ERADICATION OF A SECONDARY INFRINGER'S SAFE HAVENS: THE NEED FOR A MULTILATERAL TREATY ADDRESSING SECONDARY LIABILITY IN COPYRIGHT LAW

Scott Burger[*]

I. INTRODUCTION

Imagine the following scenario: Tori, a recording artist, creates a song in France, which is distributed in France and internationally through legal channels of commerce. Tori's song is protected from direct infringement by national laws, which are, in part, influenced by international copyright law.[1] Furthermore, national laws protect Tori's song from vicarious or contributory infringement in France.[2] Thereafter, a new internet technology is created that allows a user to download a file, called a torrent, from a website located in France. The torrent file does not contain any of the copyrighted content of the song, but the file enables individual users across

---

* J.D., Michigan State University College of Law, 2009; B.A., University of Michigan, 2006. Many thanks to Professor Sean Pager for his direction and commentary on the numerous drafts of this Article.

1. For example, France has been a signatory to the Berne Convention since 1887. World Intellectual Property Organization, Contracting Parties, http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15 (last visited Oct. 8, 2009) [hereinafter WIPO Contracting Parties].

2. For instance, Article 1382 of the French Civil Code provides, "Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it." Code civil [C. CIV.] art. 1382 (Fr.). This article provides the basis for secondary liability in France. *See also* J.A.L. STERLING, WORLD COPYRIGHT LAW 511–12 (2d ed. 2003).

the globe to access and download the copyrighted material free of charge from each other. Upon learning of the website and its ability to facilitate copyright infringement, Tori is furious because she fears that her sales will fall due to mass illegal distribution of her song.

The recording industry representing Tori sends a threatening cease-and-desist letter to the owner and operator of the website, Frank, frightening him enough to retain legal counsel. Frank's counsel researches a forum to host the website that might be more lenient on the website's facilitation of copyright infringement. Frank's counsel discovers that the Ukraine could provide an excellent safe haven for Frank because the Ukraine does not recognize any form of secondary liability for copyright infringement. Frank acts on his counsel's advice, and moves his host to the Ukraine. Since the files on Frank's website do not contain copyrighted material, Frank is safe from liability to Tori in the Ukraine. Furthermore, due to the fact that Frank's website host is located in the Ukraine, Tori does not have any legal recourse against Frank elsewhere.

Frank's website obtains worldwide publicity, and he openly flaunts the fact that the website facilitates rampant copyright infringement and that nothing can be done to stop him. Users in the United States, Australia, Canada, and almost any nation with internet access can download Tori's song from other torrent users without purchasing it. Tori could seek legal remedies against these individual users, but there are millions of them and many would be difficult to track down.[3] Due to these unfortunate circumstances, Tori loses an immeasurable amount of income for a song she spent a large amount of time and energy to create. Tori is not alone. There are hundreds of artists of many nationalities whose copyrighted works are illegally shared by users in many nations, all through the same hub.

This hypothetical scenario has occurred in reality and will continue to occur until something is done to stop it. Demonoid,[4] one of the larger BitTorrent[5] trackers, was originally located in the Netherlands before moving to Canada after legal threats from the Dutch anti-piracy group BREIN.[6] In Canada, however, Demonoid was forced to block all Canadian user traffic before eventually facing additional legal threats from the Canadian Recording Industry Association (CRIA).[7] Instead of fighting the

3. This is especially true recently because software (e.g., Ipredator) has been made available on a mass scale which enables a user to become "anonymous" so that others cannot see the user's individual Internet Protocol address. This in turn makes prosecuting direct infringement exponentially more difficult. *See Pirate Bay Gains from the Swedish Law Against Them*, SOFTSAILOR, Apr. 9, 2009, http://www.softsailor.com/news/1259-pirate-bay-gains-from-the-swedish-law-against-them.html.

4. Demonoid.com, http://www.demonoid.com/ (last visited Oct. 8, 2009).

5. BitTorrent technology will be explained in more detail, *infra* Part II.

6. Ernesto, *Demonoid Shut Down by the CRIA?*, TORRENTFREAK, Sept. 25, 2007, http://torrentfreak.com/demonoid-shut-down-by-cria-070925/.

7. Ernesto, *Demonoid Returns, Forced to Block Canadian Traffic by CRIA*, TORRENTFREAK, Sept. 30, 2007, http://torrentfreak.com/demonoid-returns-070930/.

CRIA in Canadian courts, Demonoid moved to the Ukraine where the copyright laws are more favorable.[8] This is just a sample case, illustrative of a torrent distribution website's ability to forum shop for a more lenient forum of laws; however, a number of other torrent websites, such as The Pirate Bay,[9] have followed similar paths.

This Article illustrates the need for international harmonization and minimum standards of substantive secondary liability law. Part II of this article provides a brief overview of the most recent file-sharing technology in the form of BitTorrent. Part III examines the current state of international treaties relating to copyright law, looks at a spectrum of national laws relating to secondary liability, and briefly discusses other solutions to illegal file-sharing. Part IV calls for a multi-lateral treaty containing provisions that establish a minimum standard for secondary liability. It also analyzes the potential pitfalls of such a treaty and suggests an outline of the treaty that addresses these concerns and minimum standards.

International copyright law has expressly addressed direct copyright infringement. However, it woefully lacks in its ability to bring legal action against secondary copyright infringers. Likewise, technological solutions and national solutions have failed to curb rampant file-sharing. In order to allow international copyright law to continue to be effective and for copyright infringement through file-sharing to be stopped, secondary liability must be implemented on an international level in the form of a multi-lateral treaty. If secondary copyright infringement is not adequately addressed, there are broader potential consequences, including the death of effective copyright protection. BitTorrent and similar technologies enable copyright infringement to occur on a massive scale. Despite the existence of copyright laws addressing direct infringement, it is incredibly difficult to enforce those laws against every infringer.[10] Without international secondary liability laws in place, the facilitators of mass copyright infringement will likely not be stopped. If the facilitators of mass

---

8. Ernesto, *Demonoid Tracker Moves to Ukraine*, TORRENTFREAK, Mar. 16, 2008, http://torrentfreak.com/demonoid-tracker-moves-to-ukraine-080316/.

9. *See* The Pirate Bay, http://thepiratebay.org/ (last visited Sept. 23, 2009).

10. "When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement." MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 929–30 (2005). For instance, in the United States, the RIAA has sued thousands of direct copyright infringers. *See, e.g.*, eLaw & Management, *RIAA Sues 784 Alleged Copyright Infringers*, LEGALBRIEF TODAY, July 6, 2005, http://www.legalbrief.co.za/article.php?story=20050706091217719. However, for the Demonoid.com website alone, U.S. visitors represent over thirty-five percent of the website's user traffic. *See* DomainTools, Whois Record for Demonoid.com, http://whois.domaintools.com/demonoid.com (last visited Apr. 17, 2009) [hereinafter Demonoid Whois]. *See infra* Part III.B.

infringement are allowed to continue, copyright law will be left weakened on the whole, if not irrelevant.[11]

II. BRIEF OVERVIEW OF BITTORRENT TECHNOLOGY

BitTorrent technology facilitates a specific form of file-sharing. It involves a few important pieces: a music/movie/software file, the BitTorrent software client, "seeders" and "leechers" (combined, referred to as "peers"), torrent files, and trackers.[12] A person seeking a song, for instance, must have a BitTorrent software client[13] installed on his computer and then must search for a torrent file on a website.[14] The user downloads the torrent file and opens it using the BitTorrent client. The client then uses the tracker to locate "seeders," which have either the entire song file or pieces of the song file. The client proceeds to download pieces of the song file from the "seeders" until the entire song is downloaded.[15] The client also simultaneously uploads pieces of the file already downloaded to other "peers" seeking that file. In this way, the technology is extremely efficient because there is a large swarm of peers simultaneously transmitting pieces of the file, instead of one central server sending the entire file to each individual downloader.

Under U.S. law, the programmers of the BitTorrent software clients are not liable for direct, contributory, or vicarious copyright infringement, as long as the software client is marketed for legitimate purposes and not receiving any commercial income from the software client. Basically, BitTorrent clients are analogous to VCRs in *Sony Corp. of America v. Universal Studios, Inc.*, where the court found VCRs to be not liable for contributory copyright infringement.[16] Therefore, the main potential infringers from BitTorrent technology are the websites that hold the torrent files for download (secondary liability) and the "peers" (direct infringement).

---

11. Tracking down individual infringers will only become more difficult, as new software programs have been created and distributed that hide the user's Internet Protocol address, without which the RIAA and similar groups have no way to track the transfer of copyrighted files from an individual computer. *See* Kerstin Sjoden, *The Pirate Bay's Anonymity Service Signs 100,000 Users Pre-Launch*, WIRED, Apr. 8, 2009, http://www.wired.com/threatlevel/2009/04/the-pirate-bays/.

12. *See generally* Chamith Kumarage's Guide for Systems Administrators, *How BitTorrent Works*, Oct. 19, 2008, http://saguide.wordpress.com/2008/10/19/how-bittorrent-works/ [hereinafter BitTorrent Guide].

13. There are a number of clients: µTorrent, Azureus, and BitComet, just to name a few.

14. BitTorrent Guide, *supra* note 12.

15. *Id.*

16. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (holding that the Sony-created VCRs were not liable for secondary infringement because the VCRs had legitimate purposes and Sony held no control over the VCR after the first sale of the unit).

There are a number of different players involved in the process of file-sharing using BitTorrent technology. This Part of the Article has already discussed two of the major players: the programmers of the client software and the users that "seed" or download pieces of a file. Note that these programmers and the users "seeding" or downloading the pieces of the file can be physically located anywhere in the world. Additionally, the website that allows visitors to download torrent files usually runs a "tracker," which directs a user's computer to other computers with pieces of the file that is being sought.[17] Finally, in order for the copyrighted work to be made into a transferable file, a user must "rip" the file from a DVD, CD, or other form of media, create a torrent file connected to the "ripped" file (and also pointing to a tracker), and upload that torrent file to a torrent website.[18] These various actors will be revisited in greater depth later in this Article.[19]

III. EXISTING SOLUTIONS TO INTERNATIONAL COPYRIGHT INFRINGEMENT

A number of different potential solutions have been implemented at various levels in an attempt to curb copyright infringement through file-sharing. These solutions have come at international, national, and technological levels, but none have effectively stalled copyright infringement through file-sharing. While some have accomplished more than others in the area of direct infringement, very few solutions have focused on secondary infringers, such as torrent websites. This lack of attention has allowed for the facilitation of direct infringement through torrent websites.

Considering the relative failures of each of the existing solutions to international copyright infringement, the argument is reinforced for a multi-lateral treaty addressing secondary liability in international copyright law as a wholly necessary, and furthermore, an entirely appropriate solution. The failure of these existing solutions is what merits removing national sovereignty in defining secondary liability in copyright and replacing that sovereignty, at least to a degree, with an obligating international definition.[20]

---

17. *See* Carmen Carmack, *How BitTorrent Works*, HOWSTUFFWORKS, Mar. 26, 2005, http://computer.howstuffworks.com/bittorrent2.htm.

18. For a description of how to create a torrent file *see* Ernesto, *How to Create a Torrent?*, TORRENTFREAK, Mar. 23, 2006, http://torrentfreak.com/how-to-create-a-torrent/.

19. *See infra* Part IV.B.

20. For a more in depth discussion of national sovereignty, the subsidiarity principle, and federalism, as wagered against a new multilateral treaty on secondary liability in copyright, *see infra* Part IV.

A. The Failures of Current Treaties and Conventions

The Berne Convention ("Berne"), while not the first copyright treaty, is a landmark copyright agreement.[21] Berne's most important contribution to international copyright law was the creation of national treatment for copyright. Berne established that "[t]he works mentioned in [Article 2] shall enjoy protection in all countries" that sign and ratify it.[22] However, until relatively recently, a number of nations did not assent to and ratify Berne, most notably the People's Republic of China and the Russian Federation.[23] Due to these nations' refusal to accede to Berne, the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs") was created in 1994 with hopes of bringing a larger number of nations into copyright law harmony.[24] "[T]he substantive standards of Berne (articles 1–21 and the Appendix) are incorporated directly into the TRIPs Agreement."[25] Since TRIPs is associated with the World Trade Organization ("WTO"), enforcement mechanisms for implementing the treaty are already in place. The WTO already has a dispute settlement process in place, and it authorizes trade retaliation against uncooperative members,[26] both of which streamline the transition to TRIPs.

Berne and TRIPs both provide a number of positive contributions to international copyright law, but are lacking in any provisions relating to secondary liability. The result of this simple fact is that torrent distribution websites are unaffected by any international agreement. Plainly stated, Berne and TRIPs have not kept up with technological advances, especially internet advances.

While the aforementioned agreements were successful in establishing minimum rights "within the traditional copyright categories of rights of reproduction and distribution, and of communication to the public," the World Intellectual Property Organization Copyright Treaty ("WCT") of

---

21. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended on Sept. 29, 1979, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention].

22. *Id.* This provision is referred to as "national treatment." *See generally* SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND 295–301 (2d ed. 2006).

23. The Berne Convention entered into force with respect to the People's Republic of China on Oct. 15, 1992. WIPO Contracting Parties, *supra* note 1. It entered into force with respect to the Russian Federation on Mar. 13, 1995. *Id.* Additionally, the United States did not become a signatory to Berne until Mar. 1, 1989. *Id.*

24. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1125, 1197 (1994) [hereinafter TRIPs]. The agreement also extended to other areas of intellectual property, including patents and trademarks. *Id.*

25. RICKETSON & GINSBURG, *supra* note 22, at 158. However, Article 6 bis, pertaining to moral rights, is excluded from TRIPs. *Id.* at 159.

26. *See* World Trade Organization, Understanding the WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Sept. 23, 2009).

1996 extended enforcement beyond traditional borders.[27] Articles 11 and 12 of the WCT added a digital dimension to international copyright law.[28] These provisions relate to Digital Rights Management ("DRM"), direct trafficking of copyrighted works, and expand upon the basis laid out by Berne and TRIPs, but they do little to provide a cause of action against torrent distribution websites. This is because torrent distribution websites do not traffic any copyrighted works directly.

International law completely lacks in the area of secondary liability, and therefore, fails to address the problem of mass copyright infringement through torrent distribution websites. There are, however, many individual nations with laws in place that do address the problem. But, as the following Part will illustrate, these laws are inconsistent and in gross need of harmonization, as they span a broad spectrum of coverage from strict to lenient enforcement. If these laws are not harmonized, copyright infringement may perpetually persist on an international scale through torrent distribution websites.

B. The Many National Flavors of Secondary Liability

Both Canada and the United Kingdom focus on aspects of authorization and control when it comes to assessing liability.[29] In the United Kingdom:

> A person does not necessarily authorise an act to be done merely because he intentionally puts into another's hands the means by which the infringing act can be done if those means can also be used for a perfectly legitimate purpose, even where it is known that they will in fact inevitably be used for an infringing purpose. This will be particularly so if the supplier has no control over how the means will be used, since it is the essence of a grant or purported grant that the grantor has some degree of actual or apparent right to control the relevant actions of the grantee.[30]

Under U.K. law, "authorizing someone else to commit an infringing act is itself direct copyright infringement."[31] In Canada, "authorization . . .

---

27. World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65, (1997) [hereinafter WIPO Copyright Treaty].

28. For an in depth analysis of WCT Articles 11 and 12, *see generally* RICKETSON & GINSBURG, *supra* note 22, at 964–93.

29. *See* Lynda J. Oswald, *International Issues in Secondary Liability for Intellectual Property Rights Infringement*, 45 AM. BUS. L. J. 247, 268–69 (2008).

30. COPINGER AND SKONE JAMES ON COPYRIGHT 471 (Kevin Garnett et al. eds., 14th ed. 1999) (quoting CBS, Inc. v. Ames Records & Tapes Ltd., [1981] Ch. 91, at 95 (U.K.), "[T]here is no authorisation where . . . the defendant is in no position to control the conduct of the person alleged to have been authorised.").

31. Oswald, *supra* note 29, at 268 (*citing* STERLING, *supra* note 2, at 211).

requires a demonstration that the defendant did give approval to; sanction, permit; favor, encourage."[32]

In Australia, "secondary liability for copyright is primarily statutory in origin."[33] Like U.K. law, authorization qualifies as direct infringement under Australian law.[34] The Federal Court of Australia heard a case very similar to *Grokster*,[35] *Universal Music Australia v. Sharman License Holdings*, and came to a similar decision.[36] The only difference was that instead of closing down the site, the Australian court allowed Sharman to modify its system "in a targeted way, so as to protect the applicants' copyright interests (as far as possible) but without unnecessarily intruding on others' freedom of speech and communication."[37] Although there are variances in the degree of punishment for offenses, the United Kingdom, Canada, and Australia all have implemented relatively strict laws which, comparatively speaking, have been effective against copyright infringement.[38] However, despite these laws, a simple search of the WHOIS information associated with the popular Demonoid.com torrent website shows that six percent of the visitors to the website are from the United Kingdom, almost four percent are from Canada, and more than three percent are from Australia.[39] While these percentages may appear low, they represent the third, fourth, and fifth most common visitors to the website.[40] These visitors may not be illegally obtaining copyrighted material using domestic websites, but they are, nonetheless, obtaining copyrighted material illegally by transcending national borders via the Internet.

Whether there is a statutory basis for secondary liability in copyright infringement in the United States is debated.[41] Some scholars argue that the

---

32. Soc'y of Composers, Authors & Music Publishers of Can. v. Canadian Assoc. of Internet Providers, [2004] 2 S.C.R. 427, 2004 SCC 45, ¶¶ 122, 127 (Can.).

33. Oswald, *supra* note 29, at 274.

34. "Direct infringement . . . occurs when a person 'does . . . or authorizes the doing'" and "[a]uthorization occurs when a person 'sanctions, approves or countenances' another's doing of an act that would [constitute] direct infringement." *Id.* (citing Australian Copyright Act, 1968, §§ 36, 101 (Austl.)).

35. *See* MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 929-30 (2005).

36. *See* Universal Music Australia Pty. Ltd. v. Sharman License Holdings Ltd., (2005) 220 A.L.R. 1, ¶¶ 517–26 (Austl.).

37. *Id.* at ¶ 520.

38. BitTorrent websites which receive a large amount of traffic are almost entirely absent from these countries. *See Araditracker BitTorrent Site Shutdown After Legal Action*, TORRENTFREAK, Aug. 29, 2008, http://torrentfreak.com/araditracker-bittorrent-site-shutdown-after-legal-action-080829/ (reporting on a torrent site which was shut down in the U.K. and Canada).

39. Demonoid Whois, *supra* note 10.

40. *See id.*

41. *See* Brief for Sixty Intellectual Property and Technology Law Professors and the United States Public Policy Committee of the Association for Computing Machinery as Amici Curiae Supporting Respondents, MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) (No. 04-480), *reprinted in* 20 BERKELEY TECH. L.J. 535, 552 (2005) (arguing that the

phrase, "the owner of copyright . . . has the exclusive rights to do and to *authorize*,"[42] creates a statutory basis for secondary liability.[43] Regardless, the leading case in the United States dealing with secondary liability, at least as it pertains to the situation that this Article is addressing, is *MGM Studios, Inc. v. Grokster, Ltd*.[44] The *Grokster* court found the Grokster software program creators liable for copyright infringement because the makers showed intent to induce infringement.[45] Interestingly, a group calling itself "International Rights Owners" ("IRO") filed a brief in support of MGM and cited U.S. international treaty obligations as the source for the *Grokster* court to find liability.[46] Specifically, the IRO argued that Article 41(1) of TRIPs gave nations the ability to enforce copyright through "expeditious remedies *to prevent* infringements and remedies *which constitute* a deterrent to further infringements."[47] However, this Article "deals purely with enforcement and procedural issues and does not deal with substantive obligations."[48] Clearly, as established above, no such international obligation exists. Another amicus brief filed by Sharman Networks argued this point:

> [E]loquently stated . . . '[t]he IRO's belief that [the U.S. Supreme] Court should concern itself with trade policy, diplomacy, the raising of international norms in America's interest, and the setting of precedents for foreign jurisprudence not only goes well beyond the mandate of even this Court, it usurps the role of Congress and has no constitutional underpinnings.'[49]

---

phrase "to authorize" in 17 U.S.C. § 106 (2002) "is an exceptionally thin reed on which to premise secondary liability").

42. 17 U.S.C. § 106 (2002).

43. Brief for United States Senator Patrick Leahy and United States Senator Orrin G. Hatch as Amici Curiae Supporting Neither Party at 7, MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) (No. 04-480), 2005 WL 152923.

44. Grokster, 545 U.S. at 913. The Supreme Court dealt with secondary liability in copyright pertaining to VCRs some years before *Grokster* in *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984). However, *Grokster* pertains to file-sharing software somewhat similar or analogous to torrents (as it is essentially the direct predecessor to torrent technology). 545 U.S. at 913.

45. *Grokster*, 545 U.S. at 937–40.

46. Brief for International Rights Owners as Amici Curiae Supporting Petitioners, MGM Studios, Inc. v. Grokster Ltd., 545 U.S. 913 (2005) (No. 04-480), 2004 WL 2569686 (citing TRIPs and the WIPO Copyright Treaty, among other international obligations).

47. TRIPs, *supra* note 24, art. 41(1) (emphasis added).

48. Brief for Sharman Networks Ltd. as Amicus Curiae in Support of Respondents at 7, MGM Studios, Inc. v. Grokster Ltd., 545 U.S. 913 (2005) (No. 04-480), 2005 WL 508106 [hereinafter Sharman Networks Brief].

49. Oswald, *supra* note 29, at 265 (*citing* Sharman Networks Brief, supra note 48).

Sharman Networks made a valid point, and one that the *Grokster* Court may not have considered strongly enough.[50] While secondary liability in copyright in the United States based in statute is still hotly debated, case law has served to step in and attempt to cover the area of law.[51] However, as with the nations mentioned above, the United States eradicated illegal torrent distribution websites from its own soil, and yet still contains a large number of infringing users. For example, the Demonoid.com WHOIS information shows that the United States ranks first in number of visitors to the Demonoid torrent site, representing over thirty-five percent of the website's visitors.[52] Despite reasonable domestic efforts to curb infringement, users in the United States can and do simply use internet servers in more lenient nations to illegally obtain copyrighted material.

In contradiction to those nations with seemingly strict copyright laws, there are some nations that provide safe havens for torrent distribution websites and direct infringers alike. Some nations, such as Sweden, have not fully established a position against secondary liability. Recently, Sweden sentenced four persons associated with the popular BitTorrent website, The Pirate Bay, to a year in prison.[53] While the verdict was a victory for copyright holders, it was based solely on the intent of the website's creators to commit infringement, and was entirely against them individually, not against the website itself.[54] At the time of writing this Article, The Pirate Bay continues to operate, and does not appear to be in jeopardy.[55] If Sweden had substantive laws on its books relating to secondary liability in copyright, The Pirate Bay would probably be a clear-cut case — The Pirate Bay clearly engages in secondary infringement of copyright, and it further openly flaunts the fact that it can continue to do

---

50. For a more in depth discussion of *Grokster* and the Amici Curiae Briefs filed in *Grokster*, *see* Oswald, *supra* note 29, at 259–66.

51. A bill was introduced in the Senate relating to secondary liability in copyright infringement. Inducing Infringement of Copyrights Act of 2004, S. 2560, 108th Cong. (2004). It stated that whoever intentionally induces any copyright infringement shall be liable as an infringer. *Id.* However the bill was not enacted. *See id.* Passage of such a bill would provide a more explicit statutory presence in the area of secondary liability and a true definition for the courts to adhere.

52. Demonoid Whois, *supra* note 10.

53. The Pirate Bay, *supra* note 9; Cora Nucci, *Pirate Bay Verdict: Founders Sentenced to Jail, Fined*, INFORMATIONWEEK, Apr. 17, 2009, http://www.informationweek.com/news/internet/policy/showArticle.jhtml?articleID=216600196&cid=iwhome_art_Inter_mostpop.

54. Enigmax, *Pirate Bay Trial Day 7: Screenshots for Evidence*, TORRENTFREAK, Feb. 24, 2009, http://torrentfreak.com/pirate-bay-trial-day-7-screenshots-for-evidence-090224/.

55. Other articles have addressed The Pirate Bay and Sweden and the fact that "the issue of secondary liability for copyright infringement has not yet been tested by a Swedish court." Ulric M. Lewen, Note, *Internet File-Sharing: Swedish Pirates Challenge the U.S.*, 16 CARDOZO J. INT'L & COMP. L. 173, 188 (2008).

so.[56] Until Sweden's laws change, The Pirate Bay will likely continue to operate its web servers from Sweden.

Spain, like Sweden, is somewhat murky in its approach to torrent sites and secondary liability. One of Spain's largest BitTorrent sites, TodoTorrente.com, was shut down for copyright infringement, only to be exonerated on appeal within a year.[57] Furthermore, it is legal in Spain to provide hyperlinks to copyrighted material.[58] The fact that Western nations, like Sweden and Spain, have allowed for file-sharing as a result of lax laws on secondary liability is interesting. One would almost expect lenient copyright laws from more underdeveloped nations, where there are fewer artists and copyright holders with international followings; but Spain, which has produced popular artists such as Enrique Iglesias, has a larger stake in the copyrighted material of its domestic artists. This leniency allows users in the United Kingdom, the United States, Canada, Australia, and many other nations with strict copyright laws to continue committing willful direct infringement of copyrights worldwide. With stricter laws in place in these specific nations, users would not be able to infringe as easily.

C. Business Models and Technological Solutions

Outside of statutorily-based legal solutions, there are also solutions that have been tested and implemented with the goal of curbing illegal file-sharing of copyrighted material. Success of these solutions, standing alone, has been mild at best. This Subsection will briefly discuss three: copyright levies, Digital Rights Management ("DRM") and watermarking, and legitimate business models of file-sharing.

Copyright levies are not a new idea. They have been proposed separately and in varying forms by William Fisher and Neil Netanel.[59] While the two scholars differ in the scope of their respective plans, each plan has a common element: government taxes on copying devices (CD and DVD burners, Digital Video Recorders, etc.) and on recording media (blank CDs, DVDs, and hard disk-based devices such as mp3 players). Levies also have existed for internet access — taxing of Internet Service Providers

---

56. The Pirate Bay has received numerous legal threats and openly makes humorous responses to such legal threats. The Pirate Bay, Legal Threats Against The Pirate Bay, http://thepiratebay.org/legal (last visited Sept. 23, 2009).

57. Enigmax, *BitTorrent Sites Step Closer to Legality in Spain*, TORRENTFREAK, Nov. 4, 2008, http://torrentfreak.com/bittorrent-sites-step-closer-to-legality-in-spain-081104/.

58. Enigmax, *Linking to P2P Downloads Confirmed Legal in Spain*, TORRENTFREAK, Sep. 19, 2008, http://torrentfreak.com/linking-to-p2p-downloads-confirmed-legal-in-spain-080919/.

59. *See generally* WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT (2004); Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1 (2003); Salil K. Mehra, *The iPod Tax: Why the Digital Copyright System of American Law Professors' Dreams Failed in Japan*, 79 U. COLO. L. REV. 421 (2008).

("ISPs").[60] The proceeds of these taxes are distributed to artists in some manner. While copyright levies are certainly useful to guarantee copyright owners constant income, the levies are arguably overbroad and discriminate against innocent internet and blank media users. Many internet users do not engage in illegal file-sharing. Further, many of them use legitimate pay-for services, such as iTunes, and legally place the songs they purchase on an iPod. Why should individuals who are buying licenses to copyright materials be forced to pay the price for the illegal actions of others?[61]

A popular technological solution to the BitTorrent file-sharing problem is implementing DRM. DRM technology is attached to a file and controls access to and use of the file.[62] While DRM technology is useful, the practical result is that "all DRM systems, no matter how sophisticated, face the likelihood of being cracked by 'computer geeks' across the globe."[63] Furthermore, DRM systems "also may limit legitimate use"[64] because "DRM systems can thwart the exercise of fair use rights and other copyright privileges [and] compel users to view content they would prefer to avoid (such as commercials and FBI warning notices), thus exceeding copyright's bounds."[65] Due in part to these issues, watermark technology was invented.[66] "At its most precise, a watermark could encode a unique serial number that a music company could match to the original purchase."[67] "Digital watermarking is the process by which identifying data is woven into media content . . . giving [that content] a unique, digital identity."[68] In the context of BitTorrent, watermarks can be placed on individual broken up pieces of a file, but the same major DRM problem exists with

60. *See* Lewen, *supra* note 55, at 197.

61. Narrowing the scope of ISP levies to those that actively file-share would be preferable, "[h]owever, such a modification would, of course, require monitoring, and the fees would have to be even higher since fewer people would pay into the system." *Id.* at 198. Furthermore, at least some of the proceeds would likely be paid out to the pornographic industry, which may cause publicity concerns. *Id.*

62. *Id.* at 200.

63. *Id.* at 201–02.

64. *Id.* at 201.

65. Pamela Samuelson, *DRM {and, or, vs..} the Law*, 46 COMM. OF THE ACM 41, 42 (2003).

66. David Kravets, *DRM is Dead, but Watermarks Rise from Its Ashes*, WIRED, Jan. 11, 2008, *available at* http://www.wired.com/entertainment/music/news/2008/01/sony_music.

67. *Id.* (describing how watermarks are a form of "soft DRM," except that watermarks "do not restrict listeners from making backup copies or sharing music with friends, as does DRM coding.").

68. Digital Watermarking Alliance, Quick Facts, http://www.digitalwatermarkingalliance.org/quickfacts.asp (last visited Sept. 24, 2009).

watermarks: watermarks can be cracked, hacked, or otherwise circumvented.[69]

Finally, new business models have emerged which facilitate a legitimate form of file-sharing. The most popular example of this business model is Apple's iTunes store. Users can download iTunes software for free from Apple's website. Then, users can purchase songs from the iTunes store for ninety-nine cents each. This business model is not without drawbacks. Ninety-nine cents is a relatively expensive price for a song, when an individual song's worth is entirely subjective.[70] Additionally, iTunes generally contains a lesser variety of available content versus peer-to-peer services, and therefore, may be less useful to some potential users.[71] While this type of business model is certainly something to continue to consider and revise, in its current state it is not enough to curb illegal file sharing.[72]

IV. THE NEED FOR A NEW MULTILATERAL TREATY – THE FIRST STEP TO SOLVING INTERNATIONAL COPYRIGHT INFRINGEMENT

A. Reasoning Behind a New Multilateral Treaty

The previous Part of this Article illustrated the extensive failures of various legal, technological, and business solutions to international copyright infringement. It is the failure of these solutions that creates the necessity for a new multilateral treaty that seeks to harmonize substantive national laws relating to secondary liability in copyright. As is usually the case in international law, most nations are not quick to accede to treaties because treaties call on those nations to give up a degree of sovereignty and alter their substantive law to conform to other nations.[73] Therefore, it is appropriate to analyze the principles that necessitate, in this case, giving up this sovereignty.

In the United States, this principle is known as federalism, where many areas of law are left to the states, which are more adept to acting as a "Petri dish." As Judge Brandeis aptly stated, "[i]t is one of the happy incidents of

---

69. *See* Ed Felton, *How Watermarks Fail*, FREEDOM TO TINKER, Feb. 24, 2006, http://www.freedom-to-tinker.com/blog/felten/how-watermarks-fail (explaining various potential methods to circumvent digital watermark technology).

70. Sean Silverthorne, *Delivering the Digital Goods: iTunes vs. Peer-to-Peer*, Apr. 16, 2007, http://hbswk.hbs.edu/item/5594.html.

71. *Id.*

72. Over one billion songs have been purchased and downloaded from the iTunes music store; however, there are "an estimated ten million users of Internet-based peer-to-peer (p2p) networks logged on *at any one time* to swap music." *Id.*

73. For instance, the United States was initially unwilling to accede to Berne because of the provisions relating to Moral Rights directly conflicting with the Freedom of Speech in the U.S. Constitution, differences in copyright term, and a lack of any formalities as a prerequisite to copyright protection (the United States required notice and deposit, whereas Berne did not). EDWARD SAMUELS, THE ILLUSTRATED STORY OF COPYRIGHT (2000).

the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[74] In essence, the creation of new laws defaults to the individual states, unless the federal government steps in. Certain areas of law are limited to the federal government. One of these is copyright law.[75]

Analogous to the principle of federalism, the European Community has a "subsidiarity" principle.[76] The Treaty Establishing the European Community ("EC Treaty") sets out the definition of the subsidiarity principle and its application to future EU action:

> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.[77]

The definition is further explored in Protocol on the Application of the Principles of Subsidiarity and Proportionality annexed to the EC Treaty.[78] The Protocol, in addition to reiterating the provision from Article 5, sets out a number of guidelines to use in determining whether the conditions in Article 5 are fulfilled:

> - [T]he issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States;
>
> - [A]ctions by Member States alone or lack of Community action would conflict with the requirements of the Treaty . . . or would otherwise significantly damage Member States' interest;

---

74. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

75. *See* U.S. CONST. art. I, § 8, cl. 8 (empowering the U.S. Congress "[t]o 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."). Federal copyright law preempts any state copyright law in the United States. 17 U.S.C. § 301(a).

76. Consolidated version of the Treaty Establishing the European Community art. 5, 2002 O.J. (C 325) 33, 42 [hereinafter EC Treaty].

77. *Id.*

78. See Protocol on the Application of the Principles of Subsidiarity and Proportionality, 2006 O.J. (C 321) 308 (annexed to the consolidated versions of the Treaty on European Union and of the Treaty Establishing the European Community) [hereinafter EC Treaty Protocol 30].

> - [A]ction at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.[79]

There is one problem with diverse approaches to international copyright: in practice, these diverse approaches are not successfully protecting copyright, therefore, weakening copyright law on the whole. As illustrated by the previous Parts of this Article, if a torrent distribution website faces legal threats in a given country, it can simply be physically moved to another country with more lenient laws. Furthermore, users across the planet can access these torrent files and continue to commit willful direct infringement of copyrights by downloading copyrighted materials. This process represents an end run around the national systems of copyright.

Due to the fact that torrent sites can effectively forum shop for more lenient laws, something must be done in the international legal community to draw a greater number of nations across the globe into a unified set of international copyright laws.[80] If this does not happen, users in every nation will continue to be able to download copyrighted material at will.[81] It is BitTorrent's ability to transcend physical borders of nations that forces the necessity for an international solution. An international copyright solution would be effective in unifying national standards through existing international means,[82] and therefore, would be effective in closing the door to the end run around national systems of copyright.

The reasoning for a treaty focused on international secondary liability is not all that different from the reasoning behind the Berne Convention; it is merely the next step in the form of a response to a newer technology. Berne came about as a result of the lack of national boundaries:

> [t]he printed word, the musical composition, and the artistic creation know no national boundaries. They may just as readily be appreciated by the citizens of one country as by those of another, even where translation into another language . . . is necessary for this potential to be fully realized.[83]

---

79. *Id.* at 309.

80. Especially the modernized nations with the infrastructure to provide persons with the Internet and other related technologies necessary to commit infringement on the broad scale laid out in this article.

81. Organizations such as the Recording Industry Association of America (RIAA) have focused their efforts mainly on those who upload or "share" copyrighted material, not those that download the material. Therefore, users of torrent websites, such as Pisexy.org, which give "upload credits" to users who donate money to the server voluntarily (note that some torrent websites require a reasonable download to upload ratio for a user, to be allowed to continue using that website to obtain torrents), may not ever have to upload a file in order to download large numbers of files.

82. For instance, through an addition into TRIPs or the greater WTO.

83. RICKETSON & GINSBURG, *supra* note 22, at 19.

Furthermore, "[t]he circulation of pirate copies . . . was not necessarily confined to the pirate's own country; as these were more cheaply produced, it was often profitable to smuggle them back to the work's country of origin where they could undercut the price of copies of the original work."[84] At this time, nations "did not regard the unauthorized exploitation of foreign works as either unfair or immoral,"[85] but merely protected the works of their national authors.[86]

The current situation concerns the commercial exploitation of a copyrighted work via piracy, and the significant diminution of copyright holder's commercial stake in their copyrighted material due to piracy. Any individual can visit a torrent website, download a torrent, and be directed to a location where they can obtain an entire album of music for free.[87] Arguably, this situation is as bad as, if not worse than, the situation which provided reasons for creating Berne. The current situation produces a disincentive for artists to create — international file-sharing leaves a number of users with an incredibly simple and free method of obtaining artists' works, rather than purchasing those works through legitimate methods. A new international solution is needed. This is not a problem faced on a national scale — it is an international problem because of the cross-border nature of the Internet and BitTorrent.[88]

B. The Model Definition of a New Secondary Liability Multilateral Treaty

Harmonization of international copyright law must come on an international level in the form of a treaty that provides a required standard for national laws. The standard must be defined to meet a "sweet spot" along the spectrum of national laws noted in Part III. It should be as similar as possible to most current national laws, while still strict enough to solve the problem of mass copyright infringement through BitTorrent. Hopefully a large number of nations would accede to the new standard, creating an

---

84. *Id.* at 10–20.

85. *Id.* at 19.

86. *Id.*

87. Each album could cost anywhere from $10 to $20 in retail. This Article recognizes that not all individuals downloading this material would have otherwise purchased the material; however, conservatively removing those groups of people from estimation still leaves a substantial number of users that would have purchased the album. Therefore, a large profit is lost for the copyright holder.

88. Arguably, the failure to address this international problem on an international scale may render other international copyright laws useless. Certainly, those laws address direct infringement sufficiently enough, however, with the changing technologies, direct infringement is becoming more difficult to track, and therefore more difficult to stop. A solution is needed to stop those that can facilitate copyright infringement (i.e. secondary infringers), or else international copyright law may be rendered useless in protecting copyright holders' works.

international coalition. This international coalition could then sufficiently pressure nations less willing to agree. Additionally, this "sweet spot" standard should take into consideration the different parties that may be involved in the BitTorrent process.[89]

This Article suggests a definition that is somewhat in line with the definitions in existence in the United States, the United Kingdom, Canada, and Australia. In the United States, secondary liability is broken down into two subcategories: vicarious liability and contributory liability. Contributory infringement occurs "by intentionally inducing or encouraging direct infringement."[90] Contributory infringement of copyright is defined as either "(1) actively inducing, causing, or materially contributing to the infringing conduct of another person, or (2) providing the goods or means necessary to help another person infringe."[91] Vicarious liability occurs "by profiting from direct infringement while declining to exercise a right to stop or limit it."[92] The profit must be a direct financial benefit from the infringement.[93] Vicarious infringement is defined as "a person's liability for an infringing act of someone else, even though the person has not directly committed an act of infringement."[94] Contributory infringement has a closer connection to the actual directly infringing conduct, while one who vicariously commits infringement may be profiting from the infringement or otherwise condoning the infringement.

Many torrent distribution websites do generate a profit, although from advertising placed on the site.[95] It is questionable whether such advertising could be construed to be profiting from a direct infringement;[96] however, the aspect of control requisite under the U.S. standard may be met by torrent sites. Torrent site administrators can undoubtedly remove material placed on their websites by individual users, and furthermore, can likely ban user's Internet Protocol ("IP") addresses from the website.[97] The administrators have a large degree of control over the torrent site itself and any material placed on the site.[98]

---

89. *See supra* Part II.

90. Grokster, 545 U.S. at 930; Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1170 (9th Cir. 2007).

91. BLACK'S LAW DICTIONARY 796 (8th ed. 2004).

92. Grokster, 545 U.S. at 930; Perfect 10, 508 F.3d at 1173.

93. *Id.*

94. BLACK'S LAW DICTIONARY 797 (8th ed. 2004).

95. *See, e.g.*, Chris Williams, *International Copyright Talks Seek BitTorrent-killer Laws*, THE REGISTER, May 27, 2008, http://www.theregister.co.uk/2008/05/27/acta_leak/.

96. Grokster, 545 U.S. at 940.

97. FileShareFreak, *How to Set Up your own BitTorrent Website*, http://filesharefreak.com/2008/02/22/how-to-set-up-your-own-bittorrent-website-part-i/ (last visited Sept. 27, 2009) (showing the degree of control that BitTorrent website creators and administrators hold over the website and its content and illustrating the ability of those administrators to remove torrents that facilitate copyright infringement).

98. *Id.*

Contributory liability is the better approach to curb file-sharing as the technology currently stands because it is significantly closer to the directly infringing conduct, and without the contributory infringement, the direct infringement may not have been possible. As such, a "contributorily liable person/organization in copyright infringement," according to this Article, should be defined as "one that intentionally induces, assists, encourages, authorizes, or facilitates direct copyright infringement and who makes available, and has control over, the means to commit direct infringement."[99] The standard should be a rebuttable presumption of intent.

The first and arguably most important part of this definition is "intent." In some cases, such as with *The Pirate Bay*, intent will be fairly obvious — the "contributory infringer" will actively state that it desires to facilitate and promote copyright infringement.[100] In other cases, intent will have to be inferred. This is analogous to common law tort principles, which define intent to mean "that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it."[101] Torrent site administrators should be substantially certain that when they create a website, make it public, and allow other users to upload files that can be downloaded from the website, some of these files can and will point to copyrighted materials and that these files will be downloaded without the copyright holder's authority. These results are foreseeable for a reasonable person creating such a site. The general knowledge of substantially certain consequences is important, and should be presumed.

Torrent site administrators generally know that users may upload torrent files to the torrent site, and that these files may direct users to copyrighted material. Therefore, since torrent site administrators have this general knowledge and the control to remove torrents pointing to infringing works, there should be an affirmative duty to remove these torrent files upon notice from a copyright holder. From a practical standpoint, torrent site administrators should employ a filtering system that removes some torrents that point to infringing content. At the very least, this would provide a rebuttal to the presumption that torrent administrators are intentionally committing contributory infringement.

On the other hand, as in *Sony Betamax*, persons or organizations who create, sell, or give out a technology without the intent to commit direct infringement, and furthermore, without control over the technology once it

---

99. It is important to note that this Author believes that this definition would be successfully implemented by nations such as the United Kingdom, Australia, Canada, and the United States with, at worst, only minimal alterations to each nation's current state of law.

100. The "Legal" section of The Pirate Bay webpage states that "0 torrents has [sic] been removed, and 0 torrents will ever be removed." The Pirate Bay, Legal Threats Against The Pirate Bay, http://thepiratebay.org/legal (last visited Apr. 22, 2009).

101. RESTATEMENT (SECOND) OF TORTS § 8A (1965).

is placed in the hands of others, will be held to be not liable.[102] Unlike a website, which is constantly in flux of content and, more importantly, constantly in the administrator's control, a piece of software given out to the world leaves the creator's control and passes entirely to the user's control. A piece of software, such as a BitTorrent client, also has many legitimate uses, which are not infringing upon any copyright.[103] A single torrent file on a website is either infringing or not infringing[104] – there is no middle ground. While a torrent website is capable of non-infringing uses, unlike BitTorrent client software, a torrent website administrator retains control over the website.

A large issue faced by the imposition of such a definition will be the initial reaction by every sovereign nation to scaling back its sovereignty. The definition set forth above requires elements of intent and control, while generally, definitions in the United Kingdom, Canada, and Australia require some combination of "authorization" and "control."[105] Authorization, especially when combined with elements of control, seems to be similar to "intent" in the sense of general foreseeable awareness of probable unlawful uses, as defined above. Therefore, in order to conform to such a treaty, nations such as the United Kingdom, Canada, Australia, and the United States would have to change relatively little substantively. Assuming these nations were to implement such a substantive change, each would be able to place greater pressure on other nations, such as Spain and Sweden, which would need to make more substantive changes to their current laws in order to conform.

While this standard offers a presumption of intent to contribute to copyright infringement, that presumption should be rebuttable. The ability to rebut intent to contribute to infringement should help to limit the amount of collateral damage if the standard is applied to others. Returning to the various actors in the BitTorrent situation, some will be able to rebut the presumption of intent easier than others, and the following discussion will lay out some potential rebuttals that could indicate a lack of intent. For instance, BitTorrent client programmers do not retain control over the software program once they disseminate it to others. Additionally, BitTorrent client software has many substantial non-infringing uses. Without explicit evidence of intent, like a programmer stating that he created the software in order to facilitate copyright infringement, the presumption of intent should be rebutted. The standard articulated above

---

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

103. A particular user could, for instance, create a song, digitize it, create a torrent file, and upload that torrent file. By doing so, the user has authorized others to download the song using the torrent file, and therefore, his copyright on the song has not been infringed.

104. This is true at least in most cases. In theory, a user could create a torrent file that linked to multiple files, some infringing, some not, but regardless, that file would be facilitating infringement if used.

105. *See supra* Part III.B.

probably is less important when applied to some of the other "BitTorrent actors" such as the "peers," "seeders," "rippers," and creators and uploaders of torrent files. This is because these actors are directly infringing copyright through circumventing DRM (in the case of rippers) and trafficking in copyrighted materials without authorization (in the case of "peers," "seeders," and "uploaders").

Where the standard becomes murkier is in its application to torrent websites and trackers. This is because a level of control is maintained in both situations, but also both torrent websites and trackers are capable of substantially non-infringing uses. Due to the level of control, and the fact that there are substantially non-infringing uses, another element — that of filtering systems or regular removal of potentially infringing torrent files — should be examined in determining whether intent is present. These are, of course, merely examples of potential rebuttals to the presumption of intent, but if a torrent website is attempting to avoid infringing copyrights proactively, intent and, therefore, liability should not be found.

Additionally, the nations listed above should find contributory liability and, in general, secondary liability to be a relatively simple step in substantive law — a mere extension to already existing international copyright law. The step is especially well-illustrated when compared to the steps taken by agreements like Berne, which caused these nations to alter course significantly in terms of copyright law.[106] Prior to Berne, most nations did not recognize copyright in foreign authors' works, only in domestic works.[107] Berne introduced national treatment, which forced each agreeing nation to recognize, and protect, foreign authors' works. This was not an extension to any existing law, but a complete reversal of legal course and policy. This addition of substantive law, which some nations already have, and which others are slowly moving toward, will speed up the process — not reverse any course already charted.

This rebuttable presumption of intent will likely create a lot of opposition. Therefore, a non-exhaustive exemplary list of rebuttals to the presumption should, from a policy standpoint, help to limit the collateral damage from such a strict standard. While there will certainly be some opposition to the implementation of contributory liability in a copyright infringement definition at an international level, the benefits and quick forward progress of such a substantive law would, hopefully, quickly eradicate secondary infringement of copyrights. Eradicating secondary infringers internationally, especially the torrent sites that so efficiently facilitate direct infringement, would impede the direct infringement of copyrights worldwide.

---

106. Berne Convention, *supra* note 21.
107. RICKETSON & GINSBURG, *supra* note 22, at 19.

C. Peripheral Issues to a New Multilateral Treaty

While this Article focuses mainly on a new international definition for contributory infringement of copyright, the creation of a multilateral treaty would likely face a number of external issues in its creation. Though these are peripheral issues, this Article will acknowledge a few, namely: problems relating to amendment, what entity will promulgate the treaty, enforcement measures and remedies, and conflicts of laws.

Technology is constantly in flux, and new inventions crop up frequently. Any new multilateral treaty will require amendment, at some point in the future, to keep up with these changes. Without sufficient amendment provisions, issues could arise that may lead to non-adherence, making the treaty inadequate.[108] Likewise, there may be questions as to what nation's law to apply in a given situation, necessitating a conflict of laws provision. There may also be problems caused by enforcement differences. Finally, a treaty must also address the question of what entity would be most effective in promulgating it.[109]

V. CONCLUSION

This Article argues that national laws relating to secondary liability in copyright have been largely ineffective in stalling copyright infringement on the international scale. These laws may stop the secondary infringement from occurring within the borders of that given nation, but the secondary infringer can simply move to a nation with more favorable laws. This enables anyone, including persons within a nation with "strict" secondary liability laws, to commit direct infringement with the assistance of the moved secondary infringer. Other solutions to this problem, especially as it is facilitated by the BitTorrent technology, have been largely unsuccessful.[110] Secondary liability in copyright is wholly absent from international agreements. A new multilateral treaty, providing a substantive definition for secondary liability — more specifically, contributory liability in copyright — would effectively create a coalition of nations pledged to

---

108. For instance, the European Patent Convention, and subsequent Community Patent Convention, in the European Union, are effectively impossible to amend in practical application, due to a *de facto* unanimity provisions. *See generally* Vincenzo Di Cataldo, *From the European Patent to a Community Patent*, 8 COLUM. J. EUR. L. 19 (2002) (describing the failures of the EPC and CPC relating to the community patent in Europe).

109. This author believes that the WTO would likely be the best option for the promulgation of such a treaty, since the WTO has a large membership of nations, a dispute settlement process already in place, and authorizes sanctions by (and of) its Member States. There will be, without a doubt, other issues not mentioned here, and therefore the issues mentioned are stated merely as examples of peripheral issues. However, these issues lie outside the scope of this Article.

110. *See generally supra* Part III.

preventing infringement. This coalition would place pressure on the nations that provide safe harbors for secondary infringers.

A new substantive definition, however, is only the first step in the fight against international copyright infringement. While there are other positive steps that should be further explored, such as new business models, this first step is arguably the most important because it unifies the law in every nation, eradicating the places for secondary infringers to use as a "base of operations" to facilitate direct infringement. New business models should continue to be investigated, especially business models using legitimate BitTorrent websites that feed copyright owners royalties. BitTorrent is one of the most efficient technologies to date, and it would be a waste of resources not to look into legal business models utilizing those technologies. Hopefully, large-scale international copyright infringement will be curbed, while providing both copyright owners and consumers the incentive to use new technologies in legal ways.