

11-20-2010

## International Media Pirates: Are They Making the Entertainment Industry Walk the Plank?

Lavonne Burke

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### Recommended Citation

Lavonne Burke, *International Media Pirates: Are They Making the Entertainment Industry Walk the Plank?*, 4 J. Bus. Entrepreneurship & L. Iss. 1 (2010)

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# INTERNATIONAL MEDIA PIRATES: ARE THEY MAKING THE ENTERTAINMENT INDUSTRY WALK THE PLANK?

LAVONNE BURKE, MS\*

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## I. INTRODUCTION

In response to the increasing effects of domestic and international media piracy<sup>1</sup> on the international entertainment industry (primarily motion picture and music companies), several countries have instituted increasingly stringent laws to combat such infringement. The entertainment industry is generally classified as businesses in the for-profit production, marketing, and distribution of creative

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<sup>1</sup> Piracy refers to the illegal duplication and distribution of sound and media recordings, and is often used interchangeably with the term “bootleg” recording. See Clifford A. Congo, *Drawing A Distinction Between Bootleg And Counterfeit Recordings And Implementing A Market Solution Towards Combating Music Piracy In Europe*, 17 DICK. J. INT’L L. 383, 385 (1999).

works such as music, film, books, theater, radio, television, and electronic broadcasts.<sup>2</sup> Historically, the entertainment industry has protected the production and dissemination of these copyrighted works through the legal remedies and rights afforded to the owners of such intellectual property.<sup>3</sup>

With the continued evolution of technology, the entertainment industry is now forced to respond to the use and misuse of computer-delivered digital entertainment and its uncontrolled distribution over the Internet.<sup>4</sup> Over the last decade, authorized distributors of creative works primarily controlled the reproduction of such media.<sup>5</sup> However, the revolution in Internet and digital technologies has threatened the industry's ability to regulate such reproduction and distribution.<sup>6</sup> Thanks to advances in digital technology and the availability of standard computer equipment, copying and high-quality reproductions are available to almost anyone with a CD/DVD burner.<sup>7</sup> Additionally, the Internet has afforded media pirates with an instantaneous and virtually unlimited distribution channel for digital content at little to no cost.<sup>8</sup>

It is estimated that approximately 77.4% of North Americans have Internet access, the highest percentage in the world.<sup>9</sup> Likewise, more than 398 million Asians and upwards of 340 million Europeans have online access.<sup>10</sup> As evidenced by the sheer number of worldwide Internet users, it is clear that "[t]he globalization of the world via the Internet creates a global problem when it comes to copyright law."<sup>11</sup>

It is estimated that annually more than \$20 billion in copyrighted movies, music, and other entertainment is lost to global piracy networks that are tolerated or encouraged by countries like China, Russia, India, and even Canada.<sup>12</sup> The rate

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<sup>2</sup> See generally *Busniessweek.com, Business Exchange*, <http://bx.businessweek.com/entertainment/industry/> (last visited Oct. 29, 2010).

<sup>3</sup> Copyright is a "property right in an original work of authorship . . . fixed in any tangible medium of expression, giving the holder exclusive rights to reproduce, adapt, distribute, perform or display the work." BLACK'S LAW DICTIONARY 337 (7th ed. 1999).

<sup>4</sup> See Mark Tratos, *The Impact of the Internet & Digital Media on the Entertainment Industry: Entertainment on the Internet: The Evolution of Entertainment Production, Distribution, Ownership and Control in the Digital Age*, 896 PRACTICING L. INST.: PATS., COPYRIGHTS, TRADEMARKS, AND LITERARY PROP. COURSE HANDBOOK SERIES 133, 137 (2007).

<sup>5</sup> *Id.* at 138-39. The right to reproduce a creative work is considered the most fundamental exclusive right protected by a copyright. See MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 290 (Matthew Bender & Co. 3d ed. 1999).

<sup>6</sup> See Tratos, *supra* note 4, at 137. The copyright holder's reproduction rights and distribution rights—which allow the copyright owner to make the first distribution of a protected work—is infringed when music is uploaded and shared via the Internet without authorization. See LEAFFER, *supra* note 5, at 309.

<sup>7</sup> See Tratos, *supra* note 4, at 139.

<sup>8</sup> *Id.*

<sup>9</sup> *InternetWorldStats.com, Internet Usage Statistics*, <http://www.internetworldstats.com/stats.htm> (last visited Oct. 29, 2010).

<sup>10</sup> *Id.*

<sup>11</sup> Kelly Leong, *ITUNES: Have They Created a System for International Copyright Enforcement*, 13 NEW ENG. J. INT'L & COMP. L. 365, 370 (2007).

<sup>12</sup> Michael Cieply, *Digital Piracy Spreads, and Defies a Fix*, N.Y. TIMES, Apr. 6, 2009, available at <http://www.nytimes.com/2009/04/07/business/media/07piracy.html>.

of digital media piracy is so prevalent in today's society that entertainment industry insiders estimate that only one in three music CDs and about one in twenty music downloads are sold legitimately worldwide.<sup>13</sup> In 2002, the Motion Picture Association of America estimated that between 400,000 and 600,000 movies were downloaded illegally each day.<sup>14</sup> That number was projected to triple by 2010.<sup>15</sup>

While several individuals and software companies (Napster, Kazaa, etc.) have been held liable for their infringing activities, the online conduits that have made piracy possible have remained blameless.<sup>16</sup> As this paper will illustrate, the current anti-pirating laws, have not effectively neutralized the conduits through which this pirated media is trafficked.

The purpose of this note is to examine and analyze the international struggle and subsequent legal efforts taken by the United States and the European Union to protect copyright in the digital age. This note takes the position that the current measures employed by the United States and the European Union are not effective in combating international media piracy. Additionally, this note emphasizes that media piracy, also referred to as digital copyright infringement, is a global problem that will only be eradicated through an international effort. Finally, this note will evaluate the efficacy of current domestic and foreign legislation specifically focused on preventing the Internet trafficking of pirated copyrighted works, and the subsequent duties and liability of Internet Service Providers.

## II. BACKGROUND INFORMATION

### A. *International Intellectual Property Organization*

While countries develop new copyright laws in attempts to circumvent the shifting landscape of digital media production, legal restrictions on media use and distribution, such as digital rights management,<sup>17</sup> are being championed by global heavyweights in the media and entertainment industries.<sup>18</sup> These international

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<sup>13</sup> *Id.* See also Sefano Vranca, *Six Strategies To Protect Clients Against IP Theft*, 15 NO. 1 INTELL. PROP. STRATEGIST 1 (Oct. 2008) (stating that the U.S. portion of the global music market was estimated at 60.7%, which translated into 13.2 billion illegal U.S. downloads annually).

<sup>14</sup> Associated Press, *MPAA Snooping for Spies*, WIRED, July 22, 2002, <http://www.wired.com/news/politics/0,1283,54024,00.html>.

<sup>15</sup> *Id.*

<sup>16</sup> See *A & M Records v. Napster*, 239 F.3d 1004 (9th Cir. 2001); see also *Universal Music Austl. v. Sharman License Holdings*, (2005) F.C.A. 1242 (Austl.) (holding that the Federal Court of Australia issued a landmark ruling that Sharman Networks, the parent company of Kazaa, was itself not found guilty of copyright infringement, but was guilty of "authorizing" Kazaa users to illegally swap and download copyrighted songs).

<sup>17</sup> Digital Rights Management, or DRM technology, can be used to control either the access to a work or the use of a work. DRM systems controlling the use of a work might involve limitations on the particular device on which the media can be played; whereas controlling access to a work can be limited by password encryption. See Mark Tratos, *The Impact of the Internet & Digital Media on the Entertainment Industry*, in 862 PRACTICING L. INST.: PATS., COPYRIGHTS, TRADEMARKS, AND LITERARY PROP. COURSE HANDBOOK SERIES 129, 129-30 (2006).

<sup>18</sup> See Natalie Brown, *Media Piracy: Approaching IP from the South*, ASS'N. FOR PROGRESSIVE COMM'NS, July 21, 2008, <http://www.apc.org/en/news/access/all/media-piracy-approaching-ip-south>.

efforts have resulted in increasing restrictions on media consumption, with stringent punishment for access to copyright protected materials and unauthorized dissemination of information technologies across the globe.<sup>19</sup>

1. *The World Intellectual Property Organization and the Berne Convention*

The world's intellectual property ("IP") is currently "protected" by a series of international sentinel organizations, all of which are primarily under the direction of the World Intellectual Property Organization ("WIPO").<sup>20</sup> WIPO is a specialized agency of the United Nations.<sup>21</sup> This highly specialized branch of the United Nations is dedicated to developing a balanced and accessible international intellectual property system, focused on rewarding creativity, stimulating innovation, and contributing to economic development, while safeguarding public interest in intellectual property.<sup>22</sup>

The WIPO Convention established the World Intellectual Property Organization in 1967.<sup>23</sup> The member states of WIPO mandated the promotion and protection of IP throughout the world through cooperation among states and in collaboration with other international organizations.<sup>24</sup> WIPO is headquartered in Geneva, Switzerland and currently has 184 member states.<sup>25</sup> The WIPO Convention provides that membership is open to any state that: 1) is a member of the Paris Union for the Protection of Industrial Property, or of the Berne Union for the Protection of Literary and Artistic Works; or 2) is a member of the United Nations, or of any of the United Nations' Specialized Agencies, or of the International Atomic Energy Agency, or that is a party to the Statute of the International Court of Justice; or 3) is invited by the WIPO General Assembly to become a Member State of the Organization.<sup>26</sup>

In 1996, the member states of the World Intellectual Property Organization signed two international treaties relating to copyright law; the World Intellectual Property Organization Copyright Treaty ("WIPOCT") and the WIPO Performances and Phonograms Treaty ("WPPT"), collectively known as the WIPO Internet Treaties.<sup>27</sup> The WIPOCT provided additional protection for copyrighted

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<sup>19</sup> *See id.*

<sup>20</sup> Convention Establishing the World Intellectual Property Organization, July 14, 1967 (as amended Sept. 28, 1979), *available at* [http://www.wipo.int/treaties/en/convention/trtdocs\\_wo029.html](http://www.wipo.int/treaties/en/convention/trtdocs_wo029.html).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *See* WIPO.int, World Intellectual Property Organization Home, <http://www.wipo.int/portal/index.html.en> (last visited Oct. 10, 2009).

<sup>26</sup> *Id.*

<sup>27</sup> *See* World Intellectual Property Organization Copyright Treaty ("WIPOCT"), Apr. 12, 1997, S. TREATY DOC. NO. 105-17, *available at* 1997 WL 447232; WIPO Performances and Phonograms Treaty ("WPPT"), Dec. 20, 1996, WIPO DOC. NO. CRNR/DC/95, [http://www.wipo.int/treaties/en/ip/wppt/pdf/trtdocs\\_wo034.pdf](http://www.wipo.int/treaties/en/ip/wppt/pdf/trtdocs_wo034.pdf).

works.<sup>28</sup> This was deemed necessary due to advances in information technology and the Internet that had taken place since the formation of previous copyright treaties.<sup>29</sup> Specifically, the Internet Treaties prohibited the circumvention of technological protections placed on copyrighted works, thereby allowing rights holders to prosecute individuals who attempted to bypass such safeguards.<sup>30</sup> Additionally, the treaties explicitly granted copyright owners the exclusive right to place their works on the Internet.<sup>31</sup>

With its origin dating back as far as 1883, the Berne Convention is the “oldest international treaty in the field of copyright.”<sup>32</sup>

The Berne Convention,<sup>33</sup> the predecessor to the WIPOCT, required its signatories to recognize the copyright of works of authors from other signatory countries in the same way they recognized the copyright of their own nationals.<sup>34</sup> In addition to establishing a system of equal treatment that internationalized copyright amongst signatories, the Convention also required member states to provide strong minimum standards for enforcing and protecting copyright law.<sup>35</sup>

The Berne Convention, similar to the Paris Convention which pertains to patent rights, was created as a reaction to the lack of a harmonized international standard for copyright enforcement and protection.<sup>36</sup> Since its creation, “the Berne Convention has undergone numerous revisions to modernize its parameters in accordance with changes in technology and other mediums of copyright.”<sup>37</sup> In spite of changes made to the Convention over the past century, its main tenet “to protect, in as effective and uniform a manner as possible, the rights of authors in

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<sup>28</sup> WIPOCT, *supra* note 27.

<sup>29</sup> See WIPO.int, Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, <http://www.wipo.int/treaties/en/ip/berne/index.html> (showing that as of September 2008 there are 164 countries that are parties to the Berne Convention).

<sup>30</sup> See Leong, *supra* note 11, at 373.

<sup>31</sup> *Id.*

<sup>32</sup> See Monlux, *infra* note 36, at 146-47.

<sup>33</sup> The Berne Convention is based on three main principles:

First, there is an element of ‘national treatment’ that requires assurances of similar protection to works that originate from different member states. Second, members afford immediate protection to works originating out of member states without any necessary formalities. Finally, there is an ‘independence of protection,’ meaning that protection of the work is not dependent on the degree of protection afforded the work in its originating country. Under this protectionist umbrella, the Berne Convention specifies the works it protects, rights of copyright owners, types of persons protected, and minimum standards of protection.

*Id.* at 148.

<sup>34</sup> The minimum standards for copyright protection, established by the Berne Convention, allowed member nations to create national enforcement procedures but required the enforcement of such procedures regardless of the nationality of the author. See Eleanor Lackman, *Slowing Down the Speed of Sound: A Transatlantic Race to Head Off Digital Copyright Infringement*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1161, 1184 (2003).

<sup>35</sup> *Id.*

<sup>36</sup> Nicholas R. Monlux, *Copyright Piracy On The High Seas of Vietnam: Intellectual Property Piracy In Vietnam Following WTO Accession*, 37 AIPLA Q.J. 135, 147 (2009).

<sup>37</sup> *Id.*

their literary and artistic works,” has remained constant.<sup>38</sup>

## 2. World Trade Organization, GATT, and TRIPS

The World Trade Organization (“WTO”) is a group of countries focused on “breaking down trade barriers and increasing the free flow of commodities between countries,” in order to liberalize free trade.<sup>39</sup> In furtherance of its mission, the WTO promotes policies that encourage the “unrestricted flow of goods and services,” thereby “sharpen[ing] competition . . . [and] multiply[ing] the rewards that result from producing the best products, with the best design, at the best price.”<sup>40</sup> With respect to intellectual property, the WTO creates standards that apply to copyrights and patents, and requires that imported and local goods be treated equally.<sup>41</sup>

Following the adoption of the WIPO Internet Treaties in 1996, the Trade Related Aspects of Intellectual Property Rights (“TRIPS”) provision of the multilateral General Agreement on Tariffs and Trade (“GATT”) gained prominence among the members of the WTO.<sup>42</sup> TRIPS is an international agreement administered by the WTO that establishes minimum standards for the regulation of multiple types of intellectual property.<sup>43</sup>

TRIPS specifically contains requirements that the laws of WTO member

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 143 (stating that “[t]he WTO specifies procedures and policies on international commerce to ‘help trade flow as freely as possible’”).

<sup>40</sup> World Trade Organization, The Case for Open Trade, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact3\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm) (last visited Jan. 24, 2010).

<sup>41</sup> See WTO.org, Principles of the Trading System, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact2\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm) (last visited Jan. 24, 2010). According to the WTO, “[i]mported and locally-produced goods should be treated equally--at least after the foreign goods have entered the market. The same should apply to foreign and domestic services, and to foreign and local trademarks, copyrights and patents.” *Id.*

<sup>42</sup> See Leong, *supra* note 11, at 372.

<sup>43</sup> See SociologyIndex.com, Agreement on Trade Related Aspects of Intellectual Property Rights, available at [http://sociologyindex.com/agreement\\_on\\_trips.htm](http://sociologyindex.com/agreement_on_trips.htm) (last visited Jan. 24, 2010). For example some of the most prominent TRIPS requirements are as follows:

Copyright terms must extend to 50 years after the death of the author, although films and photographs are only required to have fixed 50 and to be at least 25 year terms, respectively; (ii) Copyright must be granted automatically, and not based upon any “formality”, such as registrations or systems of renewal; (iii) Computer programs must be regarded as “literary works” under copyright law and receive the same terms of protection.; (iv) National exceptions to copyright (such as “fair use” in the United States) are constrained by the Berne three-step test; (v) Patents must be granted in all “fields of technology,” although exceptions for certain public interests are allowed and must be enforceable for at least 20 years; (vi) Exceptions to the exclusive rights must be limited, provided that a normal exploitation of the work and normal exploitation of the patent is not in conflict; (vii) No unreasonable prejudice to the legitimate interests of the right holders of computer programs and patents is allowed; (viii) Legitimate interests of third parties have to be taken into account by patent rights; (ix) In each state, intellectual property laws may not offer any benefits to local citizens which are not available to citizens of other TRIPS signatories by the principles of national treatment (with certain limited exceptions).

*Id.* (roman numerals added).



nations must meet for: copyrights; geographical indications; industrial designs; integrated circuit layout-designs; patents; monopolies for the developers of new plant varieties; trademarks; trade dress; and undisclosed or confidential information.<sup>44</sup> TRIPS also specifies enforcement procedures, remedies, and dispute resolution procedures.<sup>45</sup> Under TRIPS:

[p]rotection and enforcement of all intellectual property rights shall meet the objectives to contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.<sup>46</sup>

The WTO negotiated the TRIPS provision of GATT in an attempt to facilitate equal treatment among imported and domestic goods through specifying the legal obligations of member countries regarding intellectual property rights.<sup>47</sup> As a result, TRIPS was heralded as a “landmark step in codifying and harmonizing international IP law,”<sup>48</sup> as it “introduced intellectual property law into the international trading system for the first time.”<sup>49</sup> Moreover, TRIPS was designated the “most detailed and comprehensive multilateral agreement on intellectual property” based on its far-reaching provisions,<sup>50</sup> and remains the most comprehensive international agreement on intellectual property to date.<sup>51</sup>

TRIPS has been classified as the most wide-reaching international treaty on the subject of intellectual property, and when fully implemented, will strengthen international intellectual property rights protection.<sup>52</sup> TRIPS, although full of benefits, also has several weaknesses with respect to its applicability to protecting intellectual property rights in the current online marketplace wrought with media piracy.<sup>53</sup> Professor Marci Hamilton, in her article entitled *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*,<sup>54</sup> poignantly states that:

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Wikipedia.org, Agreement on TRIPS, <http://en.wikipedia.org/wiki/TRIPS> (last visited Mar. 8, 2010).

<sup>47</sup> See Monlux, *supra* note 36, at 143.

<sup>48</sup> *Id.*

<sup>49</sup> See Agreement on TRIPS, *supra* note 46.

<sup>50</sup> See Leong, *supra* note 11, at 372. Specifically TRIPS:

[I]n a single agreement, [ ] establishes the minimum standards of protection for the most important forms of IP [intellectual property] . . . (b) its establishes standards of enforcement of . . . IP by incorporating commitments regarding domestic procedures and remedies for enforcement of IP rights, including establishment of certain general principles applicable to all IP rights enforcement procedure; and (c) it provides a binding, enforceable dispute settlement mechanism to resolve disputes regarding [its] members’ compliance with the established standards.

*Id.*

<sup>51</sup> Agreement on TRIPS, *supra* note 46.

<sup>52</sup> See Monlux, *supra* note 36, at 144.

<sup>53</sup> *Id.*

<sup>54</sup> See Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT’L L. 613, 614-15 (1996) (Professor Marci A. Hamilton holds the Paul R. Verkuil



Despite [TRIPS's] broad sweep and . . . unstated aspirations, [it] arrives on the scene already outdated. TRIPS reached fruition at the same time that the on-line era became irrevocable. Yet it makes no concession, not even a nod, to the fact that a significant portion of the international intellectual property market will soon be conducted on-line. This silence could transform a troubling treaty into a weapon of extortion by the publishing industry, which has already succeeded in crafting TRIPS as a blunt instrument for copyright protection . . . TRIPS' silence threatens to make it both outdated and overprotective.<sup>55</sup>

In light of the current issues under examination, it appears evident that the current international efforts to combat media piracy are falling short of the Berne Convention's requirement to provide strong standards to protect copyright law. Although world leaders have designated TRIPS as the most comprehensive step taken towards harmonizing international intellectual property laws, its failure to address Internet media piracy and the unique challenges faced by countries in protecting intellectual property rights in the digital age proves that current international standards do not reach far enough.

### *B. Modern International Digital Copyright Protection Laws*

Several members of WIPO have adopted country specific legislation to combat the serious and emerging threats of media piracy. Such legislation has been designed to both codify the WIPO Internet Treaties and adhere to the minimum standards necessary for nations to comply with GATT, as outlined by the TRIPS provision.<sup>56</sup> For example, United States copyright law has attempted to mitigate the issues associated with the modernization of the Internet and information technology with its adoption of the Digital Millennium Copyright Act ("DMCA").<sup>57</sup>

#### *1. Digital Millennium Copyright Act & Beyond*

The DMCA is the United States copyright law that codifies the 1996 WIPO Internet Treaties.<sup>58</sup> It was passed on October 12, 1998 by a unanimous vote in the United States Senate and signed into law by then President, Bill Clinton, on October 28, 1998.<sup>59</sup> The DMCA amended Title 17 of the United States Code to extend the reach of copyright law, while limiting the liability of the providers of

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Chair in Public Law at the Benjamin N. Cardozo School of Law, Yeshiva University, where she is the founding Director of the Intellectual Property Law Program).

<sup>55</sup> *Id.*

<sup>56</sup> See Leong, *supra* note 11, at 372.

<sup>57</sup> See *id.* at 374-75.

<sup>58</sup> *Id.*

<sup>59</sup> U.S. COPYRIGHT OFFICE, SUMMARY OF THE DIGITAL COPYRIGHT ACT OF 1998 (Dec. 1998), <http://www.copyright.gov/legislation/dmca.pdf>; WIKIPEDIA.ORG, DIGITAL MILLENNIUM COPYRIGHT ACT ("DMCA"); [http://en.wikipedia.org/wiki/Digital\\_Millennium\\_Copyright\\_Act](http://en.wikipedia.org/wiki/Digital_Millennium_Copyright_Act) (last visited Jan. 23, 2010).

online services for copyright infringement by their users.<sup>60</sup> The DMCA currently regulates United States copyright law, as its adoption implemented: the WIPO Copyright and Performances and Phonograms Treaties Implementation Act; the Online Copyright Infringement Liability Limitation Act; the Computer Maintenance Competition Act; the Vessel Hull Design Protection Act; and numerous other provisions dealing with modern anti-circumvention laws.<sup>61</sup>

The fundamental provisions of the DMCA are “to prohibit anti-circumvention technologies and create exemptions for Internet service providers.”<sup>62</sup> This act criminalizes production and dissemination of technology, devices, or services intended to circumvent measures (commonly known as digital rights management or DRM) that control access to copyrighted works.<sup>63</sup> It also criminalizes the act of circumventing an access control, whether or not actual copyright infringement has occurred.<sup>64</sup> The act further provides:

[n]o person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title; B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or C) is marketed by that person or another acting in concert with that person with that person’s knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.<sup>65</sup>

In addition, the DMCA heightens the penalties for copyright infringement on the Internet and was designed to regulate the use of computers as recording, storage, and distribution devices of digital entertainment content.<sup>66</sup>

In more aggressive measures, the United States has attempted to implement increasingly stringent legislation that would further punish acts of infringement to include allowing federal prosecutors to file civil lawsuits against infringers.<sup>67</sup> Additionally, the United States has recently endeavored to introduce the Perform Act, also known as the Platform Equality and Remedies for Rights Holders in Music Act of 2007.<sup>68</sup>

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> DAVID NIMMER, COPYRIGHT: SACRED TEXT, TECHNOLOGY AND THE DMCA (2003).

<sup>63</sup> See 17 U.S.C. § 1201(a)(2) (2006).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 160.

<sup>66</sup> *Id.*

<sup>67</sup> The Protecting Intellectual Rights Against Theft and Expropriation Act of 2004 (“PIRATE Act”) would have let federal prosecutors file civil lawsuits against suspected infringers. See PIRATE Act, S. 2237, 108th Cong. (2d Sess. 2004), [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108\\_cong\\_bills&docid=f:s2237rfh.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:s2237rfh.txt.pdf).

<sup>68</sup> Should this bill become law, it would call for the implementation of DRM protections and restrictions on digital audio transmissions, such as over the Internet radio, and satellite radio such as XM Satellite Radio. See Platform Equality and Remedies for Rights Holders in Music Act of 2007 (PERFORM Act), S. 256, 110th Cong. (1st Sess. 2007), [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_bills&docid=f:s256is.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s256is.txt.pdf). It would also call for services to be required to

## 2. European Union Copyright Directive

As a corollary to the United States' DMCA, the European Union has also adopted similarly structured legislation to protect the intellectual property of its citizens. On May 22, 2001, the European Union passed the Copyright Directive, or EUCD, which addresses some of the same issues as the DMCA.<sup>69</sup> The EUCD was the European Union's means of implementing the WIPO Internet Treaties, having the overall purpose of promoting the "fair balance of rights and interests between the different categories of rights holders and users of protected subject-matter" in the digital age.<sup>70</sup>

Moreover, in an attempt to remove potential trade barriers, the EUCD specifically called for the harmonization of the copyright laws of European Union members.<sup>71</sup> Like the DMCA, the framework of the EUCD incorporated anti-circumvention prohibitions to preserve the author's reproduction and communication rights.<sup>72</sup> Unlike the DMCA, whose principal innovation was in the field of copyright law and specifically addressed the exemption of Internet Service Providers ("ISPs") from infringement liability,<sup>73</sup> the EUCD "does not provide broad insulation from liability for ISPs."<sup>74</sup>

Specifically in an attempt to deter Internet music piracy, the European Union ratified the Directive on the Enforcement of Intellectual Property Rights in April of 2004.<sup>75</sup> Article 8<sup>76</sup> of the Enforcement Directive states that:

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pay "fair market value" for copyrighted materials, as well as amending other laws to make this possible. *Id.* In addition, recording devices are barred from disambiguating songs in audio streams. *Id.* However, the Act would give consumers the explicit right to make "reasonable" recordings at home, for their own use, and to transfer those recordings to other computers within their home for playback. *Id.*

<sup>69</sup> See DMCA Summary, *supra* note 59.

<sup>70</sup> See Terese Foged, *U.S. v. EU Anti Circumvention Legislation: Preserving the Public's Privileges in the Digital Age?*, 24(11) E.I.P.R. 525, 535 (2002).

<sup>71</sup> *Id.*

<sup>72</sup> See Leong, *supra* note 11, at 376.

<sup>73</sup> See DMCA, *supra* note 59.

<sup>74</sup> Lackman, *supra* note 34, at 1177.

<sup>75</sup> See Enforcement Directive 2004/48, 2004 O.J. (L 157) 45 (EC) [hereinafter Enforcement Directive]; see also Leong, *supra* note 11, at 376 (stating that the Enforcement Directive allowed courts to impose liability on third-party infringers and Internet service providers); see also Press Release, IP Justice, EU Passes Dangerous IP Law, Despite MEP's Conflict of Interest "Midnight Knocks" by Recording Industry Executives Get Go-Ahead, Mar. 9, 2004, [http://www.ipjustice.org/CODE/release20040309\\_en.shtml](http://www.ipjustice.org/CODE/release20040309_en.shtml).

<sup>76</sup> Article 8, §1 of the Enforcement Directive provides in full:

Member States shall ensure that, in the context of proceedings concerning an infringement of an intellectual property right and in response to a justified and proportionate request of the claimant, the competent judicial authorities may order that information on the origin and distribution networks of the goods or services which infringe an intellectual property right be provided by the infringer and/or any other person who:

- (a) was found in possession of the infringing goods on a commercial scale;
- (b) was found to be using the infringing services on a commercial scale;
- (c) was found to be providing on a commercial scale services used in infringing activities; or
- (d) was indicated by the person referred to in point (a), (b) or (c) as being involved in the production, manufacture or distribution of the goods or the

judicial authorities may order the information on the origin and distribution networks of the goods or services which infringe an intellectual property right . . . by the infringer and/or any other person who: . . . was found to be providing on a commercial scale services used in infringing activities.<sup>77</sup>

### 3. DADVSI

France, while a member of the European Union, has established its own legislation to address the emerging issues of media piracy.<sup>78</sup> DADVSI reformed French copyright law, and was written primarily to implement the EUCD, which in turn implemented the 1996 WIPO treaty.<sup>79</sup> DADVSI primarily focused on the repression of the exchange of copyrighted works over peer-to-peer networks and the criminalizing of the circumvention of DRM protection measures.<sup>80</sup> Additionally, in order to prevent the unauthorized exchange of copyrighted material, DADVSI created a criminal cause of action for failing to screen Internet connections.<sup>81</sup>

### III. POTENTIAL CAUSES OF ACTION FOR INTERNET SERVICE PROVIDERS

In the event of proven copyright infringement, a copyright holder may request the court to impose third-party liability on a party other than the direct infringer.<sup>82</sup> Currently under United States law, there are two potential legal doctrines in which third-parties can be prosecuted as copyright infringers.<sup>83</sup> “Indeed, courts have long recognized that, in order to protect the copyright holder’s statutory monopoly, parties other than the direct infringer must often be held accountable for copyright infringements.”<sup>84</sup>

Two causes of action for third-party liability recognized in modern case law

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provision of the services.

Enforcement Directive, *supra* note 75.

<sup>77</sup> *Id.*

<sup>78</sup> See “Loi sur le Droit d’Auteur et les Droits Voisins dans la Société de l’Information” (“DADVSI”) [“Law on Authors’ Rights and Related Rights in the Information Society.”] (Aug. 4, 2006) <http://www.assemblee-nationale.fr/english/index.asp>.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> See Code de la propriété intellectuelle, Article L 335-12 (Aug. 1, 2006), [http://www.legifrance.gouv.fr/affichCodeArticle.do?sessionId=63A46FAE0F679E2D1ACE0496FE9334BF.tpdjo09v\\_1?cidTexte=LEGITEXT000006069414&idArticle=LEGIARTI000006279242&dateTexte=20090513&categorieLien=id](http://www.legifrance.gouv.fr/affichCodeArticle.do?sessionId=63A46FAE0F679E2D1ACE0496FE9334BF.tpdjo09v_1?cidTexte=LEGITEXT000006069414&idArticle=LEGIARTI000006279242&dateTexte=20090513&categorieLien=id).

<sup>82</sup> See *Polygram Int’l Publ’g, Inc. v. Nevada/TIG, Inc.*, 855 F. Supp. 1314, 1320 (D. Mass. 1984). In this case, song copyright holders sued organizers of a computer trade show for copyright infringement, based upon the unauthorized performance of copyrighted songs during the trade show and awards ceremony. *Id.*

<sup>83</sup> While third-party liability for copyright infringement is not expressly stated in the federal Copyright Act, the Supreme Court has held that “[t]he absence of such express language in the copyright statute does not preclude the imposition of liability . . . .” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 435 (1984). See also 17 U.S.C. §§ 106, 504-05 (2006).

<sup>84</sup> *Polygram Int’l Publ’g*, 855 F. Supp. at 1320 (citing *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1161-62 (2d Cir. 1971)).

are vicarious liability<sup>85</sup> and contributory copyright infringement.<sup>86</sup> Although the Copyright Act<sup>87</sup> does not expressly impose liability on anyone other than direct infringers, courts have long recognized that in certain circumstances, vicarious or contributory liability will be imposed.<sup>88</sup> In *Sony Corp. of America v. Universal Studios, Inc.*, the Court held that “vicarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying circumstances in which it is just to hold one individually accountable for the actions of another.”<sup>89</sup> Due to their origins in the American judicial system and their far-reaching implications in the regulation of intellectual property rights and copyright infringement, the theories of vicarious and contributory liability will each be examined in turn.

## A. UNITED STATES

### 1. Vicarious Copyright Infringement

The legal doctrine of vicarious copyright infringement originated in the Second Circuit of the United States Court of Appeals.<sup>90</sup> In the 1963 landmark case of *Shapiro, Bernstein & Co. v. H.L. Green Co.*, the court examined vicarious liability for sales of counterfeit recordings.<sup>91</sup> The case developed from a copyright infringement suit against the owner of a chain of department stores, where a concessionaire was selling counterfeit recordings.<sup>92</sup> Diverging from the historical rule of respondeat superior, which imposes liability on an employer for copyright infringements by an employee, the court in *Shapiro* fashioned a principle for enforcing copyrights against a defendant who did not actually employ the direct infringer, but who derived economic benefit from interests intertwined with those of the direct infringer.<sup>93</sup>

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<sup>85</sup> When debating the 1976 copyright amendment, Congress was fully cognizant that the existing Copyright Act had been interpreted as imposing vicarious liability on proprietors of nightclubs and other establishments for music infringement. *See id.* *See also* H.R. REP. NO. 94-1476, at 159-60. (1976). During this time, the Judiciary Committee considered and ultimately denied a proposal to amend the Act to exempt such proprietors from vicarious liability. *Id.*

<sup>86</sup> *See Polygram Int'l Publ'g*, 855 F. Supp. at 1320.

<sup>87</sup> *See* 17 U.S.C. §§ 101-22 (2006).

<sup>88</sup> *See Sony Corp. of Am.*, 464 U.S. at 435. The Court in *Sony* concluded that the video device, while capable of making illegal copies, was also capable of providing consumers with a useful ability to record and watch programs that they would otherwise miss. *Id.* at 445-47. This time-shifting capacity of the Betamax technology allowed the copies that were made for personal home use to fall within the fair use exception of the Copyright Act. *Id.* at 454-55. In 2004, relying upon the Supreme Court's decision in *Sony*, the Ninth Circuit Court of Appeals incorrectly concluded that P2P file-sharing software, which was used for making illegal copies of files, could also be used for other non-infringing purposes. *See MGM Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004).

<sup>89</sup> *Sony Corp. of Am.*, 464 U.S. at 435.

<sup>90</sup> “The concept of vicarious copyright liability was developed in the Second Circuit as an outgrowth of the agency principles of respondeat superior.” *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 261 (9th Cir. 1996).

<sup>91</sup> *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 308 (2d Cir. 1963).

<sup>92</sup> *Id.* at 305-06.

<sup>93</sup> *Id.* at 308-09.

In developing the doctrine of vicarious copyright infringement, the Second Circuit relied on a line of cases called the “dance hall” cases.<sup>94</sup> In these cases, the operators of entertainment venues were held liable for infringing performances when the operator (1) could control the premises and (2) obtained a direct financial benefit from the audience, who paid to enjoy the infringing performance.<sup>95</sup>

Drawing from the rationale of the “dance hall” cases, the court imposed liability on the storeowner in *Shapiro*, even though the owner was unaware of the concessionaire’s infringement.<sup>96</sup> Here the court articulated what has emerged as the gold-standard for a finding of vicarious liability in the context of copyright infringement.<sup>97</sup> It held that:

[w]hen the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials—even in the absence of actual knowledge that the copyright monopoly is being impaired—the purposes of copyright law may best be effectuated by the imposition of liability upon the beneficiary of that exploitation.<sup>98</sup>

The *Shapiro* court deemed the imposition of vicarious liability “neither unduly harsh nor unfair because the store proprietor had the power to cease the conduct of the concessionaire, and because the proprietor derived an obvious and direct financial benefit from the infringement.”<sup>99</sup>

Later the Second Circuit more succinctly articulated a test for vicarious liability in which it stated that: “even in the absence of an employer-employee relationship one may be vicariously liable if he has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.”<sup>100</sup> More recently Judge Keeton has contributed additional color to the doctrine of vicarious liability for copyright infringement in his opinion in *Polygram International Publishing, Inc. v. Nevada/TIG, Inc.*<sup>101</sup> Judge Keeton has gone further in clarifying the benefit prong of the vicarious liability test, set forth in *Shapiro*.<sup>102</sup> Keeton stated that the “crucial question for establishing the benefit prong of the test for vicarious liability is not the exact amount of the benefit, but

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<sup>94</sup> See, e.g., *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 198-99 (1931); *Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co.*, 36 F.2d 354, 355 (7th Cir. 1929).

<sup>95</sup> *Buck*, 283 U.S. at 198-99; *Dreamland Ball Room*, 36 F.2d at 355.

<sup>96</sup> *Shapiro*, 316 F.2d. at 304.

<sup>97</sup> *Polygram*, 855 F. Supp. at 1324 (citing *Shapiro*, 316 F.2d. at 304).

<sup>98</sup> *Id.*

<sup>99</sup> *Shapiro*, 316 F.2d at 307. Additionally in *Shapiro*, the court focused on the formal licensing agreement between the department store and the direct infringer-concessionaire; where the concessionaire agreed to the terms and conditions of the department store (e.g. observing and obeying regulations as specified in the licensing/business agreement) and the department store had the right to police its concessionaire. *Id.* at 308.

<sup>100</sup> *Gershwin Publ’g Corp. v. Columbia Artists Mgmt. Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). In *Gershwin*, the Second Circuit affirmed the district court’s ruling that the concert artists’ management firm, which assisted in organizing the local community concert association and directed artists from whom it received commissions, was liable to owners of copyrighted music performed at concerts for license fees that were not paid by the artist or community association. *Id.* See also 3 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1204(A), at 1270-72 (1995).

<sup>101</sup> See *Polygram Int’l Publ’g, Inc.*, 855 F. Supp. at 1314.

<sup>102</sup> *Id.* at 1333.

only whether the defendant derived a benefit from the infringement that was substantial enough to be considered significant.”<sup>103</sup>

Following the Second Circuit’s guidance, the Third Circuit has also averred through its analysis in *Columbia Pictures Industries, Inc. v. Aveco, Inc.*<sup>104</sup> that providing a site or facility for known infringing activity is sufficient to establish contributory liability.<sup>105</sup>

## 2. Contributory & Inducement Infringement

The second legal doctrine to be examined is contributory copyright infringement. Contributory infringement is a cause of action that originates in tort law and is based on the legal tenet that one who directly contributes to another party’s infringement should be liable.<sup>106</sup> Contributory infringement<sup>107</sup> imposes liability on a person who knowingly contributes to the infringing conduct of another, and is often been described as an expansion of enterprise liability.<sup>108</sup>

For example, in *Screen Gems-Columbia Music, Inc. v. Mark Fi Records, Inc.*,<sup>109</sup> the district court held that an advertising agency which placed non-infringing advertisements for the sale of infringing records, a radio station which broadcast such advertisements, and a packaging agent which shipped the infringing records could each be held liable as a “contributory” infringer if it were shown to have had knowledge, or reason to know, of the infringing nature of the records. Their potential liability was predicated upon the “common law doctrine that one who knowingly participates in or furthers a tortious act is jointly and severally liable with the prime tortfeasor.”<sup>110</sup>

More recently in *MGM Studios, Inc. v. Grokster, Ltd.*,<sup>111</sup> the U.S. Supreme

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<sup>103</sup> *Id.*

<sup>104</sup> *Columbia Pictures Indus., Inc. v. Aveco, Inc.*, 800 F.2d 59 (3d Cir. 1986). In *Columbia Pictures*, the Third Circuit Court of Appeals held that a videocassette rental business, by renting its rooms to members of the general public in which they could view performances of copyrighted videocassettes, violated the producers’ exclusive rights to perform the work publicly. *Id.*

<sup>105</sup> See 2 WILLIAM F. PATRY, COPYRIGHT LAW & PRACTICE 1147 (“[m]erely providing the means for infringement may be sufficient” to incur contributory copyright liability).

<sup>106</sup> See 1 NEIL BOORSTYN, BOORSTYN ON COPYRIGHT § 10.06, at 10-21 (1994) (“[i]n other words, the common law doctrine that one who knowingly participates in or furthers a tortious act is jointly and severally liable with the prime tortfeasor, is applicable under copyright law”).

<sup>107</sup> Contributory infringement is defined as “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.” *Gershwin*, 443 F.2d at 1162.

<sup>108</sup> See 3 NIMMER § 1204[a], at 1275; *Demetriades v. Kaufmann*, 690 F. Supp. 289, 292 (S.D.N.Y. 1988).

<sup>109</sup> *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399 (S.D.N.Y. 1966).

<sup>110</sup> *Id.* at 403.

<sup>111</sup> *Grokster*, 545 U.S. 513. In *Grokster*, the unanimous Court held that “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.” *Id.* at 919. The Court concluded that each defendant clearly and knowingly promoted and marketed its software with the intent to further the business models employed by similar former services being challenged in court for facilitating copyright infringement when it advertised and



Court held that manufacturers of information sharing technology could be liable for copyright infringement if they were aware of, financially benefited from, participated in, or promoted illegal uses of those devices.<sup>112</sup> Furthermore, the Court established a third theory of infringement called inducement infringement.<sup>113</sup> Under the theory of inducement infringement, the Court integrated the patent law's rule on inducing infringement and common law's fault-based liability and derived an inducement rule whereby a court will consider evidence of active steps taken to encourage direct infringement, including statements or actions directed to promoting infringement.<sup>114</sup>

As a corollary to copyright law, United States courts have adopted the doctrine of contributory trademark infringement. In *Hard Rock Cafe*,<sup>115</sup> the Seventh Circuit held that regardless of the lack of proof that the flea market had actual knowledge of its vendors' sales of counterfeit Hard Rock Cafe trademarked merchandise, contributory liability could be imposed if the swap meet was "willfully blind"<sup>116</sup> to the ongoing violations.<sup>117</sup> The court further observed that while trademark infringement liability is more narrowly construed than copyright infringement, it recognizes that a company "is responsible for the torts of those it permits on its premises 'knowing or having reason to know that the other is acting or will act tortiously . . .'"<sup>118</sup> The Seventh Circuit concluded with stating that with respect to contributory trademark infringement, "a swap meet can not disregard its vendors' blatant trademark infringements with impunity."<sup>119</sup>

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expressly communicated to the users of the ability of its software to download copyrighted works. *Id.* at 938. Additionally, defendants made no attempt to develop filtering tools or mechanisms to filter or diminish copyrighted material from users' downloads, nor did they attempt to impede the sharing of copyrighted files using their software. *Id.* at 926. Lastly, the Court noted the value of direct evidence that the defendants derived financial gains through advertising. *Id.* at 939. Here the defendants made money by selling advertising space, whereby the advertisements were directed to the screens of computer users that employ their software. *Id.* at 940. Consequently, the more the software was employed by a user downloading copyrighted files, the more the advertisements were delivered to the user, resulting in greater revenue for the defendants, thus exhibiting further evidence of inducement and subsequent financial gain. *Grokster*, 545 U.S. at 940.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *See id.* Furthermore, the Court pointed to evidence of inducement on the part of *Grokster*, which included advertising infringing uses, instructing on how to engage in an infringing use by providing information that goes beyond a product's characteristics, demonstrating an affirmative intent that the product be used to infringe, and actively encouraging such infringement. *Id.* Furthermore, the inducement rule premises liability on purposeful, culpable expression and conduct, whereby mere knowledge of potential or of actual infringing use and ordinary acts incident to product distribution are not enough. *Id.* at 937.

<sup>115</sup> *Hard Rock Cafe Licensing Corp. v. Concession Servs., Inc.*, 955 F.2d 1143 (7th Cir. 1992). In this case, the owner of the "Hard Rock" trademark sued the owner and operator of multiple flea markets on the basis of contributory and vicarious liability for the vendors' trademark violations and the retail store for direct liability. *Id.* The trademark owner sought damages and permanent injunctions against the flea market owners under the Lanham Trademark Act. *Id.*

<sup>116</sup> Willful blindness as to the counterfeit nature of a mark or designation is sufficient to trigger mandatory provisions requiring an award of treble damages and attorney fees to the prevailing party in a trademark infringement action. *See* Lanham Trademark Act, §§ 32, 35 (a)-(b), 43 (1946) (codified as amended at, 15 U.S.C.A. §§ 1114, 1117(a)-(b), 1125 (2010)).

<sup>117</sup> *Hard Rock Cafe*, 955 F.2d at 1149.

<sup>118</sup> *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 877(c) & cmt. d (1979)).

<sup>119</sup> *Id.*

As evinced from the robust body of law discussed above, it is incontestable that the United States is slowly dredging forward towards the establishment of effective civil law aimed at combating copyright infringement and media piracy. While United States courts have been innovative in their utilization and integration of legal doctrines from other areas of intellectual property law, melioration is still needed as the courts seek to establish a more stringent body of copyright common law.

## B. EUROPEAN UNION

### 1. France

The international media industry has watched closely as France has worked to approve and implement its famed High Authority for Copyright Protection and Dissemination of Works on the Internet (“HADOPI”) Law.<sup>120</sup> The HADOPI Law, if adopted as originally proposed, would have given ISPs the power to block access to the Internet for anyone accused three times of illegal file-sharing.<sup>121</sup> Moreover, under the initial bill, the HADOPI organization would have received complaints from authorized representatives of the entertainment industry, and would have tracked down offenders with the cooperation of ISPs.<sup>122</sup> The HADOPI organization would have also had the authority to obtain any and all identification information and personal data about the infringers from ISPs without any prior judicial procedure.<sup>123</sup> Additionally, the organization would have been tasked with protecting “copyrighted content over the Internet, promot[ing] the development of legal downloads of such content, and oversee[ing] [Digital Rights Management] and identification measures.”<sup>124</sup> However, despite strong support by French President Nicholas Sarkozy, the bill was rejected in its original form.<sup>125</sup>

Although the bill was ultimately adopted in May 2009 by both the French National Assembly and the French Senate,<sup>126</sup> on June 10, 2009 the French Constitutional Council declared the main part of the bill unconstitutional and

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<sup>120</sup> The HADOPI law or “Creation and Internet Law” are the nicknames for the French law officially titled “*Loi favorisant la diffusion et la protection de la création sur Internet*” or “law favoring the distribution and protection of creative works on the Internet,” regulating and controlling the usage of the Internet in order to enforce compliance to the copyright law. See High Authority for Copyright Protection and Dissemination of Works on the Internet (“HADOPI”) (2009), <http://www.senat.fr/dossierleg/pjl07-405.html>. The government organization charged with monitoring Internet users’ compliance with the bill is also named the High Authority for Copyright Protection and Dissemination of Works on the Internet. See Gunn, *infra* note 121.

<sup>121</sup> See Angela Gunn, *French Assembly Passes ‘Three Strikes’ HADOPI Law*, BETANEWS: POL. & L. NEWS, May 12, 2009, <http://www.betanews.com/article/French-Assembly-passes-three-strikes-HADOPI-law/1242172150>.

<sup>122</sup> See Szuskin, *infra* note 127, at 3.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *French Reject Internet Piracy Law*, BBC NEWS.COM, Apr. 9, 2009, <http://news.bbc.co.uk/2/hi/europe/7992262.stm> (Oct. 23, 2010).

<sup>126</sup> See *Lawmakers Adopt Internet Anti-Piracy Bill*, FRANCE24.COM, May 13, 2009, <http://www.france24.com/en/20090512-lawmakers-adopt-internet-anti-piracy-bill-illegal-downloading-France>.

removed several controversial provisions.<sup>127</sup> As originally proposed, HADOPI would have allowed sanctions to be issued against Internet users simply accused of infringement as opposed to only those convicted of infringement.<sup>128</sup> The French Constitutional Council found that because “the Internet is a component of the freedom of expression” and “in French law the presumption of innocence prevails,” only a judge can impose sanctions under the law.<sup>129</sup> As a result, on October 22, 2009, a revised version of HADOPI was approved, which mandated judicial review prior to revoking a user’s Internet access.<sup>130</sup> As currently enacted France’s HADOPI law,<sup>131</sup> in addition to creating punishments for both civil and criminal counterfeiting, establishes a novel approach to combating online piracy by holding users of an Internet access point directly responsible for any improper use.<sup>132</sup>

## 2. United Kingdom

Until early 2010, the United Kingdom’s position on copyright infringement was “governed by the Copyright Designs and Patents Act 1998 (“CDPA”), [which] regulate[d] copyright and design rights and provide[d] criminal sanctions for infringement.”<sup>133</sup> England recently adopted a more robust solution to the issue of media piracy in the form of the Digital Economy Act.<sup>134</sup> The Digital Economy Energy Bill was first announced in the Queen’s 2009 speech before the U.K. Parliament.<sup>135</sup> In her address, the Queen stated that “[the] Government [would] introduce a Bill to ensure the communications infrastructure is fit for the digital age, supports future economic growth, delivers competitive communications and enhances public service broadcasting.”<sup>136</sup>

The main focus of the Digital Economy Act is tackling online copyright

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<sup>127</sup> See Laurent Szuskin et al., *Beyond Counterfeiting: The Expanding Battle Against Online Piracy*, 1 INTELL. PROP. & TECH. L.J. 1, 2 (2009). See also *Top Legal Body Strikes Down Anti-Piracy Law*, FRANCE24.COM, Nov. 23, 2009, <http://www.france24.com/en/20090610-top-legal-body-strikes-down-anti-piracy-law-hadopi-constitutional-council-internet-france>. The Council found that the law violated the 1789 Declaration of the Rights of Man and of the Citizen, particularly the presumption of innocence, freedom of speech, and separation of powers. *Id.*

<sup>128</sup> See FRANCE24.COM, *supra* note 127.

<sup>129</sup> *Id.*

<sup>130</sup> Eric Pfanner, *France Approves Wide Crackdown on Net Piracy*, N.Y. TIMES, Oct. 22, 2009, available at [http://www.nytimes.com/2009/10/23/technology/23net.html?\\_r=1](http://www.nytimes.com/2009/10/23/technology/23net.html?_r=1).

<sup>131</sup> The law underlying the HADOPI is derived from the new Article L.336-3 of the French intellectual property code (“IPC”). See Szuskin, *supra* note 127, at 3. Under this provision of the IPC, Internet users have a duty to prevent their Internet access from being used as a means to share (via download, upload, stream, or otherwise making available to others) contents protected by copyright without the authorization of the rights holders. *Id.*

<sup>132</sup> *Id.* at 2.

<sup>133</sup> *Id.* at 6.

<sup>134</sup> See Digital Economy Act 2010, available at <http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=3699621> (last revised Oct. 29, 2010).

<sup>135</sup> See Queen Elizabeth II of U.K., Speech at Meeting of the House of Lords (Nov. 18, 2009) (transcript available at <http://www.publications.parliament.uk/pa/ld200910/ldhansrd/text/91118-0001.htm#09111813000012>).

<sup>136</sup> *Id.*

infringement through a two-stage process.<sup>137</sup> The first stage is designed to establish a system of laws aimed to simplify the tracking and prosecution of persistent infringers.<sup>138</sup> The second stage comprises the government using its reserve powers to introduce technical measures and anti-infringement initiatives, such as blocking access to Internet locations.<sup>139</sup> Under the current version of the Digital Economy Act, with appropriate consent the Secretary of State can block access to a location on the Internet “from which a substantial amount of material has been, is being or is likely to be made available in infringement of copyright,” or a location which “facilitates” infringing behavior.<sup>140</sup>

U.K. copyright holders were previously pressuring Parliament to enact legislation that would require ISPs to act in the role of “copyright police.”<sup>141</sup> In response, the current legislation requires ISPs to assume responsibility for identifying and preventing infringement by their network subscribers.<sup>142</sup> The statutory basis to support such legislation was granted in Section 97A of the CDPA, which states that “the High Court can grant an injunction against a service provider that has ‘actual knowledge’ of another person’s using their service to infringe copyright.”<sup>143</sup> Thus, the Digital Economy Act again codifies the High Court’s power to issue injunctions; however, it requires additional conditions to be met before an injunction can be requested.<sup>144</sup>

### 3. Germany

Germany currently has no similar legislation to that of France or England.<sup>145</sup> Additionally, there is no pending legislation or governmental initiatives comparable to the HADOPI Law or the Digital Economy Act.<sup>146</sup> In a 2008 report, the German government advocated for the development of cooperative approaches between intellectual property rights holders and ISPs.<sup>147</sup> The German government has been reluctant to adopt the methods suggested by HADOPI Law because it includes the transfer of personal data of Internet users.<sup>148</sup> The German Constitutional Court has recently developed regulations which would require any personal data collected from Internet users to be reconciled with the court’s creation of the secrecy of telecommunications, the right of informational self-determination, and the fundamental right to the guarantee of the confidentiality and

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<sup>137</sup> See Queen Elizabeth II, Digital Economy Bill Address (Nov. 18, 2009), (available at <http://www.number10.gov.uk/Page21348>).

<sup>138</sup> Digital Economy Act, *supra* note 134, § 10.

<sup>139</sup> *Id.* § 17.

<sup>140</sup> *Id.*

<sup>141</sup> See Szuskin, *supra* note 127, at 6.

<sup>142</sup> *Id.* See also Digital Economy Act, *supra* note 134, §§ 3, 4, 16.

<sup>143</sup> See Szuskin, *supra* note 127, at 6.

<sup>144</sup> Digital Economy Act, *supra* note 134, § 17.

<sup>145</sup> See Szuskin, *supra* note 127, at 8.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

integrity of information technology systems.<sup>149</sup>

Under German law, ISPs are not responsible for illegal information that they transfer or store for their users if they do not know about the illegal acts and they immediately remove the information or lock the user's access as soon as they learn about the infringement.<sup>150</sup> German court practices however are inconsistent and some courts hold ISPs responsible for copyright infringements with regard to online piracy.<sup>151</sup>

#### 4. Sweden

In recent years, Sweden has received "notoriety as a piracy safe haven" and a rogue nation with respect to illegal file-sharing, which stands in stark contrast to the nation's general reputation as a model society.<sup>152</sup> This article briefly addresses Sweden's legal position on copyright protection and media piracy based on the unique factors that have contributed to the country becoming a hotbed for Internet piracy. Because Sweden is typically one of the world's earliest adopters of new technologies, Internet file-sharing and media piracy caught on early.<sup>153</sup>

By the time any actions were taken against illegal file-sharing, the practice had already become deeply entrenched in Sweden's technological culture.<sup>154</sup> Pirate Bay and Kazaa are two of the most prominent and popular file-sharing sites on the Internet, and both Pirate Bay and Kazaa originated in Sweden.<sup>155</sup> Accordingly, the highest-profile Swedish file-sharing case was not against an individual user, but against the BitTorrent site Pirate Bay.<sup>156</sup> The site had been a long-time target of the Motion Picture Association of America ("MPAA") and major Hollywood studios for its facilitation of media piracy.<sup>157</sup> Pirate Bay had gained worldwide notoriety by openly embracing piracy and mocking threats of legal actions by posting complaints and cease-and-desist letters on its website.<sup>158</sup>

Additionally, "Sweden has faster broadband with deeper penetration than just about anywhere in the world. That, combined with the techno-friendly attitude that pervades Scandinavia and a government slow to take any kind of action,

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<sup>149</sup> *Id.* at 9.

<sup>150</sup> See Szuskin, *supra* note 127, at 9.

<sup>151</sup> *Id.*

<sup>152</sup> See, e.g., David Brooks, Op-Ed: *The Culture of Nations*, N.Y. Times, Aug. 13, 2006, available at <http://select.nytimes.com/2006/08/13/opinion/13brooks.html?n=Top/Opinion/Editorials%20and%20Op-Ed/Op-Ed?Columnists/David%20Brooks>. In fact, Sweden has often been held up as a model society. The British newspaper, *The Guardian* proclaimed Sweden to be "[t]he most successful society the world has ever known." See Polly Toynbee, Comment, *The Most Successful Society the World has Ever Known*, GUARDIAN (U.K.), Oct. 25, 2005, available at <http://www.guardian.co.uk/Columnists/Column/0,,1599939,00.html>.

<sup>153</sup> Ulric M. Lewen, *Internet File-Sharing: Swedish Pirates Challenge the U.S.*, 16 CARDOZO J. INT'L & COMP. L. 173, 192 (2008).

<sup>154</sup> *Id.* at 187-88, 192.

<sup>155</sup> *Id.* at 174.

<sup>156</sup> *Id.* at 187-88.

<sup>157</sup> *Id.*

<sup>158</sup> See Lewen, *supra* note 153, at 187-88.

allowed file-sharing to root deeply in practice and popular culture.”<sup>159</sup> Arguably, the most contributing factor to the rate of media piracy in Sweden is the fact that, until July 1, 2005 when Parliament amended the Swedish Copyright Act,<sup>160</sup> downloading copyrighted material for private use was not explicitly illegal in Sweden.<sup>161</sup> However, uploading copyrighted material without permission was previously prohibited.<sup>162</sup>

Sweden’s Department of Justice, under the guidance of the European Union’s Enforcement Directive,<sup>163</sup> is again debating whether the Directive’s language grants intellectual property rights organizations the right to petition a court to order ISPs to reveal the names of alleged infringers.<sup>164</sup> Originally, Sweden chose not to adopt any provisions requiring ISPs to reveal to copyright holders the identities of suspected infringers, citing privacy concerns.<sup>165</sup> If Swedish lawmakers ultimately find that the Enforcement Directive reads on the

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<sup>159</sup> *Id.* at 192 (quoting Quinn Norton, *A Nation Divided Over Piracy*, WIRED, Aug. 17 2006, <http://wired.com/news/culture/0,71544-0.html>).

<sup>160</sup> See Ann Harrison, *The Pirate Bay: Here to Stay?*, WIRED, Mar. 13, 2006, <http://www.wired.com/science/discoveries/news/2006/03/70358> (discussing how Pirate Bay has eluded the MPAA’s crackdown on peer-to-peer sites); see also Proposition [Prop.] 2004/05:110 Upphovsrätten i informationsamhället—genomförande av direktiv 2001/29/EG, m.m. [government bill] (Swed.), available at <http://www.regeringen.se/sb/d/108/a/40699>.

<sup>161</sup> “The amended Copyright Act made it illegal to download pirated material or any other posted material without the permission of the copyright owner.” See Lewen, *supra* note 153, at 184 (2008); see also 2 ch. 12 § Lag om upphovsrätt till litterära och konstnärliga verk [Act on Copyright in Literary and Artistic Works] (Svensk författningssamling [SFS] 1960:729) (Swed.), translated in <http://www.sweden.gov.se/content/1/c6/01/51/95/69b07709.pdf> [hereinafter Swedish Copyright Act] (“Anybody is entitled to make, for private purposes, one or a few copies of works that have been made public. As regards to literary works in written form the making of copies may, however concern only limited parts of works, or such works of limited scope. The copies must not be used for purposes other than private use . . . This Article does not confer a right to make copies of a work when the copy that constitutes the master copy has been prepared or has been made available to the public in violation of Article 2.”); SWEDISH MINISTRY OF JUSTICE, *A Brief Overview of the Swedish Copyright System* 13 (2006), <http://www.sweden.gov.se/content/1/c6/05/67/65/ac3af6b4.pdf>.

<sup>162</sup> *Id.*

<sup>163</sup> The European Union’s Enforcement Directive that prompted the amendment of the Swedish Copyright Act of 2005 provides language that can be interpreted as giving Internet Service Providers more direct responsibility for what their customers disseminate online. See Enforcement Directive, *supra* note 75. Article 8, §1 of the Enforcement Directive provides that:

Member States shall ensure that, in the context of proceedings concerning an infringement of an intellectual property right and in response to a justified and proportionate request of the claimant, the competent judicial authorities may order that information on the origin and distribution networks of the goods or services which infringe an intellectual property right be provided by the infringer and/or any other person who:

- (a) was found in possession of the infringing goods on a commercial scale;
- (b) was found to be using the infringing services on a commercial scale;
- (c) was found to be providing on a commercial scale services used in infringing activities; or
- (d) was indicated by the person referred to in point (a), (b) or (c) as being involved in the production, manufacture or distribution of the goods or the provision of the services.

*Id.*

<sup>164</sup> Lewen, *supra* note 153, at 186-87.

<sup>165</sup> *Id.* at 185-86.

duty of ISPs, such a change would bring current Swedish copyright law further in line with United States, French, and British copyright laws.<sup>166</sup> The “commercial scale” provision of the Enforcement Directive would likely prevent ISPs from providing information on non-commercial file-sharers.<sup>167</sup> Thus, the vast majority of media pirates who illegally download media for personal pleasure would be exempt from the long-arm of the Enforcement Directive.<sup>168</sup>

#### IV. SAFE HARBOR? WHY?

Currently, United States federal law creates a conditional safe harbor for Online service providers (“OSPs”), including Internet service providers and other Internet intermediaries by shielding them from liability for the infringing acts of others.<sup>169</sup> The Online Copyright Infringement Liability Limitation Act (“OCILLA”) was passed as a part of the 1998 DMCA.<sup>170</sup> OCILLA is sometimes referred to as the “safe harbor” provision or as “DMCA 512” because it added § 512 to Title 17 of the United States Code.<sup>171</sup> By exempting Internet intermediaries from copyright infringement liability (provided they follow certain rules), OCILLA attempts to strike a balance between the competing interests of copyright owners and digital users.<sup>172</sup> OCILLA allows OSPs to avoid liability, provided

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<sup>166</sup> *Id.* at 175.

Sweden receives the highest per capita amount in the world from receipts of royalties and license fees . . . . In fact, Sweden is the third largest exporter of music in the world, after the United States and the United Kingdom. Thus, both Sweden and the United States benefit economically from intellectual property rights and have similar interests in protecting such rights.

*Id.*

<sup>167</sup> *Id.* at 187.

<sup>168</sup> *Id.*

<sup>169</sup> See 17 U.S.C. § 512 (2006).

A service provider shall not be liable for monetary relief, or . . . for injunctive or other equitable relief, for infringement of copyright by reason of the provider’s transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if-- (1) the transmission of the material was initiated by or at the direction of a person other than the service provider; (2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider; (3) the service provider does not select the recipients of the material except as an automatic response to the request of another person; (4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and (5) the material is transmitted through the system or network without modification of its content.

*Id.*

<sup>170</sup> *Id.*

<sup>171</sup> See § (512)(a) (2006).

<sup>172</sup> See *id.*



they comply with the terms of the statute, regardless of the validity of any claim of infringement.<sup>173</sup>

More simply put, to qualify for “safe harbor” protection under § 512, the OSP must not have actual knowledge that it is hosting infringing material or be aware of facts or circumstances from which infringing activity is apparent.<sup>174</sup> It is clear from the statute and legislative history that an OSP has no duty to monitor its service or affirmatively seek infringing material on its system.<sup>175</sup> The statute, however, describes two ways in which an OSP can be put on notice of infringing material on its system: 1) notice from the copyright owner, and 2) the existence of “red flags.”<sup>176</sup>

The entertainment industry has expressed increasing displeasure with the safe harbor provisions for ISPs and their resistance of assisting in piracy control; thus industry heads have proposed modifications to § 512 and the DMCA.<sup>177</sup> In the past few years, Senator John McCain, head of the Senate Commerce Committee, announced that hearings would be held to evaluate further “legal dispute[] between the [Recording Industry Association of America] and Internet providers over copyright protection.”<sup>178</sup> Concerned about the implications for copyright infringement and privacy of subscribers, the Commerce Committee hearings will be an early test of the entertainment industry’s continued clout on Capitol Hill.

## V. WHAT’S NEXT?

The inability to control the widespread distribution of digital information over the Internet is a daunting challenge for the entertainment industry. Although many businesses have exerted immense efforts to develop techniques for encryption, water marking,<sup>179</sup> and other safety technologies which would prevent

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<sup>173</sup> *Id.*

<sup>174</sup> *See* § (512)(c) (2006).

<sup>175</sup> *See id.*

<sup>176</sup> *See id.*

<sup>177</sup> *See* Tratos, *supra* note 4, at 223-24.

<sup>178</sup> *Id.*

The United States faces a threat to the measures already imposed under the DMCA; courts have been hearing arguments that the DMCA violates due process, fair use, and First Amendment protections; and new bills have been introduced in the House of Representatives that try to address the over-inclusiveness of the DMCA. If the DMCA is rewritten, the European Union, in the interest of harmonization, would probably have to follow suit by revising the Copyright Directive. Otherwise, U.S. citizens could be sued in another country for a use that is considered fair in the United States, thus potentially dismantling WIPO’s ideals in encouraging member states to agree to its treaties in the first place.

*See* Lackman, *supra* note 34, at 1206.

<sup>179</sup> Digital watermarking technology alters content to such a minute degree that the mark itself is imperceptible to the human eye or ear. However, the embedded metadata becomes inextricably interwoven with the content so that the deletion of the metadata either materially degrades the quality of the content or even renders the content useless. *See* STEFAN KATZENBEISSER & FABIEN A. PETITCOLAS, INFORMATION HIDING TECHNIQUES FOR STEGANOGRAPHY AND DIGITAL WATERMARKING (2000).

the unauthorized use, copying, and distribution of digital content, none of these technologies have yet proven effective.<sup>180</sup> Additionally:

because the Internet knows no state or country boundaries, the laws of states and countries other than the physical location of the Internet publisher or broadcaster may apply, particularly where the intended audience or market exists in a locale other than the location where the materials are being placed onto the Internet.<sup>181</sup>

The United States' entertainment industry is currently seeking more effective measures to protect their intellectual property interests. The industry has continuously encouraged lawmakers to reject Internet neutrality laws such as OCCILLA and its safe harbor provision, and instead has sought to advance laws requiring ISPs to police their networks for infringing works.<sup>182</sup> On April 6, 2009, the Foreign Affairs Committee of the U.S. House of Representatives held a hearing on global copyright piracy.<sup>183</sup> During this hearing, Congressman Howard L. Berman, Committee Chair, stated that he would soon introduce legislation that would begin to elevate the attention given to intellectual property concerns abroad.<sup>184</sup> Berman further stated that, "[i]ntellectual property protection is an economic stimulus . . . [and t]o help boost our economy, it is imperative that we take measures to ensure American innovations are protected abroad and artistic communities can earn a return on their investment in new creative expression."<sup>185</sup>

Numerous alternative solutions have been proposed for the international community to compensate and/ or further protect the rights of copyright holders. One of the most commonly discussed solutions is to impose a levy or tax to compensate copyright holders for lost revenues resulting from media piracy.<sup>186</sup> It has been proposed that such a levy could be collected in a manner similar to the television license fees currently imposed by several European countries.<sup>187</sup> Suggestions have also been made to enact levies on broadband connections and/or taxes on ISPs.<sup>188</sup> Under this collective licensing scheme, monies collected through such levies and/or taxes would be distributed to the rights holders, by proportioning the collected fees based upon popularity of the pirated works.<sup>189</sup> Collective societies<sup>190</sup> and/or similar trade associations would be responsible for

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<sup>180</sup> These methods are collectively referred to as Digital Rights Management.

<sup>181</sup> See Tratos, *supra* note 4, at 217.

<sup>182</sup> See Anne Broache, *MPAA Wants ISP Help in Online Piracy Fight*, CNET NEWS, Sept. 18, 2007, [http://news.cnet.com/8301-10784\\_3-9780401-7.html](http://news.cnet.com/8301-10784_3-9780401-7.html).

<sup>183</sup> FOREIGNAFFAIRS.HOUSE.GOV, Committee on Foreign Affairs, *At Foreign Affairs Committee Field Hearing, Berman Launches New Initiative to Fight Global Intellectual Property Theft*, (Apr. 6, 2009), [http://foreignaffairs.house.gov/press\\_display.asp?id=608](http://foreignaffairs.house.gov/press_display.asp?id=608).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> Lewen, *supra* note 153, at 197-98 (citing Ivar Ekman, *Politicians Smell Votes in Sweden's File-sharing Debate*, INT'L HERALD TRIB., (June 18, 2006), <http://www.iht.com/articles/2006/06/18/business/levies.php> (discussing efforts in France to impose such a levy in order to legalize file-sharing)).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> In a similar manner, organizations such as ASCAP, BMI, and SESAC were created by artists to

administering the distribution of the money collected from the tax to the copyright holders. Similarly, both the United States and Sweden already impose a levy on blank recording media under the Swedish Copyright Act and the United States Audio Home Recording Act<sup>191</sup> in order to allow copyright holders compensation for legal copying.<sup>192</sup> Further suggestions have been made that the levies on recordable media could either be increased or combined with taxes on broadband connections.<sup>193</sup> One pitfall to collective licensing schemes is that in attempts to compensate rights holders for piracy, Internet access could become prohibitively expensive.<sup>194</sup>

Another potential solution would be to follow the European Union's mandate, which requires online music providers to obtain licenses from record labels and collecting societies that represent authors and songwriters, as a condition of their operation in the EU market.<sup>195</sup> The EU Commission is currently contemplating a "music licensing framework that would give right holders the choice to authorize one single collecting society to license and monitor all the different uses made of their works across the twenty-five EU member states."<sup>196</sup> While each of these suggestions would likely curb the current levels of Internet media piracy, it is unlikely that any of the nations mentioned in this paper will address these issues in the near future, in light of the current global economy.

## VI. CONCLUSION

While there have been numerous efforts to combat media piracy, the current international laws do not reach far enough to protect the rights of the entertainment

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collect royalties from radio stations in the early twentieth century, thus creating a voluntary collective licensing system. *Id.* at 199. Under this system "songwriters and copyright owners grant to performance rights societies a license to sublicense the rendition of public performances of their musical works." AL KOHN ET AL., KOHN ON MUSIC LICENSING 961 (3d ed. 1996).

<sup>191</sup> In 1992, the United States passed the Audio Home Recording Act ("AHRA"), which required the manufacturers of digital audio tapes, digital compact cassettes, mini-discs, and other audio recorders and recordable media to make royalty payments to the music industry and its subsequent rights holders. *See* Tratos, *supra* note 4, at 159-60; *see also* 17 U.S.C. § 1003 (2006). Under the AHRA, royalty payments are to be deposited with the United States Copyright Office from both manufacturers and importers of digital recorders and from companies that produced the blank media on which recordings were made. *See* Tratos, *supra* note 4, at 159-60; *see also* 17 U.S.C. § 1003 (2006). The Copyright Office then holds the deposited sums in two separate funds: the Sound Recordings Fund and the Musical Works Fund. These funds hold portions of the royalties allocated for distribution to artists and the sound recording copyright holders, in addition to distribution to songwriters and publishers. *See* Tratos, *supra* note 4, at 159-60; *see also* 17 U.S.C. § 1003 (2006). The Copyright Office administers the distribution of royalties to the individual claimants on a yearly basis. *See* Tratos, *supra* note 4, at 159-60; *see also* 17 U.S.C. § 1003 (2006). The AHRA further prohibits the import or manufacture of digital audio recording devices or digital audio recording mediums unless applicable royalty payments are made for each device manufactured. *See* Tratos, *supra* note 4, at 159-60; *see also* 17 U.S.C. § 1003 (2006).

<sup>192</sup> *See* Lewen, *supra* note 153, at 198. *See also* Lewis Kurlantzick & Jacqueline E. Pennino, *The Audio Home Recording Act and the Formation of Copyright Policy*, 45 J. COPYRIGHT SOC'Y U.S.A. 497, 500-01 (1998).

<sup>193</sup> *See* Lewen, *supra* note 153, at 199.

<sup>194</sup> *Id.* at 199-200.

<sup>195</sup> *See* Leong, *supra* note 11, at 390.

<sup>196</sup> *Id.* at 391.

industry from media piracy. Unless more stringent laws are enacted or safe harbor provisions for ISP's are removed as in the current United States law, the entertainment industry will remain in financial jeopardy. Although the Berne Convention, TRIPS, and the WIPO Internet Treaties have all aimed to harmonize copyright law, it is evident from the extensive survey of the international intellectual property laws provided above that the global community is far from worldwide harmonization of copyright standards.

Today international media piracy is rampant on the Internet and suggests that the current measures employed by the United States and the European Union are ineffective and insufficient in protecting copyright holders against copyright infringement. As a result, the United States and global entertainment industry have suffered irreparable harm that will go un-remedied unless copyright laws are both strengthened and harmonized. "Unfortunately, the incentives and profits for engaging in piracy are high, and the risks of being apprehended and sanctioned are low in many countries around the world. Piracy of copyrighted materials is not a victimless crime and its global repercussions must be addressed."<sup>197</sup>

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<sup>197</sup> Committee on Foreign Affairs, *supra* note 183.