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I. INTRODUCTION

Digital copyright infringement costs the music and movie industries, and consequently the U.S. economy, potentially billions of dollars in lost revenue and profits annually.[1] As technology advances exponentially,[2] the issues associated with digital copyright infringements will only continue to become more complex and widespread.[3] For example, as three-dimensional

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1. Andrew James McGarrow, *The "Making Available" Theory and the Future of P2P Networks: Does Merely Making Files Available for Further Distribution Constitute Copyright Infringement, and is it Time for Congress to Act in Accordance with this Technology?*, 88 U. DET. MERCY L. REV. 155, 156 (2010); Annemarie Bridy, *Is Online Copyright Enforcement Scalable?*, 13 VAND. J. ENT. & TECH. L. 695, 710 (2011).

2. In 1965, Gordon Moore of Intel predicted that integrated circuits would double in density every year for ten years. Stephen Shankland, *Moore's Law: The Rule that Really Matters in Tech*, CNET (Oct. 16, 2012), http://www.cnet.com/news/moores-law-the-rule-that-really-matters-in-tech/. In 1975, Moore updated his prediction to a doubling every two years. *Id*. This prediction, known as "Moore's Law," has been hit until present day. *Id*.

3. *See* Brian A. Benko, *Russia and Allofmp3.com: Why the WTO and WIPO Must Create a New System for Resolving Copyright Disputes in the Digital Age*, 1 AKRON INTELL. PROP. J. 299, 299 (2007); *see also* Virginia Knapp Dorell, *Picturing a Remedy for Small Claims of Copyright Infringement*, 65 ADMIN. L. REV. 449, 456 (2013) ("For the twelve-month period ending in March 2011, the Administrative Office of the U.S. Courts recorded a twelve-percent increase in the number of copyright cases commenced in the U.S. District Courts.").

printing becomes mainstream, the cross of the physical and digital world will present new and complicated copyright problems.[4]

Resolving these online copyright infringements presents serious challenges to modern copyright owners.[5] Copyright owners often do not know whom to sue, with infringers hiding in the anonymity of the Internet.[6] Even when copyright owners can determine the identity of the infringer, traditional intellectual property litigation is an impractical solution, as it is particularly complicated, expensive, and lengthy in these cases.[7] In order to be cost-effective, copyright owners have largely resorted to pursuing *John Doe* lawsuits, suing facilitators rather than infringers, or simply not filing suit at all.[8] Furthermore, there is an international component to digital copyright infringement that leads to disputes without an adequate framework for resolution.[9] Alternative dispute resolution (ADR) systems that can effectively solve these issues would benefit online commerce, legitimate businesses, and the general public.

This article does not attempt to provide a single solution for all digital copyright infringement issues, but suggests that a strategic place to begin to confront this problem is in an area where there is a practical solution, and that is with infringements that take place on peer-to-peer (P2P) file-sharing networks.[10] Within the field of digital copyright, copyright infringements on

4. Lucas S. Osborn, *Of PhDs, Pirates, and the Public: Three-Dimensional Printing Technology and the Arts*, 1 TEX. A&M L. REV. 811, 812 (2014).

5. Will Moseley, *A New (Old) Solution for Online Copyright Enforcement After* Thomas *and* Tenenbaum, 25 BERKLEY TECH. L.J. 311, 338 (2010).

6. *See* Robert G. Larson & Paul A. Godfread, *Bringing John Doe to Court: Procedural Issues in Unmasking Anonymous Internet Defendants*, 38 WM. MITCHELL L. REV. 328, 329-330 (2011) ("One of the predominant properties of the Internet is the general veil of anonymity. . . . Without a clearly identifiable defendant, a plaintiff has little chance of recovery, and while anonymous defendants are not a phenomenon unique to the Internet, the prevalence of the Internet in modern society has exacerbated this problem."); *see also* Moseley, *supra* note 5, at 316 ("Although unauthorized sharing of copyrighted songs online was a serious problem for the RIAA's member labels, the RIAA struggled to prove that particular users had actually committed any infringing acts.").

7. David Allen Bernstein, *A Case for Mediating Trademark Disputes in the Age of Expanding Brands*, 7 CARDOZO J. CONFLICT RESOL. 139, 154 (2005); Dorell, *supra* note 3, at 456.

8. Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1378 (2004) [hereinafter Lemley & Reese, *Reducing Infringement*]; *Copyright Remedies: Hearing Before the Subcomm. on Courts, Intellectual Property, & the Internet of the Comm. on the Judiciary H.R.*, 113th Cong. 4 (2014) (statement of Jerry Nadler, Ranking Member of the Subcommittee). In September 2013, the Copyright Office released a report stating that "most infringements will never be prosecuted because [it is] economically infeasible" for the creators to commence an action in federal court. *Id*.

9. Benko, *supra* note 3, at 301.

10. Napster, a popular Internet service that allowed people to easily share their MP3 files of music with other participants, is an example of a P2P file sharing service. *See* Michael Yang & Francis J. Gorman, *What's Yours is Mine: Protection and Security in a Digital World*, 36-DEC MD. B.J. 24, 31 (2003).

P2P file-sharing networks alone cause significant economic harm.[11] These infringements cause so much harm because P2P networks account for a significant portion of data that is downloaded online,[12] and piracy is widespread on these networks. [13] Despite the severity of the problem, the current laws in place—the Digital Millennium Copyright Act[14] (DMCA) and its mechanisms for streamlining dispute resolution—inadequately address copyrights infringed by P2P file-sharing networks.[15] Fortunately, however, implementing a specific dispute resolution strategy for resolving straightforward cases of infringement on P2P networks is doable and can have a meaningful impact, even if it is narrowly tailored to only resolving straightforward cases.[16] Additionally, the fundamental components of that dispute resolution system could be replicated in dispute resolution systems addressing other areas of digital copyright infringement.

This Article proposes application of an ADR system for resolving online copyright disputes related to P2P file sharing. Section II provides an overview of P2P file sharing networks and associated copyright infringement. Section III explores current approaches that fall short in resolving P2P copyright disputes, namely the Digital Millennium Copyright Act, litigation, and private agreements. Section IV examines the two primary proposed solutions to online copyright disputes: alternative dispute

11. Stan J. Liebowitz, *File Sharing: Creative Destruction or Just Plain Destruction?*, 49 J.L. & ECON. 1, 24, (2006) ("[T]he evidence here supports the current findings from almost all econometric studies that have been undertaken to date, including those in this issue--file sharing has brought significant harm to the recording industry."); McGarrow, *supra* note 1, at 156 (stating that, in 2006, the Motion Picture Association of America estimated movie studios lost $2.3 billion due to file sharing).

12. McGarrow, *supra* note 1, at 162; Bridy, *supra* note 1, at 704-05.

13. Rachel Storch, *Copyright Vigilantism*, 16 STAN. TECH. L. REV. 453, 456 (2013).

14. Digital Millennium Copyright Act (DMCA), Pub. L. No. 105–304, 112 Stat 2860 (1998).

15. The DMCA, which was drafted before P2P file sharing became widespread, covers infringement claims of material that is stored on the defendant's computer system. Bridy, *supra* note 1, at 731. The majority of infringing activity on P2P networks occurs in transmission rather than in storage, placing it outside the scope of the DMCA. *Id*.

16. Mark A. Lemley & R. Anthony Reese, *A Quick and Inexpensive System for Resolving Peer-to-Peer Copyright Disputes*, 23 CARDOZO ARTS & ENT. L.J. 1, 2 (2005) [hereinafter Lemley & Reese, *Peer-to-Peer Disputes*]. A dispute resolution system was implemented for straightforward Internet domain name disputes, and "resolved about 7,500 domain name trademark disputes in its first four years, at a cost of $1200-$1500 each and an average resolution time of a little more than a month." *Id*. A system that improves upon the shortcomings of this one could likely be successful in resolving straightforward copyright disputes on P2P file-sharing networks. *Id*. Furthermore, Lemley and Reese argue that online copyright infringement doesn't need to be eliminated entirely, but "in the context of online copyright infringement, the real policy question is how to bring infringement down to a manageable level akin to the rate of infringement in the traditional copyright environment." Lemley & Reese, *Reducing Infringement*, *supra* note 8, at 1398.

resolution and federal small claims. Section V recommends that a streamlined online dispute resolution system is necessary (even if a federal small claims tribunal is adopted), and concludes.

II. P2P FILE-SHARING NETWORKS AND ASSOCIATED COPYRIGHT INFRINGEMENT

An understanding of copyright infringements on P2P networks is made within the broader context of copyright law. Copyright is a right granted by the U.S. Constitution[17] and governed by federal statute under the Copyright Act of 1976,[18] with federal courts maintaining exclusive jurisdiction over copyright cases.[19] To be protected by copyright law, a work must be original, creative, and within the subject matter of copyright.[20] In copyright disputes, the plaintiff has the burden of proving a prima facie case that the defendant wrongfully exercised a right under the Copyright Act; meanwhile, the defendant can present affirmative defenses such as fair use.[21] Examples of fair use include parodies, publishing photographs in news stories, and providing links to images available on the Internet.[22] In 1998, Congress passed the DMCA, which updated the Copyright Act of 1976 to adapt to technology and implement two 1996 treaties of the World Intellectual Property Organization (WIPO).[23] This is the law that currently governs copyright disputes on P2P networks.

An understanding of copyright infringements on P2P networks also requires basic knowledge of P2P file sharing. File sharing generally is "the practice of sharing computer data or space on a network."[24] Traditionally, networks were centralized, which means that they would "grow radially—outward from the center, like a starfish; there's only so fast they can grow, because the center has to 'keep up' with the whole network."[25] P2P networks solved this issue by decentralizing data transmission to make it "grow[ ] like a bush . . . . [A]s the network grows, its ability to grow

17. U.S. CONST. art. I, § 8, cl. 8. ("To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries".).

18. Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (1976). The Copyright Act of 1976 defines the rights of copyright holders and codified the doctrine of fair use. *Id*.

19. Dorell, *supra* note 3, at 454.

20. *Id*. at 455.

21. *Id*.

22. Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2539 (2009).

23. Digital Millennium Copyright Act, Pub. L. No. 105–304, 112 Stat 2860 (1998).

24. *File Sharing Definitions*, COLLINS ENG. DICTIONARY, http://www.collinsdictionary.com/dictionary/english/file-sharing (last visited Oct. 9, 2015).

25. Bridy, *supra* note 1, at 697 (quoting DAVID POST, IN SEARCH OF JEFFERSON'S MOOSE: NOTES ON THE STATE OF CYBERSPACE 76 (2009)).

grows."[26] One problem that arose with P2P networks was that a majority of nodes on the network would download content without ever uploading any, a problem known as free riding.[27] In 2001, BitTorrent offered a solution to this by making it impossible for any peer on the network to take without giving.[28]

In 2001, the Ninth Circuit became the first court to address the question of whether sharing copyrighted works on P2P networks is lawful as fair use[29] (or as the district court put it, the task was to determine "the boundary between sharing and theft").[30] Napster had launched a wildly successful computer program facilitating P2P uploading and downloading of copyrighted songs[31] in digital MP3 file format.[32] The Ninth Circuit affirmed a preliminary injunction against Napster's operation,[33] and ruled there was no valid fair use defense.[34] The court found that users were liable as direct infringers, while Napster was liable as a secondary infringer.[35] This case laid the groundwork for liability for sharing copyrighted works on P2P networks.

Napster is not an anomaly—piracy is rampant on P2P file-sharing networks.[36] While actual estimates vary, data both outside the courtroom and within it indicates that the majority of files available on P2P networks are infringing.[37] Outside of the courtroom, one study found that 99% of 1021 BitTorrent files were likely infringing, while another study found that 97.9% of 1000 BitTorrent transfers that were non-pornographic were likely

26. *Id*.

27. Bridy, *supra* note 1, at 700.

28. *Id*. at 700-01.

29. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011 (9th Cir. 2001). The Ninth Circuit was the first to address this question because "[t]he case represents a landmark in the uncharted waters of internet copyright law."; *Napster Loses Net Music Copyright Case*, THE GUARDIAN (Jul. 26, 2000), http://www.theguardian.com/technology/2000/jul/27/copyright.news.

30. A&M Records, Inc. v. Napster, Inc., 114 F.Supp.2d 896, 900 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001).

31. It was determined that "as much as eighty-seven percent of the files available on Napster may be copyrighted and more than seventy percent may be owned or administered by plaintiffs." *Id*. at 911.

32. Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1537 (2004).

33. *Napster*, 239 F.3d at 1029.

34. *Id*. at 1013-19.

35. *Id*. at 1019-24.

36. Bridy, *supra* note 1, at 709; Storch, *supra* note 13, at 456.

37. Bridy, *supra* note 1, at 709; Storch, *supra* note 13, at 456.

infringing.[38] Additionally, in 2010 Australian researchers from the University of Ballarat found that 89% of all torrents in a sample of over one million were infringing.[39] Within the courtroom, expert witnesses have given similar estimates for other P2P networks.[40] For example, "the court in Arista Records LLC v. Lime Group LLC credited the expert's testimony that 98.8[%] of the files requested for download on the LimeWire system were copyrighted and not authorized for free distribution."[41]

It becomes clear that this widespread infringement within P2P networks is a problem when the overall prevalence of P2P network usage and the impacts of P2P infringement on the economy are examined. While some argue that P2P traffic is past its peak,[42] the amount of people using P2P file sharing networks and software applications has actually increased.[43] One estimate indicates that BitTorrent and associated protocols account for 75% of all Internet traffic.[44] Furthermore, P2P networks currently account for 35.6% of all data downloaded on the Internet.[45]

All of this illegal file sharing takes a toll on the economy.[46] Although there is some variation amongst the statistics released on the specific amount of harm, it is clear that the harm is substantial.[47] The Motion Picture Association of America (MPAA) estimated that in 2006, movie studios lost $2.3 billion due to file sharing,[48] and file sharing has brought similar financial harm to the recording industry.[49] In 2007, the Institute for Policy Innovation study found that the U.S. economy loses $12.5 billion in total output, 71,060 jobs, $2.7 billion in earnings, and $422 million in tax revenues annually due to copyright infringement.[50] Another 2007 study estimated annual losses to be $58 billion in total output, over 370,000 jobs, and $2.6 billion in tax revenue.[51] Similarly, in 2010, the MPAA asserted that "online infringement costs U.S. creative industries billions of dollars and hundreds of thousands of jobs annually."[52] The prevalence of copyright

38. Storch, *supra* note 13, at 456.
39. Bridy, *supra* note 1, at 709.
40. Storch, *supra* note 13, at 456.
41. Bridy, *supra* note 1, at 708-09.
42. *Id*. at 704-05.
43. McGarrow, *supra* note 1, at 162.
44. *Id*.
45. Regular Internet surfing accounts for 31.6% of all downloaded data, and streaming media usage accounts for 17.9% of downloaded data. *Id*.
46. Bridy, *supra* note 1, at 710; Liebowitz, *supra* note 11.
47. Bridy, *supra* note 1, at 710; McGarrow, *supra* note 1.
48. McGarrow, *supra* note 1, at 156.
49. Liebowitz, *supra* note 11, at 24.
50. McGarrow, *supra* note 1, at 156.
51. Bridy, *supra* note 1, at 710.
52. *Id*.

infringement on P2P networks and the harm it causes demonstrates that infringement on P2P networks remains a significant issue.

III. EXISTING APPROACHES THAT FALL SHORT: THE DMCA, LITIGATION & PRIVATE AGREEMENTS

The first obvious potential solution to digital copyright enforcement is that it should be dealt with through existing law—which, in this case, is the DMCA. However, because the DMCA does not currently extend to cover disputes on P2P networks, Congress would have to amend the statute for this to be a viable solution, something that is unlikely to occur in the foreseeable future.[53] In the absence of Congress amending DMCA, copyright owners have been resorting to *John Doe* lawsuits, theories of indirect liability, and private agreements between broadband ISP's and corporate rights owners.[54] The following section examines why each of these current methods are found lacking in resolving P2P copyright disputes.

A. The Digital Millennium Copyright Act Fails to Resolve P2P File-Sharing Infringement Disputes

The DMCA provides two methods for copyright owners to enforce infringement without intervention from a court: (1) a notice-and-takedown process;[55] and (2) a process which permits rights owners to serve subpoenas on service providers outside of litigation to obtain the identities of alleged infringers.[56] This notice-and-takedown provision of the DMCA has arguably been sufficient to protect rights when it comes to user-generated content,[57] but does not adequately address infringements by means of P2P

53. Bridy, *supra* note 1, at 726.

54. *Id.* at 727 ("After Congress declined to amend § 512(h) to overturn the results in Verizon and Charter, ISPs and rights owners stepped into the breach to reach a compromise among themselves that serves the interests of both privacy and efficiency.").

55. DMCA § 512(c).

56. DMCA § 512(h). *See also* Bridy, *supra* note 1, at 715 (explaining that the downside of efficiency, and avoiding the delay and expense of litigation, is that it creates a potential for abuse by copyright owners). "For example, notices of infringement have been used to censor speech that copyright owners find offensive and to suppress unlicensed uses of copyrighted works that are colorably fair; similarly, DMCA pre-litigation subpoenas have been used as a pretext for identifying constitutionally protected anonymous speakers". *Id.*

57. Bridy, *supra* note 1, at 713-14.

file-sharing networks.[58] This makes sense, because the DMCA was enacted in 1998, before P2P file sharing took off.[59]

Specifically, the DMCA is a poor fit in cases involving P2P file sharing because it was designed to deal with providers serving a centralized file-storage function.[60] Section 512(c) covers infringement claims of material that is stored on the defendant's computer system or network.[61] Because the majority of infringing activity on P2P networks occurs in transmission rather than storage, such activity falls beyond the scope of § 512(c).[62] DMCA § 512(h) is also beyond the scope of P2P network infringement because the application for a subpoena under § 512(h) must include a copy of the notice described in § 512(c)(3).[63]

Some judges have looked past the letter of the DMCA to make it applicable to P2P file sharing.[64] However, this is an issue that should arguably be resolved by Congress through legislation, rather than by the judicial system.[65] As the D.C. Circuit said in *Recording Industry Association of America v. Verizon Internet Services*:

> It is not the province of the courts . . . to rewrite the DMCA in order to make it fit a new and unfor[e]seen [I]nternet architecture, no matter how damaging that development has been to the music industry or threatens being to the motion picture and software industries. The plight of copyright holders must be addressed in the first instance by the Congress . . .[66]

Both the Recording Industry Association of America (RIAA) and the Motion Picture Association of America (MPAA) have historically lobbied

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58. *Id*., at 716.

59. Lital Helman, *Pull Too Hard and the Rope May Break: On the Secondary Liability of Technology Providers for Copyright Infringement*, 19 TEX. INTELL. PROP. L.J. 111, 132 (2010).

60. Bridy, *supra* note 1, at 717.

61. Lemley & Reese, *Reducing Infringement*, *supra* note 8 at 1371.

62. Bridy, *supra* note 1, at 717-18.

63. *Id*. at 718.

64. *Id*.

65. *Id*.

66. *Recording Indus. Ass'n of Am. v. Verizon Internet Servs*, 351 F.3d 1229, 1238 (2003). In analyzing the decision, Bridy explains:

> In the absence of Congressional action to bring P2P file sharing and the providers whose networks are used for it within the scope of §§ 512(c) and (h) of the DMCA, rights owners cannot avail themselves of the statute's mechanisms for making online copyright enforcement scalable by allowing it to operate outside of litigation. When it comes to P2P file sharers, rights owners must sue to enforce their copyrights and, for that matter, even to figure out whom to sue.

Bridy, *supra* note 1, at 719.

Congress to prevent the illegal trading of copyrighted music and movies.[67] In 2003, the Senate Judiciary Committee heard testimony concerning the applicability of DMCA § 512(h) to P2P networks.[68] At the hearing, Register of Copyrights Marybeth Peters argued that Congress should amend the DMCA if necessary to make the subpoena provision reach P2P providers.[69] However, since that hearing, Congress has not given any indication that it plans to take action to modify the DMCA.[70] Furthermore, in 2008, the president of the RIAA asserted that the organization is no longer attempting to "relegislate" by lobbying Congress to amend the DMCA. [71] Even if Congress did reconsider amending the DMCA, there are privacy concerns that would likely be raised in opposition.[72] Therefore, at this point in time, it seems unlikely that Congress will amend the DMCA.

B. Litigation is Insufficient to Resolve P2P File-Sharing Infringement Disputes

With rights owners unable to use the DMCA's provisions, they have been forced into two problematic ways of litigating: suing facilitators (those providing services or writing software) rather than individual infringers, or filing *John Doe* lawsuits against hundreds to thousands of individual defendants.[73] Indirect liability is not a good solution because it stifles innovation by shutting down legal content.[74] Naming multitudes of *John*

67. Tony Bradley, *If You Can't Beat 'Em, Join 'Em: P2P Networks Start Lobbying*, ABOUT.COM, http://netsecurity.about.com/cs/generalsecurity/a/aa070803.htm (last visited Oct. 11, 2015).

68. Bridy, *supra* note 1, at 725, n. 175.

69. *Id*.; *Pornography, Technology, and Process: Problems and Solutions on Peer-to-Peer Networks, The Register of Copyrights Before the Subcomm. on the Judiciary*, 108th Cong. 1 (2003) (statement of Marybeth Peters, Register of Copyrights), http://www.copyright.gov/docs/regstat090903.html.

70. Bridy, *supra* note 1, at 725, n. 175.

71. *Id*.; Anne Broache, *RIAA: No Need to Force ISPs by Law to Monitor Piracy*, CNET, http://www.cnet.com/news/riaa-no-need-to-force-isps-by-law-to-monitor-piracy/ (last visited Oct. 11, 2015).

72. Bridy, *supra* note 1, at 725 nn. 725-26.

73. *Id*. at 720; Lemley & Reese, *Reducing Infringement*, *supra* note 8, at 1346-50. *See also* Moseley, *supra* note 5, at 312 ("The RIA, in service of its mission to 'protect intellectual property rights worldwide,' first responded to the threat of online music sharing by filing lawsuits against the companies that released file sharing software or operated peer-to-peer networks . . . [t]he RIAA's member labels sued at least eight other companies operating peer-to-peer networks [besides Napster].").

74. Lemley & Reese, *Reducing Infringement*, *supra* note 8, at 1349-50.

Doe defendants in a single action, while efficient, is also unfavorable because of due process and administration of justice issues.[75]

Regarding indirect liability, copyright owners have overwhelmingly resorted to relying on theories of secondary or tertiary liability to sue facilitators instead of individual infringers.[76] Congress amended the 1976 Copyright Act to apply liability not only to actual infringers but also to those who authorize infringement,[77] and it makes sense that copyright owners are attracted to an indirect liability approach. Practically speaking, suing individual infringers is not cost-effective, while suing facilitators is simpler and provides substantial damages and injunctive relief.[78] Furthermore, it is easier to find a defendant facilitator than it is to locate a defendant individual. However, while indirect liability does not have some of the imbalance of power issues associated with *John Doe* lawsuits, it presents problems of its own. Specifically, Professors Mark Lemley and Anthony Reese assert that indirect liability presents a significant policy concern by stifling innovation and investment in innovation.[79] Regulating copyright infringement over P2P networks poses risks of discouraging technological innovation in such networks,[80] and causing social harm by banning existing legal uses of the technology.[81] Suits against facilitators do just that by shutting down legal content shared along with the illegal content shared.[82]

Regarding *John Doe* lawsuits, trade organizations such as the Recording Industry Association of America and the Motion Picture Association of America have led litigation against P2P file sharing hosts.[83] Organizations such as these are typically significantly wealthier than the individuals they are suing. [84] Additionally, because federal courts have exclusive jurisdiction over copyright cases, this litigation is even more expensive and less efficient

75. Bridy, *supra* note 1, at 722-24 ("Including thousands of allegedly infringing files in a single § 512(c) takedown notice is a workable way of killing lots of birds with one stone when it comes to hosted content, but including thousands of defendants in a single copyright infringement lawsuit is not analogously effective in the P2P context.").

76. Lemley & Reese, *Reducing Infringement*, *supra* note 8, at 1346-50.

77. Helman, *supra* note 59, at 131-32.

78. Lemley & Reese, *Reducing Infringement*, *supra* note 8, at 1350.

79. *Id*. at 1349-50.

80. *Id*. at 1352.

81. *Id*. at 1390.

82. *Id*. at 1381.

83. Steven Tremblay, *The Stop Online Piracy Act: The Latest Manifestation of a Conflict Ripe for Alternative Dispute Resolution*, 15 CARDOZO J. CONFLICT RESOL. 819, 823 (2014); Moseley, *supra* note 5, at 312 ("On September 3, 2003, the RIAA's member labels filed 'the first wave of what could ultimately be thousands of civil lawsuits against major offenders who have been illegally distributing substantial amounts . . . of copyrighted music on peer-to-peer networks'. . . . Ultimately, the RIAA filed charges against approximately 35,000 individuals over the course of five years.").

84. Anthony Ciolli, *Lowering the Stakes: Toward a Model of Effective Copyright Dispute Resolution*, 110 W. VA. L. REV. 999, 1002 (2008).

than it would be if it could be litigated in state courts.[85] Consequently, while the organizations break even on litigation costs, the individuals are forced to settle, often agreeing to unfavorable settlements, rather than litigate the lawsuits to a final judgment.[86] For example, "of thousands of lawsuits filed by the RIAA against individual file sharers since September 2003, only twelve have resulted in legal challenges by a defendant. Most defendants, rather than challenging their claims in court, have settled with the RIAA for amounts usually ranging from $4,000 to $5,000."[87] This litigation model is not ideal, giving power to wealthy plaintiffs rather than providing justice.

C. Private Agreements are Insufficient to Resolve P2P File-Sharing Infringement Disputes

In a different vein than litigation, some copyright owners have been entering into private agreements with broadband ISP's to deal with P2P infringement.[88] In such agreements, the broadband ISP's agree to pass along notice of infringement to their subscribers.[89] For example, in 2005 "Verizon agreed to forward notices of infringement for Disney; in return, it received the right to transmit certain Disney programming over its network."[90] Additionally, in 2009, Verizon entered into a similar agreement with the RIAA.[91] Verizon found these notices to be highly effective in reducing copyright infringement, with most people stopping their illegal activity after one warning email.[92] While private agreements are a positive step in

85. *Id*.; Dorell, *supra* note 3, at 542 ("The most recent economic survey estimates that, in an intellectual property lawsuit with less than $1 million at stake, the median cost was $350,000 to litigate a case. In addition to high costs, a federal district court case takes an average of twenty-three months to conclude.").

86. Ciolli, *supra* note 84, at 1002.

87. *Id*.

88. Bridy, *supra* note 1, at 726 ("Congress has declined to amend § 512(h) to overturn the results in Verizon and Charter, and so ISPs and rights owners have stepped into the breach to reach a compromise among themselves that serves the interests of both privacy and efficiency."). Similar solutions have been suggested for reducing the number of students on college campuses downloading music illegally via P2P networks. *See* Antoinette D. Bishop, *Illegal P2P File Sharing on College Campuses—What's the Solution?*, 10 VAND. J. ENT. & TECH. L. 515, 521 (2008) ("The music industry and ISPs or individual users could enter into a collective licensing agreement where the ISPs would pay a flat fee in exchange for unrestricted use of any P2P file-sharing technology used to download music.").

89. Bridy, *supra* note 1, at 726.

90. *Id*.

91. *Id*. Another party to enter into similar agreements is Comcast. *Id*.

92. David Carnoy, *Verizon Ends Service of Alleged Illegal Downloaders*, CNET (Jan. 10, 2010), http://www.cnet.com/news/verizon-ends-service-of-alleged-illegal-downloaders/.

reducing online copyright infringement and should be continued and expanded, they are not a comprehensive solution.

Ultimately, there should be a process for resolving P2P copyright disputes that allows for individual infringers to be held liable without powerful plaintiffs taking advantage of them, as well as permitting individual copyright owners to assert their own rights. Ideally, this method would be cost effective and efficient without restraining technological innovation.[93] Additionally, it would be preferable if the system could be transplanted and used in other areas of online copyright infringement with few modifications. Currently, no such solution exists.

IV. PROPOSED SOLUTIONS: ALTERNATIVE DISPUTE RESOLUTION AND FEDERAL SMALL CLAIMS

In the absence of a viable existing method for resolving P2P copyright disputes, several scholars have proposed recommended solutions. These suggestions include a federal small claims court or tribunal, a deterrence system, a levy system, a dispute resolution system, or some combination of the aforementioned.[94] Even the scholars that proposed the deterrence and levy systems advised that a dispute resolution system would be superior to either of the latter methods.[95] Consequently, alternative dispute resolution and small claims emerge as the two leading options.

A. Alternative Dispute Resolution: The Lemley & Reese Model

Although alternative dispute resolution has not yet been used to resolve P2P copyright disputes in the U.S., a policy does exist for solving Internet domain name trademark disputes: the Uniform Dispute Resolution Policy (UDRP).[96] Professors Lemley and Reese propose an alternative dispute resolution system that could be used for P2P copyright disputes, and improves on UDRP's issues.[97] Internationally, a dispute resolution model

93. Lemley & Reese, *Reducing Infringement*, *supra* note 8, at 1350.

94. Ciolli, *supra* note 84, at 1018; Lemley & Reese, *Peer-to-Peer Disputes*, *supra* note 16 ("A deterrence system would sue selected users of P2P services for large amounts of money."); Tremblay, *supra* note 85, at 821 (proposing that an online piracy arbitration panel housed in the WIPO Arbitration and Mediation Center should be adopted).

95. Lemley & Reese, *Reducing Infringement*, *supra* note 8, at 1351-53. In their opinion, "a dispute resolution would be more fair than selective prosecution, because the burden of paying the penalty for infringement would fall more evenly on each wrongdoer, rather than imposing stark punishment on a few in order to serve society's interest in deterring the rest." *Id*. Furthermore, "relative to levies, a dispute resolution system would trade off some increase in cost for precision, targeting only those making illegal uses rather than all users of computers or p2p networks." *Id*.

96. Lemley & Reese, *Peer-to-Peer Disputes*, *supra* note 16.

97. *Id*.

for resolving P2P file-sharing networks has already been implemented in France — a system called HADOPI, in France.[98] It is helpful to examine HADOPI to as a real life example of a solution similar to the Lemley and Reese model. Therefore, the following subsections will discuss the Lemley and Reese alternative dispute resolution model, framed by explanations of UDRP and HADOPI.

1. The Uniform Dispute Resolution Policy for Trademark Disputes

The UDRP offers an online alternative dispute system for Internet domain name trademark disputes.[99] This system deals with claims made when a domain name registrant has registered and used an identical or similar domain name to the owner's trademark in bad faith.[100] It is intended to resolve only straightforward cases using expert panelists to consider the complaints.[101] Implemented by the Internet Corporation for Assigned Named and Numbers (ICANN), it "resolved about 7,500 domain name trademark disputes in its first four years, at a cost of $1200-$1500 each and an average resolution time of a little more than a month."[102] While UDRP has positive features, offering hope that efficient dispute resolution is possible in a similar context, and is a useful prototype for a P2P copyright dispute resolution system, it would need to be modified if it were used as a model.[103]

First, trademark domain name claims and digital copyright disputes are factually distinct, so some modifications would be necessary to adapt the UDRP model to make sense at all in a P2P context.[104] Domain names are under the control of ICANN, and UDRP is imposed by ICANN on all domain name registrars, who impose it by contract on all registrants.[105] There is no similar control over digital copyright infringements or authority that contracts with Internet users generally.[106] Therefore. a substitute sanction is needed as an enforcement mechanism and the dispute resolution

98. Bridy, *supra* note 1, at 733-34.
99. Lemley & Reese, *Peer-to-Peer Disputes*, *supra* note 16, at 1-2.
100. *Id*.
101. *Id*.
102. *Id*.
103. *Id*. ("It lacks important procedural due process protections, such as an administrative appeal, a fair system for assigning panelists, and a penalty for overreaching complainants.")
104. *Id*.
105. *Id*. at 3.
106. *Id*.

system for copyright would need to be statutorily imposed by copyright law.[107]

Second, in addition to UDRP being adapted for the differences between trademark and copyright disputes, it would need to be changed to address some structural problems.[108] UDRP has been criticized for being deficient in important procedural due process protections, including lacking "an administrative appeal, a fair system for assigning panelists, and a penalty for overreaching by complainants."[109] These problems could be solved in a P2P dispute resolution system by the provision of a fair process for selecting judges, an administrative appeal, and a sanction for frivolous or bad faith claims.[110]

2. Lemley and Reese's Proposed Alternative Dispute Resolution Model for Online Copyright Disputes

Professors Lemley and Reese propose a streamlined online copyright dispute resolution system modeled after UDRP.[111] Under Lemley and Reese's system, copyright owners could enforce their intellectual property rights "by pursuing a claim in an administrative dispute resolution proceeding before an administrative law judge in the Copyright Office."[112] They suggest that Congress should amend the copyright statute to extend to particular cases of copyright infringement on P2P networks.[113] In such cases, a copyright owner would have the option to pursue a civil copyright infringement claim in federal court or to pursue a claim in an administrative dispute resolution proceeding before an administrative law judge in the Copyright Office.[114]

Lemley and Reese' system would only be available for relatively straightforward, prima facie claims of copyright infringement.[115] Furthermore, it would only be available against those alleged to have uploaded a significant number of copyrighted works to a P2P network,

107. *Id*. at 1-2.
108. *Id*. at 2-3.
109. *Id*. at 2.
110. *Id*. at 2-3.
111. Lemley & Reese, *Reducing Infringement*, *supra* note 8, at 1410-11.
112. *Id*. at 1413.
113. Lemley & Reese, *Peer-to-Peer Disputes*, *supra* note 16 at 3-4.
114. *Id*.
115. This is consistent with the original intent of the UDRP. Lemley and Reese gave "uploading more than 50 files to a network in a 30-day period" as an example of a clear case. *Id*. at 4-5. Furthermore, the system would automatically exclude any case where the defendant may raise a plausible mistaken identity or fair use defense. Lemley & Reese, *Reducing Infringement*, *supra* note 8, at 1351-52.

making them available for downloading by others.[116] Parties would present their evidence and argument online, and would be required to present evidence that the complaining party owned the copyright, that the works were available at a particular Internet Protocol (IP) address at a particular date and time, and that the IP address in question was assigned to the person against whom the dispute is brought.[117] The existence of an online forum would reduce the need for travel and attorneys.[118] Parties could implement a limited number of defenses against the claim.[119] Two types of remedies would be provided: monetary relief and "the official designation of an unsuccessful defendant as an infringer."[120] The monetary damages would be intended as a deterrent, and Lemley and Reese estimated that $250 per work infringed in cases involving the uploading of fifty or more works would be sufficient to have a deterrent effect.[121] Decisions would be subject to appeal in a streamlined format.[122]

Arguments against the Lemley and Reese model are that it could retain the lack of procedural safeguards that UDRP has,[123] and that it fails to address copyright infringements that occur outside of P2P sharing networks.[124] As to the first concern, there will always be some sacrifice of procedural safeguards in order to achieve greater efficiency—a sacrifice that is necessary in the context of online copyright infringement cases. Additionally, ensuring that mechanisms for defenses and appeals are a part

116. Lemley & Reese, *Peer-to-Peer Disputes*, *supra* note 16, at 4 ("Making a copyrighted work available for other people to copy is much more likely to constitute copyright infringement than is any individual instance of downloading, where the downloader's act of reproduction might well be excused as fair use or by some other defense. The potential for justifiable instances of downloading means that keeping the dispute resolution procedure streamlined would require a focus on much less defensible acts of uploading.").

117. *Id*. at 4-5 ("Such evidence could consist of, for example, screen shots showing the availability of files and a sworn statement that the copyright owner determined that the titles listed were actually available and were actually copies of copyrighted works.").

118. Dorell, *supra* note 3.

119. Lemley & Reese, *Peer-to-Peer Disputes*, *supra* note 16, at 6. (Examples of potential defenses are arguments that "the copyright owner is engaged in copyright misuse and is therefore not entitled to enforce the copyrights until the misuse has been purged," or that "the copyrights are unenforceable because of alleged fraud in registering the works as works made for hire.").

120. *Id*. at 9.

121. *Id*. at 9-10 ("Monetary penalties should be sufficiently large that the possibility of having uploading challenged in the administrative procedure serves to deter others from engaging in large-scale uploading . . . It seems likely that in cases involving the uploading of fifty or more works, a penalty in the magnitude of $250 per work infringed would have a strong deterrent effect.").

122. *Id*. at 9.

123. Lemley & Reese, *Reducing Infringement*, *supra* note 8, at 1352.

124. Ciolli, *supra* note 84, at 1022.

of the dispute resolution system for P2P infringement could minimize these risks. Regarding the second concern, the fact that Lemley and Reese model only resolves disputes on P2P networks is not a reason to dismiss it. Copyright infringement on P2P networks alone is a massive problem that deserves to be addressed.

3. HADOPI Dispute Resolution System in France

France recently implemented HADOPI, a system for resolving copyright disputes that has no minimum threshold value like the Lemley and Reese system does.[125] HADOPI is responsible for issuing warning letters to users suspected of copyright infringement, which are followed by an accelerated legal proceeding presided over by a judge, which could result in a suspension of Internet access for a maximum of one year.[126] The judge can impose an access sanction without a hearing; however, the affected subscriber also has the right to an appeal at which he or she is represented.[127]

Notice of infringement in the HADOPI system is generated by an Internet security and content detection company selected by rights owners. The notice is forwarded from the security company to the copyright owner, who then refers the incident to HADOPI. To protect the accused subscriber's privacy, HADOPI forwards the notice to the subscriber without disclosing his or her identity to the copyright owner. If a subscriber is alleged to have infringed on a second occasion within six months of receiving the first notice, HADOPI forwards a second notice. If a third infringement is alleged within a year of the second notice, HADOPI refers the matter to a prosecutor, and a judge can order the subscriber's Internet access suspended. If the judge determines that the infringement was the result of a negligent failure on the subscriber's part to secure his or her Internet connection, the suspension is limited to one month. If the judge determines that the infringement was not merely negligent, a one-year suspension may be imposed. If the subscriber wants to contest the judge's decision to suspend access, he or she can exercise the right to be heard on appeal.[128]

While the HADOPI system is an interesting example of dispute resolution being used to resolve online copyright disputes, suspending Internet access is a stronger remedy than is necessary. The majority of the global population believes that basic Internet access is a human right, and the UN Humans Rights Council officially declared Internet access and

125. Bridy, *supra* note 1 at 735.
126. *Id*. at 734.
127. *Id*.
128. *Id*.

online freedom of expression a human right.[129] Although not everybody might share that view, and Internet access is not a legal right in the United States, revoking Internet access for up to a full year seems like a harsher penalty than is necessary.

B. Federal Copyright Small Claims Court or Tribunal

A competing argument to Lemley and Reese's system is the proposal of a federal copyright small claims court as the best way to resolve copyright disputes.[130] Anthony Ciolli suggested such a court where parties could participate in hearings on the Internet, telephone, or online.[131] Rules of evidence and civil procedure would be relaxed so that parties could appear without being represented by a lawyer without being at a significant disadvantage.[132] Either the plaintiff or the defendant would have the right to compel the small claims court to hear the dispute rather than a district court.[133] A significant difference between Ciolli's proposal and the Lemley-Reese proposal is that the federal small claims court would have the ability to hear all affirmative defenses, remedies unavailable in an administrative setting.[134] Appeals would be allowed; however, if the judgment were affirmed, the losing party would be required to pay the prevailing party's attorney's fees and costs.[135] This small claims court system would have jurisdiction to hear all type of cases involving copyright infringement, both online and offline.[136]

Arguments against a federal small claims court are that it could lead to frivolous lawsuits,[137] copyright suits would still be brought primarily against facilitators rather than infringers,[138] and it would give wealthy litigants an unfair advantage.[139] Furthermore, according to the U.S. Copyright Office, the issue with a federal small claims court model is that district courts would be required to "adopt unprecedented, specialized rules for the streamlined

129. Matt Petronzio, *Majority of Global Population Agrees Internet Access is a Human Right*, MASHABLE (Nov. 27, 2014), http://mashable.com/2014/11/27/internet-human-right-chart/.
130. Ciolli, *supra* note 84 at 1024.
131. *Id*.
132. *Id*.
133. *Id*.
134. *Id*. at 1024-25.
135. *Id*. at 1025.
136. *Id*.
137. *Id*. at 1027.
138. *Id*. at 1027-28.
139. *Id*. at 1029-30.

handling of such claims."[140] The Copyright Office also argued that this would result in no improvement for many litigants, encourage forum shopping, and be daunting to the federal district courts given that copyright cases are only 1% of all matters before them.[141] Finally, although small claims court would be a significant improvement on litigation, it may still not be efficient enough to motivate individual copyright owners to bring suit.[142]

To that end, in 2013, after a two-year study, the Copyright Office recommended that Congress should create a tribunal within the Copyright office that would administer an approach for small claims.[143] This tribunal would consist of three adjudicators, and would focus on small infringement cases of no more than $30,000 in damages.[144] Two of the adjudicators would be experienced in copyright law, while the third would have a background in alternative dispute resolution.[145] Determinations of the small claims tribunal would only be binding with respect to the parties and claims at issue, would be subject to administrative review for error, and could be challenged in federal district court.[146] The report recommended that all types of work be covered by the small copyright claims system.[147] However, it acknowledged that certain types of work, such as computer software programs, might be beyond the tribunal's technical capacity.[148] In 2014, the Senate subcommittee on Courts, Intellectual Property, and the Internet had another hearing on copyright remedies at which the idea of a small claims tribunal was discussed, indicating that this idea is still being seriously considered.[149]

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140. MARIA A. PALLANTE, U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS: A REPORT OF THE REGISTER OF COPYRIGHTS 93 (Sep. 2013), http://copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf.

141. *Id*.

142. *Id*. at 25 n. 142 ("I suspect that even if there were a small claims court, a modestly cheaper way to do it, that songwriters would not have the wherewithal and really wouldn't want to have to spend their time bringing 10,000 small claims proceedings, even if they were cheap. That's not what songwriters want to do. They want to create, perform, and that's why they have turned to publishers, and in some cases record labels and PROs to manage the business side.").

143. Carolyn E. Wright, *Copyright Office Releases Report on Copyright Small Claims*, PHOTO ATTORNEY (Sep. 30, 2013), http://www.photoattorney.com/copyright-office-releases-report-copyright-small-claims/.

144. *Id*.

145. Ieuan Mahony & Samuel L. Taylor, *No Claim is Too Small: Copyright Office Proposes Small Claims Tribunal*, HOLLAND & KNIGHT LLP (Nov. 5, 2013), http://www.lexology.com/library/detail.aspx?g=741bc245-c237-4e55-9763-0fdf93990d0d.

146. Wright, *supra* note 143.

147. Mahony & Taylor, *supra* note 145.

148. *Id*.

149. *Copyright Remedies*, *supra* note 8, at 78-80.

Furthermore, the United States would not be the first to implement such a system for resolving copyright disputes. In 2012, the United Kingdom Intellectual Property Office adopted a small claims track for copyright owners to sue individuals, for claims with damages not exceeding 5000 pounds.[150] The process involves informal hearings with relaxed rules of evidence (expert evidence is discouraged), and lawyers are not required.[151]

V. CONCLUSION

Copyright infringement on P2P file sharing networks present a significant problem, but a dispute resolution system that is efficient, cost effective, and fair may provide a viable means to address the problem. Such a system should encourage copyright owners to sue individual infringers rather than facilitators of infringement. Given the recent recommendations made to Congress by the U.S. Copyright Office for a federal small claims tribunal,[152] there is a considerable chance of a small claims tribunal being implemented. A small claims tribunal has the advantage of having the capacity to handle moderately complicated cases, a broader range of cases, and a more sophisticated method for appealing.[153]

While a more formal small claims model may be beneficial for copyright disputes generally, it does not eliminate the need for an even more streamlined system. A federal small claims tribunal would not be efficient enough to handle the vast number of online copyright disputes. A system that quickly and cheaply resolves straightforward cases is necessary to reduce the vast number of P2P copyright disputes. Therefore, an online dispute resolution modeled after Lemley and Reese's proposal should not be forgotten, even if a federal small claims tribunal is created.

150. CMU EDITORIAL, *New Fast-Track Court for Copyright Disputes Launched*, COMPLETE MUSIC UPDATE (Oct. 3, 2012), http://www.completemusicupdate.com/article/new-fast-track-court-for-copyright-disputes-launched/.

151. Foley Hoag LLP, *Sliding the Scale: the UK's New "Small Claims" Court for Intellectual Property Disputes*, JD SUPRA (Oct. 15, 2012), http://www.jdsupra.com/legalnews/sliding-the-scale-the-uks-new-small-c-11166/.

152. Wright, *supra* note 143.

153. Ciolli, *supra* note 84.