a person can take a single CD and within seconds deliver it to millions of people in nearly perfect identical copies.² Judge Posner added, in trying to account for the proliferation of millions of people involved in copyright piracy, particularly through music swapping, that they are either “ignorant,” “disdainful” of copyright, or they simply “discount” the risk they will be sued.³

It was four years ago the RIAA (the Recording Industry Association of America) filed suit against Napster. I am sure you have heard of the *Napster* case.⁴ When the Ninth Circuit in the year 2001 upheld Judge Marilyn Patel’s injunction against Napster that was the first major breakthrough against copyright piracy by the record companies.⁵ But stay tuned. That case is not over. As of July 2004 some new events have turned in that case and a couple of them have turned against the record companies.⁶ I will mention those in a moment.

In contrast to the *Napster* case, you have the *Grokster* case, just decided last month, in which the enablers of certain peer-to-peer software were allowed to continue supporting music piracy.⁷ I will discuss this case near the end of my remarks.

On the other hand, going after individual pirates and individual consumers, not only engenders a lot of bad publicity, but also as Judge Posner has observed, “chasing individual consumers is time consuming and is a teaspoon solution to an ocean problem.”⁸

Moreover, complicating public perception about what is piracy, and what is not, the *Grokster* court last month acknowledged “thousands of . . . musical groups have authorized free distribution of their music through the inter-net [sic].”⁹ So you have among pirates many people who might want to comply with copyright laws but are confused as to what is and is not copyrighted.¹⁰

2. *In re Aimster Copyright Litig.*, 334 F.3d 643, 646 (7th Cir. 2003).

3. *Id.* at 645.

4. *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000).

5. *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

6. *See In re Napster, Inc. Copyright Litig.* No. MDL 00-1369 MHP, 2004 U.S. Dist. LEXIS 7236 (N.D. Cal. Feb. 22, 2004).

7. *See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*, 380 F.3d 1154 (9th Cir. 2004).

8. *In re Aimster Copyright Litig.*, 334 F.3d 643, 646 (7th Cir. 2003) (quoting Randal C. Picker, *Copyright as Entry Policy: The Case of Digital Distribution*, 47 ANTITRUST BULL. 423, 442 (2002)).

9. *Grokster*, 380 F.3d at 1161.

10. *See Aimster*, 334 F.3d at 645.

The first case I will discuss is *Recording Industry Association of America (RIAA) v. Verizon*.¹¹ Remember, about four years ago the RIAA got an injunction against Napster—which I will call the “parent” infringer company.¹² Since that time, the RIAA has targeted hundreds of what are both literally and figuratively the “kids of Napster.”¹³ That is, the individual file swappers of music. The test case I have cited for you involved just two subpoenas that were sought under the Digital Millennium Copyright Act¹⁴ and directed against Verizon’s Internet service to identify the alleged pirate swappers, subscribers to Verizon’s services.¹⁵

Verizon refused to comply with the subpoena.¹⁶ The court held defendants exempt from the DMCA subpoena requirement because Verizon was acting as a mere conduit for P2P files.¹⁷ That is to say, Verizon did not actually store infringing material on its website as Napster did. I will have more on this when we get to the *Grokster* case.

To me this case contained potential Fourth Amendment privacy issues and First Amendment anonymity issues. But, of course, Verizon could not argue those defenses vicariously.

The second case is *Aimster*.¹⁸ Aimster was another Internet service provider, one that helped with P2P swapping. Owners of copyrighted music sued it for contributory as well as vicarious infringement,¹⁹ that is the typical one-two punch against deep-pocket infringers. They also sued for an injunction pending litigation.²⁰ The court held that because Aimster allowed their subscribers to share files and offered a tutorial on that subject, it would likely be found a contributory infringer.²¹

The case rejected Aimster’s argument that its software was capable of non-infringing uses.²² That is the argument the U.S. Supreme

11. *Recording Indus. Assoc. of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003).

12. *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 927 (N.D. Cal. 2000).

13. *See Verizon*, 351 F.3d at 1232.

14. Digital Millennium Copyright Act, 17 U.S.C. § 512(h)(1) (2004) [hereinafter DMCA].

15. *Verizon*, 351 F.3d at 1231.

16. *Id.* at 1232.

17. *Id.* at 1239 (remanding case to District Court to vacate order enforcing subpoena and granting motion to quash subpoena).

18. *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003).

19. *Id.* at 645.

20. *See id.*

21. *Id.* at 652.

22. *Id.* at 651.

Court injected into copyright law twenty-eight years ago in the famous *Sony Betamax*²³ case: Back then, the Court held if the television recorder could be used lawfully, then its manufacturer could not be a contributor infringer when some customers used it unlawfully.²⁴ This defense did not work for Aimster because there was no evidence Aimster's software had ever been used in a non-infringing way.²⁵ So the "staple article of commerce" defense is not always available for large infringers. This case was a victory for the music industry.

The third case is *Country Road Music v. MP3.Com*.²⁶ The court calls it, "just one more in the series of copyright infringement cases against MP3.Com."²⁷ During summary judgment MP3 argued it had a fair use defense, which arose from its license to perform the music.²⁸ Defendants said that license should also authorize them to make copies of the music.²⁹ The court threw out that argument, noting that performance and reproduction are clearly and unambiguously separate rights under the Copyright Act of 1976.³⁰

The fourth case is *In re Napster*.³¹ This case, which started back on December 6, 1999,³² is still continuing. After the Ninth Circuit upheld Judge Marilyn Patel's injunction against Napster, the defendant sought extended discovery for essentially three purposes. One, to be able to determine if the record companies really owned the copyright to all those records they said were being pirated.³³ Judge Patel accepted this discovery purpose, a ruling that is currently causing the record companies a lot of trouble. They have got to go back in their own files for contracts, most of which were often not put together properly in the first place. Or they were not filed properly and so are difficult to find now, to prove their chain of title for the music they claim was pirated.

Secondly, Napster asked for expanded discovery to present a defense of misuse of copyright.³⁴ This is an unusual defense and seldom

23. *Sony Corp. of Am., Inc. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

24. *See id.* at 456.

25. *In re Aimster Copyright Litig.*, 334 F.3d 643, 653 (7th Cir. 2003).

26. *Country Road Music, Inc. v. MP3.com, Inc.*, 279 F. Supp. 2d 325 (S.D.N.Y. 2003).

27. *Id.* at 327.

28. *Id.*

29. *Id.*

30. *Id.*

31. *In re Napster, Inc., Copyright Litig.*, U.S. Dist. LEXIS *7236 (N.D. Cal. Feb. 22, 2004).

32. *Id.* at *7.

33. *Id.* at *18.

34. *Id.* at *37.

successful. By this time the record companies had finally gotten around to putting their own downloadable music on a commercial website. However, in granting Napster's motion for extended discovery, Judge Patel said, "The evidence now shows the plaintiffs [the record companies] have licensed their catalogs of works for digital distribution in what could be called an overreaching manner."³⁵ That is stepping right into misuse of copyright.

The third reason for extending discovery was to pursue Napster's counterclaim based on anti-trust.³⁶ According to Napster, the music company's currently downloadable catalogue of music was assembled in too sweeping and exclusive a manner.³⁷ "The evidence also suggests," Judge Patel declared, "that plaintiffs' entry into the digital distribution market may run afoul of antitrust laws³⁸. . . . [P]laintiffs' allegedly inequitable conduct is currently ongoing and the extent of the prospective harm is massive."³⁹

The fifth case is *Motown v. iMesh.com*.⁴⁰ A major record company sued the Israel-based iMesh company for copyright piracy by way of the latter's 23 million subscribers.⁴¹ Defendant moved to dismiss for lack of personal jurisdiction, but the court held personal jurisdiction established.⁴² Although the website was allegedly operated in Israel, the court observed the corporation "has repeatedly held itself out to governmental authorities and to third parties as being physically present in New York."⁴³ When iMesh incorporated in Delaware, "it listed a New York address" and it also "ordered services and merchandise, which have been billed to it in New York."⁴⁴

The sixth case is *Arista Records, Inc. v. Sakfield Holding Co.*⁴⁵ Another large record company sued a web site owner, a Spanish company, for copyright infringement by letting its customers download copyrighted music.⁴⁶ Defendants moved for lack of personal jurisdic-

35. *Id.* at *38.

36. *Id.* at *56.

37. *Id.* at *38.

38. *Id.*

39. *Id.* at *69.

40. *Motown Records Co. v. iMESH.com, Inc.*, 2004 U.S. Dist. LEXIS *3972 (S.D.N.Y. Mar. 12, 2004).

41. *Id.* at *2.

42. *Id.* at *4.

43. *Id.* at *7-8.

44. *Id.* at *8.

45. *Arista Records, Inc. v. Sakfield Holding Co. S.L.*, 314 F. Supp. 2d 27 (D.D.C. 2004).

46. *Id.* at 29.

tion because of insufficient evidence it did business with residents of the District of Columbia, where the case was filed.⁴⁷

The court found personal jurisdiction, based on the declaration of a single D.C. resident because he had downloaded music from the defendant's website.⁴⁸ That act was all that was necessary, said the court, to give it personal jurisdiction over the Spanish company.

There was also the matter of defendant's "unclean hands" in this case. Sakfield purged many of its electronic records—destroying important tracking data—and then claimed there was insufficient evidence to prove personal jurisdiction.⁴⁹ The trial court called that argument laughable, particularly in light of the fact plaintiffs' experts were able to reconstruct some of the destroyed electronic files.⁵⁰ So file-purging is another way international pirates cannot elude personal jurisdiction in United States courts.

The seventh case is *UMG Recordings v. Bertelsmann AG*.⁵¹ Record companies brought in the deep pocket and solvent defendants who are now behind the Napster enterprise. UMG sued them for vicarious and contributory infringement during their earlier involvement with then bankrupt Napster.⁵² The defendants moved to dismiss for failure to state a claim.⁵³ The court held the record companies stated a sufficient claim by alleging defendants had exercised full, operational control over Napster at the time Napster was still downloading pirated music.⁵⁴

That brings up another practical difficulty—in terms of dollars and cents—with suing large-scale infringers; they often go bankrupt. In this case at least plaintiffs had a deep-pocket target. Bertelsmann is one of the largest music distributors in the world.⁵⁵

Case Number Eight is *Sony Music Entertainment, Inc. v. Does 1-40*.⁵⁶ Sony and sixteen other record companies sued unidentified fast track and P2P file swappers, namely Does 1-40.⁵⁷ Plaintiffs served a

47. *Id.*

48. *Id.* at 31.

49. *Id.* at 33.

50. *Id.* at 34.

51. *UMG Recordings, Inc. v. Bertelsmann AG*, 222 F.R.D. 408 (N.D. Cal. 2004).

52. *Id.* at 410.

53. *Id.* at 409.

54. *Id.* at 413.

55. Dallas Business Journal, *Music Distributors, retailers to pay \$67M in settlement*, American City Business Journals Inc., at <http://dallas.bizjournals.com/dallas/stories/2002/09/30/daily8.html> (Sept. 30, 2002).

56. *Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004).

57. *Id.* at 558.

subpoena on Cablevision, who was the swappers' cable-service provider, ordering them to divulge the swappers' names and addresses.⁵⁸ One of the subpoenaed people, a "Jane Doe," came forward to quash the subpoena on First Amendment grounds.⁵⁹

The court recognized two First Amendment issues entwined in this case. First, whether Internet file swappers are engaged in exercising anonymous speech? The court said, yes, they were.⁶⁰ Second, whether this speech was constitutionally protected under the First Amendment? Here the court answered, yes, but only to a limited degree—and that degree was not strong enough to override the copyright holders' rights to utilize the subpoena process.⁶¹

On a related issue of Fourth Amendment privacy, the court held Internet users have a "diminished expectation of privacy" if either one of two circumstances are present. Either (1) the swappers have a contract with their ISP, that allows disclosure, "as necessary to satisfy any law, regulation or other governmental request;"⁶² or (2) they share their files globally. In the latter instance the court said, "[I]t is hard to understand just what privacy expectation he or she has after essentially opening the computer to the world."⁶³ To me, at least one of these circumstances would seem to be present in most instances of P2P swapping.

Finally, you have the largest judicial setback for the music industry in *Metro-Goldwyn Mayer, Inc. v. Grokster*,⁶⁴ the last case I will discuss. It was handed down last month. This time major record companies filed infringement suits against the distributor of P2P file-sharing software for both contributory and vicarious infringement.⁶⁵

The Ninth Circuit upheld the trial court, which had granted *Grokster* summary judgment. Specifically, plaintiffs failed to prove, under contributory infringement, the elements of knowledge and contribution, a subject I will return to in a moment.⁶⁶ Likewise, for vicarious

58. *Id.* at 559.

59. *Id.* at 561. Jane Doe actually based the motion to quash on four grounds, violation of first amendment rights, lack of personal jurisdiction, improper joinder and lack of actual showing to allow discovery.

60. *Id.* at 564.

61. *Id.*

62. *Id.* at 559.

63. *Id.* at 566 n.7 (citing Recording Indus. Assoc. of Am., Inc. v. Verizon Internet Serv., Inc., 257 F. Supp. 2d 244, 267 (D.D.C.2003)).

64. *Metro-Goldwyn-Mayer, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004).

65. *Id.* at 1160.

66. *Id.* at 1163.

infringement, plaintiffs failed to prove Grokster operated an integrated service that gave it the right to supervise the swappers.⁶⁷

What primarily distinguishes this case from the Napster case was that the Grokster system did not store infringing music on its own files.⁶⁸ It only enabled its subscribers to trade music by providing them with software.⁶⁹

To defeat plaintiffs' claim that supplying the enabling software was an act contributing to infringement, and that the defendant knew that the software would be used for infringement, Grokster successfully invoked the "staple article of commerce" doctrine.⁷⁰ Recall, a previous court had rejected this defense in *Aimster*, the second case discussed today.⁷¹ According to the Ninth Circuit, even if Grokster had knowledge its software was being used for copyright infringement, since the software could also be used for legitimate downloading of musical, digital, audio, video, picture, or text files, Grokster's software was capable of substantial non-infringement uses, and thus was not liable for any infringement activities.⁷² The court bolstered its conclusion with what I quoted at the beginning of my talk: "[T]housands of . . . musical groups have authorized free distribution of their music through the inter-net [sic]."⁷³

So what is the upshot today? If you go after the big guys—the businesses that facilitate copyright piracy—you are going to get them if they still are ill advised enough to allow infringing files to remain on their websites. You are going to get them whether they are based in this country or, for example, in Israel or Spain. It only takes a single download to get personal jurisdiction over them.

But you are not going to get any more than an injunction to stop infringing activity by the particular defendant or on that particular website. Which—considering how easily it for pirates to establish a different websites—is like patching a toothpaste tube riddled with holes: You cover one hole and paste squirts from another. Moreover, if defendants go belly up like the original Napster enterprise, you are lucky if you can recover any financial losses.

67. *Id.* at 1165.

68. *Id.* at 1163.

69. *Id.* at 1158.

70. *Id.* at 1160-63.

71. *See supra* notes 18-22 and accompanying text.

72. *Id.*

73. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154, 1161 (9th Cir. 2004).

On the other hand, if you go after individual file swappers, you are supporting the belief many youthful pirates possess: that entertainment giants making billions of dollars a year are trying to bludgeon kids who just want to hear a little music.

So how do you stop piracy? As I have indicated in my two-page handout, I think the most effective way is for copyright owners to climb into the engineer's cab and start driving the digital train before it runs over them. Obviously the music industry did not do that in time. If not, then as soon as technology makes it easy for pirates to download video games, films, books and other kinds of product that require more megs and faster delivery, all entertainment companies will face the same digital train. A logical first step would be for them to collaborate in launching a standard electronic platform that enables worldwide consumers to access, purchase and download their products legally.

Just yesterday, however, a newspaper I picked up contained the account of a squabble within the MPAA (The Motion Picture Association of America). Its leaders were arguing over how to get copies of potential Academy Award films into the hands of its members for viewing and picking the annual winners. The MPAA's concern was how to stop these films from being pirated through the misuse or neglect of its members. The idea being hotly debated was to give each of the 10,000 voters of the MPAA an \$800 DVD-playing machine that the MPAA could obtain wholesale for \$500. This machine would ensure that when members played their specially coded DVD movie, they could not make copies or upload the film to anybody else. This is the sort of playground quarrel the movie industry seems occupied with, instead of focusing on the looming threat of film piracy on the widespread scale that currently plagues the music industry.

I believe a lot of consumers in this and other countries will lawfully download and pay for music, movies and games if they are given an easy way at a reasonable price. Since they were not given that for a long time in the music market and have not yet been given that for other entertainment products, the public will to continue to pirate. That, at least, is my personal view.

COOPER: Thank you Professor Campbell. In order to change what you are talking about here we need to understand that media companies are using old business models and confronting new developments in technology. Clearly, there is a mismatch. A lot of the media companies are still relying on old regimes of copyright, trademarks and patents that are very much based on laws dating back to the nineteenth century. The world of copyright is clearly in flux as pri-

vate lawsuits against individuals proliferate and companies like MP3, Napster and others look at ways to test the boundaries and the patience of multi-national media corporations. The United States is the home of much innovation and also a great deal of new kinds of licensing and other schemes to test the new landscape of digital entertainment.

It is important to note we are not just talking about music, software, books and movies. IP piracy is also becoming a matter of public safety as there are health and safety concerns with the flood on the market of fake Viagra, bogus cancer drugs and phony cocktails to combat the effects of AIDS. It is no longer just fake automobile brakes and phony Rolls Royce engines that are put into airplanes—both of which are menaces to public safety as well.

The world of biotechnology too has become hostage to IP fraud as the developing world starts to enjoy the yields that agriculture can bring with stronger and more reliable seeds. Monsanto, a U.S. corporation, has sold its genetically modified seeds to grow corn and other agricultural products in Chile and has seen Argentine farmers steal saplings without paying the required royalties.

Professor Robert Bohrer, our next speaker, is an internationally recognized expert on biotechnology. He is on the board of directors of biotechnology companies here in San Diego. He has spoken internationally at the Max Planck Institute for Comparative Public Law and International Law and a variety of other places. And I know he has got a couple of ideas he wants to share with you, concerning biotechnology, the Food and Drug Administration and some of the challenges new technologies force national legal cultures and institutions to address. With respect to intellectual property protection and the context of changing legal regimes in developing countries like Chile, it is difficult enough to sustain success in transitioning from the Inquisitorial to adversarial systems in criminal procedure. But when you add in new technologies and the ethical issues that come with biotechnology at that same time, it becomes quite a challenge to adapt, harmonize with other states' laws and even begin to regulate when there are so many other pressing regulatory priorities. Please welcome Professor Robert Bohrer.

BOHRER: Thank you Jamie and it is a great pleasure to be here and to have an opportunity to comment on my distinguished colleague Professor Campbell's remarks.

Let me first say something very brief in comment about one of Art Campbell's points, which is that technology innovation threatens established products. That is a very interesting problem in copyright. By that he means, of course, that you have records and then they are

threatened by cassette recorders and then you have CD's and they are threatened by the basic ubiquitous nature of CD burners and the internet. And that is a problem in copyright and for copyright based enterprises. But it in fact is not at all the same problem by and large for enterprises which are based on patents, particularly the pharmaceutical industry. In fact the very purpose of pharmaceutical patents is to encourage innovation that destroys the value of earlier products. There was a generation of blood pressure medicines based on blocking of beta adrenergic receptors and then someone comes up with alpha blockers and to a large degree the value of the beta blocker franchise is destroyed, but that is the very purpose of the incentives created by the patent system. And that is a process of creative destruction, which creates fierce competition among the world's largest multi-national pharmaceutical companies. It is a competition that in the long run produces ever better health care products and pharmaceuticals and which is only threatened by the trend towards consolidation by merger. That is a very real problem, but that is where patents are in fact not a barrier to antitrust enforcement, but actually a basis for it. In the European antitrust office and in United States antitrust office, two companies that hold patents which substantially dominate a particular market, can be prevented from consolidating or merging because of that. Nevertheless, there has been far too much consolidation.

Can we say something else about the nature of counterfeit and pirated goods in the patented pharmaceutical context? Counterfeit pharmaceuticals are, I believe, very different from counterfeit CD's. Counterfeit pharmaceuticals are by and large not really pharmaceuticals. And there are counterfeit pharmaceuticals and they are very dangerous. Because if you need a cancer drug, one of the worst things that can happen is for you to get vial containing a solution of similar density and similar color but that is not the cancer drug. And that does happen. It is a lot easier to get a suitcase full of fake erythropoietin into the United States than a suit case full of real cocaine. So if cocaine fields are being destroyed or if in Afghanistan there really is a diminution in the production of hashish, one of the ways to replenish the profits for criminal enterprise, which is in some cases terrorist enterprise, is to counterfeit drugs. The vials are actually fairly easy to counterfeit and it is not hard to make the labels. The anti-counterfeiting system in that area has not been very effective and is something that needs to be done. But that may be something pharmaceutical companies may be a little ambivalent about because the existence of those counterfeit drugs is their principal defense against im-

portation of drugs from Canada. And so when they warn you not to buy drugs from Canada and not buy drugs from a Romanian internet site, the reason they are warning you is because there are counterfeit drugs out there. On the other hand, if they really had an effective counterfeiting label and drug tracking system, then they would not be able to argue so strongly against drug importation. So it is a dual edged sword for the pharmaceutical industry. They may not be really keen on making it impossible to pass off counterfeit drugs, because then they would not be able to stop the importation of what then would become gray-market goods into the United States. Now, that gray-market raises another problem, which is something a little different. That is a problem for the pharmaceutical industry and relates to a much more fundamental issue I want to discuss of my own: access to pharmaceuticals and developing countries.

One of the problems with the differences in costs between pharmaceuticals in the United States and pharmaceuticals in other countries is the inevitable possibility of gray-market re-importation in the United States. It is one thing to provide people in a poverty-stricken African country with low cost HIV drugs. It is quite another thing, to provide them to the government of that country for distribution to their country's HIV patients and then find that a substantial portion of it is being diverted because it can be resold there for a profit back into a gray-market system which provides those pharmaceuticals in the United States at half the price that is ordinarily paid in the United States, or, if not in the United States, in France and England or wherever. That form of gray-market diversion from countries where poverty is rampant and pharmaceuticals need to be cheap, back into first world countries where pharmaceutical prices support the research and innovation that is required for the development of those pharmaceuticals is another kind of problem of intellectual property, which intellectual property protection is intended to avoid. When a company develops and patents a drug, they can limit where and how it can be sold in the countries in which they have a patent. And that is a part of the broader problem. So let me speak a little bit about that last problem which is access to drugs in lesser developed countries where there is wide spread disease and first world pharmaceuticals would be a substantial benefit.

First, while all forms of intellectual property protection can perhaps be justified by a Lockean notion of natural property rights (the idea that persons, by investing of themselves in the creation of an invention are entitled to own it), the primary contemporary understanding of the purpose of the protection of intellectual property rights,

whether it is copyright or patent, is that it is necessary to encourage the investment of, that produces a social benefit. In art, music, literature in the copyright area, and new drugs in the patent area we provide intellectual property protection to stimulate investment by artists and scientists in the process of creation and invention. It is a utilitarian justification. However, there is a real difference between the nature of that investment in the case of copyright and the investment in the creation of pharmaceuticals, which is part of my own field. The artist may need copyrights to provide them any return. If an artist does not own her songs, or her performance of those songs, then you have to decide she is going to be otherwise employed, or at the least have a "day job" in order to support herself, which would infringe upon her ability to make her art. But, generally speaking their investment is simply one of their own time and genius and copyright provides them with additional incentive for applying their time and genius to the production of their works of art.

By comparison, the pharmaceutical companies, while actual dollar figures are controversial, truly act as an investment coordinating firm that expends very large sums of money and that involves the efforts and talents of hundreds of persons. Whether it is \$200 million or one billion dollars is really almost irrelevant. Pharmaceutical scientists, clinical investigators, lawyers, managers, a variety of persons all work together for years in the hopes of producing a single new drug. So in essence piracy of the pharmaceutical is actually a source of far greater harm, or at least significant harm, to far more people. The price of encouraging an investment of that magnitude is necessarily high. So let me address the human rights issue then, which is so much part of this discussion of pharmaceutical patents these days. In particular, there is a widespread debate about whether the high prices of drugs and the resulting limitations in access are unethical.

Now, I have already stated that the basic purpose of patents is to promote investment in the development of these products. And, on the other hand, people are suffering. People have terrible diseases. People have life threatening, and life impairing and life altering conditions. And there are pharmaceuticals available to ameliorate those conditions. And while it took the utilitarian, incentive-providing frame work of patent law to encourage the production of those, what do we do about the people who are suffering? Well, I know we are running very much behind schedule so I am going to give you a fly-by discussion of the ethical approaches to this problem.

First, a brief analysis of the utilitarian answer to that problem, which is simply that if giving suffering people the pharmaceuticals

creates more good than it does harm, then we need to do it. But the utilitarian arguments at that level are really not very satisfying—they require us to provide the pharmaceuticals but they do not answer at whose expense? So let us turn to Kantian reasoning. The autonomy and reason and will of the sufferer demands that they have access to the drug. But the autonomy, will and reason of the pharmaceutical scientist is: I do this because I want to be rewarded for it. So you have a conflict between their individual autonomies. What John Rawls might say, based on his Theory of Justice, is that we would agree from behind the veil that people have a right, in a system that has adequate surplus to provide these things, to those things which are essential to their fundamental existence and well being, whether it is food, or shelter or clothing or health care with access to life saving drugs. A civilized world with adequate resources cannot ethically deny them to its members, but in Rawl's view, it is arguably *not* the sole burden of any one person or group to provide them.

We do not expect farmers to give away a significant portion of their crop to the hungry. And we do not expect home builders to provide housing for all people that need housing at little or no cost. Rather we might, and I think at times have had, a sufficient social consensus, throw around the idea that the prosperous among us can pay taxes at a level that at the least allows the least fortunate to be provided with those minimum necessities by all of those whose talents reward us with sufficient surplus. I cannot imagine why we think it should be different for pharmaceuticals. It is not the pharmaceutical scientist in New Jersey who must donate her labor so that children in Kenya get HIV drugs any more than the farmer in Kansas must say, "well, I'm going to shift most of my crop this year to starving people in a third world country." It is our responsibility collectively as members of what we hope is a civilized world in the twenty-first century. There are a lot of myths about the pharmaceutical industry and what causes high prices. There are also many problems in the market in which those prices are determined and those drugs are distributed.

No matter how much one ascribes to the notion that the right to health care is a basic human right, there is no ethical or logical reason that pharmaceuticals should be the only minimum necessity or fundamental human right, the burden of providing which falls solely on the party that produces that good. We do not think that way about food, we do not think that way about shelter, we do not think that way about Levi's having to give jeans to anybody who happens to be ill clothed. I do not think the talents that produce pharmaceuticals deserve less autonomy. There are a lot of problems in pharmaceutical policy but

this one seems to me to be an illusory one. And by the way, I only eat genetically modified corn in soy when I can get it, thank you.

COOPER: Thank you Professor Bohrer for your thoughtful remarks and for providing us with a sense of how the pharmaceutical industry plays a role in this arena of intellectual property protection. Because a lot of these developing countries are at the moment going through various legal reform processes, I am often asked, why do Proyecto ACCESO's training efforts focus on intellectual property rights rather than other areas of need, such as human rights sensitivity training for the police. The real question is in what order, or rather, what sequence is the right sequence for the legal reform? Some analysts maintain that valuable and scarce public resources are better spent enshrining the rule of law through a reduction of street crime or in anti-corruption regimes for law enforcement rather than prosecuting IP piracy or regulating the pharmaceutical industry as Professor Bohrer mentioned. Instead of helping the multi-national media corporations with IP piracy prosecution assistance, are the public resources better spent fighting organized crime, enshrining human rights or increasing public trust in the administration of justice? Our next speaker knows about public insecurity and the construction of new institutions to better protect rights. Our next speaker is Claudio Pavlic who was National Public Defender in Chile in 2002. He currently works in Ninth Region of Chile supervising twenty-eight lawyers in the public defenders office, which is the first place in Chile where the criminal procedure reform was implemented. A graduate of the University of Chile and a Professor at the Catholic University of Chile, he was one of the first public defenders to train here at California Western back when the institution was built and trained at this campus in October of 2000 with the late Professor Janeen Kerper. Claudio is now the Academic Director of Proyecto ACCESO and managed a team of attorneys that successfully defended indigenous leaders in the first Mapuche case of March 2003. This case first tested the criminal procedure and the presumption of innocence in Chilean courts. Claudio was a supervising attorney for Al Macina, one of our graduates here at the law school, who interned in Chile. One of the leaders of the legal reform movement in Latin America, I have the great pleasure of introducing Claudio Pavlic.

PAVLIC: I would like to take this opportunity to express my appreciation to Professor Cooper as well as to California Western School of Law for affording me the opportunity to be here today. Professor Cooper asked that I share with you for a few minutes how the creation of a public institution has come about for the purpose of providing

public defense services. The processes of judicial reforms in Latin America are embedded in a series of changes that have taken place over the past decade, with the aim of improving the democratic government systems. These, lacking adequate justice mechanisms (particularly in the sphere of criminal justice) and, therefore, in the frameworks for protecting liberties, cannot assure that the speeches on respecting human rights will take concrete form for all citizens who must face exposition to the state's power to punish. This, to avoid mistakes in criminal prosecution, especially when citizen safety protection policies may lead these systems to commit an injustice and affect the people's rights and liberties.

In most Latin American countries it was necessary to replace Inquisitive systems which originated in nineteenth century Spanish Law. These were distinguished mainly by written processing, a secret investigation phase and, as a fundamental probative element, the confession of the accused.

When drawing-up of the codes containing the principles of criminal procedures, the persons who proposed changes included procedural elements of the accusatory system that are completely obvious to those who have always applied them; for instance, oral presentation of arguments before the court, both for preliminary hearings and trials. Also, presentation of evidence directly and in person to the judges who must assess that evidence to form their convictions, considering the public nature of the hearings for the accused and his/her defense as well as for the public who might want to attend the hearing. The aforementioned distinctive features constitute a novelty in countries such as ours. Therefore, they demand efforts from lawyers who intervene in the new processes (judges, prosecutors and defenders) to develop new skills which were not required before.

With regard to the Chilean reality, one of the most significant changes that has taken shape is the creation of two entirely new institutions: the Public Ministry and the Criminal Public Defender's Office. Said institutions must both work to represent before a court the opposing interests that arise in criminal conflicts—namely, the interest of the state and of the victim on the one hand, and on the other, the defense of citizen rights and liberties.

It has been relevant to keep said institutions independent of the political sector. In our country this has occurred with great vigor in the case of the Public Ministry, which has constitutional independence, and to a lesser degree with the Criminal Public Defender's Office. Hence, it has already been proposed to make this state service independent, mainly due to the interest shown by the political sector,

should it not be connected to one institution. In concrete cases in which it intervenes, the political sector normally upholds positions on delinquency issues that are contrary to the dominant interest of the authority.

The two institutions represent both sides of the scales, which must be perfectly balanced, to realize the ideals of justice.

There was another important issue, in my opinion, which was taken into consideration to begin the reform process in our country. It was the need to be on the same standing as other nations of the world, whose justice systems have efficient ways of protecting the rights and liberties of persons who find themselves in situations that pose a greater risk (such as criminal prosecution).

From the defense's viewpoint, the new criminal procedure in Chile takes into account the incorporation of rights that were previously non-existent in our system. For instance, the right to intervene in a trial from the beginning of the criminal prosecution; the right to be informed of the charges; the right to rebut allegations of the criminal prosecution; and the right to make his/her own allegations, among others.

The commitment that the state took on in this modernization has translated into several relevant aspects. The Parliament has passed laws that were made to create this new justice, with an almost unanimous approval of senators and representatives. Many financial resources of the state have been invested in the hiring of more judges, prosecutors and criminal public defenders. New buildings have been erected to house these institutions. Furthermore, all necessary administrative support personnel and equipment has been provided for these new courts and offices to operate. Additionally, funds were supplied to train the new judges, prosecutors and public defenders.

In my opinion, the decision to allocate a significant amount of public resources and invest a part thereof in skills development turned out to be important when evaluating the progress made in Latin American countries in these matters. I have participated in international forums held in Rio de Janeiro, Brazil and in Asuncion, Paraguay, at which comparative analyses of the progress in these reforms were made. The Chilean case was been deemed successful during the findings of said forums. It is my belief that what made the achievement of those results possible is our nation's political will to give financial resources in order to be distinguished from the old judicial system. Moreover, the most salient point has been the training of people, so that the full advantages of change are not abridged by inertia and old practices.

The aforementioned training plus experience in practical work have translated in Chilean lawyers being invited to participate as trainers in courses given in other Latin American countries, such as Ecuador, Paraguay, Costa Rica and Bolivia.

Regarding training, Proyecto ACCESO and CWSL have played an important role. The first public defense teams attended training courses on oral advocacy skills in the lecture rooms of this School of Law in San Diego, California. In addition, several defenders who began their training here are part of the Proyecto ACCESO team of trainers.

We are a “punishing” society. Consider the following: the press informs in striking terms about a person accused of a criminal act—especially if it is a serious offense. Our impulse is to demand the harshest punishment for the “delinquent,” and we regard the criminal procedure to be an impediment which only delays the application of a well-deserved punishment. Nobody stops to think whether that person is in fact responsible for the crime or not, or that he/she might be falsely accused.

In this context, within the judicial reform program, the design, framework, resources and efficiency of the services rendered to people who for some reason cannot have legal counsel of their own choosing are very relevant, bearing in mind the way the inhabitants of our countries think.

I like giving the following example to illustrate this. If a police officer stops us and extends a traffic ticket, most of the times we have an explanation that frees us of any responsibility, or we believe that the police officer made a mistake. However, when we see that same police officer arresting an individual for a theft or homicide charge, it never crosses our mind that it might be a mistake (of the officer) or a wrongful accusation. What is the difference? In the first case it is about us. In our own interest we demand justice, the revision of police procedures and respect for the presumption of innocence. In short, we want someone to defend our rights. Consequently, we appreciate the importance of having a solid and efficient defense only if it is we who face criminal prosecution.

It is necessary to bring about a cultural change which makes all individuals aware of the existence of rights and liberties that benefit them, and of the obligation of respecting other people’s rights. Once this happens we can say that we have become a better society.

In addition, the most relevant task of an efficient legal counsel is to constitute the best criminal prosecution quality filter, causing im-

provements in police procedures and in that way becoming more efficient in protecting society from those who in fact commit crimes.

Lastly, we currently face a major challenge: the actual or apparent increase in number of complaints or crime perpetration that affect public opinion and put pressure on the authorities to make their anti-delinquency activities more effective. As a consequence thereof, the first impulse is to achieve great results the easy way. In our country we have observed the promoting of reforms to the reform, which make police tasks easier and reduce an individual's liberties. We deem this to be too simple and "spectacular" an answer to solve a complex problem. We should learn about the authorities making greater demands on police work and reinforcing precautionary measures on crime, not proposing changes to the judicial system that only abridge a person's rights and liberties. The previous, considering above all that no criminal procedure system may take on responsibility for crime prevention—simply because it starts functioning once a crime has been perpetrated.

As explained, it is no easy task. However there is sufficient motivation to make all authorities realize the significance of adequate protection of the presumption of innocence principle and its consequences on the quality of life in a nation. Thank you.

COOPER: Thank you Claudio. Our next speaker, Professor Laurence Benner has been a leading lawyer, teacher and problem solver in the criminal justice arena for more than thirty years. His scholarship has been cited in the United States Supreme Court and excerpted in leading textbooks on criminal justice and procedure. Before he joined the faculty at California Western School of Law, Professor Benner was a trial and appellate advocate, and served as Director and Chief Trial Counsel of a Michigan public defender office. He also taught at the University of Chicago Law School in the Mandel Legal Aid Clinic.

Professor Benner understands the role that new institutions play in emerging democracies. In the mid-1970's, he served as Chief Legal Counsel to the Ombudsman Commission of Papua New Guinea, a constitutional office established to protect human rights. He will be sharing with you some of his experiences and the challenges he and his colleagues faced in building that office, in the face of widespread corruption and governmental lethargy.

BENNER: When Jamie Cooper asked if I would talk about my experiences as Legal Counsel to the Ombudsman Commission of Papua New Guinea, I hesitated at first, because it has been many years since I left the shores of that beautiful island nation in the South Pa-

cific. As we are on the eve of the twenty-ninth anniversary of Papua New Guinea's independence, however, it is perhaps appropriate that we revisit the goals Papua New Guinea set for itself on Independence Day, September 16, 1975, and examine one of the institutions they created to help ensure those goals were realized.

Papua New Guinea lies just south of the equator, near the northern most tip of Australia. Slightly larger than California, with a population today of over five million, it shares the second largest island in the world with Indonesia. This strange arrangement is a relic of Papua New Guinea's colonial history. The western half of the island, now called West Irian, was initially colonized by the Dutch while the eastern half was divided between Germany and England.⁷⁴ Following World War I, the British sector (Papua) and the German sector (New Guinea) came under the colonial rule of Australia.⁷⁵

The task of nation building following independence has been a daunting one. The interior of the main island is so mountainous that there was little contact with the outside world until the early 1900s. There still are no roads directly connecting the coastal capital, Port Moresby, to communities in the interior highlands. This geography resulted in tribes living in such complete isolation from each other that each group developed its own language. Over 700 separate languages have been identified.⁷⁶

The territorial boundary of Papua New Guinea also includes four other major islands (New Britain, New Ireland, Manus and Bougainville,) as well as an archipelago of smaller islands, including the Trobriand Islands made famous by the anthropologists Margaret Mead and Branislaw Malinowski. The island of Bougainville, which has one of the largest copper mines in the world, led a secessionist revolt for almost a decade in an unsuccessful attempt to break away.

On the positive side of the ledger, Papua New Guinea has a wealth of mineral deposits, including gold, silver and copper, which make up the bulk of its exports, along with coffee, timber and oil. Yet the majority of its population still is engaged in subsistence agriculture and fishing. One of the major challenges facing the government is to develop a viable economy that will provide job opportunities for its citizens, without squandering its natural resources and destroying its environment through strip mining, pollution and deforestation.

74. MARK TURNER, *PAPUA NEW GUINEA: THE CHALLENGE OF INDEPENDENCE* 4 (1990).

75. *Id.* at 6.

76. *Id.* at 22.

At Independence Papua New Guinea became a parliamentary democracy. Its remarkable constitution, 110 pages in length, was created with the assistance of a team of international consultants and approved by an elected Constituent Assembly. Woven into the fabric of the legal system is a potpourri of influences, including English common law, Australian statutory laws, indigenous customary law and numerous provisions modeled after the Universal Declaration of Human Rights and the American Bill of Rights. It is an inspiring document, spelling out in detail the structure for an ideal society based on equality and freedom.

The Constitution begins with a statement of "National Goals and Directive Principles" intended to guide the nation's leaders and citizenry. The first goal declares that all activities of the state should be directed toward the personal liberation and fulfillment of every citizen, so that each man and woman will have "the opportunity to develop as a whole person in relationship with others."⁷⁷ Other goals declare that "[a]ll citizens should have an equal opportunity to participate in and benefit from the development of [the] country,"⁷⁸ and emphasize that natural resources and the environment of Papua New Guinea should be conserved and renewed in the interest of future generations.⁷⁹

Mirroring the Universal Declaration of Human Rights, the Constitution also spells out fundamental rights and freedoms that are protected, including freedom of conscience,⁸⁰ expression⁸¹ and association,⁸² the right to privacy,⁸³ the right to information about the government,⁸⁴ the right to freedom of choice of employment⁸⁵ and freedom of movement.⁸⁶ It also contains twenty-seven specific rights

77. PAPUA N.G. CONST. pmb. § 1 (Integral Human Development) *reprinted in* BRIAN BRUNTON & DUNCAN COLQUHOUN-KERR, *THE ANNOTATED CONSTITUTION OF PAPUA NEW GUINEA* (1985). The full text provides: "We declare our first goal to be for every person to be dynamically involved in the process of freeing himself or herself from every form of domination or oppression so that each man or woman will have the opportunity to develop as a whole person in relationship with others."

78. *Id.* pmb. § 2 (Equality and Participation).

79. *Id.* pmb. § 4 (Natural Resources and Environment).

80. *Id.* § 45 (Freedom of Conscience, Thought and Religion).

81. *Id.* § 46 (Freedom of Expression).

82. *Id.* § 47 (Freedom of Assembly and Association).

83. *Id.* §§ 49 (Right to Privacy) and 44 (Freedom from Arbitrary Search and Entry).

84. *Id.* § 51 (Right to Freedom of Information).

85. *Id.* § 48 (Freedom of Employment).

86. *Id.* § 52 (Right to Freedom of Movement).

protecting the criminally accused, many of which are modeled after the American Bill of Rights.⁸⁷

These basic rights can be qualified only by a law that is necessary to achieve certain specified objectives, such as public health and safety. Any qualification of these basic rights is also subject to the requirement that the restriction must be “reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind.”⁸⁸

Perhaps the most unique feature of the Papua New Guinea Constitution, however, is the fact it establishes the Ombudsman Commission as a constitutional office to serve as a government watchdog. The express purposes of the Ombudsman Commission are to improve the work of governmental bodies, eliminate discrimination by them, and eliminate unfair and defective legislation and administrative practices.⁸⁹ The Ombudsman also enforces a unique Leadership Code which is designed to prevent corruption and malfeasance in office.⁹⁰

Of course, the ombudsman concept is not new. There are now ninety countries that have some form of ombudsman. Papua New Guinea’s Ombudsman is unique, however, in that it has broader responsibilities and greater powers than most ombudsmen elsewhere. Because of concern over the potential for foreign exploitation, it was intended at the outset that the government would maintain tight control over economic development and run virtually all major services through state-owned corporations.⁹¹ Thus everything from electric utilities and telecommunications to the national airlines was run by the state. It was also recognized that citizens would have limited access to the legal system, given low income levels and the fact there were few lawyers among the small educated elite. Therefore the Ombudsman Commission established an alternative dispute resolution mechanism to help the average citizen deal with the huge governmental bureaucracy. The Ombudsman was accordingly given extraordinary powers, including the power to subpoena witnesses and documents

87. *Id.* §§ 37 (Protection of the Law) and 42 (Liberty of the Person).

88. *Id.* § 38(1)(b) (General Qualifications on Qualified Rights).

89. *Id.* §§ 217-220.

90. See ORGANIC LAW ON THE DUTIES AND RESPONSIBILITIES OF LEADERSHIP [LEADERSHIP STATUTE] (Papua, N.G.) at http://www.paclii.org/pg/legis/consol_act/olot-darol528/ (last visited Mar. 27, 2005). This law, called an organic law because of its special status as a law, the making of which was specifically authorized by the Constitution, was enacted by the Constituent Assembly on September 12, 1975, and became effective on Independence Day. *Id.*

91. See *Final Report of the Constitutional Planning Committee*, pt. 1, ch. 2 at 10-11 (1974); PAPUA N.G. CONST. pmb1. § 3 (National Sovereignty and Self Reliance).

and take testimony under oath. It also was given the power to bring a declaratory action, called a Constitutional Reference, in the Supreme Court of Papua New Guinea to challenge a legislative enactment on the ground it was unconstitutional.⁹²

Without doubt, however, the most novel responsibility of the Papua New Guinea Ombudsman is its Leadership Code function. The architects of the Constitution correctly foresaw that the political elites would inevitably be tempted to use their position of power to benefit themselves. They therefore passed a very stringent Leadership Code, having the status of a constitutional law and gave the task of enforcing it to the Ombudsman Commission.

The Leadership Code prohibits public officials from receiving gifts, having conflicts of interest, entering into business partnerships with foreigners, or otherwise engaging in any activity that would allow their official integrity to be called into question.⁹³ Politicians, department heads and other important public officials are also required make financial disclosures to the Ombudsman Commission and obtain approval before entering into business relationships.⁹⁴ The Ombudsman's leadership function is nevertheless primarily investigatory rather than adjudicative. When it concludes that there is a *prima facie* case that the Leadership Code is violated, it refers the matter to a Leadership Tribunal made up of judges. The leader is suspended from office pending the Tribunal hearing and if dismissed from office by the Tribunal is thereafter ineligible to hold elective public office for a period of three years.⁹⁵

The Ombudsman was created as a Commission consisting of three members, one of whom is designated the Chief Ombudsman. The members of the Commission serve six year terms and are appointed by the Head of State upon the advice of an Ombudsman Appointments Committee made up of the Prime Minister, Chief Justice of the Supreme Court, Leader of the Opposition Party, Chairman of a Parliamentary Committee and Chairman of the Public Services Commission. In practice the three members are selected so that the three distinct regions of the country—the highlands, the coastal area and the outlying islands—are represented.

A person is not eligible for appointment as Chief Ombudsman unless he or she is "a person of integrity, independence of mind, reso-

92. PAPUA N.G. CONST. § 19(3)(e).

93. See LEADERSHIP STATUTE, *supra* note 90, §§ 4-15.

94. See *Id.*

95. PAPUA N.G. CONST. § 31 (Disqualifications on Dismissal).

lution and high standing in the community.”⁹⁶ These requirements reflect the concern of the drafters of the Constitution that this position should be held by a person having the highest ethical standards and great moral courage. There was universal consensus at the time of independence that there was only one possible choice for the first Chief Ombudsman—a man who had the courage of a lion and the integrity of a saint. That man was Father Ignatius Kilage—a Jesuit priest, from the Chimbu tribe in the highlands.

Father Kilage was an extraordinary individual. Raised from youth in a monastery, he was highly educated and an eloquent speaker and writer. He could quote Plato or Shakespeare when appropriate to the occasion and wrote excellent poetry. The “Chief” as everyone called him was also a tremendous motivator and manager of people. Although humble in demeanor, his gentle bearing commanded respect. Above all he had unimpeachable integrity.

This was demonstrated repeatedly over the period I was privileged to serve as the Ombudsman’s legal counsel. One occasion involved a leadership code violation by the head of a government agency. It was one of the first such investigations I participated in and I was in the Chief Ombudsman’s office when the decision to refer charges to a Leadership Tribunal was made. I recall the solemnity of the moment, the deep sadness in the Chief Ombudsman’s face and his remark at the time: “If this is our duty, then we must do it.” Only later did I learn that the leader he had referred for prosecution had been his friend and schoolmate.

The Chief Ombudsman also never hesitated to stand up against even the most powerful forces in the country. On one occasion this included directly challenging the political power structure which was controlled by two dominant political parties. In an attempt to shut out independent candidates at the start of an upcoming election, a law was hastily passed under a suspension of normal rules, which increased ten-fold the nomination fee to stand for election to the Parliament. Exercising its power to bring a declaratory action in the Supreme Court, the Ombudsman Commission filed a Constitutional Reference alleging that the law had been improperly passed in contravention of procedural rules designed to protect constitutional rights. We also argued that the unreasonably high nomination fee violated the substan-

96. ORGANIC LAW ON THE OMBUDSMAN COMMISSION § 4(1) (Papua N.G.) at http://www.paclii.org/pg/legis/consol_act/olotoc362/ (last visited Mar. 27, 2005).

tive right to participate in political life guaranteed by Section 50 of the PNG Constitution.⁹⁷

With the assistance of several government agencies including the National Computer Centre and the Policy and Research Division of the Department of Labor and Industry, we established that given the extremely low annual per capita income (about \$200 U.S.), it was impossible for the average Papua New Guinean citizen to save enough between elections to be able to afford to run for political office. With the election imminent a resolute Supreme Court unanimously ruled from the bench after oral argument that the law had not been validly passed. The Court subsequently ruled on the merits in a written opinion finding the increased nomination fee was unconstitutional because it denied a majority of eligible citizens a reasonable opportunity to stand for election to Parliament.⁹⁸

At the time the Constitutional Reference was filed there were only three political parties. Today there are more than twenty. The ability of the various sectors of Papua New Guinean society to participate in the political process may perhaps be one reason why this experiment in democracy has been able to continue on its mission to weld together a nation of different geographic areas and disparate interest groups, despite the centrifugal forces inherently tending toward fragmentation and destabilization.

The Ombudsman Commission is also fighting a never-ending war against official corruption. Unfortunately corruption seems to often be a fact of life in developing nations and Papua New Guinea was no exception. For example, the Minister for Commerce was dismissed from office by a Leadership Tribunal following an Ombudsman investigation which uncovered that the minister had misappropriated public funds from a grant program for rural economic development, by diverting them into a bank account he and his family controlled. In another case a top aide to the Prime Minister and a department head received kickbacks for government purchases made in violation of tender procedures.

The main work of the Ombudsman Commission, however, lay in the daily handling of complaints by average citizens. In order to provide better access, the Ombudsman established regional offices

97. PAPUA N.G. CONST. § 50 (Right to Vote and Stand for Public Office).

98. In the Matter of the Constitution of Papua New Guinea / In the Matter of a Special Reference by the Ombudsman Commission, 1982 PNGLR 214 (1982) *available at* <http://www.paclii.org/cgipacii/displ/pg/cases/PGLAWREP/1982/17.html?query=%7E%20constitutional%20reference%20no%20.%202%20of%201982#disp8> (last visited Mar. 27, 2005).

throughout the country and also made visits to areas not otherwise readily accessible. Complaints ranged from allegations of police brutality to simple administrative errors and included charges of maladministration and discrimination based on tribal loyalties. One provincial government, for example, established a policy of issuing business licenses to only members of local tribes.

In the exercise of its complaints function, the Ombudsman only has the power to make recommendations. Nevertheless, because the Ombudsman has the ability to mobilize public opinion against obstinate bureaucrats, especially through its Annual Report to Parliament, it can usually achieve compliance with its recommendations. During the time I was there about two thirds of the complaints were found to be justified.⁹⁹ It is a testament to the stature of the Chief Ombudsman, and also perhaps his persistence, that 96% of the recommendations made by the Ombudsman Commission were agreed to and 93% were implemented at the time the case was closed.¹⁰⁰

Shortly after I left the country, the Chief Ombudsman was knighted by the Queen and appointed Governor General of Papua New Guinea, a position he held until his death. It has often been said of George Washington that he was an indispensable man, essential to the successful launching of our country's own independence. Certainly the same can be said of Sir Ignatius Kilage. Together with Papua New Guinea's first Prime Minister, Sir Michael Somare and her first Chief Justice, Sir Buri Kidu, these true patriots steered the ship of state through the early tempestuous days of independence with selfless devotion to their country. Each played a critical role in founding and maintaining independence.

If there was one lesson I took away from my experience in Papua New Guinea, it was a deeper appreciation and understanding of the fact that institutions are only as good as the individuals who run them. You can design the perfect system, but without the right people operating that system, the best structural design in the world will collapse and fail to accomplish its intended mission. Because of his integrity and his steadfast courage, Ignatius Kilage was the right man, at the right time, in the right institution. He was indeed the ideal Ombudsman and I would therefore like to close with his words:

99. See *Ombudsman Commission of Papua New Guinea, Seventh Annual Report* at 47 (1982) (reporting 69% of investigations closed during the reporting period were "justified" complaints.)

100. *Id.* at 48.

If the Ombudsman idea is an external expression of what is noble, selfless, humane and ethical, then as long as human beings have governments . . . as long as there are haves and have nots; as long as human beings are differentiated according to opportunities, education, culture and status, surely an ombudsman has a role to play in any society.¹⁰¹

COOPER: Thank you Professor Benner. Thank you for such an eloquent reflection on your days in Papua New Guinea. Professor Ruben Garcia joined the faculty last year an expert in labor law. He has both practical experience and a tremendous penchant for theory and will give us his thoughts on the role of public institutions in supporting legal reform efforts. Please welcome Professor Ruben Garcia who will also provide some comments on the earlier presentations by Professor Benner and Claudio Pavlic.

GARCIA: I would like to reflect on all that we have heard today and also comment on the provocative presentations that were made during the afternoon session on public institutions. There is a long history of efforts by U.S. legal scholars to reach out to other cultures. These efforts have involved studying other legal cultures, while simultaneously sharing some U.S. legal culture with other countries. An example of the most recent iteration of these projects is found here at California Western School of Law—Proyecto ACCESO.¹⁰² I want to add some thoughts to give a context about where we have been in this regard, and also to look forward and suggest some things to think about as we move forward with these really exciting efforts in training and education in countries like Chile and other countries in Latin America.

We should begin by defining terms: what is “law” and what is “development?” In this context, “law” is generally perceived as a tool for instigating social change. Educating people about dispute resolution and “creative problem solving” could potentially lead to alternative methods for resolving conflicts. This was a very popular model in the 1960s and the early 1970s that began to be exported to other countries in the Western Hemisphere and other countries throughout

101. Ignatius Kilage, *The Evolution of the Role of the Ombudsman* (Mar. 27, 2005) (unpublished manuscript, on file with the author).

102. ACCESO is a Spanish acronym for *Abogados Creativos Colaborando para Encontrar Soluciones Optimas*. In English, it translates to “Creative Lawyers Collaborating for Optimal Solutions.” Proyecto ACCESO, our project, at http://www.proyectoacceso.com/ingles/proyecto_esp.htm (last visited Mar. 30, 2005). Proyecto ACCESO is a project of the McGill Center for Creative Problem Solving at California Western School of Law. *Id.* For more information about the proyecto ACCESO program, see *id.*; Claude Walbert, *Improving Justice South of Border*, L.A. DAILY J., Feb. 5, 2003 at 1; Leonel Sanchez, *Legal Group Makes its Case for the U.S. Judicial System*, SAN DIEGO UNION-TRIBUNE, May 21, 2001 at B1, available at 2001 WLNR 9479773.

the world. Scholars who are now on law faculties at Wisconsin, UCLA, Stanford and the University of Miami law schools went to other countries trying to learn from their legal cultures, but also to bring some of our own legal culture to them.¹⁰³ This emphasis on law has been described well by Bryant Garth and Yves Dezalay.¹⁰⁴ Garth and Dezalay have detailed the trajectory of law and development efforts in Chile, Argentina and other Latin American countries. The confluence of legal scholars and human rights practitioners to other countries underwent rapid change in the early 1970s when we saw the rise of dictatorships in Latin American countries such as Chile. “The rule of law” became associated in many people’s minds with authoritarian regimes, rather than a predictable set of rules applied consistently across cases.¹⁰⁵

Perhaps as a result of skepticism in “the rule of law” in critical jurisprudential circles, we saw a move away from a theory of law to a theory of development in the 1970s. The theory of development seemed to be that development in itself would deal with deficiencies in law. Chicago School economists then began traveling to developing countries to work towards building better societies. This school of thought sometimes assumes that law is an obstacle to development. I think in the presentations we have seen today, and the work that is being done in Proyecto ACCESO, that law and development are intertwined and I want to suggest that is really the most constructive approach to use when we are talking about building public institutions.

New law and development efforts are coming under new forms of skepticism and increased challenge by those who view such efforts as taking away democratic control from the people who are governed—the people who inhabit these societies. These efforts are complicated even more by the rise of Europe and the United States as economic

103. See generally JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1980) (a skeptical look at the Law and Development movement); John Henry Merryman, *SLADE: A Memoir*, in *LEGAL CULTURE IN THE AGE OF GLOBALIZATION: LATIN AMERICA AND LATIN EUROPE* 499 (Lawrence M. Friedman & Rogelio Perez-Perdomo, eds., 2003) (discussing efforts to reform legal education in Chile); David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development* 82 *YALE L.J.* 1 (1972) (one of the first reports on the law and development movement);

104. See generally YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF THE PALACE WARS: LAWYERS, ECONOMISTS AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* (2002) (discussing the shift from legal scholars to economists in the building of Latin American states).

105. Even in the United States, critical scholars have argued that the “rule of law” is sometimes a mask for draconian uses of state power. See BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 82-84 (2004) (for critical conceptions of the “rule of law”).

superpowers in the world.¹⁰⁶ Much of the current context is really about the notion that certain structures or institutions, super structures such as trade agreements, and institutions like the World Trade Organization, are taking away democratic control from individuals.¹⁰⁷ Thus, there is much dispute about the role that legal culture and the exploitative nature of some legal institutions, intellectual property to name only one example. For example, we saw in Professor Bohrer's talk earlier today how multi-national pharmaceutical companies are sometimes blamed for problems in the developing world, as a distraction from the real policy debates about how to increase access to medicines to our increasingly globalized community.

Now I want to comment briefly on the two afternoon presentations. I think what we heard from Professor Benner with regard to the Ombuds office in Papua New Guinea illustrates the goal of early law and development efforts to construct public institutions on paper that could then be implemented through the help of educated lawyers who ran the office. This raised the question of who should make decisions about how to construct legal systems.

The challenge in terms of developing public institutions is how those institutions are created and how those are constructed. These questions occupied the law and development movement of the 1960s and 1970s. On the other hand, building the ideal society on paper does not work when institutions are under funded and understaffed.

Proyecto ACCESO at California Western bridges the gap between ideas and implementation through creative pedagogy. Proyecto ACCESO provides education as a way to integrate law and development strategies that have most often worked in isolation. Perhaps this is the "third way" between legal institutions and ideals that work well on paper, and on the other hand simply saying that development will take care of all the problems because people have development and will not need the law. It is readily apparent that the latter approach has not worked very well in the new global context—whether it is in the intellectual property or pharmaceuticals that were discussed earlier. In other areas, such as migration, slave labor, child labor, or hu-

106. See LEGAL CULTURE IN THE AGE OF GLOBALIZATION: LATIN AMERICA AND LATIN EUROPE 499 (Lawrence M. Friedman & Rogelio Perez-Perdomo, eds., 2003) (for a discussion of Latin America's connection to Europe).

107. See generally ALFRED C. AMAN, JR., THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM (2004) (discussing the way that international institutions like the World Trade Organization and trade agreements create a deficit between the institutions and citizens of nation states).

man trafficking, we have seen that development without attention to law is unsustainable as well.

This is why I think a holistic approach to law and development is very important to study and very important to discuss. We have seen the law in action in the creation of the public defender's office in Chile, which has involved a pedagogical approach to creating institutions. Creating educational tools allows people to continue to do the work that the teachers have started even after they have gone. We saw in Claudio Pavlic's presentation this kind of development from the bottom up. Pavlic discussed the construction of the public defender's office in Chile and the role that Proyecto ACCESO has played in "training the trainers." This is the kind of replication that is necessary for global public legal institutions to thrive.

In sum, we have headed towards the realization that you cannot have law without development. This is clear from the earlier presentations about intellectual property, and medicines. Now I would like to suggest that you cannot have development without law. But it is also clear that you cannot have law without enforcement. And to have enforcement, you must train people in the ways of enforcement and educate people about the need for enforcement of norms in order for those norms to exist, and I think Proyecto ACCESO is at its best when it fills this gap. In a world marked by neoliberal ideas that markets will solve all ills, the rule of law must also be emphasized. In the contexts that we have discussed today, I look forward to seeing more creative instruction in the rule of law at this law school, and perhaps, in the rest of legal education.

COOPER: Thank you Professor Garcia. As Professor Garcia said, there can be no law without development, and no development without law. Moreover, there would be nothing without really good leadership to facilitate the human capacity building that support these kinds of projects. Dean Steven Smith has been a wonderful supporter of Proyecto ACCESO's work in Latin America, and he has participated in a conference on the use of law and technology that was held on March 4, 2003 in honor of the late Professor Janeen Kerper. Although Janeen is no longer with us, her legacy grows through our innovative programming throughout the region and the scholarship, teaching and public service that is so evident here at this symposium. I would like to invite Dean Steven Smith to provide some concluding remarks.

SMITH: Thank you, Jamie Cooper. I am grateful to everyone who planned and presented this conference. It is an honor for California Western School of Law to host it. We all owe a special thank you

to each of those who have made presentations during the course of the conference. This has been an extraordinary afternoon. Our colleague from Chile honors us by his participation. He has taught us about the structure of legal systems and the process of law reform. I am grateful not only for what I have learned today, but also for what all of us at California Western have received from our South American neighbors.

Today is a reminder that no student in law school today can isolate himself or herself in the law of one country. We live not only in an international market and international legal system, but in an environment where everything we touch will increasingly have international implications. Virtually every major event anywhere in the world has an impact on our laws and our clients. Losing the cocoon of isolation can be a bit frightening in some respects, but in so many ways it creates a sense of freedom. It means that we have colleagues from whom we can learn and great opportunities for collaboration with creative and dedicated colleagues throughout the world. Jamie Cooper reminds us of this periodically and he and our friends in Chile are great examples of what lawyers can add to their societies when they are broadly collaborative and creative.

This afternoon also demonstrates, I believe, the importance of creative problem solving in the law. The discussion of intellectual property underscores this. Intellectual property is difficult to control in even the narrowest or most local sense. When we consider those issues on a global scale, they seem almost impossible. The law will not be able to deal with these issues by applying the very simple, traditional approaches to intellectual property. Lawyers, however, must find ways of resolving these problems creatively. We can begin by using the basic tools of problem solving: carefully thinking about what the goals of our clients and society are and how to efficiently and effectively reach those goals; and avoiding unintended consequences. Repeatedly, as we deal with these new problems associated with globalization and reform on an international level, we will need to begin with asking what the goals are of our clients, how those goals conflict with others' goals and values and what we can do to creatively find ways of helping reduce the conflicts of values and goals and improve the chances for everyone to achieve their most important purposes efficiently and effectively. In the words of international trade theory, it is this form of creative problem solving that is the "comparative advantage" offered by the law and lawyers.

I am very optimistic that despite the difficult issues that globalization and international cooperation raise for our societies, lawyers will

find solutions. The lawyers of the world, thinking together about these issues, trading ideas and learning from one another, will be able to serve the clients and the nations that rely upon us for better ways of doing business and for better ways of promoting justice. Thank you very much for an extraordinary afternoon.

COOPER: Thank you Dean Smith for your concluding remarks and to all the speakers for their participation today in the symposium. Legal reform is often a moving target given the timeframes involved the glacial pace of meaningful change. But with the kind of intellectual underpinnings, as evidenced by today's presentations, and through the hard work by those legal professionals on the ground, sustainable reform is not only possible, but is occurring right now all around us—from San Diego to Santiago and everywhere in between. It is your Hemisphere. Use it wisely.

APPENDIX

PARADOXES OF COPYRIGHT PIRACY*

I struggle with conflicting allegiances when I survey the Internet's digitization of entertainment product. On the one hand I favor strong enforcement of copyright law; on the other I favor strong enforcement of anti-monopoly law. My conflict, however, springs from a fundamental paradox in United States law. Copyright is, of course, a monopoly.

The theory of copyright—to foster our culture's creative artists by letting them monopolize their works—is eminently reasonable. But in practice, for artists to live by their skill, they must bow to the marketplace. In other words, to showcase their works, creative artists must turn to show-business companies— which buy or license their copyrights.

Currently the global delivery of mainstream artistic product is controlled by a handful of transnational entities. So what begins as a small monopoly by an individual artist over her own productions evolves to massive corporate monopolies over most the world's output of books, movies, music, television, and stage productions.

At this point another uniquely American paradox marches across the digital scene. A century ago hi-tech launched what's now a global entertainment industry by giving it moving pictures, piano rolls, and high-speed presses. Yet the history of show-biz reveals that once each corporate giant attained control over its chosen medium, it fiercely resisted—until it could capture—further hi-tech advances.

Why? For the natural reason that innovation in production or delivery threatened its monopolistic power and profits. Thus the sheet-music business fought piano rolls and recording on discs. The film business battled television, videotape, and VCRs. Broadcast television warred against cable and satellite television. Vinyl music struggled with audiotape; then audiotape resisted digital-audio and CDs.

When digitization met the Internet, the boardrooms of showbiz threw fits. If consumers could download pirated product at home, they'd no longer pay to access it conventionally—in movie theaters and music stores. Computers handed consumers the power to cripple corporate monopolizing of product distribution.

* Copyright, Arthur W. Campbell, 2004.

Compared to lengthier movies and books, recorded music was most vulnerable to Internet piracy. Yet, despite being warned of decimated CD sales, during the last decade of the twentieth century the major music companies lay paralyzed—unable to agree on even a unified platform for digital distribution. For years this refusal to embrace new technology left consumers with no way to legitimately download music for a reasonable price.

From a pragmatic perspective, the popularity of peer-to-peer file-sharing resulted from a classic marriage of product with price—the price being zero. From an historical perspective, the music industry’s Goliath has been staggered by a high-tech slingshot. But from the perspective of law, P2P trading of music was and remains an egregious infringement of copyright.

As of Fall 2004 the music industry has secured courtroom victories over centralized P2P piracy (e.g., Napster) but not decentralized ones (e.g., Grokster.) Infringement suits against individual consumers have been costly in dollars and unfavorable publicity—and called a “teaspoon solution to an oceanic problem.”

Moreover, in the die-hard Napster litigation the record companies—who have finally set up their own digital-delivery system—still face Napster’s counterclaim evidence that, according to Judge Marilyn Patel, “suggests that plaintiffs’ entry into the digital distribution market may run afoul antitrust laws.”

Her observation brings my survey and personal struggle full circle. Our law needs to protect the works of creative artists but, like Odysseus, must somehow shoot copyright’s arrow through multiple axe-handles of high technology, corporate monopoly, and what the music industry has allowed to become piracy on a planetwide scale. Captains of film, publishing, television, and videogames watch anxiously on the sidelines, trying to spot their best strategy when they get drawn more deeply into the piracy game.

