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Notes

Online Music Sharing in a Global Economy: The U.S. Effort to Command (or Survive) the Tidal Wave

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INTRODUCTION

For many recent college graduates, the soundtrack to the college experience was broadcast from a personal computer. Napster was undoubtedly a prevalent cultural force on many college, as well as high school campuses, and its users rarely questioned the appropriateness of their habit. Many students used Napster with the same frequency as their e-mail services. Some enthusiasts may have realized that what they were doing was morally questionable, but most saw the service as a way to collect more music than they would ever be willing to pay for, or as a way to “audition” new artists before purchasing their CDs.

With the boom of the Internet in the early 1990s, downloading a five minute song could take up to several hours.¹ Then, in 1999, a college student named Shawn Fanning developed a peer-to-peer file sharing system, Napster, which used the faster MP3 format.² By 2002, laptop stereos were the norm on college campuses,³ and at its peak, Napster enrolled an estimated sev-

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1. Stacy Berger, *The Use of the Internet to “Share” Copyrighted Material and its Effect on Copyright Law*, 3 J. LEGAL ADVOC. & PRAC. 92, 92 (2001).

2. *Id.*; see also Peter Brown, *The Fight’s Just Starting*, 23 NAT’L L.J., Oct. 9, 2000, at A16 (Col. 1); Michael S. Mensik & Jeffrey C. Groulx, *From the Lightweight ‘Rio’ Flows Heavyweight Battle: Two-ounce Device that Can Play Music Files Downloaded from the Net Sparks a Dispute for Control Over Digital Music Distribution*, 21 NAT’L L.J., Dec. 14, 1998, at B5 (Col. 2).

3. Heather Nehila, *International Copyright Law: Is it Music to American Ears?*, 16 TEMP. INT’L & COMP. L.J. 199, 199 (2002); see also Stephen W. Webb,

enty million users.⁴ Currently, opposing societal views of the appropriateness of Napster-spinoff usage continue to spark debate.⁵ The courts, global trade organizations, and music industry, however, have cracked down significantly since Napster's unrestrained, explosive inception, and have utilized a variety of different tactics in their efforts to quell music-sharing's popularity.⁶

Music-sharing is not just a domestic problem. Performers and producers of music in all nations will benefit from tighter copyright controls. Moreover, the international nature of the Internet makes it imperative that any solution to the music-sharing problem be a truly global solution.

This Note highlights some of the legal inadequacies of current efforts to control international music sharing. Part I outlines the important historical events that led to the music-sharing crisis. Then, using the *Metro-Goldwyn-Mayer Studios Inc. v. Grokster* case as an example, Part II illustrates how U.S. personal jurisdiction law may falter in future cases of online music-sharing litigation. The possibility for personal jurisdiction problems in *Grokster*, however, is only one example of how countries, when left to their own legal devices, may fail to protect copyright holders effectively. Consequently, Part II of this Note also examines how the TRIPS Agreement fails to provide sufficient provisions for enforcing copyright infringement. Ultimately, this Note shows that, until uniform enforcement pro-

RIAA v. Diamond Multimedia Systems: *The Recording Industry Attempts to Slow the MP3 Revolution – Taking Aim at the Jogger Friendly Diamond Rio*, 7 RICH. J.L. & TECH. 5 (2000), available at <http://www.richmond.edu/jolt/v7i1/note2.html>.

4. See Matt Richtel, *With Napster Down, Its Audience Fans Out*, N.Y. TIMES, July 20, 2001, at A1.

5. See, e.g., John Snyder & Ben Snyder, *Embrace File-sharing, or Die* (Feb. 1, 2003), at http://www.salon.com/tech/feature/2003/02/01/file_trading_manifesto/print.html (arguing that 200 million people worldwide cannot be wrong when it comes to the power of file sharing). John Snyder is a record executive, who argues that popular MP3s ultimately lead to more record sales, and that a more efficient, legitimate online subscription service is needed to satisfy the demand for easier and cheaper music access; Ben Snyder is his music-sharing son. *Id.* In contrast, for a persuasive argument in favor of compensating artists and recording studios for their products, see Joshua P. Binder, *Current Developments of Public Performance Rights for Sound Recordings Transmitted Online: You Push Play, But Who Gets Paid?* 22 LOY. L.A. ENT. L. REV. 1, 2 (2001) (arguing that the benefits derived from musical works in a commercial setting are assets, and therefore should be compensated, like other capital investments).

6. For a comprehensive discussion of concerns and strategies of the courts and the music industry, see Jed Scully, *Beyond Napster—Is it Just Music? Or Are Judicial Resolutions Ineffective in Digital Commerce?* 15 TRANSNAT'L LAW. 313 (2002).

visions are enacted on a global level, the digital revolution will surge onward, leaving the recording industry to pick up the pieces.

I. CONTRIBUTING FORCES TO THE CURRENT STATE OF THE LAW REGARDING MUSIC SHARING

A. INTERNATIONAL INTELLECTUAL PROPERTY LAW

Intellectual property law attempts to protect inventors or creators of intellectual goods and services by granting them the exclusive rights to control the use of their creations for a certain length of time.⁷ Historically, copyright law developed out of the invention of the printing press, because the publishers that were expending large sums of money to print materials needed some way to insure that their investments would reap a profit.⁸ Today, a commonly advanced philosophical justification for copyright law is utilitarian.⁹ The utilitarian theory posits that the purpose of copyright is to encourage the production of the widest possible variety of creative goods at a low cost.¹⁰ The theory is that people have no incentive to create artistic expressions or new technologies if they do not receive compensation for their efforts.¹¹ That concern, however, is balanced against the public need for information.¹² Utilitarian theory is contrasted with the natural rights theory, which suggests that a creator has an in-terminable *moral* right to his or her creative product.¹³ Both schools have influenced intellectual property law significantly.¹⁴ Intellectual property law has also evolved over time with the in-

7. INTRODUCTION TO INTELLECTUAL PROPERTY: THEORY AND PRACTICE 3 (World Intellectual Property Org. ed., Kluwer Law Int'l Ltd., 1997).

8. *Id.* at 23.

9. PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE 3 (Oxford Univ. Press 2001) (describing the utilitarian theory of copyright law).

10. *Id.*

11. INTERNATIONAL INTELLECTUAL PROPERTY LAW 268 (Anthony D'Amato & Doris Estelle Long eds., 1997). Copyright laws also serve to protect inventors or performers from competitors pirating their ideas or works. *Id.*

12. Paul Katzenberger & Annette Kur, *TRIPS and Intellectual Property*, in 18 IIC STUDIES IN INDUSTRIAL PROPERTY AND COPYRIGHT LAW: FROM GATT TO TRIPS—THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS 5–7 (Friedrich-Karl Beier & Gerhard Schricker eds., 1996).

13. INTERNATIONAL INTELLECTUAL PROPERTY LAW, *supra* note 11, at 27–28.

14. *Id.*

roduction of new media, such as the phonogram¹⁵ or the computer. The evolution of substantive international copyright norms has generally necessitated increased minimum standards for protected subject matter and exclusive rights.¹⁶

To understand the current international intellectual property conflicts over file sharing, it is important to understand the unique copyright issues that music sharing raises within a historical context. Currently, most nations consider the protection of digital reproductions of musical works to be under the umbrella of neighboring rights; in other words, rights that "neighbor" on, or attach to, the copyright privileges authors of original works possess.¹⁷ Neighboring rights include the rights of producers of phonograms in their phonograms, and the rights of broadcasting organizations in their radio and television programs.¹⁸ Protection of neighboring rights was first established at the Rome Convention,¹⁹ which came into force in May 1964.²⁰ The Rome Convention was followed by the Geneva Phonograms Convention,²¹ which served to remedy two of the most notable shortcomings of the earlier treaty: first, the Rome Convention does not require minimum rights against the unauthorized importation or allocation of phonograms;²² and second, the Rome Convention had attracted only a few adherents because of its insistence on simultaneous adherence to the Berne and Universal Copyright Convention and due to the political antagonism towards the treaties that existed at the time.²³ The World Intel-

15. Article 3 of the Rome Convention defines "phonogram" as "any exclusively aural fixation of sounds of a performance or other sounds." International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, Oct. 26, 1961, art. 3, 496 U.N.T.S. 43, 46.

16. GOLDSTEIN, *supra* note 9, at 13.

17. INTRODUCTION TO INTELLECTUAL PROPERTY: THEORY AND PRACTICE, *supra* note 7, at 158. The United States, however, does not make the neighboring rights distinction and consequently treats *all* copyright issues as being under the umbrella of copyright law. *Id.* The primary remedies available to an owner of a violated copyright are an injunction to curb future infringement, and damages that compensate the copyright owner for the depreciation caused by the infringement. *Id.* at 169.

18. *Id.*

19. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, Oct. 26, 1961, 496 U.N.T.S. 43.

20. GOLDSTEIN, *supra* note 9, at 38. The United States was not a signatory to the Rome Convention, but the treaty was signed by forty other states. *Id.*

21. Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, Oct. 29, 1971, 866 U.N.T.S. 67.

22. GOLDSTEIN, *supra* note 9, at 41.

23. *Id.*

lectual Property Organization (WIPO)²⁴ Performances and Phonograms Treaty²⁵ further supplemented the Rome Convention and the Geneva Agreement by adding additional substantive requirements. Under the Performances and Phonograms Treaty, performers receive rights of “attribution” and “integrity” in their live aural performances or in their phonogram products.²⁶ The agreement requires that performers receive the economic rights to fix their performances, to broadcast unfixed performances, to reproduce the performances fixed in their phonograms, and to distribute those performances fixed in phonograms.²⁷ The treaty also gives phonogram producers comparable rights for making those phonograms available to the public.²⁸

B. THE TRIPS AGREEMENT

On December 15, 1993, the Uruguay Round of multilateral trade negotiations held under the General Agreement on Tariffs and Trade (GATT) concluded, and the resulting agreement was adopted on April 15, 1994, in Marrakesh, Morocco.²⁹ The Uruguay Round included the first multinational discussion of the impact of intellectual property rights on international trade.³⁰ The result of that specific discussion was the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).³¹ This Note focuses specifically on the neighboring

24. In 1967, WIPO was founded as an agency of the United Nations to administer treaties and facilitate global cooperation in intellectual property matters. World Intellectual Property Organization, *General Information*, at <http://www.wipo.int/about-wipo/en/gib.htm> (last visited Sept. 25, 2004). Currently, the organization has 181 member states and administers 23 treaties. See World Intellectual Property Organization, *Treaties and Contracting Parties*, at <http://www.wipo.int/treaties/en/index.html> (last visited Sept. 25, 2004). WIPO treaties fall into three categories: (1) those that establish international protection; (2) those that facilitate international protection; and (3) those that establish classification systems along with procedures for improving them and keeping them current. INTRODUCTION TO INTELLECTUAL PROPERTY: THEORY AND PRACTICE, *supra* note 7, at 29.

25. WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 78, available at <http://www.wipo.int/treaties/en/ip/wppt/index.html>.

26. GOLDSTEIN, *supra* note 9, at 43.

27. *Id.*

28. *Id.*

29. INTRODUCTION TO INTELLECTUAL PROPERTY: THEORY AND PRACTICE, *supra* note 7, at 475 (citing Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement]).

30. *Id.*

31. TRIPS Agreement, *supra* note 29. The TRIPS Agreement states explicitly

rights provisions of this treaty.

The TRIPS Agreement specifies that countries should provide effective enforcement of neighboring rights for phonogram performers and producers.³² It is ambiguous, however, in terms of procedural detail, an inadequacy that is described later in this Note. Nevertheless, the TRIPS Agreement is the first widely subscribed multilateral intellectual property agreement that is enforceable between governments, which allows for conflict resolution through the World Trade Organization's dispute settlement mechanism.³³ The TRIPS Agreement also provides minimum standards of copyright enforcement, although nations are free to enact stricter standards than are contemplated in TRIPS.³⁴

The Berne Convention, which is incorporated into the TRIPS Agreement by reference, provides that "all authors of works published in contracting states, irrespective of their nationality, should be treated without discrimination under the national law of a member country and without being subjected to any formalities," like registration or notice.³⁵ International conventions and agreements on intellectual property protection,

that it does not impair the validity of either the Revised Berne Convention or the Rome Convention, although it may take precedence over both prior agreements in the field of music piracy, because of its specific regulation of phonogram producers in Article 14. *Id.*; see also Paul Katzenberger, *TRIPS and Copyright Law*, in 18 IIC STUDIES: STUDIES IN INDUSTRIAL PROPERTY AND COPYRIGHT LAW: FROM GATT TO TRIPS—THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS 60 (Friedrich-Karl Beier and Gerhard Schriker eds., 1996) (citing TRIPS Agreement, art. 14).

32. TRIPS Agreement, *supra* note 29, arts. 41–49.

33. *Id.*

34. GOLDSTEIN, *supra* note 9, at 16. Copyright treaties may manifest themselves differently in different nations. Some countries view treaties as self-executing, or as existing as a source of rights directly applicable to private parties, while others hold that private actions must be founded on domestic legislation that implements the treaty. *Id.* at 14. International intellectual property expert Paul Goldstein uses the following example:

[T]he owner of world-wide rights in a work, if the work is exploited without the owner's authority in a civil law country like Italy, may directly invoke the applicable terms of the Berne Convention as the governing law while . . . in Canada . . . the owner's rights will be measured exclusively by the terms of the Canadian Copyright Act.

Id. at 14–15. Nevertheless, if a country holds a treaty to be self-executing, that does not mean that the nation cannot enact legislation encompassing more subject matter or extend more exclusive rights than are contemplated by the treaty's minimum standards. *Id.* at 16.

35. INTERNATIONAL TREATIES ON INTELLECTUAL PROPERTY 5 (Marshall A. Leaf-fer ed., 2d ed. 1997).

however, contain very few regulations on enforcement of rights.³⁶ If signatory countries choose to stipulate enforcement measures for their own countries, there is no assurance that they will be effective or will match the force of other nations' laws.³⁷

C. UNITED STATES COPYRIGHT LAW

1. Copyright Act of 1976

As previously indicated, member states of WIPO are allowed to supplement the treaty agreements to which they are signatories with stricter laws.³⁸ In recent centuries, the United States has been a massive force in intellectual property output, and consequently, has some of the most comprehensive copyright protection legislation in the world. However, one of the primary problems with developing a strategy for curbing the music sharing revolution is finding a feasible legal framework for challenging it.³⁹ The United States Copyright Act of 1976 extended copyright protection to specific fixed expressions, like books, movies, sculptures, musical works, and sound recordings, and was the first legislation to provide for protection of digital expression, by granting exclusive rights to creators of computer programs.⁴⁰ The Copyright Act identifies six exclusive rights of the creator: the rights to reproduce, adapt, distribute, publicly display, and publicly perform a copyrighted work, along with, in the case of sound recordings, the right to perform the digital audio transmission publicly.⁴¹ Section 101 of the Act defines the transmission of a song as a communication by any device in which "sounds are received beyond the place from which they are sent."⁴²

36. Thomas Dreier, *TRIPS and the Enforcement of Intellectual Property Rights*, in 18 IIC STUDIES: STUDIES IN INDUSTRIAL PROPERTY AND COPYRIGHT LAW: FROM GATT TO TRIPS— THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS 249 (Friedrich-Karl Beier and Gerhard Schrickler eds., 1996).

37. See *id.*

38. See *id.*

39. See generally Natalie Koss, *The Digital Music Dilemma: Protecting Copyright in the Age of Peer-to-Peer File Sharing*, 5 VAND. J. ENT. L. & PRAC. 94 (2003).

40. 17 U.S.C. § 101 (1994 & Supp. V 1999); see Binder, *supra* note 5, at 3.

41. 17 U.S.C. § 106 (1994 & Supp. V 1999); see also Binder, *supra* note 5, at 3.

42. 17 U.S.C. § 101.

2. *Digital Millennium Copyright Act*

The Copyright Act was amended in 1998 with the enactment of the Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 512, which was enacted partly in response to the WIPO conference in Geneva.⁴³ The DMCA governs limitations on liability relating to material online. The objective of Title 1 of the DMCA was to rewrite U.S. copyright laws to comply with two of the WIPO Treaties that were concluded in 1996, as well as to strengthen protection for copyrighted works in electronic formats.⁴⁴ The DMCA makes it illegal for a person to manufacture, import, or sell to the public any device or technology that is designed primarily to circumvent copyright protection measures.⁴⁵

Napster, the Internet's first music sharing service, allowed individual users to upload individual CD collections onto the Internet, to search the collections of other users, and to download the music they desired.⁴⁶ Napster included a disclaimer on its website which stated that users were responsible for complying with federal and state copyright laws: "As a condition to your account with Napster, you agree that you will not use the Napster service to infringe the intellectual property rights of others in any way."⁴⁷ It was widely understood, however, that illegal files were being traded at a tremendous rate.

Ultimately, on December 6, 1999, eighteen record companies joined forces and filed suit against Napster for contributory and vicarious infringement of the right to distribute and reproduce a copyrighted work.⁴⁸ Napster countered with a summary

43. See Amy K. Jensen, *Copy Protection of CDs: The Recording Industry's Latest Attempt at Preventing the Unauthorized Digital Distribution of Music*, 21 J. MARSHALL J. COMPUTER & INFO. L. 241, 247 (2003) (citing Digital Millennium Copyright Act, 17 U.S.C. § 512 (1998)).

44. Nehila, *supra* note 3, at 204.

45. *Id.*

46. See *id.*

47. See Liz Robinson, *Music on the Internet: An International Copyright Dilemma*, 23 U. HAW. L. REV. 183, 211 (2000) (quoting *About Us, Napster*, at [http://www.napster.com/company\\$.html](http://www.napster.com/company$.html) (last visited Dec. 19, 2000)). Napster's website, along with its service, has been radically revamped, so this page is currently unavailable. See also David Balaban, *The Battle of the Music Industry: The Distribution of Audio and Video Works Via the Internet, Music and More*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 235, 236-37 (describing how a single copy of a sound recording, once uploaded onto the Internet, can provide an unlimited number of perfect, unlicensed copies available for free distribution).

48. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001); see Nehila, *supra* note 3, at 207.

judgment motion, arguing that it was protected under the safe harbor provision of the DMCA, 17 U.S.C. § 512(a).⁴⁹ The company argued that: (1) any infringing users have no direct relationship with Napster and are not engaged in a commercial activity; (2) Napster is supplying a technology that is capable of significant non-commercial non-infringing uses; (3) consumers are sharing music on a non-commercial basis; and (4) Napster is an ISP that has no ability to “know” the specific locations of its users.⁵⁰ The court held that because Napster did not “transmit, route, or provide connections through its system,” it had failed to demonstrate that it qualified under the safe harbor rule.⁵¹ After Napster lost its summary judgment motion, it again lost at the appellate level with a fair use argument.⁵²

49. *A&M Records, Inc. v. Napster, Inc.*, No. C 99-05183 MHP, 2000 WL 573136, at *1 (N.D. Cal. May 12, 2000), *aff'd* *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). The safe harbor provision of the DMCA limits liability “for infringement of copyright by reason of the [service] provider’s transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider . . .” 17 U.S.C. § 512(a) (1999). It states:

Transitory digital network communications— A service provider shall not be liable for monetary relief . . . for injunctive or other equitable relief, for infringement of copyright by reason of the provider’s transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if—

the transmission of the material was initiated by or at the direction of a person other than the service provider;

the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;

the service provider does not select the recipients of the material except as an automatic response to the request of another person;

no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and

the material is transmitted through the system or network without modification of its content.

Id.

50. Nehila, *supra* note 3, at 208.

51. *A&M Records, Inc.*, 2000 WL 573136, at *8.

52. *See A&M Records, Inc.*, 239 F.3d at 1004.

3. Fair Use Doctrine

The fair use doctrine, codified at 17 U.S.C. § 107, provides courts with four factors to determine whether copyright infringement has occurred.⁵³ Those four factors are: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.⁵⁴ Another important aspect of the analysis pertaining to technology that facilitates copying is whether the product is also capable of noninfringing uses.⁵⁵ Noninfringing uses can include a variety of uses, such as watching movies that have been paid for on a VCR, or recording birthday parties on a camcorder.⁵⁶ Some illegitimate online music distributors have attempted to gain protection under the fair use doctrine.⁵⁷ As it currently stands, however, the fair use doctrine does not encompass digital transmission of music.⁵⁸

D. KAZAA LITIGATION

One of Napster's most successful progeny is Kazaa, an Australian venture headed by entrepreneur Nikki Hemming, with operations scattered throughout the globe in Estonia, Australia,

53. 17 U.S.C. § 107 (1976).

54. *Id.*

55. Jeffrey P. Weingart & Monica B. Richman, *Copyright Law: Fair Use and the Internet*, NAT'L L.J., Oct. 2, 2000, at B8; *see, e.g.*, *Oak Indus. Inc. v. Zenith Elec. Corp.*, 697 F. Supp. 988 (N.D. Ill. 1988) (describing how the seller of a device, which is incidentally capable of performing an infringing function unrelated to its normal use, is not normally liable for contributory infringement).

56. For example, in *Sony Corp. of Am. v. Universal City Studios, Inc.*, the Supreme Court held that Sony Entertainment Corporation could not be liable for videotape copyright infringement of Universal's television programs, because videotaping was merely a privately utilized mechanism for viewing programs at a later time. 464 U.S. 417, 442 (1984). The Court also held that the individual consumer act of creating a personal archive did not create enough of a detrimental effect on the market to warrant its prohibition. *Id.* In addition, the Court found that the Betamax videotaping machine was capable of "substantial noninfringing uses," which added to its acceptability. *Id.*

57. *See* Weingart & Richman, *supra* note 55, at B8 (discussing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994), *Sony Corp. of Am.*, 464 U.S. at 417; *UMG Recordings, Inc. v. MP3.Com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000), *A&M Records, Inc. v. Napster, Inc.*, No. C 99-5183 MHP, 2000 U.S. Dist. LEXIS 11862, at *1 (N.D. Cal. Aug. 10, 2000)); *see also* Nehila, *supra* note 3, at 199.

58. Weingart & Richman, *supra* note 55, at B8.

Vanuatu, Denmark, Sweden, the Netherlands, and the West Indies.⁵⁹ The company will not explain how its software ultimately works, although it does deny having a central server like Napster.⁶⁰ The wildly popular spin-off has attracted tens of millions of Internet users around the world.⁶¹ The developer of the technology defends the product as a "breakthrough technology that makes things more efficient," and as "a solution that everyone was crying out for," rather than as an instrument manipulated to infringe upon recording companies' copyright privileges.⁶²

The development of the Kazaa BV Company was truly a global affair. Three Estonian youths wrote the code, and Swedish and Danish businessmen joined together to market the technology as a Netherlands company.⁶³ Eventually, Kazaa BV, in response to impending litigation in the Netherlands, sold its key assets to Sharman Networks, which ultimately incorporated in Vanuatu.⁶⁴ The RIAA is convinced that the Sharman decision to formalize its venture in this very private country was based on a desire for secrecy and refuge from international copyright laws; however, Sharman maintains that it was merely seeking the best tax situation.⁶⁵

Kazaa was successful in its attempts to fend off litigation in the Netherlands.⁶⁶ The company, however, did not fare as well in the United States.⁶⁷ In 2003, two related cases were joined in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster*.⁶⁸ Motion picture and recording industry members brought the first case under 17 U.S.C. § 501, as a violation of their copyright privileges.⁶⁹ Professional songwriters and music publishers brought the second case as a class action citing similar copyright claims against the

59. Associated Press, *Hollywood Attacks File-Sharing Site*, CBS NEWS.COM, Feb. 3, 2003, available at <http://www.cbsnews.com/stories/2003/02/030tech/main539104.html>.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 243 F. Supp. 2d 1073, 1079 (C.D. Cal. 2003); Associated Press, *supra* note 59, available at <http://www.cbsnews.com/stories/2003/02/030tech/main539104.html> (noting that Sharman Networks is now Kazaa's official company name).

65. *Grokster*, 243 F. Supp. 2d at 1079.

66. *Id.*

67. *See id.*

68. *Id.* at 1080.

69. *Id.*

defendant companies.⁷⁰ The two actions were subsequently consolidated for discovery and pretrial purposes.⁷¹

The consolidated action was brought against Grokster, MusicCity, and Kazaa BV, three separate companies, each of which, at the time of the filing of the suit, branded, marketed, and distributed individual software for music sharing.⁷² Their legal issues were very much the same, however, because all three companies initially utilized the same "FastTrack" networking technology as their peer-to-peer (P2P) platform consisting of software that was developed by the founders of Kazaa BV, Niklas Zennstrom and Janus Friis.⁷³ Consequently, users of all three software platforms were connected to the same P2P network and could exchange files freely.⁷⁴

1. *How the Kazaa System Functions*

The Kazaa system operates in a manner conceptually analogous to the original Napster format, although there are some significant modifications.⁷⁵ Essentially, the Sharman company provides its users with the Kazaa Media Desktop (KMD), which is proprietary software that allows online customers to search for and exchange digital media with other FastTrack Network users across the globe.⁷⁶ The Kazaa.com website serves as a central distribution and customer service hub for the software.⁷⁷ Sharman, however, denies having a central server like Napster.⁷⁸ Most of Sharman's revenue is generated through advertising on its website, because the KMD soft-

70. *Id.*

71. *Id.*

72. *Id.* In a footnote, the court indicates that operations have changed since the filing of the lawsuit. *Id.* at 1080 n.1. First, the operation of the Kazaa system was transferred to Sharman Networks. *Id.* Second, the MusicCity/Streamcast defendant no longer uses the FastTrack technology. *Id.* Now, Streamcast employs the "open" Gnutella networking technology and distributes its own technology rather than a branded version of the Kazaa Media Desktop it previously marketed. *Id.* This is a good example of how quickly things change in Internet commerce.

73. *Id.*

74. *Id.*

75. *Id.* at 1081.

76. *Id.*

77. *Id.* The software can be downloaded from servers (operated by Sharman) to the individual user's computer. *Id.* Once the software is downloaded, the user can elect to share various files on the user's hard drive, such as music or video files, e-books, text files, or software applications. Once the share feature is enabled, the user is automatically connected to the FastTrack network. *Id.*

78. *Id.*

ware itself is free. Sharman does not directly sell advertising space; rather, it bundles its KMD software with other third-party software that operates whenever KMD is launched.⁷⁹ The third party software, in turn, attracts advertising from other third-party servers, and then displays that advertising through the KMD interface.⁸⁰

2. Sharman's Motion to Dismiss for Lack of Personal Jurisdiction

In January 2002, Kazaa was facing litigation in both the Netherlands and in California.⁸¹ It was at this time that it transferred ownership of the company's key assets to Sharman Networks, including the Kazaa.com website and domain, the KMD software, and a long-term license to the FastTrack software.⁸² Essentially, Sharman acquired the primary assets of the company without formally acquiring the company.⁸³ Sharman explicitly disclaimed assumption of any of Kazaa BV's liabilities, including any liability from the pending lawsuits.⁸⁴ Kazaa BV, however, ceased defending the California action early on in the litigation, so the court's analysis centered on Sharman's argument for lack of personal jurisdiction.⁸⁵ On January 9, 2003, a district court judge in California denied Sharman's motions to dismiss for lack of personal jurisdiction, lack of subject matter jurisdiction, improper venue, and *forum non conveniens*.⁸⁶ Nevertheless, the court's decision and supporting argument is not a complete panacea to the complex, international copyright issues that future cases may present. Unless the United States revisits its conception of personal jurisdiction with an eye for the possibility of online contacts, future control of illegal music sharing will be significantly limited.

E. CURRENT EFFORTS

In September 2003, the Recording Industry Association of America (RIAA) unleashed a series of individual lawsuits

79. *Id.*

80. *Id.*

81. *Id.* at 1080.

82. *Id.* at 1080–81.

83. *Id.* at 1081.

84. *Id.* at 1080.

85. *Id.* at 1081–82.

86. *Id.* at 1079.

against music-sharers across the country, as well as in Denmark, Germany, Italy, and elsewhere.⁸⁷ The RIAA hired an undisclosed company to search through a list of several hundred popular songs and to automatically send a “copyright infringement warning” to Grokster and Kazaa users who seemed to be sharing those musical works.⁸⁸ The RIAA estimated that one million of those messages could be sent out every week.⁸⁹ It is unclear, however, whether industry efforts will be able to curtail the escalating momentum of the Napster spin-offs.⁹⁰ Technological advances in sound quality and download speed continue to attract new users who are tired of paying for expensive CDs, and websites that allow for “artist authorized” downloads will continue to blur the lines between music piracy and free marketing.⁹¹ Napster has reopened its website as a legitimate music

87. Houston Chronicle News Services, *Students Scared, Angry over Music Lawsuits* (Sept. 16, 2003), available at <http://www.chron.com/cs/CDA/ssistory.mpl/headline/tech/2090660>. The RIAA reported that it was suing 261 frequent users across the United States (with a large percentage of college students as targets) for as much as \$150,000 per song distributed online. See Frank Ahrens, *RIAA Lawsuits Meet Surprised Targets*, WASH. POST, Sept. 10, 2003, available at <http://www.msnbc.com/news/964291.asp?cp1=1>; see also Torrance Mendez, *US Recording Giants Hunt Online Pirates—Download Downside*, WEST AUSTL., June 27, 2003, available at 2003 WL 64454494; Steve Seidenberg, *New Battleground in File-Sharing: After Copyright Loss, Strategy Shifts to Going After Individuals*, NAT'L L.J., May 5, 2003, at A15; *Top European Music Stars Urge Ban on Internet Music Sharing*, CNEWS, July 14, 2000, available at http://www.canoe.ca/TechNews0007/13_mp3.html.

88. See Ahrens, *supra* note 87, available at <http://www.msnbc.com/news/964291.asp?cp1=1>.

89. Seidenberg, *supra* note 87, at A15. It is unclear, however, if the warning messages would be read. Users leave file-sharing programs running unattended for hours at a time, and rarely read the IM messages that come with the system. *Id.* It is also undecided whether the messages violate some state anti-spam laws, or whether the users could possibly sue for trespass to chattels. *Id.*

90. See Koss, *supra* note 39, at 96. Many Americans feel that they are entitled to “free music,” because fair use allows for recording of music off the radio. *Id.* at 95. Furthermore, public perception of the recording industry is one of skepticism and cynicism. See Houston Chronicle News Service, *supra* note 87, available at <http://www.chron.com/cs/CDA/ssistory.mpl/headline/tech/2090660>. The distrust of the wealthy music industry has only increased with the Recording Industry’s new individual-based litigation strategy. See *id.* In addition, ignorance of copyright law compels the belief of some citizens that the Fair Use Act allows consumers to do whatever they want with CDs they purchase. See Robinson, *supra* note 47, at 216; see also Margaret A. McGurk & Christina Oliva, *Napster Ruling Won’t Stop Music Sharing*, CINCINNATI ENQUIRER, July 28, 2000, available at http://www.enquirer.com/editions/2000/07/28/fin_napster_ruling_wont.html (describing how many people only see benefits for free music sites, and how the shutting down of Napster will only push users to the alternative sites with alternative methods for swapping files, bringing their extensive music supply with them).

91. See Robinson, *supra* note 47, at 184–85. For a provocative post-modern discussion of the morality of Internet anonymity, see Albert Z. Kovacs, *Quieting the*

store that will offer individual song downloads for ninety-nine cents each, mimicking the Apple version of the legal site iTunes.⁹² Nevertheless, it is yet to be seen whether consumers that have been receiving music without cost for up to five years will be open to switching to a payment-based scheme.⁹³

CD manufacturers have also attempted to employ new techniques to thwart piracy.⁹⁴ One such tactic involves encryption technologies that block digital transmission onto computer hard drives.⁹⁵ Computer hackers, however, have consistently been able to crack the encryption code.⁹⁶ In addition, some consumers are concerned about the invasion of their privacy that may occur if the recording industry instead attempts to target individual computer hard drives through watermarking or cookies.⁹⁷

Virtual Prison Riot: Why the Internet's Spirit of "Sharing" Must be Broken, 51 DUKE L.J. 753 (2001) (describing how the Internet allows users to exist independently of their real world identities and how that secrecy allows them to transcend real world moral boundaries).

92. Ethan Smith & Nick Wingfield, *New Ways to Pay 99 Cents for Music: In Wake of Apple's iTunes, Sites Target Windows Users: The Birth of (Legal) Napster*, WALL ST. J. Oct. 9, 2003, at D1.

93. See Neil Strauss, *Record Sales' Woes Go Beyond File Swapping; Legal Tactics may Alienate Consumers*, INT'L HERALD TRIB., Sept. 10, 2003, available at <http://www.iht.com/articles/109428.html>. One example of a legitimate music sharing system is [pressplay.com](http://www.pressplay.com). In exchange for the ability to download music to the user's online account, \$9.99 is deducted from the user's bank account every month (even if the system is not utilized), and \$5.00 is required to actually download the song from the online database to the computer's hard drive. Pressplay, at <http://www.pressplay.com> (last visited Sept. 29, 2003). The author has experienced technical difficulties with the system in the past; it is unclear what the consumer response will be overall.

94. See Jensen, *supra* note 43, at 242. For example, when a purchaser of a CD attempts to listen to the music on a computer, he or she would be directed to a web site controlled by the CD manufacturer and perhaps music companies. *Id.* After the user entered personal information, he or she would be able to use the CD, but only in proprietary format. *Id.* Another tactic involves employing disc layouts that are nontransferable to a computer format, inhibiting music sharers' ability to share new music. *Id.*

95. Allen N. Dixon, Address at the JSO 4th Asia-Pacific Copyright and Neighboring Rights Seminar (March 8, 2003), available at http://www.ifpi.org/site-content/legal/allen_dixon_speech.html.

96. *Id.* See generally S.H. Kwok & S.M. Lui, *A License Management Model for Peer-to-Peer Music Sharing*, 1 INT'L J. INFO. TECH. & DECISION MAKING 541 (2002) (describing an alternate form of licensing for controlling online music sharing).

97. Jensen, *supra* note 43, at 254. Digital watermarking is defined as "a pattern of bits inserted into a digital image, audio or video file that identifies the file's copyright information (author, rights, etc.)." E-Commerce Guide, at http://e-comm.webopedia.com/TERM/d/digital_watermark.html (last visited Aug. 23, 2004). A cookie is defined as "a small file or part of a file stored on a World Wide Web user's computer, created and subsequently read by a website server, and containing per-

Other countries have also unleashed new tactics aimed at forcing music-sharers to see the error of their ways. For example, the Canadian Recording Industry Association has not targeted individual users, but has instead launched litigation against illegal online distributors and produced television commercials designed to make users feel remorse for illegally downloading materials.⁹⁸ In contrast, in Belgium, the Belgian arm of the International Federation of the Phonographic Industry (IFPI) turned over hundreds of individual users to the police in 2001.⁹⁹ Similarly, in April 2003, Australian Federal Police charged three Sydney students with copyright violations allegedly worth over sixty million dollars.¹⁰⁰ Even though the Australian government seems willing to fight piracy within its own borders, Australian universities are still fighting U.S. efforts to obtain the identities of suspected copyright pirates on their university networks.¹⁰¹ That resistance reflects the lack of global unity and cooperation that has so far made it impossible to thwart the explosion of Internet piracy.

II. LIMITATIONS PLAGUING THE POSSIBILITY OF FUTURE CONTROL

The current U.S. effort to control music sharing is hampered by ineffective standards and mechanisms for quelling the insatiable global demand. Although the legal system has made some strides towards suppressing the primary culprits, as a whole, it remains ill-equipped to deal with many of the knotty issues raised by music-sharing activities. Previous attempts to hold users responsible for their actions have been complicated by deficiencies both in U.S. domestic law regarding personal jurisdiction and contributory liability, and in international intel-

sonal information (as a user identification code, customized preferences, or a record of pages visited)." Merriam Webster Online, at <http://www.merriamwebster.com/cgi-bin/dictionary?book=Dictionary&va=cookies&x=11&y=11> (last visited Aug. 23, 2004). Cookies can therefore be used to generate profiles of web usage habits, which may infringe on personal privacy.

98. Ted Bridis, *Music Industry Escalates Net Fight: Threatens to Sue Individuals Illegally Sharing Files*, WINNEPEG FREE PRESS, June 26, 2003, at A12.

99. CNET News.com Staff, *Global Music Industry to ID Napster fans*, CNET NEWS.COM, Feb. 21, 2001, at <http://news.com.com/2009-1023-252888.html?legacy=cnet&xlr8yourmac>.

100. Mendez, *supra* note 87, available at 2003 WL 64454494. WA Internet Users Association also reports that intimidating letters have been sent to Internet service providers in Australia. *Id.*

101. *Id.*

lectual property treaties.

A. PERSONAL JURISDICTION COMPLICATIONS

Asserting jurisdiction over foreign defendants can be complicated for a number of reasons. First, as illustrated above in the Australian example, foreign governments may not cooperate in identifying the perpetrators that the accusing country is attempting to indict. Second, asserting jurisdiction over those defendants may be complicated by the *accusing* country's own inefficient, overly specialized, or outdated jurisdictional laws. Moreover, the Internet has dramatically altered the global transactional arena, and many countries have not fully transformed their systems to reflect those changes. The current state of U.S. personal jurisdiction law may thwart its own efforts to protect against online music sharing.

In the United States, personal jurisdiction can easily be asserted for traditional reasons like physical presence, domicile, or consent; nevertheless, in the case of an incorporated foreign defendant, due process requires that a non-resident defendant have "certain minimum contacts with the forum, such that the continuation of the suit does not offend "traditional notions of fair play and substantial justice."¹⁰² In *Grokster*, in order for the California district court to have personal jurisdiction over the Australian/Vanuatu company, the exercise of jurisdiction must be authorized under California's long-arm jurisdictional statute and must comport with constitutional due process limitations.¹⁰³ In California's long-arm statute, jurisdiction is authorized to the fullest extent of the Constitution, so the only question that the district court had to answer was whether the exercise of personal jurisdiction over Sharman was consistent with constitutional due process.¹⁰⁴ Since Sharman was not sub-

102. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 243 F. Supp. 2d 1073, 1082 (C.D. Cal. 2003) (citing *Int'l Shoe v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940))).

103. *Id.* (citing *Aanestad v. Beech Aircraft Corp.*, 521 F.2d 1298, 1300 (9th Cir. 1974)); see also *Fed. R. Civ. P. 4(k)(1)(A)*.

104. *Grokster*, 243 F. Supp. 2d at 1082 (citing *Cal. Code Civ. Proc. § 410.10* (2002)); see *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1317 n.2 (9th Cir. 1998). It is important to note that in a motion to dismiss for lack of personal jurisdiction, the plaintiff has the burden of establishing that jurisdiction. Only a *prima facie* showing, however, must be made when a court has not made any findings of fact. Factual allegations made by the defendant in the *Grokster* litigation were taken as true, although the court was allowed to look beyond the pleadings to any evidence before the court. *Grokster*, 243 F. Supp. 2d at 1082 (citing *Cargill Intern.*

ject to the traditional bases for personal jurisdiction of presence in the forum, the court focused its analysis on whether the following types of jurisdiction existed: (1) general jurisdiction; (2) specific jurisdiction; and/or (3) an alternative basis for purposeful availment based on the “effects test.”¹⁰⁵

The plaintiffs in the *Grokster* case alleged that Sharman’s in-forum activities extended to the following activities:

- 1) Provision of the KMD software to approximately two million California residents and execution of end-user license agreements between Sharman and these users;
- 2) Use of California and U.S. agents, including a Los Angeles-based public relations firm, a California company engaged in selling and serving advertising to users of the KMD software, and a San Francisco-based law firm;
- 3) Contracts Sharman assumed from Kazaa BV, including use of California-based CNET.com for recording the number of copies of Defendant’s software downloaded, and advertising-related agreements with California and U.S. companies; and

Inclusion in certain contracts assumed from Kazaa BV of California and other U.S. state choice of law and forum selection clauses, including in the FastTrack licensing agreement.¹⁰⁶

1. *General Jurisdiction*

The plaintiffs in the *Grokster* case did not meet the fairly high burden for establishing general jurisdiction,¹⁰⁷ which essentially requires that defendant’s contacts “approximate physical presence.”¹⁰⁸

S.A. v. M/T Pavel Dybenko, 991 F.2d 1012, 1019 (2d Cir. 1993)).

105. *Grokster*, 243 F. Supp. 2d at 1083–95. For a discussion of the effects test, see discussion *supra* Part II.A.3.

106. *Grokster*, 243 F. Supp. 2d at 1083 (quoting Plaintiffs’ Memorandum in Opposition to Defendants Sharman’s and LEF’s Motions to Dismiss at 4–10).

107. In the case of non-resident defendants, general jurisdiction exists where the defendants’ contacts with the forum state are “continuous and systematic,” and the exercise of jurisdiction does not offend “traditional notions of fair play and substantial justice.” *Id.* (quoting *Ziegler v. Indian River County*, 64 F.3d 470, 473 (9th Cir. 1995)). The court noted that the plaintiffs in this case did not make a meaningful attempt to establish general jurisdiction. *Id.* In fact, they limited their argument to a two-sentence footnote. *Id.*

108. *Bancroft & Masters, Inc. v. Augusta Nat’l, Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000) (quoting *Gates Lear Jet Corp. v. Jensen*, 743 F.2d 1325, 1331 (9th Cir. 2000)). At the time of the case, the Supreme Court had upheld general jurisdiction in only one case that involved wide-ranging contacts, and the Ninth Circuit has

Although Sharman does engage in a continuous stream of commercial contact with the forum state, the company is not registered or licensed to do business in California, nor does it have any substantial physical presence in the state.¹⁰⁹ Moreover, commercial contacts without other evidence of corporate presence have not traditionally constituted sufficient evidence to satisfy general jurisdiction.¹¹⁰ Consequently, the court in *Grokster* held that general jurisdiction did not exist against Sharman Networks.¹¹¹

As the doctrine of general jurisdiction currently stands, it is not satisfied in the *Grokster* case. It is worth noting, however, that in the context of Internet transactions, physical presence is not a terribly effective or meaningful concept.¹¹² Companies that would have necessarily located offices in every state in the past can now incorporate and conduct business in another country, and still sustain a comparable level of business in those same states. The people who make up those companies are not *actually* physically present in consumers' homes when they engage in online transactions, but arguably a direct transaction still results. In the past, courts could not have conceived of the business interactions that now occur without interpersonal contact. By explicitly expanding the specific jurisdiction concept to include online transactions, like purchases or downloads, courts could solve many possible personal jurisdiction problems and could acknowledge the new transactional paradigms made possible by new technologies.

2. *Specific Jurisdiction*

Under the prevailing Ninth Circuit doctrine, specific jurisdiction is presumptively reasonable where: "1) a nonresident defendant purposefully avails itself of the privilege of conducting activities in the forum state, thereby invoking the protections of

regularly declined to use the doctrine. *Grokster*, 243 F. Supp. 2d at 1083.

109. *Grokster*, 243 F. Supp. 2d at 1084. Sharman does not appear to have any offices, employees, or assets in California. *Id.*

110. *Id.* (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (establishing that no general jurisdiction existed where Colombian corporation repeatedly purchased helicopter parts in Texas and held training in the state, but had no offices, agents, employees, or a license to do business there)).

111. *Id.*

112. The Internet creates unique challenges for the concept of "presence." Albert Kovacs states, "[b]ecause in cyberspace people can exist independent of their names, identities, faces, and personalities, they often transcend the real world's moral and legal boundaries." Kovacs, *supra* note 91, at 754.

its laws; and 2) the plaintiff's claims arise out of the defendants' forum-related activities."¹¹³ As described above, Sharman did purposefully direct activities toward California; the *Grokster* court, however, questioned whether several of those means of contact fit under the relatedness requirement.¹¹⁴

The Ninth Circuit uses a wide-ranging "but for" test of relatedness that is more inclusive than tests adopted in other circuits.¹¹⁵ Essentially, the second prong of the test is satisfied if, but for the contacts between the defendant and the forum state, the claim would not have arisen.¹¹⁶ The plaintiffs in *Grokster* attempted to classify all of Sharman's activities in California as being essential to its ability to infringe on their copyright. In other words, "but for Sharman's overall corporate activities, it would not be in business and would not be engaging in the alleged infringement of Plaintiff's copyrights."¹¹⁷ Nevertheless, but for contacts must convey some proximate causation to be an acceptable source of personal jurisdiction.¹¹⁸ The *Grokster* court found that *all* corporate contacts could be considered in furtherance of corporate purposes, and interpreting the rule that broadly would swallow its purpose altogether.¹¹⁹ Consequently, the court held that Sharman's public relations contacts, law firm contacts, advertising contacts, and the use of a California company in counting downloads were not but for causes of the alleged infringement.¹²⁰

Nonetheless, the court found that Sharman's distribution of the KMD software and the licensing of its use were but for causes of the alleged infringement.¹²¹ Sharman was unsuccessful in arguing that its Internet activities were passive in nature,

113. *Grokster*, 243 F. Supp. 2d at 1084; see also *Ochoa v. J.B. Martin & Sons Farms*, 287 F.3d 1182, 1189 (9th Cir. 2002); *Ziegler v. Indian River County*, 64 F.3d 470, 473 (9th Cir. 1995).

114. *Grokster*, 243 F. Supp. 2d at 1085-86.

115. *Id.* at 1085; see also *Loral Terracom v. Valley Nat'l Bank*, 49 F.3d 555, 561 (9th Cir. 1995).

116. *Grokster*, 243 F. Supp. 2d at 1085.

117. *Id.* Plaintiffs argued that retaining law and public relations firms and advertising-related sales ultimately perpetuated the existence of the Sharman business. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* The court also noted that although Plaintiffs allege that Sharman engaged in advertising specifically to California residents, that advertising was served by third-party companies. *Id.* at 1086. Therefore, that direct contact was not appropriately considered under a but for analysis. *Id.*

121. *Id.* "But for Sharman's acts in these regards, Plaintiffs' claims of direct infringement never would have arisen against Sharman." *Id.*

as its software could be downloaded by anyone in the world, not just by Californians.¹²² Essentially, Sharman contended that the only distribution contacts with California were those that were initiated by California residents.¹²³

It is here that the court's analysis weakened. It acknowledged that personal jurisdiction is typically not found where contacts with the forum state are the result of isolated or fortuitous acts not directed by the defendant.¹²⁴ It also recognized that the operation of a website where the contacts with a forum state consist of viewings of the website's content typically will not give rise to specific jurisdiction.¹²⁵ The court, however, set up a kind of sliding scale of substantial activity towards the forum to determine whether Sharman's purposeful availment was enough to overcome those barriers. The court cited *Cybersell, Inc. v. Cybersell, Inc.* as its support for the contention that jurisdiction might be appropriate where Internet conduct includes something more than just Internet viewing to prove that the plaintiff directed substantial activity towards the forum.¹²⁶

Cybersell is certainly an interesting comparison to *Grokster*. In *Cybersell*, a Florida corporation offered web page construction services under the name of Cybersell.¹²⁷ An Arizona company had previously incorporated under the same name, although it was not listed on the web and did not yet have a PTO permit for the service mark.¹²⁸ The Arizona company attempted to bring an infringement action in Arizona, but the court lacked personal jurisdiction over the Florida defendant because general jurisdiction was inappropriate, and also because the defendant did not meet the specific jurisdiction requirement of purposeful availment.¹²⁹ The defendant would have needed to "purposefully di-

122. *Id.* Sharman further contended that it did not know the identity of the users of its software, and it also did not know the locations where downloads took place. *Id.*

123. *Id.*

124. *Id.* (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (holding that plaintiff failed to establish a sufficient basis for jurisdiction in Oklahoma over a New York company when a consumer bought a car in New York and drove it through Oklahoma)).

125. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 243 F. Supp. 2d 1073, 1087 (C.D. Cal. 2003).

126. *Id.* (citing *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997)).

127. *Cybersell*, 130 F.3d at 415.

128. *Id.*

129. *Id.* at 416-20.

rect efforts” at the forum’s residents.¹³⁰ Similarly, although Kazaa wanted as many users as possible (presumably so it could charge more to its advertisers), the requirement of purposefully directed efforts is starkly missing.

The *Grokster* court described several factors that aid in determining whether specific jurisdiction can be established in a website situation.¹³¹ Those factors include: (1) whether the defendant encouraged residents of the forum state to engage in relevant contacts with the defendant; (2) whether there is evidence that the contacts constitute a continuous and substantial part of the defendant’s business; (3) whether the defendant exchanged messages with forum residents or gained subscribers through its contacts; or (4) whether the defendant otherwise purposefully availed itself of the privilege of doing business in the forum.¹³²

The court, in a cursory manner, noted two reasons why the Sharman network satisfied the above factors.¹³³ First, the court noted that Sharman admitted to having millions of users worldwide, and the KMD software had been downloaded 143 million times.¹³⁴ Although it had no concrete factual evidence to support the estimate, the court seemed to agree with the Plaintiffs’ assertion that approximately two million of those software users were from California.¹³⁵ Consequently, it asserted that it would be mere cavil to reject the contention that Sharman engaged in a significant amount of contact with California residents.¹³⁶

Although the court might have been correct in this instance, to state that it is mere quibble to contend otherwise is to avoid the real underlying issues, revealing the flaws in the current doctrine that may arise in future cases. The court did not specifically wrestle with the evaluating factors it espoused, and on closer examination, this omission turns out to be substantial, if

130. *Id.* at 417.

131. *Grokster*, 243 F. Supp. 2d at 1087.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* The court indicated that one of Sharman’s third-party advertising vendors estimated that Kazaa had been downloaded by at least twenty million users in the United States. *Id.* at 1087 n.6. Because California holds approximately twelve percent of the country’s population, the court accepted the Plaintiffs’ contention that approximately two million of those users are from California. *Id.* Although it is likely that there are many users in California, the fact that the Kazaa website does not keep track of the locations of its users does not help the Plaintiffs’ argument.

136. *Id.* at 1087.

not fatal. First, there was no express evidence tending to show that Sharman encouraged Californians to engage in contacts with the defendant. Of course, as a practical matter, Sharman offered its services to anyone worldwide that downloaded the software. Still, should that factor be enough to establish specific acts of encouragement in California? Second, although the contacts that Sharman made in California were arguably substantial, there was no *actual evidence* presented to show that a “continuous and substantial part of the defendant’s business” was in the California area.¹³⁷ Such a requirement may be a mere formality in a case with a company as hugely successful as Kazaa; in future cases involving more obscure companies, however, the absence of real evidence will likely be more significant. Third, the court did not consider whether the defendant exchanged messages with forum residents or gained subscribers through its contacts. Finally, the court did not explicitly offer other examples of purposeful availment by Sharman. Arguably, the contact with law firms and public relations or advertising companies might have some supplemental persuasive weight, but since those contacts were not considered appropriate for consideration prior to the analysis of these four factors, that line of reasoning is unpersuasive.

3. *The Effects Test*

The court justified its vulnerable analysis of specific jurisdiction by claiming that comprehensiveness was not required due to the existence of the effects test.¹³⁸ The court overtly asserted, “even if purposeful availment were not manifested by Sharman’s commercial contacts, it nonetheless may be demonstrated through the ‘effects test.’”¹³⁹ Essentially, under the effects test, even if a defendant does not directly contact the forum state, purposeful availment may be demonstrated where the effects of a defendant’s conduct are felt in that state.¹⁴⁰ In 1998, the Ninth Circuit clarified the effects test in *Panavision Int’l*

137. Again, no evidence indicating the specific number of Californian Kazaa users was offered. The advertiser’s estimate of two million users, however, is sufficient to indicate at least a substantial *Internet* presence in the State.

138. *Grokster*, 243 F. Supp. 2d at 1088.

139. *Id.*

140. *Id.* (citing *Calder v. Jones*, 465 U.S. 783 (1984) (establishing the effects test); *Panavision Int’l L.P. v. Toeppen*, 141 F.3d 1316, 1321–22 (9th Cir. 1998) (sustaining jurisdiction over a non-resident defendant who registered Internet domain names that infringed plaintiff’s trademarks)).

L.P. v. Toeppen,¹⁴¹ and held that three factors establish personal jurisdiction over a non-resident defendant: "(1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered, and which the defendant knows is likely to be suffered, in the forum state."¹⁴²

One significant complicating factor acknowledged by both Sharman and the court was that Sharman's software does not, in itself, infringe upon copyrights. The *users* are responsible for any infringement that occurs. The court resolved this issue by distinguishing between the plaintiffs' theories of liability. It acknowledged that the effects test is likely sufficient to show purposeful availment for purposes of the contributory infringement claims, while it might not be enough to support an exercise of jurisdiction for vicarious liability.¹⁴³

Still, it is worth noting that *Panavision* can be distinguished from the *Grokster* litigation in several ways. The *Panavision* case consisted of a trademark dilution and infringement action against an Illinois defendant brought by a California resident plaintiff. First, the court held that "simply registering someone else's trademark as a domain name and posting a web site on the Internet is not sufficient to subject a party domiciled in one state to jurisdiction in another."¹⁴⁴ It then distinguished this defendant's situation from *Cybersell* by indicating that personal jurisdiction was proper, because the defendant had engaged in a scheme for the purpose of extorting that money from the plaintiff company.¹⁴⁵ As in *Cybersell*, the court indicated that there must be "something more" to demonstrate that the defendant directed his activity to the state bringing the action.¹⁴⁶ The something more in the *Panavision* case consisted of the defendant engaging in similar domain-registering conduct with other companies, sending letters to the plaintiff company offering to sell the domain name, and after they refused to sell, registering a PanaFlex.com domain that merely said "hello" once opened.¹⁴⁷

This kind of tortious conduct is, at least on some level, dis-

141. *Panavision Int'l L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998).

142. *Id.* at 1321 (quoting *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1486 (9th Cir. 1993)).

143. *Grokster*, 243 F. Supp. 2d at 1089.

144. *Panavision*, 141 F.3d at 1322 (citing *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997)).

145. *Id.*

146. *Id.*

147. *Id.* at 1319.

tinguishable from Kazaa's interaction with the State of California. Kazaa merely registered a domain name and marketed software that allowed *other people* to engage in copyright infringement. The public relations firms that were allegedly contacted by the company were *not* the plaintiffs bringing the action. Arguably, the Kazaa company *directed no action* at the plaintiffs in California. Moreover, the fact that Kazaa denied having a central server further discredits any claim that the company was engaged in doing any maintenance in furtherance of the copyright infringement. In summary, personal jurisdiction law in the United States must be elucidated more clearly if it is to be effective in tackling the unique problems that online transactions generate.

B. CONTRIBUTORY LIABILITY

Contributory infringement is built on the notion that "[o]ne who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer."¹⁴⁸ After *Napster*, Plaintiffs must offer proof that Sharman *intended* to contribute to the infringing conduct of another.¹⁴⁹ It is not enough that the software merely allowed for such activity.¹⁵⁰ The Plaintiffs alleged both intentional conduct, and, more specifically, intentional conduct directed at the forum state of California.¹⁵¹ Of course, the *Napster* court did not deal with these factual questions in the personal jurisdiction motion, but the concept of intentional conduct is certainly blurred in an online medium. Can the production of software and maintenance of a website that passively allows for the quick and easy transfer of files fairly be classified as deliberately illegal conduct? This issue is especially thorny, considering the conduct must be "targeted at a plaintiff whom the defendant knows to be a resident of the forum state."¹⁵²

Nevertheless, on July 2, 2003, the *Grokster* court made another move towards shutting down the Kazaa empire when Judge Wilson held that: (1) the distributor did not have stand-

148. *Grokster*, 243 F. Supp. 2d at 1089 (quoting *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)).

149. *Id.*

150. *Id.*

151. *Id.* at 1089-90.

152. *Id.* (quoting *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000)).

ing to maintain counterclaims under the Sherman Act or its state law counterpart; and (2) the distributor was not entitled to obtain declaratory relief as to a counterclaim of copyright misuse that it had raised as an affirmative defense.¹⁵³ It appears likely that Kazaa will be successfully extinguished by this action. Still, the problems identified in the United States' personal jurisdiction jurisprudence may resurface in the future with other entrepreneurial P2P companies.

C. DEFICIENCIES IN THE TRIPS AGREEMENT

Other problems will likely emerge on an international level in attempts to control the music sharing craze. Specifically, the TRIPS Agreement has several shortcomings that will likely serve as obstacles to comprehensive copyright infringement protection. TRIPS was enacted as a flexible means of enforcing each member states' intellectual property rules.¹⁵⁴ The agreement allows countries to tie demands for stronger copyright protection to reciprocal concessions on exported materials,¹⁵⁵ because trade sanctions have been historically effective measures for initiating stronger judicial measures of control.¹⁵⁶ Again, it is worth noting that TRIPS is not the only agreement governing international trade of copyrighted goods.¹⁵⁷ This section of the Note nonetheless focuses on TRIPS because of its more recent enactment, and because of its specific regulations in the field of digital reproductions.¹⁵⁸

The TRIPS Agreement sets out several regulations for protecting performers, phonogram producers, and broadcasters. Article 14 of the agreement specifies that:

153. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 269 F. Supp. 2d 1213, 1223, 1226 (C.D. Cal. 2003).

154. GOLDSTEIN, *supra* note 9, at 47.

155. *Id.* at 47-48.

156. *Id.* Prior to TRIPS, the multilateral Revised Berne Convention governed conflicts in international intellectual property; an agreement that controlled 111 member states at the time TRIPS was enacted. Katzenberger, *supra* note 31, at 59.

157. Neither the Revised Berne Convention nor the Rome Convention has been impaired by the enactment of TRIPS. *See id.*

158. *See generally* Katzenberger, *supra* note 31. The TRIPS Agreement does not adopt the neighboring rights provisions of the Rome Convention, which in some cases, may be stronger than TRIPS regulations. The United States is not a member of the Rome Convention, however, so it is only subject to the TRIPS provisions. When countries that are members of both TRIPS and the Rome Convention deal with countries that are only bound by TRIPS, they will not apply Rome Convention principles to their proceedings. *See* Katzenberger, *supra* note 31, at 74.

1. In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.

2. Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.¹⁵⁹

Unless contracting nations desire an explicit mention of online activities, this provision appears to establish clearly the illegality of free online music sharing.¹⁶⁰ Nevertheless, the inefficiencies and shortcomings of TRIPS lie in its theory of nationalism and its purported methods of enforcement.

1. *The Territory Principle*

Article 1 of the TRIPS agreement sets out the “Nature and Scope of Obligations” under the Agreement:

1. Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their domestic law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.

....

3. Members shall accord the treatment provided for in this Agreement to the nationals of other Members.¹⁶¹ In respect of the relevant intellectual property right, the nationals of other Members shall be understood as those natural or legal persons that would meet the criteria for eligibility for protection provided for in the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits, were all Mem-

159. TRIPS Agreement, *supra* note 29, art. 14.

160. Of course, Napster had not been invented at the time the TRIPS Agreement was enacted, so it is impractical to expect the Agreement to have included a specific mention of P2P activities.

161. The TRIPS Agreement includes a footnote after this sentence, which states that “when ‘nationals’ are referred to in this Agreement, they shall be deemed, in the case of a separate customs territory Member of the WTO, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory.” TRIPS Agreement, *supra* note 29, art. 1 n.1.

bers of the WTO members of those conventions¹⁶²

Article 3 of the TRIPS Agreement deals with how member nations must treat other member nations who allegedly violate the hosting country's specific copyright laws:¹⁶³

1. Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property. . . . In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement¹⁶⁴

Moreover, Article 4 of the Agreement establishes that any "advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members."¹⁶⁵ Accordingly, some countries, if they wish, may choose to enact more stringent standards than those set out in copyright or neighboring rights treaties. The purpose of most-favored-nation treatment, however, is to prevent discrimination against other foreign-rights holders.¹⁶⁶ Of course, most nations, including the United States, do not have tendencies to produce copyright law regimes that show preference for foreign nationals, so international agreements are the natural source for equalizing the treatment of all copyright infringers within a specific nation's borders.¹⁶⁷ In addition, the concept of borders is also vaguer in an international digital commons, and many experts are concerned about the practicality and possible success of attempting to implement such borders.¹⁶⁸

The TRIPS Agreement treatment of nationals also reflects the territoriality principle, which holds that a state has no com-

162. TRIPS Agreement, *supra* note 29, art. 1.

163. Katzenberger notes, however, that some exceptions may apply under Article 3, such as those exceptions that were already laid down in the Berne Convention, certain retaliatory measures available under Article 6, and certain procedural discrepancies that may occur due to the existence of international defendants. See Katzenberger, *supra* note 31, at 74. The problem of U.S. personal jurisdiction jurisprudence is one example. See *supra* notes 107-47 and accompanying text.

164. TRIPS Agreement, *supra* note 29, art. 3.

165. TRIPS Agreement, *supra* note 29, art. 4.

166. See Katzenberger, *supra* note 31, at 75 (citing JOSEF DREXL, *Entwicklungsmöglichkeiten des Urheberrechts im Rahmen des GATT: IN LÄNDERBEHANDLUNG, MEISTBEGÜNSTIGUNG, MAXIMALSCHUTZ: EINE PRINZIPIENORIENTIERTE BETRACHTUNG IM LICHTE BESTEHENDER KONVENTIONEN* 10-11 (Münchener Universitätschriften.; Reihe der Juristischen Fakultät, 1990)).

167. See *id.*

168. Scully, *supra* note 6, at 321.

petence to enact regulations governing activities occurring outside its borders.¹⁶⁹ Still, every country is required to provide the same protection under its domestic laws to both domestic and foreign defendants.¹⁷⁰ The territoriality principle responds to two needs.¹⁷¹ The first principle is the need for national sovereignty.¹⁷² Most countries are more willing to agree to the terms of treaties when they are able to retain control over the violations that occur within their borders.¹⁷³ The second principle is the promotion of international commerce through certainty in investment-backed expectations.¹⁷⁴ Countries will be less likely to engage in international business if they are subject to stricter copyright laws than they would be in their own or another more lax country's jurisdiction.¹⁷⁵ Historically, territoriality has been the dominating norm of international copyright cases.¹⁷⁶ Harold Maier describes the modern concept of territoriality as follows: "acts of foreign sovereigns should, when appropriate, be given effect within another state's territory . . ."¹⁷⁷

The primary concern surrounding the territoriality principle is that it presents no agreement on worldwide substantive rights.¹⁷⁸ Although some common ground may be found in the substantive provisions of international copyright treaties, most of the fundamental police controls and enforcement measures

169. GOLDSTEIN, *supra* note 9, at 63; see INTERNATIONAL INTELLECTUAL PROPERTY LAW, *supra* note 11, at 231. The TRIPS Agreement incorporates territorial concepts from the Paris and Berne Conventions, and bears similarity to comparable premises in the GATT. *Id.* at 232. Goldstein even classifies the TRIPS Agreement as being "backward looking." *Id.* at 237.

170. INTERNATIONAL INTELLECTUAL PROPERTY LAW, *supra* note 11, at 231; see also Katzenberger, *supra* note 31, at 72-73.

171. GOLDSTEIN, *supra* note 9, at 63.

172. *Id.*

173. *Id.* Goldstein uses this example: "[F]or State A to impose copyright liability on conduct occurring in State B might be viewed by State B as an attack on its sovereignty, particularly if its own law excused the same conduct from copyright liability." *Id.*; see INTERNATIONAL INTELLECTUAL PROPERTY LAW, *supra* note 1, at 231.

174. GOLDSTEIN, *supra* note 9, at 63.

175. *Id.*

176. *Id.* at 64-65 (citing EUGEN ULMER, INTELLECTUAL PROPERTY RIGHTS AND THE CONFLICT OF LAWS 13-14 (1978), György Boytha, *Some Private International Law Aspects of the Protection of Authors' Rights*, 24 COPYRIGHT 399 (1988)).

177. Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 282 (1982). Conduct that occurs outside a country may also be subject to that country's jurisdiction if that activity will have a substantial effect inside the country.

178. INTERNATIONAL INTELLECTUAL PROPERTY LAW, *supra* note 11, at 231. In addition, for an interesting look at some limited exceptions to the most-favored-nation treatment regime, see Katzenberger, *supra* note 31, at 77.

are left to individual countries to decide.¹⁷⁹ Some theorists are beginning to attack the territoriality concept, though many countries are unwilling to relinquish their sovereignty over essential intellectual property decisions for a variety of economic reasons.¹⁸⁰ Intellectual property experts like Doris Estelle Long claim that treaty approaches centering on territorial controls will not adequately manage the expanding reach of the Internet, because of the possibility for widespread violations.¹⁸¹

2. *Enforcement of Rights*

The primary problem with the national treatment practice seems to be that there is no guarantee that countries will have rules in place to adequately protect against Internet music sharing. Consequently, developed countries like the United States are now also demanding extra-territorial protection for their works.¹⁸² As Thomas Dreier emphasizes, "it is not enough simply to grant world-wide substantive protection at a sufficiently high level; rather, it is necessary to create measures for the enforcement in practice of the substantive protection at this level."¹⁸³ Because it is primarily an area dominated by the music industry of America, other countries may be unwilling to focus their energies on this admittedly centralized problem that has limited consequences for their own citizens other than the censorship of free-flowing information.

Part III of the TRIPS Agreement governs the enforcement of substantive rights. The composition of this section was controversial and precarious, because the framers of the agreement were attempting to balance the need for unrestricted trade in goods and services with effective means for protecting against

179. See INTERNATIONAL INTELLECTUAL PROPERTY LAW, *supra* note 11, at 231.

180. See *id.* at 231–32. The author uses this example:

[The] Nike company wanted to have its trademark attached to the clothing worn by Olympic athletes in Barcelona in 1992. A Spanish claimant had previously registered the name "Nike" as a trademark in Spain and sued to prevent the Nike Company from using the same in Barcelona. National treatment results in subjecting Nike to prior registration in Spain, just as it would any Spanish national. But should this purely territorial priority preclude disseminating a trademark worldwide? That was, in any event, where Nike wanted its mark televised from the Olympics.

Id.

181. See *id.* at 232–33.

182. See *id.* at 270–71.

183. Dreier, *supra* note 36, at 249.

intellectual property violations.¹⁸⁴ Arguably, the ultimate inadequacy that resulted from this balancing act is that the language of Part III, Section 1, is ineffectual and ambiguous. For example, Paragraph 2 of Article 41 states, "Procedures concerning the enforcement of intellectual property rights shall be *fair* and *equitable*. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays."¹⁸⁵ Or, as Paragraph 5 states,

It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of laws in general, nor does it affect the capacity of Members to enforce their laws in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of the law in general.¹⁸⁶

Part III, Section 2 does provide for some basic procedural requirements, like the right to legal representation, the necessity of production of proof, the ability to request injunctions or damages, and the right to indemnification.¹⁸⁷ Still, if countries are not actively policing the copyright infringement occurring within their boundaries, then none of those basic legal provisions will have any force whatsoever.¹⁸⁸

Specifically, the United States confronts the problem that although infringing countries may be violating copyright privileges of U.S. producers under U.S. laws in a variety of cases, the infringing nation has no similar laws of its own.¹⁸⁹ For example, some Middle Eastern countries have no copyright protections in

184. *Id.* at 254. Dreier states that an attempt was made to construct a "*minimum basic stock of procedural regulations*" that he believes reflected a certain Anglo-American pragmatism that does not always mix with Continental-European concepts of formal procedural fairness. *Id.* at 255. He also notes that it remains undecided as to which developing countries were not adequately represented throughout the TRIPS negotiations, but that it is clear that industrialized nations were primarily in control. *Id.* at 257; see also INTRODUCTION TO INTELLECTUAL PROPERTY: THEORY AND PRACTICE, *supra* note 7, at 328.

185. TRIPS Agreement, *supra* note 29, art. 41 (emphasis added).

186. *Id.*, art. 41.

187. *Id.*, arts. 42-48.

188. The World Intellectual Property Organization agrees that lack of more stringent enforcement measures can be an immense problem in adequately protecting against copyright infringement. For an interesting discussion of both draft legislation for stronger standards, and for a description of further international conventions dealing with those problems, see INTRODUCTION TO INTELLECTUAL PROPERTY: THEORY AND PRACTICE, *supra* note 7, at 329.

189. *Id.* at 453.

place.¹⁹⁰ In addition, countries like Malaysia and Indonesia only provide foreign works with protection if they are published in their country within thirty days of being published abroad.¹⁹¹

Another conflicting pressure is that the first sentence of the TRIPS Agreement explicitly states that although vigilant protection of intellectual property rights is necessary to maintaining economic viability in most cases, the Agreement was also enacted to “ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.”¹⁹² Still, this desire to stimulate the unfettered transfer of goods is not given the same priority that it was given in the 1947 GATT, where freedom of international trade was clearly the overriding concern.¹⁹³ The preamble to other similar intellectual property agreements often reflects a similar tension; for example, the WTO Agreement states in its preamble that contracting nations will seek further agreements that constitute “reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations.”¹⁹⁴

D. TRADE CONSEQUENCES—SECTION 301 OF THE TRADE ACT

Even though the interest in encouraging trade is strong,¹⁹⁵ the lack of support for stronger copyright enforcement has caused the United States and some European countries to initiate trade sanctions.¹⁹⁶ One accepted strategy for persuading other countries to abide by U.S. copyright standards involves imposing trade sanctions against countries that violate our copyright standards, while simultaneously applying political pressure to their leaders and offering education on our poli-

190. *Id.* Some countries also do not provide protection for newer forms of expression, like computer software and semiconductor chips. *Id.*

191. *Id.*

192. TRIPS Agreement, *supra* note 29, preamble.

193. Katzenberger & Kur, *supra* note 12, at 5–6 (citing General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A–11, T.I.A.S. 1700, 55 U.N.T.S. 194).

194. See WTO Agreement, preamble.

195. Katzenberger & Kur, *supra* note 12, at 16–17. The authors note that the United States sometimes hesitates to immediately impose trade policy retaliation measures under § 301 due to political pressures. *Id.*

196. RIAA, *RIAA Praises Administration for its Stand Against Copyright Piracy in Foreign Markets: Annual Government Report Detailing Deficiencies of IP Protection in Foreign Markets Issued*, RECORDING INDUS. ASS'N OF AM. PRESS ROOM, May 1, 2003, available at <http://www.riaa.com/news/newsletter/050103.asp>.

cies.¹⁹⁷ Section 301 directs the President to “take all . . . appropriate and feasible action” to enforce United States rights in trade agreements.¹⁹⁸ On May 1, 2003, U.S. Trade Representative Robert Zoellick released his Special 301 Report published under the Act detailing the inadequacy and ineffectiveness of intellectual property protection in seventy-four different nations around the world.¹⁹⁹

The 2003 report placed specific emphasis on the growing issue of counterfeiting and piracy in most nations across the globe, with focus on Internet copyright infringement.²⁰⁰ The report contended that the reason for unacceptably high levels of piracy and counterfeiting of U.S. intellectual property is that certain countries have not fulfilled the necessary implementation of TRIPS enforcement provisions.²⁰¹ Nations that threaten U.S. intellectual property rights are placed into priority categories.²⁰² For example, in 2003, Ukraine was identified as the highest priority because of its repeated failure to take effective action against significant levels of optical media piracy and its lack of adequate intellectual property laws in general.²⁰³ Many other countries, including, but not limited to, China, Italy, Brazil, Taiwan, and Belarus, were also identified for their failure to comply with U.S. intellectual property demands.²⁰⁴ All of the countries listed on the report are described as having inefficient or imprecise copyright enforcement measures.²⁰⁵

Section 301 rebuts the presumption that strong intellectual property rights and methods of enforcement aid all countries, regardless of their status of development, because if that were true, more countries would be working to protect against the intellectual property violations that the United States has been experiencing.²⁰⁶ All of the countries that are refusing to actively police the copyright infringement occurring within their borders

197. See Koss, *supra* note 39, at 96.

198. 19 U.S.C. § 2411(a)(1) (2000). See Koss, *supra* note 39, at 96.

199. ROBERT ZOELLICK, 2003 SPECIAL 301 REPORT, 1 (2003), available at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2003/2003_Special_301_Report/asset_upload_file665_6124.pdf. See RIAA, *supra* note 196, available at <http://www.riaa.com/news/newsletter/050103.asp>.

200. ZOELLICK, *supra* note 199, at 1.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 10–32.

205. *Id.* at 10–42.

206. See *id.*; see also RIAA, *supra* note 196, available at <http://www.riaa.com/news/newsletter/050103.asp>.

are likely doing so for a reason.²⁰⁷ For example, China has repeatedly neglected to enforce the copyright protections that the United States has attempted to institute.²⁰⁸ Trademark counterfeiting, unauthorized production and sale of copyrighted products and piracy of U.S. books has continued unabated.²⁰⁹ Freedom of access to goods and services is a value that many foreign nationals covet, and little to no thought may be given to the foreign copyright holder—living somewhere across the globe—who is not financially benefiting from the use of that creation. Moreover, the United States is viewed as a prosperous superpower by many nations of the world, so its desire to retain absolute control over the revenue of its intellectual property is understandably not the top priority of many impoverished and developing nations.²¹⁰ The infusion of better quality products or entertainment sources at low cost is likely more of a perceived benefit than a threat to such struggling economies.

Nevertheless, the trade sanctions wielded in the past by the United States have worked in several cases,²¹¹ so it is possible that further sanctioning efforts may serve to combat the free market pressures of developing nations. Still, until the global economy is more equally proportioned, it is unlikely that the majority of other foreign countries will be as concerned with the possibility of copyright infringement as the United States will undoubtedly remain. This imbalance may result in further complications to the U.S. effort to restrain online music sharing worldwide.

CONCLUSION

Recent history has proven that international demand for the P2P music-sharing format is insatiable. To complicate matters, technology has met and surpassed every barrier that the music industry or the legal system has attempted to put in the P2P format's path. Furthermore, the speed and ease with which citizens can obtain digital media and information online has

207. See INTRODUCTION TO INTELLECTUAL PROPERTY: THEORY AND PRACTICE, *supra* note 7, at 329.

208. ZOELLICK, *supra* note 199, at 10–11.

209. *Id.*

210. In addition, some conservative economists believe that a products market unfettered by intellectual property rights would attain greater efficiency than at present. See *id.*

211. See *id.* at 33–41.

drastically altered society's conception of propriety, entitlement, and ownership, which has also subsequently contributed to the music sharing revolution.

The United States and other similarly invested nations will persist in attempting to control the chaos; however, problems in policing private citizens' anonymous Internet activities and inadequacies in enforcing existing laws will continue to thwart those efforts. Specific deficiencies in personal jurisdiction law in the United States and insubstantial provisions in the international TRIPS Agreement will contribute to the impenetrability of the P2P music-sharing format. Hence, U.S. courts must aggressively revamp personal jurisdiction over Internet interactions in order to curb music sharing. In addition, WIPO should amend the TRIPS Agreement by supplementing the current provisions with more substantial, cohesive methods for policing Internet activities, and by mandating stronger enforcement measures that can truly aid in preventing copyright infringement.²¹² In order for those enforcement measures to be effective, they must be uniformly stringent, while still allowing some flexibility for national autonomy. Consequently, a completely new paradigm may be the necessary solution. An innovative, expedient, uncompromising, and unified global effort will be necessary to ensure the success of any strategy.

212. One of WIPO's primary responsibilities is to enact new legislation that adapts existing provisions to new technologies and reflects emerging consensus for increasing the level of protection on rights in general. See INTRODUCTION TO INTELLECTUAL PROPERTY: THEORY AND PRACTICE, *supra* note 7, at 335.

