The Record Business Blues

Composed by Steven Seidenberg
Arranged by James Podgers

RECESSION OR NO, THE MUSIC industry has been hitting a high note lately.

Reports indicate that, on average, revenues are on the rise for musical artists. Income from concerts and ancillary merchandise (such as souvenir T-shirts) has become a key revenue source for most performers. New vehicles for delivering music in innovative and exciting ways are being introduced regularly. And consumers are getting more music at lower prices.

But sales of recorded music have hit a sour note. In 2000, manufacturers shipped 942.5 million music CDs with a retail value of $13.2 billion to sales outlets in the United States alone, according to the Recording Industry Association of America. By 2008, those numbers had dropped to 384.7 million CDs shipped with a retail value of $5.5 billion—a plunge in dollar value of 58 percent in only eight years. (Ironically, the only segment of the physical recordings market to grow between 2000 and 2008 was vinyl LP records, thought at one point to be headed for extinction.)

Many in the recording industry say the villain in this opera is file-sharing, which allows computer files to move back and forth freely among networks of users on the Internet. The recording industry sees no coincidence in the fact that file-sharing has exploded during the same period that the market for CDs has withered.

In the industry's view, the problem is that file-sharing is both enormously popular and almost always illegal.

In 2008, for example, 40 billion music downloads—95 percent of the total worldwide—were infringing, according to the International Federation of the Phonographic Industry.

ILLUSTRATION BY DAVID PLUNKERT

Though the RIAA says the music industry has fully embraced the Internet as a major channel for distribution to consumers, the group has called on the Federal Communications Commission to endorse efforts to curb illegal downloads of copyrighted works.

"The full potential of those licensed digital distribution models [is] undermined by a glut of illegal file-sharing, which has inflicted enormous damage on the creative industries generally," the group said in a press release in January.

Illegal file-sharing also has wider economic implications, said the RIAA, citing a 2007 report by the Institute for Policy Innovation in Lewisville, Texas. That report, titled *The True Cost of Copyright Industry Piracy to the U.S. Economy,* estimates that in 2005 at least $25.6 billion in potential revenue was lost to piracy in sound recordings, motion pictures, business software and entertainment software/video games. The report claims that copyright piracy costs the U.S. economy more than 373,000 jobs annually in related fields and industries, and also results in more than $2.6 billion in lost tax revenue for local, state and federal governments every year.

"We need to get file-sharing to a level that is manageable, that allows the music industry to flourish," says Steven M. Marks, executive vice president and general counsel at the RIAA.

I Fought the Law

The recording industry has lots of experience battling file-sharing. Since 1999, recording companies have sued some 35,000 individuals, as well as Napster, Grokster, LimeWire and other companies that were making and distributing file-sharing software. Recording companies won several landmark court rulings, drove file-sharing companies out of business or into new lines of work, and collected settlements from tens of thousands of people for illegally sharing files.

But even after winning so many legal battles, the recording industry still appears to be losing the war.

"Every time the courts came out with a decision, people came out with another way to circumvent it," says Jeffrey E. Jacobson, a founding member of Jacobson & Colfin in New York City who chairs the Broadcasting, Sound Recordings and Performance Artists Committee in the ABA Section of Intellectual Property Law.

In 2001, for instance, the industry won a legal victory that effectively killed the wildly popular Napster file-sharing service only two years after it went into operation. The San Francisco-based 9th U.S. Circuit Court of Appeals ruled in *A&M Records Inc. v. Napster Inc.* that because Napster maintained a central index of all shared files, the company knew its users were sharing copyrighted materials and could be held liable for contributory copyright infringement. The court also held that because Napster failed to take reasonable steps to police its system—and profited from file-sharing that infringed on copyrights—the company could be held liable for vicarious infringement as well.

Napster went out of business, but it was quickly replaced by Kazaa, eDonkey, BearShare, LimeWire and other companies that created and supplied decentralized file-sharing software. Users connected directly with one another, and the companies supplying this peer-to-peer, or P2P, software could not monitor or control what files users were sharing. Thus there was no infringement, whether vicarious or contributory, under the *Napster* standard.

our notices, and today we've sent out more than a million of them to ISPs for forwarding on to their subscribers," says RIAA spokeswoman Cara Duckworth.

Marks says recording companies have not asked Internet service providers to implement three-strikes policies. "That's not something we are pursuing here with the ISPs. We've never even put it on the table," he says. "Our focus is on working with ISPs to determine the best approach. Different ISPs have different ideas about what is good deterrence and what works best for their systems and subscribers."

Perhaps the recording industry hasn't pushed for a three-strikes policy in the U.S., but it certainly has done so in other countries. The industry has strongly supported France's law that imposes a three-strikes policy on ISPs. And the industry has been pushing other European countries (including the U.K.) to adopt mandatory three-strikes laws. That strong support for three-strikes overseas, plus the industry's reluctance to specify the type of graduated response it is seeking in the U.S., has led many observers to suspect that the industry would prefer a three-strikes policy in the U.S., if it could get it.

But getting U.S. service providers to agree to any graduated response policy is tricky—and not simply because consumer groups would howl in protest. ISPs don't want to be in the awkward position of enforcing copyrights against their customers. "It's not in the ISPs' interest to have customers know they will cut off the customers' service after three notices," says Julie E. Cohen, a professor at Georgetown University Law Center in Washington, D.C.

Around the World

The recording industry may have found another way to push U.S. ISPs into applying a graduated response policy. Along with the film industry and the luxury goods industry, recording companies are supporting a proposed international agreement that would write graduated response into law. The Anti-Counterfeiting Trade Agreement is not meant to create new intellectual property rights, say its proponents. Instead, they say, ACTA is intended simply to establish improved international standards for acting against large-scale infringements of protected intellectual property.

The United States is a strong proponent of ACTA and is currently negotiating its terms with the European Union, Japan, Canada, Switzerland, Australia, Jordan, Mexico, Morocco, New Zealand, South Korea, Singapore and the United Arab Emirates. The countries are pushing to complete the agreement this year.

ACTA has been a lightning rod for controversy, suspicion and rumor since negotiations began in 2007, due partly to the unusual secrecy of the negotiations. Many outside the talks fear the U.S. is using the negotiations to establish tough, new international standards that would grant undue protection to intellectual property rights. One persistent rumor has been that ACTA would require all signatory nations to have their ISPs impose a three-strikes policy against file-sharers.

That rumor was denied in late January by U.S. Trade Rep. Ron Kirk. In a letter to Sen. Ron Wyden, D-Ore., Kirk wrote, "We are not seeking any obligations that go beyond U.S. law concerning termination of repeat infringers."

But several weeks after Kirk sent that letter, a U.S.-proposed ACTA provision leaked out of the negotiations that suggests he was parsing his words very carefully. The provision stated that all parties to ACTA must adopt laws holding that an ISP is not secondarily liable for copyright infringements committed by its users. But this safe-harbor protection only would be available if the ISP implements "a policy to address the unauthorized storage or transmission of materials protected by copyright." A footnote cited as an example of such a policy one that would terminate the ISP accounts of "repeat infringers."

Many experts say that approach would bully ISPs into adopting a three-strikes policy because if a provider used a different method of handling repeat

PHOTOGRAPHS (L-R) GABRIEL BOUYS/AFP/GETTY IMAGES, COURTESY APPLE I

A few years later, the recording industry won another landmark legal victory—this time against the P2P companies—when the U.S. Supreme Court recognized a new type of copyright claim in *MGM Studios Inc. v. Grokster Ltd.* The court ruled that P2P companies could be held liable for "inducing" copyright infringement if they marketed their software as a tool for uploading and downloading files that infringed on copyrights.

After *Grokster*, all the P2P companies save one admitted defeat and settled with the recording companies. (LimeWire is still battling in the courts.)

But the recording companies did not limit their copyright suits to makers and distributors of file-sharing software. Starting in 2003, the labels began suing thousands of individuals who allegedly downloaded and shared copyrighted songs without authorization. Initially, this widely publicized litigation campaign drove down the frequency of file-sharing. But within months the number of file-sharers surpassed pre-lawsuit levels and kept climbing.

The odds were one-sided. The recording industry eventually filed thousands of suits, but there were millions of file-sharers. "People thought they weren't going to get caught," Jacobson says.

And the Law Won – Maybe

In late 2008, the recording companies abruptly ended their litigation campaign, announcing that they would no longer sue file-sharers for copyright infringement except in egregious circumstances.

Critics of the recording industry say its litigation campaign was bound to fail, and was a public relations disaster to boot. The industry claims, however, that the campaign was a qualified hit that raised public awareness about the illegal nature of unauthorized copying and slowed the growth of file-sharing enough to give the industry a chance to establish legal online music distribution channels.

"Litigation was a good deterrence strategy, but we thought it better to find a way that scaled more naturally," Marks says.

That better way is working through Internet service providers—ISPs.

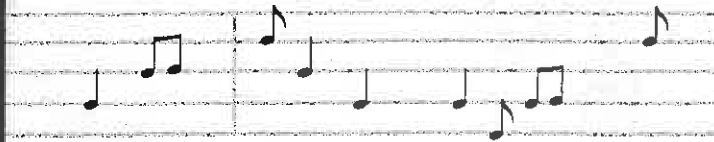
At about the same time the recording companies were ending their litigation campaign, they announced they had reached confidential agreements in principle with several leading U.S. ISPs.

The agreements envisioned "graduated response programs" under which an ISP would take increasingly tough steps against customers engaged in file-sharing that infringes on copyrights.

One of the tougher versions of a graduated response program involves a "three strikes" approach under which the ISP would initially issue a warning to a customer to stop the infringing activity. If the activity continues, the service provider would send an additional warning and diminish the customer's download and upload speeds. If the customer still persists in illegal file-sharing, the ISP would terminate the customer's account.

More than a year has elapsed since the tentative deals on graduated response programs were announced, but no final agreements have materialized. Most ISPs have agreed, however, to cooperate with the record labels on notice programs, under which a recording company uncovers the Internet address of a file-sharer and sends a warning notice to the ISP. The service provider then passes the notice of copyright infringement on to its customer.

"A few short years ago, ISPs barely even recognized



PHOTOGRAPH: BOSTON GLOBE/YOON S. BYUN/ LANDOV

infringers, it would risk falling outside the safe harbor and face potential liability of hundreds of millions in infringement damages.

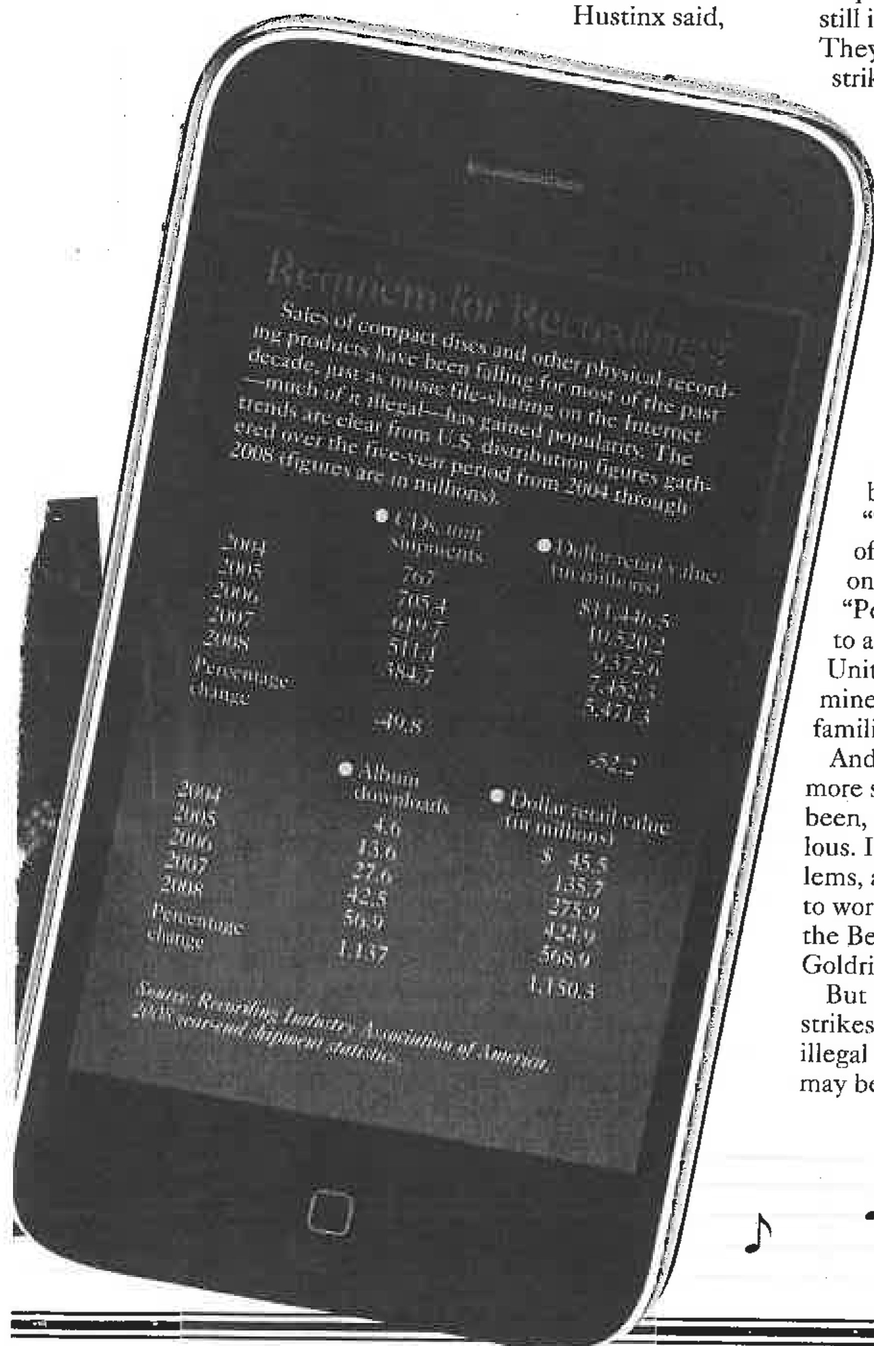
"This doesn't mandate ISPs to adopt a three-strikes policy," says Michael Geist, a law professor at the University of Ottawa in Ontario, Canada, "but ISPs will clearly want to get into the safe harbor, and the only example of an adequate policy is the three-strikes policy. So that's what you're going to get."

There was a huge outcry against the provision—and not just from digital rights groups. Peter Hustinx, the data protection supervisor for the European Union, declared that the provision would violate EU privacy laws. The provision would, Hustinx said, "profoundly restrict the fundamental rights and freedoms of European citizens, most notably the protection of personal data and privacy."

On March 10, the European Parliament voted 633-13 (with 16 abstentions) to adopt a resolution stating that ACTA "should not make it possible for any so-called three-strikes procedures to be imposed." The resolution also demanded that ACTA's full text be made public.

The criticisms may have had an effect. On April 21, ACTA negotiators released to the public an updated version of the agreement in which the three-strikes footnote no longer appeared.

However, opponents of a three-strikes rule remain suspicious. They say the just-released version of ACTA still is vague on ISP liability for secondary infringement. They continue to worry that some version of a three-strikes rule will appear in the final agreement.



Sales of compact discs and other physical recording products have been falling for most of the past decade, just as music file-sharing on the Internet—much of it illegal—has gained popularity. The trends are clear from U.S. distribution figures gathered over the five-year period from 2004 through 2008 (figures are in millions).

	CDs: unit shipments	Dollar retail value (in millions)
2004	767	$11,446.5
2005	705.4	10,520.2
2006	619.7	9,372.6
2007	511.1	7,452.3
2008	384.7	5,471.3
Percentage change	-49.8	-52.2

	Album downloads	Dollar retail value (in millions)
2004	4.6	$ 45.5
2005	13.6	135.7
2006	27.6	275.9
2007	42.5	424.9
2008	56.9	568.9
Percentage change	1,137	1,150.3

Source: Recording Industry Association of America, 2008 year-end shipment statistics.

One key concern is that throwing people off the Internet for online infringement of copyrights would be a draconian step in an increasingly digital world. "Internet access is increasingly important, and it is trivially easy to lose it" under proposed three-strikes policies, says Cohen. And Geist says such a policy "affects the whole household, not just the person involved in file-sharing."

The three-strikes policy also would impose significant costs on ISPs. "You've got to make sure you're sending the notice to the right person, make sure the notice was received, and build in some type of due process," says Geist. "The costs will run into the hundreds of millions of dollars." And ISPs would almost certainly pass on at least some of the costs to consumers, he says. "People with lower incomes may no longer be able to afford Internet connections," he predicts. In the United Kingdom, for instance, the government determined that a three-strikes policy would cause 40,000 families to lose their Internet access.

And in the end, the three-strikes policy will be no more successful than other attacks on file-sharing have been, some assert. "The three-strikes policy is ridiculous. It will open up a whole Pandora's box of problems, and it will never work. People will find a way to work around it," says Fred Goldring, a partner at the Beverly Hills, Calif., entertainment law firm of Goldring, Hertz, Lichtenstein & Haft.

But perhaps the real reason to question the three-strikes policy is not whether it will effectively reduce illegal file-sharing. The more fundamental question may be whether the three-strikes policy—or something

like it—would be an extreme solution to a problem that doesn't really exist.

Some researchers express doubts about the recording industry's long-standing assertion that file-sharing is killing the market for CDs and similar products in a way that will stifle the entire music field.

"There is no doubt that trade groups vastly exaggerate the impact of file-sharing on industry profitability when they treat every pirated copy as a lost sale," states *File-Sharing and Copyright,* a paper issued in January by Felix Oberholzer-Gee, a professor at Harvard Business School in Cambridge, Mass., and Koleman S. Strumpf, a professor at the University of Kansas School of Business in Lawrence. "At a price close to zero, many consumers will download music and movies that they would not have bought at current prices."

Oberholzer-Gee and Strumpf say the empirical evidence of the effect of file-sharing on sales of recorded music products is mixed, and they note that many studies conclude that music piracy accounts for no more than one-fifth of the recent decline in recording sales. Moreover, the authors assert, file-sharing hasn't hurt the music industry overall: "While file-sharing disrupted some traditional business models in the creative industries, foremost in music, in our reading of the evidence there is little to suggest that the new technology has discouraged artistic production."

Indeed, Oberholzer-Gee and Strumpf indicate that despite the explosion in file-sharing over the past decade the production of new artistic works is on the rise. "The publication of new books rose by 66 percent over the 2002-07 period," wrote Oberholzer-Gee and Strumpf in their paper. "Since 2000, the annual release of new music albums has more than doubled, and worldwide feature film production is up by more than 30 percent since 2003."

Other experts also point to what appears to be a thriving music industry despite the recent plunge in CD sales. In addition to strong revenue from concerts and souvenir sales, television and movies are paying well for songs, scores and musical performances. Lucrative new markets for music have opened up, including ringtones, ringbacks and electronic games (see Guitar Hero). Innovative companies like Pandora, Lala, Mog and Spotify are providing customers with new ways to get music online and over their cellphones. Many experts see this as the industry's future, with customers paying a fee for unlimited access to music rather than purchasing individual songs or albums.

"The large recording companies are struggling to find a new business model that is anywhere near as profitable as the old one used to be. Other parts of the music industry are doing very well," says Oberholzer-Gee.

The debate over how to respond to file-sharing of music and the products of other creative efforts also raises questions about the true purpose of copyright law.

The RIAA's Marks says the principle of copyright is simple. "It is a property right," he says. "You spend time creating something or investing in it, you should have the law grant you enough rights that your creative or financial investment is protected."

I'm with the Band

There is, however, another view about the purpose of copyright law. Article I, section 8 of the U.S. Constitution grants Congress the power to establish copyright protections for authors and inventors to "promote the progress of science and useful arts."

To achieve that goal, copyright law creates "a system to 'incentivize' creators and their backers so they can be rewarded for the fruits of their labors so they can continue to create new works," Goldring says.

If the ultimate goal is to promote the creation of new works, then perhaps it isn't really necessary to take stronger legal actions against illegal file-sharing because the evidence does not suggest that it is hindering the creation of new works by musicians. That is, at least, the contention of Oberholzer-Gee and Strumpf. They note in their paper that, despite the growth of illegal file-sharing, more music than ever is being created and made available to the public. "This makes it difficult to argue that weaker copyright protection has had a negative impact on artists' incentives to be creative," their paper states.

The reasons for the surge in musical output aren't entirely clear to Oberholzer-Gee, Strumpf and other researchers. They suggest that part of the answer is that making music isn't just about making money. For a lucky few music can be highly lucrative, but most musicians can't even afford to make it their full-time job.

"Given these poor prospects, why are there so many musicians?" ask Oberholzer-Gee and Strumpf in their paper. "One explanation is that musicians enjoy their profession. Under this view, musicians take pleasure from creating and performing music, as well as aspects of the lifestyle such as flexible hours and the lack of an immediate boss. If this theory is correct, the economic impact of file-sharing is not likely to have a major impact on music creation."

Not only is more music available to the public, but it has become more affordable in the era of file-sharing, which may suggest another important lesson about the real purposes of copyright law.

"For the past 200 years, we have been continually strengthening copyright protections," Oberholzer-Gee says. "We always thought we needed super-strong rights to make people create. Maybe we were wrong."

That more music at lower cost became available to the public just as copyright protections were being weakened by file-sharing suggests that the need for even stronger protection is open to question, he says.

That kind of argument won't make the charts with the music recording industry, which has shown little willingness to give up its fight to rein in illegal file-sharing. But some in the industry are showing interest in the idea of making file-sharing legal.

The idea goes like this: Impose a blanket license on copyright owners, making it legal for all their musical works to be shared online. In return, ISP customers would pay a monthly licensing fee. Music rights organizations like ASCAP and BMI would collect the licensing fees and distribute royalty payments to performers and songwriters.

"If we were getting $2 or $3 monthly for each family with a broadband connection, and music royalties were distributed based on what people were listening to or downloading, that becomes significant money," says Ted Cohen, a former music company executive who is now managing partner at Tag Strategic in Los Angeles, a consulting firm for the digital entertainment industry. "That ultimately is the solution to file-sharing."

Cohen says an experiment in legal file-sharing may soon be launched by the Isle of Man, a self-governing British possession in the Irish Sea. The island's government has proposed a small monthly tariff on each customer's ISP connection, which would allow the customer to download an unlimited amount of music. A customer may opt out of the plan, but if the user is caught downloading a copyright-protected file just once, his or her Internet connection will be terminated.

Variations on all-you-can-hear music plans already are being offered by some innovative Internet music providers. Slacker and Pandora, for instance, offer the option of creating customized music streams that are playable on a customer's computer, iPhone or BlackBerry. Spotify and Mog both enable users to select and stream an unlimited number of tracks or albums. These plans offer consumers the ability to hear a huge selection of music for a low monthly fee instead of spending large amounts of money to amass their own collections of songs.

By making music cheap and easy to access—and by offering other consumer-friendly add-ons, such as lyrics and online music communities—these providers may be showing the way on how to put the clamps on infringing file-sharing, many experts believe.

"The best way to stamp out file-sharing is by creating better, new, licensed legal models, which make it more attractive not to pirate than to pirate," says Fred Davis, an attorney and founding partner of Code Advisors, an investment bank in New York City that focuses on technology and new media. "We're on the frontier of those new models, and that's what the future of the music industry holds."

Steven Seidenberg is a lawyer and freelance journalist in Fanwood, N.J., who contributes regularly to the ABA Journal.

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FAMILY LAW GOES GLOBAL
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EDITED BY JAMES PODGERS / PODGERSJ@STAFF.ABANET.ORG

LETTER PERFECT

Rediscovered notes to the president help a lawyer retrieve some fond memories

BY DEBRA CASSENS WEISS

ATTORNEY SHELLEY HUBNER WAS AN INDUSTRIOUS CHILD. JOHN F. Kennedy was a hero to her, and she wrote to the president often. Sometimes she asked him about current issues, such as international relations, and sometimes she sought advice on more personal issues.

"I recall asking him how I could get my parents not to fight as much, as if he could answer that," says Hubner, now a special counsel in the San Francisco office of Sedgwick, Detert, Moran & Arnold. She remembers writing to the president from summer camp to ask "how we could improve camp spirit—as if he were the guru." Kennedy's personal secretary, Evelyn Lincoln, dutifully replied to the letters, sending photographs of the president and his family that Hubner posted on her wall.

Shelley Hubner responds to the discovery of a letter she wrote to LBJ as a child. Archivist Bob Tissing (front, left) found the document during a visit by Health Law Section leaders.

After Kennedy was assassinated, Hubner wrote to President Lyndon B. Johnson in a quest for more photos for her treasured collection. But that was nearly a half-century ago. The letters and photos, placed in a box for safekeeping, disappeared a long time ago, and Hubner's memories of them were starting to fade.

But those memories came back in April, as Hubner toured the Lyndon Baines Johnson Library and Museum in Austin, Texas, with other leaders of the ABA Section of Health Law who were in town for a meeting. Hubner chairs the section's Breast Cancer Initiatives Executive Committee.

For more
Read Shelley Hubner's letter to LBJ
ABAJournal.com /magazine

Archivist Bob Tissing told the group that the library houses more than 45 million pages of cataloged documents. Then he asked whether anyone in the group had ever written to Johnson, and Hubner raised her hand.

FINDING KEEPERS

WITHIN MINUTES, TISSING HAD retrieved a box full of nearly 40 documents and began looking for Hubner's letter, written under her maiden name of Kushnick. "I just kind of rolled my eyes, thinking 'not a chance,' " says Hubner. But there it was—a letter in her handwriting.

A reply was attached from LBJ's personal secretary, Juanita Roberts, telling Hubner that it was "friendly of you to write the president" and sending along his best wishes.

Reading the correspondence nearly 50 years later, Hubner was stunned. "I was absolutely touched to tears," she says. "I think the reason was not so much that the letter was found, but that there was an opportunity to be reunited with that part of my childhood, which was such a unique period for me and, I think, all Americans."

Now Hubner has fired off another letter, this one to the John F. Kennedy Presidential Library & Museum in Boston. The archivist there has answered with good news: He has three of Hubner's childhood letters on file, including the one seeking advice on camp spirit.

"We would like you to write a letter," Hubner had implored President Kennedy, to tell campers that "every single person and their doings count." ■

PHOTOGRAPH BY ROBERT HUBNER