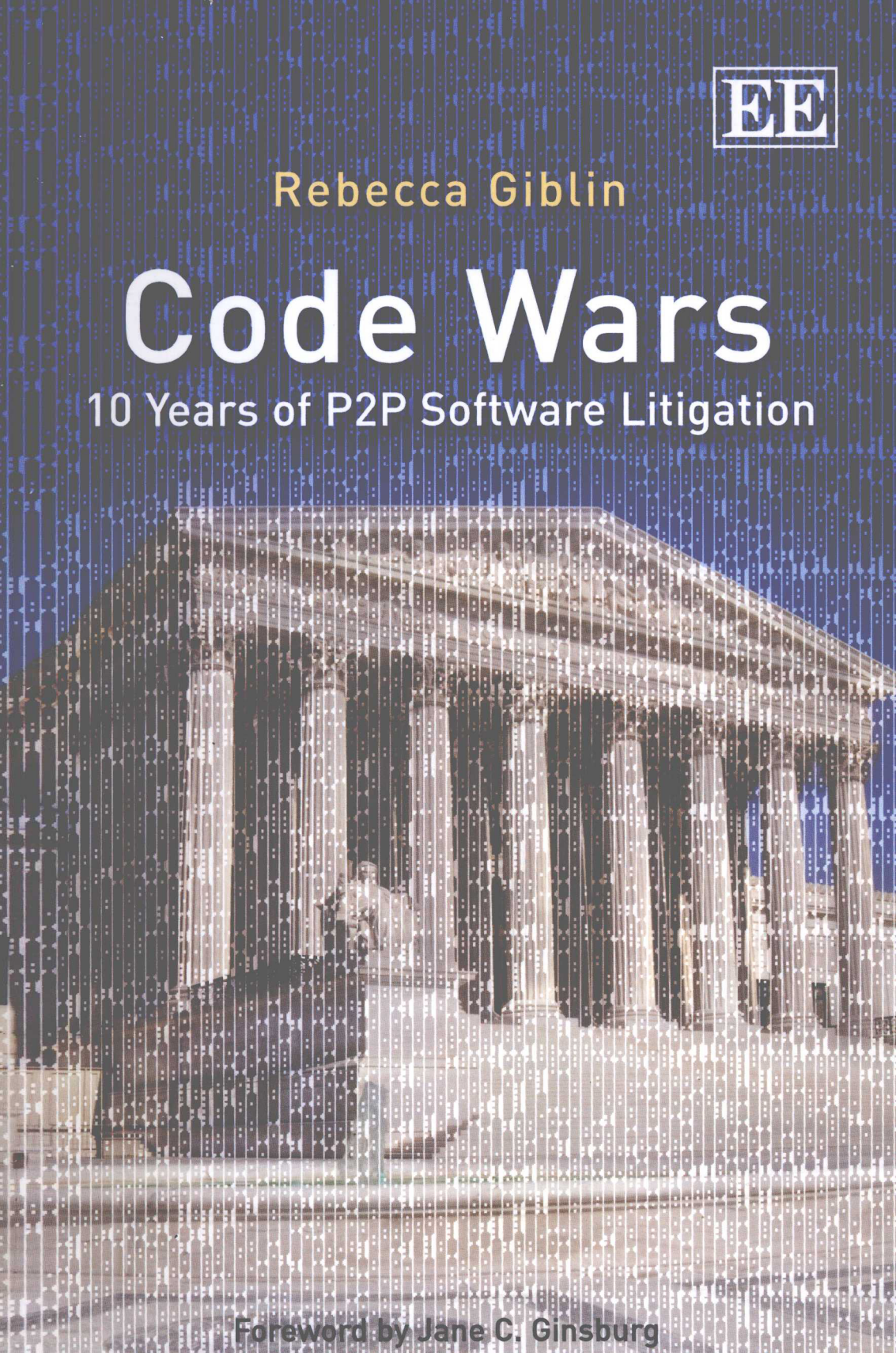
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Rebecca Giblin
Code Wars
10 Years of P2P Software Litigation
Foreword by Jane C. Ginsburg

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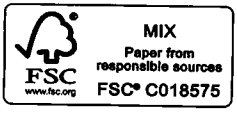

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Foreword

In *Code Wars: 10 Years of P2P Software Litigation* Dr Rebecca Giblin poses a paradox. From the inception of peer-to-peer file sharing networks (at the end of the Paleolithic 1990s), every time a copyright owner has alleged the legal liability of a P2P network entrepreneur, the copyright owner has prevailed in court; yet unauthorized P2P file sharing persists, if anything, more virulently than before. This book examines and explains the technological developments and legal doctrines that have produced that paradox. Equally importantly, and more rarely for analyses of the phenomenon of online piracy (which abound in the academic and popular press), Dr Giblin does not just diagnose the causes of current legal norms' inadequacy to the task of stemming rampant copying; she prescribes how legal rules should change in order better to confront those causes.

That said, Dr Giblin's diagnosis is both original and persuasive. She aptly sets out how P2P technologies work; her straightforward explanations make the software-design decisions comprehensible even to the technologically unacquainted. She also provides a compelling account of the history of the various P2P cases in the United States and elsewhere, particularly her native Australia. She builds on the insights of scholars such as Tim Wu's *When Code Isn't Law*, which, contesting the claim that technology progresses according to its own logic that creates its own law, demonstrated that P2P technologies instead developed specifically to elude legal constraints. Dr Giblin significantly supplements the reasons that have motivated and enabled the propagation of what she calls "anti-regulatory code." In addition to the already-recognized causes – widespread ability of end users to copy and distribute works (absence of industry gatekeepers), and many of those users' willful disregard of copyright law (lack of public support for legal rules regarding copyright) – Dr Giblin identifies two more: the absence of a profit motive for much software development, and widespread norms among software developers promoting the sharing of their innovations. Legal rules that assume that software will be expensive, and that its creators, in order to keep creating it, therefore require both monetary incentives and security from copying their output, thus fall far short of the mark. Together, these features critically distinguish the online world from the hardcopy world, and account for the failure of rules

grounded in assumptions about the off-line world to regulate behavior online.

Regarding the cures for these causes, Dr Giblin starts from proposals by Peter Menell and David Nimmer to substitute for the current tests for contributory infringement of copyright the products liability tort law standard of "reasonable alternative design." She considers what such a standard would mean not only for physical hardware such as recording equipment, but, more pertinently, for infringement-enabling software. As in her analysis of the causes of P2P file sharing, Dr Giblin underscores how "physical world assumptions" have hampered the conception of appropriate responses to "anti-regulatory code." In fact, as Dr Giblin shows, the points of non-correspondence between hard goods and software may reveal the way forward. For example, distribution of hard goods removes their end use from the manufacturer's or distributor's ability to control. The software horse, by contrast, never completely leaves the barn: automatic updates and other features that tether the end user to the software provider can perform the function of a virtual bridle. A developer's failure to retain the horse on its lead may under appropriate circumstances be ruled an actionable rejection of a reasonable alternative design. What those circumstances are, how the test would be applied, and whether the test implements good policy, constitute the essence of the last chapter of this book.

Code Wars is an eye-opening contribution to the debate over the copyright-technology rivalry. Whether Dr Giblin's prescriptions will convert a fratricidal conflict into an exemplar of sibling harmony (or at least a workable truce) remains to be seen. In the interim she has evocatively described the contending forces and convincingly shown why, court victories to the contrary notwithstanding, the legal rules that should prevent the exploitation of piracy-based business models have in fact charted the course for a behind-the-lines rout.

Jane C. Ginsburg,
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I also wish to acknowledge Thomson Reuters and Sweet & Maxwell for giving permission for some of my previously published work in this area to be incorporated into the book. That work appeared in the following publications:

Rebecca Giblin, "The Uncertainties, Baby: Hidden Perils of Australia's Authorisation Law" (2009) 20 *Australian Intellectual Property Journal* 148–77.

Rebecca Giblin, "On *Sony*, StreamCast and Smoking Guns" (2007) 29(6) *European Intellectual Property Review* 215–26.

Rebecca Giblin and Mark Davison, "Kazaa Goes the Way of Grokster? Authorisation of Copyright Infringement via Peer-to-Peer Networks in Australia" (2006) 17(1) *Australian Intellectual Property Journal* 53–76.

Rebecca Giblin, "Rewinding *Sony*: An Inducement Theory of Secondary Liability" (2005) 27(11) *European Intellectual Property Review* 428–36.

Some additional context was drawn from the following publication in which I hold the copyright:

Rebecca Giblin, "A Bit Liable? A Guide to Navigating the US Secondary Liability Patchwork" (2008) 25(1) *Santa Clara Computer & High Technology Law Journal* 7–49.

Note about internet resources

This project has been under development for a number of years, and not all internet resources referenced within the book remain online. However, copies of all electronic sources are on file with the author. Please contact the publisher or author if you wish to view any source. Alternatively, archived copies may be available via the Internet Archive Wayback Machine at www.archive.org.

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1. Introduction

The P2P phenomenon

In 1998 a college dropout called Shawn Fanning wrote a little application called Napster, and the way content was delivered to consumers changed forever. Those few lines of code launched owners of the copyrights in music, movies, books and games into a death battle to protect traditional revenue streams and preserve their exclusive right to new ones. In previous decades they'd felt threatened by plenty of other technologies, including the phonograph, radio, photocopier and VCR, but they had never before faced such a Hydraean opponent. In the next decade, they expensively and lengthily litigated three major actions against P2P providers in US courts, and then a fourth action in Australia. In all that time not a single P2P provider ultimately emerged victorious. Sooner or later, every single one was held liable for the copyright infringements of its users.

Against any one of those predecessor technologies, that kind of emphatic victory would surely have brought about compromise or obliteration. But P2P file sharing software proved different. Unfazed by the overwhelming legal successes of rights holders, software developers continued creating new programs that facilitated file sharing between individual users. By 2007 there were more individual P2P applications available than there had ever been before. The average number of users sharing files on P2P file sharing networks at any one time was nudging 10 million,[1] and it was estimated P2P traffic had grown to comprise up to 90 percent of all global internet traffic.[2] At that point, rights holders tacitly admitted defeat. Abandoning their long-held strategy of suing key P2P software providers, they closed the chapter on P2P litigation and diverted enforcement resources to other areas, particularly global efforts to persuade or compel internet service providers to police infringing users.

This book tells the story of that decade-long struggle between rights holders and P2P software providers, tracing the development of the fledgling technologies, the attempts to crush them through litigation and legislation, and the remarkable ways in which they evolved as their programmers sought ever-more ingenious means to remain one step ahead of the law. In telling the complete legal and technological story of this

fascinating era, the work focuses on answering the question that has so long baffled beleaguered rights holders – why is it that, despite being ultimately successful in holding individual P2P software providers liable for their users' infringement, their litigation strategy has failed to bring about any meaningful reduction in the amount of P2P development and infringement?

Under the P2P model, all or most of the infrastructure necessary to distribute content – together with the content itself – is supplied by the participating individuals. It is this fact that is at the crux of rights holders' objections to P2P file sharing technologies. Very often it is their content that is being made available to potentially millions of individual users, without license, and without the payment of any royalty. In the vernacular of P2P providers, this is known as file sharing. The owners of that content would prefer to call it stealing.

At times, the US music industry has taken direct enforcement action against some of these individuals, hoping that the astronomical statutory damages available under US law, ranging between $200 and $150 000 per infringed work, might deter future infringers.[3] From 2003–2007, members of the industry "filed, settled, or threatened" lawsuits against more than 20 000 individuals.[4] Illustrating the enormity of the campaign, just 2084 civil copyright suits were instituted in total across the whole of the US the year before the Recording Industry Association of America's ("RIAA") campaign commenced.[5] However, by any measure, it was not a success. Missteps by the RIAA helped turn the campaign into a public relations nightmare. (One memorable case involved a Mr Larry Scantlebury, war veteran and grandfather of three, who passed away during the course of the litigation against him. The plaintiffs sought to continue the suit post-mortem against his children – albeit after a 60-day stay to allow them "time to grieve".[6]) There was relatively little support for the suits, and only a tiny percentage of the actions made it to trial. And even those few that resulted in the sought-after awards of statutory damages can't be described as untrammeled successes. The most notorious involved a Minnesota single mother of four, Jammie Thomas, who was sued for sharing 24 songs via the Kazaa P2P file sharing program. Massive publicity followed the farcical situation as statutory damages of over $222 000 US were awarded at her first trial, upped to $1.92 million by the jury at a second, slashed to $54 000 by the trial judge's exercise of remittitur (being the maximum that he considered not to be "monstrous and shocking",[7] and then upped back up to $1.5 million by yet a third jury.[8] In a second case, undergraduate student Joel Tenenbaum was sued for infringing the copyright in 30 songs, and the jury awarded $675 000 in statutory damages.[9] The District Court judge subsequently found this to be "unconstitutionally excessive", and

substituted an award of $67 500 in total.[10] As of early 2011, both matters were still being appealed.

The publicity over these and other cases triggered public questioning of the industry's motives and business model, and escalated growing discontent from its customer base. The loss of goodwill brought about by the direct litigation campaign might have been acceptable collateral damage had it been effective, but it did not bring about any reduction in the amount of file sharing. Indeed, despite the unprecedented number of lawsuits initiated or threatened, P2P infringement actually appeared to increase over the relevant period.[11] In late 2008 the music industry abruptly announced an abandonment of its mass litigation strategy against end users (although unfortunately for Thomas and Tenenbaum, no abandonment of existing suits).[12]

The failure of the direct litigation campaign was predictable in advance. It has long been recognized that liability imposed directly upon wrongdoers will sometimes be ineffective.[13] Professor Reinier Kraakman argues that this will be the case where "'too many' wrongdoers remain unresponsive to the range of practicable legal penalties."[14] That was precisely the case for P2P file sharers: the number of participating infringers was so high, the price of pursuing them so costly, and the chances of their being apprehended so remote, that the threat of direct infringement – even with the possibility of astronomical penalties – left individual infringers largely unmoved.[15] Where direct liability will be predictably ineffective, the "standard legal response" is to seek a remedy by targeting the intermediaries or "gatekeepers" responsible for committing or enabling large-scale infringement.[16] As Professor Tim Wu has pointed out, until recently, copyright law was "entirely dependent on gatekeeper enforcement":[17]

> . . . [C]opyright law achieved compliance through the imposition of liability on a limited number of intermediaries – those capable of copying and distributing works on a mass scale. The gatekeepers were book publishers at first; later gatekeepers included record manufacturers, film studios, and others who produced works on a mass scale. Their role resembled that of doctors with respect to prescription drugs – they prevented evasion of the law by blocking the opportunity to buy an infringing product in the first place.[18]

Traditionally, rights holders had considerable success in using legal doctrines based on these principles of gatekeeper enforcement to shut down activities that facilitated copyright infringement, whether they were swap meets whose proprietors tacitly permitted vendors to sell infringing records, dance halls whose operators didn't secure licenses allowing visiting bands to perform copyrighted music, or advertising agencies who created campaigns for purveyors of "suspiciously" cheap records.[19] Such

enforcement efforts were also successful in deterring many later market entrants from engaging in the kinds of conduct that had previously resulted in liability, and thus further limiting eventual third party infringement. When they commenced their 10-year struggle to apply the same principles to P2P software providers, rights holders undoubtedly expected to achieve the same outcome.

A unique vulnerability to anti-regulatory code

To start to understand why those lengthy, expensive and ultimately successful efforts to shut down individual P2P file sharing technologies had little or no impact on the current availability of file sharing software, it is necessary to understand something about the unique properties of software code. For some time now it has been recognized that code can have regulatory effects – or, as Professor Lawrence Lessig famously put it, that "code is law".[20] As he explains, "[t]he software and hardware that make cyberspace what it is constitute a set of constraints on how you can behave".[21] For example, software code may regulate behavior by imposing a password requirement on users seeking to gain access to a particular service.[22] Historically, rights holders have used a variety of code-based measures as part of their efforts to promote compliance amongst end-users, with the most notable example being Sony's disastrous rootkit experiment.[23] In the P2P file sharing context, however, the idea that code regulates is less significant than the separate but related idea that code can be anti-regulatory in effect. Wu explains that "the reason [why] code matters for law at all is its capability to define behavior on a mass scale. This capability can mean constraints on behavior, in which case code regulates, but it can also mean shaping behavior into legally advantageous forms."[24] Wu analogizes such anti-regulatory programmers to tax lawyers. "[They look] for loopholes or ambiguities in the operation of law (or, sometimes, ethics). More precisely, [they look] for places where the stated goals of the law are different than its self-defined or practical limits. The designer then redesigns behavior to exploit the legal weakness."[25]

As the following chapters will demonstrate, post-Napster P2P developers engaged in precisely this kind of behavior, routinely seeking to code their software in ways that sidestepped the limits of the existing law while nonetheless still facilitating vast amounts of infringement. This book explores the great lengths they went to in their efforts to fall outside the strict letter of existing secondary liability formulations, including by coding their software to utilize encryption, to eliminate liability-attracting centralization or to facilitate copying in unanticipated new ways. Some of these strategies enjoyed a remarkable degree of success – for example, Chapters 3 and 4 will demonstrate that those behind the Grokster and