NOTES

DOWNLOADING THE TRUTH: IS "ALLOFMP3" LEGAL?

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I. INTRODUCTION

The United States recording industry was once quick to adopt technological advances such as the introduction of the cassette tape and the compact disc. However, the industry has been somewhat hesitant to embrace more recent advances, such as the popular MP3 format and the use of the Internet as a means for digital distribution. Over the past several years, the Recording Industry Association of America (RIAA), an industry trade group representing the recording industry,[1] has been involved in a series of hotly debated lawsuits against several peer-to-peer (P2P) software companies, such as Napster, Aimster, and Grokster.[2] The RIAA has even sought to step up its campaign by pursuing legal action against individual users of P2P systems,[3] a method of recourse once thought to be too difficult to be viable.[4] These cases have highlighted the RIAA's growing battle with technology, despite the increasingly popular sentiment that the recording industry should instead embrace digital distribution[5] as it once embraced the cassette tape and compact disc formats.

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[1] Recording Industry Association of America, *About Us*, *at* http://www.riaa.com/about/default.asp (last visited Jan. 5, 2007). The mission of the RIAA is "to foster a business and legal climate that supports and promotes our members' creative and financial vitality." *Id.* The RIAA's members are record labels that account for approximately 90% of all legally produced music in the United States. *Id.*

[2] A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001); *In re* Aimster Copyright Litig., 334 F.3d 643 (7th Cir. 2003), *cert. denied*, 540 U.S. 1107 (2004); MGM Studios, Inc. v. Grokster, Ltd., 380 F.3d 1154 (9th Cir. 2004).

[3] *See*, *e.g.*, John Borland, *RIAA Sues Campus File-swappers*, CNET NEWS.COM, Apr. 4, 2003, *at* http://news.com.com/2100-1027-995429.html; *Twelve year-old Settles Music Swap Lawsuit*, CNN.COM, Feb. 18, 2004, *at* http://www.cnn.com/2003/TECH/internet/09/09/music.swap.settlement.

[4] *See* Symposium, *Public Appropriation of Private Rights: Pursuing Internet Copyright Violators*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 893, 895–97 (2004) (describing the Internet theory of "mice and elephants" whereby it is held that the best way to regulate the Internet is to "enforce the law against the elephants, because they are big and slow-moving, and hope that they stamp out the mice because you have no chance of getting the mice yourself").

[5] *See* Mark Ward, *Call to Legalise File-sharing with Taxes,* BBC.CO.UK, Sept. 22, 2004, *at* http://news.bbc.co.uk/1/hi/technology/3674270.stm (arguing that the recording industry should develop new ways to generate revenue—for example, a tax—by taking advantage of technology rather than fighting it).

Although the recording industry has yet to fully adopt the digital media format as its new medium of choice, it recently granted licenses to several online music stores to distribute digital versions of songs,[6] a possible sign that the industry is beginning to soften its stance. Subsequently, sales of legally downloaded songs soared to 581.9 million in 2006, an increase of nearly sixty-five percent over the 352.7 million songs sold in the previous year.[7] Indicators show that digital music sales will likely continue to grow,[8] and the future looks bright for this new form of music distribution.

Most major online music stores, such as Apple's iTunes Store and Real Rhapsody, provide their users with numerous benefits, such as convenient access to a centralized catalog of music and higher quality audio. Furthermore, online music stores help to rid users of moral qualms sometimes associated with using an illegal service, such as Napster, since they are officially recognized as legal vendors of copyrighted music by the RIAA. However, not all online music stores are authorized by the RIAA, especially those located in foreign countries where copyright laws are not quite as stringent as in the United States. One such example is Allofmp3, an online music store based in Russia.[9]

Allofmp3 has gained notoriety for being one of the cheapest online music sites on the Internet. The website provides users with many of the same benefits as its competitors, only at a fraction of the cost and without the implementation of anti-piracy protections, such as Digital Rights Management encryption.[10] While it might be difficult to conceive how Allofmp3 can afford to undercut its competitors by such a large margin, the answer is actually quite simple: unlike its competitors, Allofmp3 does not pay royalties directly to any recording labels or song writers. Instead, the Russian company has an agreement with the Russian Multimedia and Internet Society (ROMS), a performing rights organization that manages digital intellectual property rights in the Russian Federation.[11] Under the

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[6] *See*, *e.g.*, John Borland, *Apple Unveils Music Store*, CNET NEWS.COM, Apr. 28, 2003, *at* http://news.com.com/Apple+unveils+music+store/2100-1027_3-998590.html; Joris Evers, *Real Music Store Opens for Business*, PC WORLD.COM, Jan. 7, 2004, *at* http://www.pcworld.com/article/id,114108-page,1/article.html.

[7] Phil Gallo, *Digital Sales Boost Music Industry*, VARIETY, Jan. 5, 2007, *available at* http://www.variety.com/article/VR1117956655.html?categoryid=16&cs=1.

[8] *See*, *e.g.*, *Piper Jaffray Disputes Report of Weak iTunes Sales*, REUTERS, Dec. 13, 2006, *at* http://today.reuters.com/news/articlebusiness.aspx?type=telecomm&storyID=nN13176776&from=business (stating that digital music sales at Apple's iTunes service surged over the first half of 2006); Antone Gonsalves, *Healthy Growth Forecast For Online Music Stores*, INFORMATIONWEEK, Mar. 15, 2006, *at* http://www.informationweek.com/news/showArticle.jhtml?articleID=181504154 (stating that the online music market is expected to increase sevenfold by 2010).

[9] Allofmp3 is an Internet music store operated by Mediaservices, Inc., a company based in Russia. Jeff Leeds, *Music Labels' Lawsuit Seeks Shutdown of Russian Online Service*, N.Y. TIMES, Dec. 22, 2006, *available at* http://www.nytimes.com/2006/12/22/technology/22music.html. This Note will make reference to Allofmp3 directly, however, as it is the public face of Mediaservices, Inc.

[10] Electronic Frontier Foundation, *Digital Rights Management and Copy Protection Schemes*, *at* http://www.eff.org/IP/DRM/ (last visited Jan. 5, 2007).

[11] Allofmp3.com, *Top Questions: Is it legal to download music from site AllofMP3.com?*, *at* http://music.allofmp3.com/help/help.shtml (follow "Is it legal to download music from site AllofMP3.com?" hyperlink) (last visited Jan. 5, 2007) [hereinafter *Is it legal to download music from Allofmp3*]; *see also* Russian Organization for Multimedia & Digital Systems (ROMS), *About ROMS*, *at*

agreement, Allofmp3 pays a portion of its revenues to ROMS, which then independently handles the compensation of rights-holders.[12]

Piracy through foreign online music stores marks yet another challenge in a seemingly endless line of technological threats to the recording industry. In relation to previous threats, such as Napster, the RIAA states that the "pretense of legitimacy makes [Allofmp3.com] potentially even more damaging than the shadowy pirate operations that cater only to those users willing to engage in intentional copyright infringement."[13]

On December 20, 2006, the RIAA filed a lawsuit in a Federal District Court in New York seeking monetary damages and an injunction against Allofmp3 from selling copyrighted music without permission.[14] The RIAA claims that US customers illegally downloaded more than 11 million songs from the Russian service between June 2006 and October 2006 alone.[15] At a rate of $150,000 per violation, this would amount to roughly $1.65 trillion in damages.[16] While there can be no doubt that the recording industry views Allofmp3's actions to be copyright infringement, the international nature of the alleged infringement presents numerous issues for the industry.

This Note evaluates the legal issues involved with Allofmp3, along with the remedies available to rights-holders. Part II identifies the conflict between Allofmp3 and the United States recording industry. Part III discusses the issues that the RIAA will likely face in its upcoming lawsuit against Allofmp3 in United States courts. This section also evaluates whether the New York District Court will exercise jurisdiction over Allofmp3, whether the court will subsequently apply United States or Russian law, and whether infringement has occurred. This section also identifies potential enforceability issues. Finally, Part IV discusses alternative remedies that the recording industry can seek through an appeal to international intellectual property laws, such as the Berne Convention and the World Trade Organization.

II. THE CONFLICT BETWEEN ALLOFMP3 AND THE RECORDING INDUSTRY

On the surface, Allofmp3 appears to be similar to any other online music store on the Internet. It offers convenient access to hundreds of thousands of albums, including selections from major music charts around

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http://www.roms.ru/index.php?option=com_content&task=blogsection&id=10 (last visited Feb. 6, 2007).

[12] Russian Organization for Multimedia & Digital Systems (ROMS)**,** *About ROMS*, *at* http://www.roms.ru/index.php?option=com_content&task=blogsection&id=10 (last visited Feb. 6, 2007).

[13] Nate Anderson, *RIAA sues AllofMP3 in US Court*, ARS TECHNICA, Dec. 21, 2006, *at* http://arstechnica.com/news.ars/post/20061221-8473.html.

[14] Leeds, *supra* note 9.

[15] Jim Welte, *Labels Sue AllofMP3.com for $1.7 trillion*, MP3.COM, Dec. 21, 2006, *at* http://www.mp3.com/news/stories/7794.html.

[16] *Id.*

the world.[17] The service features streaming previews of its songs and even allows its users to select the digital media format—MP3 and WMA, for example—as well as the quality of the digital recording.[18] In fact, the only notable difference between Allofmp3 and its mainstream competitors is Allofmp3's aggressive pricing scheme. Rather than pricing per song like many of its competitors, Allofmp3 prices per volume of data downloaded. At Allofmp3's current rates, an average song costs roughly ten cents at default quality settings[19]—approximately one-tenth the price of the iTunes Store, which charges ninety-nine cents per song.[20]

A more in-depth investigation into Allofmp3's operations shows that the service is unlike most online music stores. Allofmp3 is not an authorized legal vendor of copyrighted music by the RIAA.[21] According to Allofmp3's website:

> The availability over the Internet of the ALLOFMP3.com materials is authorized by the license # LS-3M-05-03 of the Russian Multimedia and Internet Society (ROMS) and license # 006/3M-05 of the Rightholders Federation for Collective Copyright Management of Works Used Interactively (FAIR). In accordance to the licenses' terms MediaServices pays license fees for all materials downloaded from the site subject to the Law of the Russian Federation "On Copyright and Related Rights".[22]

While Allofmp3 claims that it is authorized to sell copyrighted music under Russian law through its agreement with ROMS, many have questioned this claim. For example, critics often point out that the website service offers selections from musical groups such as The Beatles,[23] who have yet to consent to the release of their works in any digital media format.[24] However, creative works in many countries, however, are only provided a limited term of protection. Under current Russian law, for example, works produced before 1973—including many of the works composed by The Beatles—are in the public domain.[25]

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[17] Allofmp3.com, *Top Questions: What is AllofMP3.com and What Services Do You Offer?*, *at* http://music.allofmp3.com/help/help.shtml (last visited Jan. 5, 2007).
[18] *Id*.
[19] According to Allofmp3, "the average download cost . . . [is] approximately $0.10." Allofmp3.com, *FAQ Regarding The Legality of the Allofmp3 pay service*, *at* http://music.allofmp3.com/help/help.shtml (follow "FAQ Regarding The Legality of the Allofmp3 pay service" hyperlink) (last visited Jan. 5, 2007).
[20] Apple, iTunes Store, http://www.apple.com/itunes/store/ (last visited Jan. 5, 2007).
[21] *See* Leeds, *supra* note 9.
[22] *Is it legal to download music from Allofmp3*, *supra* note 11.
[23] Kevin Maney, *File-sharing War Won't Go Away; It'll Just Go Abroad*, USA TODAY, Apr. 6, 2005, *available at* http://www.usatoday.com/money/industries/technology/maney/2005-04-05-file-sharing_x.htm.
[24] Recent reports, however, suggest that the Beatles may be close to bringing its catalog online in an exclusive deal with Apple's iTunes Store. Tim Arango, *Beatles: Only on iPod?*, CNN.COM, Nov. 27, 2006, *at* http://money.cnn.com/2006/11/22/technology/apple_beatles_ipod.fortune/index.htm.
[25] INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, 2004 SPECIAL 301 REPORT: RUSSIAN FEDERATION 194, *available at* http://www.iipa.com/rbc/2004/2004SPEC301RUSSIA.pdf; *see* David E. Miller, *Combating Copyright Infringement in Russia: A Comprehensive Approach for Western Plaintiffs*, 33 VAND. J. TRANSNAT'L L. 1203, 1205 (2000) ("Some Western parties have argued that

Much of this conflict arises as a result of the major discrepancies between United States and Russian copyright law. One plausible explanation for these discrepancies is that the two nations have vastly different intellectual property policy regimes.[26] For centuries, one of the fundamental principles of the intellectual property system in the United States has been the protection of an author's exclusive rights in his or her creation.[27] However, countries such as Russia, where communism once governed, have yet to embrace the same incentive-based principles as the United States.[28] As a result, Russia's intellectual property policies are not nearly as stringent when it comes to the protection of an author's exclusive rights.

A. RUSSIAN COPYRIGHT LAW

Russian law is based considerably on the preexisting body of law of the former Soviet Union, historically an economically unstable system.[29] As a result, many analysts assume that Russia "has no law" and that its courts are "inefficient, incompetent, or simply corrupt."[30] Russia, however, has taken several steps towards an effective copyright system by adopting the "Law on the Legal Protection of Computer Programs and Databases" and the "Law on Copyright and Neighboring Rights" in 1992 and 1993, respectively.[31] Recognizing the need for an effective body of laws and regulations, Russia has been in an ongoing transitional process towards further legal development.[32] Unfortunately, the development of sophisticated and effective legislation is an extremely slow process at best.[33]

The Law on Copyright and Related Rights[34] states that Russian copyright law extends to "scientific, literary and artistic works that are the product of creative work, regardless of the purpose, the merit and the manner of expression thereof."[35] Musical songs and their lyrics are therefore covered generally under Russian copyright law and qualify as "phonograms," defined as "any exclusive sound recording of performances or of other sounds."[36] The reproduction of a phonogram is defined under

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Russia is not eligible to join the WTO because its laws do not meet the minimum standards required by TRIPS. In particular, these parties insist that Russia must extend retroactive protection to all 'pre-1995 U.S sound recordings and pre-1973 U.S. works.'"). *Id*. at 1220–21.

[26] Alina M. Collisson, *The End of Software Piracy in Eastern Europe? A Positive Outlook With International Help*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1005, 1010–11 (2004).

[27] *Id.*

[28] *Id.* at 1011.

[29] THOMAS H. REYNOLDS & ARTURO A. FLORES, FOREIGN LAW: CURRENT SOURCES OF CODES AND LEGISLATION IN THE JURISDICTIONS OF THE WORLD, VOL. II-B: WESTERN AND EASTERN EUROPE AND THE EUROPEAN COMMUNITES, at II Russia 1 (William S. Hein & Co., Inc. 2002).

[30] Miller, *supra* note 25, at 1205.

[31] *See* Miller, *supra* note 25, at 1205.

[32] *See* REYNOLDS & FLORES, *supra* note 29.

[33] REYNOLDS & FLORES, *supra* note 29.

[34] Law of the Russian Federation on Copyright and Related Rights, *translation available at* http://www.fips.ru/ruptoen2/law/low_cop.htm (last visited Jan. 5, 2007) [hereinafter Russian Copyright Law].

[35] *Id.* at art. 6(1).

[36] *Id.* at art. 4.

the law as "the making of one or more copies of a phonogram or part of a phonogram on any physical medium."[37] As a result, Russian copyright law only applies to corporeal transfers of work—it has yet to be updated to include the digital transfer of works.

In addition, Russian law provides compulsory copyright licenses to wire broadcasters of phonograms,[38] likely a remnant from the Communist system that once forced inventors to relinquish all rights to their creations in exchange for limited rewards provided by the state.[39] Copyright owners are required to license their work to wire broadcasters upon request.[40] The only requirement is that remuneration be paid to the copyright owner through an organization for the collective administration of rights-holders, such as ROMS, as defined under Article 44 of Russia's Law on Copyright and Related Rights.[41]

The current state of Russian copyright law resulted in Russian prosecutor's decision not to conduct a criminal investigation of Allofmp3, after determining that the service operated legally under the law of the Russian Federation.[42] Since Allofmp3 creates digital copies of copyrighted songs, this does not constitute the reproduction of a phonogram under Russian copyright law, which only applies to copies made in a physical medium. It is also likely that the Internet would qualify as a cable transmission under Article 39 of Russia's Law on Copyright and Related Rights, which would allow Allofmp3 to receive compulsory licenses for all songs sold through the service. Therefore, Allofmp3 would not be required to obtain authorization from copyright owners as long as it satisfies the remuneration requirement, which it does through its agreement with ROMS, the Russian national organization for collective management of authors' intellectual property rights in digital formats.[43]

While new copyright legislation is currently in the works in Russia, the process is incredibly slow, and it is not certain whether the proposed legislation will even pass.[44] Until the appropriate changes are made, Allofmp3 will continue to operate legally under Russian copyright law.

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[37] *Id.*

[38] James Chapman, Note, *Russian Web Sites Jeopardize U.S. Users: The Dangers of Importing Copyrighted Material over the Internet*, 29 HASTINGS INT'L & COMP. L. REV. 267, 288 (2006).

[39] *See* Michael Mertens, Note, *Thieves in Cyberspace: Examining Music Piracy and Copyright Law Deficiencies in Russia as it Enters the Digital Age*, 14 U. MIAMI INT'L & COMP. L. REV. 139, 154 (2006).

[40] Russian Copyright Law, *supra* note 34, at art. 39(1)(3) (stating that communication of a phonogram to the public by cable shall be authorized even without the consent of the producer of a commercial phonogram); Chapman, *supra* note 38.

[41] Russian Copyright Law, *supra* note 34, at art. 39(2).

[42] *See* John Borland, *Legal reprieve for Russian MP3 site?*, CNET NEWS.COM, Mar. 7, 2005, *at* http://news.com.com/Legal+reprieve+for+Russian+MP3+site/2100-1027_3-5602743.html.

[43] Russian Organization for Multimedia & Digital Systems (ROMS), *supra* note 11.

[44] Musically, *Russian 5c MP3 Site 'Unlicensed'*, THE REGISTER, May 5, 2004, *at* http://www.theregister.co.uk/2004/05/05/russian_mp3_site/ (stating that "even the labels are not assuming that the new laws are a done deal").

B. UNITED STATES COPYRIGHT LAW

Copyright law is far more developed in the United States than in Russia. While the United States currently boasts some of the most stringent copyright regulations in the world, this was not always the case. Until the Chace Act of 1891, the United States was a copyright piracy haven for foreign works.[45] The Chace Act, sometimes referred to as the International Copyright Act of 1891,[46] opened the door to bilateral agreements between the United States and foreign nations.[47] The United States has since developed its copyright law, eventually arriving at the Copyright Act as it stands today.

Copyright law in the United States extends to protect "original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[48] The United States fosters the stimulation of creativity through the use of its incentive-driven intellectual property policy. As a result, United States copyright law provides rights-holders with the following exclusive rights:

> (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.[49]

United States copyright protection extends to musical songs and their lyrics since both qualify as "original works of authorship."[50] Copyright protection also extends to any "original song, whether stored on a cassette tape, CD, or as a digital audio file on your computer or portable MP3 player."[51] For musical compositions, there are at least two sets of rights-

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[45] MELVILLE B. NIMMER & DAVID NIMMER, COPYRIGHT § 17.01[C][1][a] at 17-12 (MB 2002) (1963). [hereinafter NIMMER ON COPYRIGHT] (stating that "the United States was a copyright piracy haven from the first copyright statute of 1790 until the Chace Act of 1891"). This helps illustrate that the development of sophisticated and effective copyright legislation is a slow process. *Id.*
[46] *Id.* §17.01 [C] [1] [a] at 17-13 (2002).
[47] *Id.*
[48] 17 U.S.C. § 102(a) (2000).
[49] *Id.* § 106 (2000).
[50] *Id.* § 102(a)(2) (2000).
[51] John A. Fedock, Note, *The RIAA v. The People: The Recording Industry's Misguided Attempt to Use the Legal System to Save Their Business Model*, 32 PEPP. L. REV. 947, 958 (2005) (citing Recording Indus. Ass'n of Am. v. Verizon Internet Serv's, Inc. 351 F.3d 1229 (D.C. Cir. 2003)).

holders[52]—the record label, which holds the sound recording copyright,[53] and the song writer, who holds the composition copyright.[54] The violation of any exclusive right without the permission of both rights-holders[55] constitutes copyright infringement and entitles the copyright owner monetary or injunctive relief.[56]

The two exclusive rights under United States copyright law that are most relevant to Allofmp3 are the rights "to reproduce the copyrighted work" and "to distribute copies or phonorecords of the copyright work."[57] Unlike its Russian counterpart, United States copyright law is not limited to copies made in physical media.[58] Since the United States does not operate on a compulsory copyright system, Allofmp3 would be required to obtain consent from all rights-holders, likely in the form of a licensing agreement, before being authorized to create legal copies of a copyrighted work. While Allofmp3 may operate legally under current Russian copyright law, under United States copyright law it is clear that the Russian service violates the exclusive rights of copyright holders through its creation and distribution of digital copies of copyrighted songs.

Nevertheless, the international nature of the Allofmp3 situation presents several threshold issues for the RIAA in its upcoming lawsuit against the Russian music service. The RIAA will likely face significant choice-of-law and enforcement issues. However, as with many Internet law disputes—especially those transcending international boundaries—the first issue will be whether a United States court will exercise jurisdiction over the Russian company.

III. PURSUIT OF LEGAL ACTION IN THE UNITED STATES COURT SYSTEM

A. JURISDICTIONAL ISSUES

1. *Traditional Personal Jurisdiction: The International Shoe Standard*

The personal jurisdiction doctrine as it stands today was essentially defined by the Supreme Court's decision in *International Shoe Co. v. Washington*.[59] The Court, taking into account the growing ease of interstate commerce, redefined personal jurisdiction to free the jurisprudence from

[52] Aric Jacover, Note, *I Want My MP3! Creating a Legal and Practical Scheme to Combat Copyright Infringement on Peer-to-Peer Internet Applications*, 90 GEO. L.J. 2207, 2219 (2002) ("[A] sound recording contains two separate copyrights: a copyright in the sound recording, and a copyright in the underlying music composition.").
[53] *Id.*
[54] *Id.*
[55] *Id.* ("[I]f an Internet company wants to copy sound recordings onto its server and make them available for download, the company has to get permission from the owners of both the music composition and sound recording copyrights.").
[56] *See* 17 U.S.C. § 501 (2002).
[57] *Id.* at § 106(1), (3) (2000).
[58] *See id.* at § 1001 (2006).
[59] Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

the rigid doctrine announced in *Pennoyer v. Neff*,[60] where personal jurisdiction was determined by mere presence in the forum state.[61] In *International Shoe*, the Court announced that the new rule for personal jurisdiction would be based on an analysis of minimum contacts where the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[62] This essentially meant that the potential for liability arose only after a defendant had purposefully availed itself of the forum state's benefits and protections.[63]

2. *Personal Jurisdiction Over the Internet: The Zippo Standard*

Just as a new framework was necessary to account for the growing ease of participation in interstate commerce during the days of *International Shoe*, the Internet has created the need for further development of the personal jurisdiction doctrine. The Internet's ubiquitous nature, where information can be easily accessed across international borders at any given time,[64] has greatly reduced the costs of international transactions. One of the first cases to address personal jurisdiction in the Internet age was *Inset Systems, Inc. v. Instruction Set, Inc.*[65] In *Inset*, Inset Systems, a Connecticut-based corporation, sued Instruction Set, a Massachusetts-based corporation, for trademark infringement when Instruction Set registered the domain "Inset.com."[66] The lawsuit was filed in Connecticut, where Instruction Set's only contact with the forum state was the accessibility of its website.[67] The court analogized Instruction Set's Internet advertising—namely its website—to a catalog advertised in periodicals with a Connecticut circulation.[68] Under this analogy, the court held that the accessibility of a website in a forum state was enough to subject the defendant to personal jurisdiction in that forum.[69] Many courts initially adopted this standard despite its similarities to the rigid framework of *Pennoyer*, which placed a heavy emphasis on a defendant's presence in the forum state.[70]

A more flexible standard for determining personal jurisdiction in Internet cases was later developed in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*[71] *Zippo* involved a trademark dispute in a Pennsylvania District Court between Zippo Manufacturing, the popular Pennsylvania-based manufacturer of tobacco lighters, and Zippo Dot Com, a news

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[60] *Id*. at 316–17 (citing Pennoyer v. Neff, 95 U.S. 714 (1877)); *see also* Dennis T. Yokoyama, *You Can't Always Use the* Zippo *Code: The Fallacy of a Uniform Theory of Internet Personal Jurisdiction*, 54 DEPAUL L. REV. 1147 (2005).
[61] *See Pennoyer*, 95 U.S. at 722 (stating that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory").
[62] *Int'l Shoe*, 326 U.S. at 316 (quoting Millikin v. Meyer, 311 U.S. 457, 463 (1940)).
[63] *Id.*
[64] Reno v. ACLU, 521 U.S. 844, 850–51 (1997).
[65] 937 F. Supp. 161 (D. Conn. 1996).
[66] *Id.* at 162–63.
[67] *Id.*
[68] *Id.* at 164–65.
[69] *Id.* at 165.
[70] *See* Pennoyer v. Neff, 95 U.S. 714, 722 (1877).
[71] Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119 (W.D. Pa. 1997).

service website based in California.[72] The *Zippo* court recognized that "as technological progress has increased the flow of commerce between States, the need for jurisdiction has undergone a similar increase."[73] There can be no question that the Internet represents such a technological advancement, "making it possible for an individual to conduct business throughout the world using a single desktop computer."[74] As a result, the *Zippo* court developed the first sliding scale for Internet personal jurisdiction cases consistent with the *International Shoe* framework.[75]

The *Zippo* court effectively applied the concept of purposeful availment to Internet cases by stating that personal jurisdiction would be reasonable for a defendant who "clearly does business over the Internet" by "enter[ing] into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet."[76] The court also abandoned the *Inset* doctrine by creating a distinction between active and passive websites.[77] The court held that personal jurisdiction would not be reasonable in the case of a passive website where the site does "little more than make information available to those who are interested."[78] Furthermore, personal jurisdiction for cases in the middle ground—"interactive Web sites where a user can exchange information with the host computer"[79]—is to be determined by "examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site."[80]

In *Arista Records, Inc. v. Sakfield Holding Co.*,[81] the court relied on the *Zippo* standard in holding that both general and specific jurisdiction had been established over Sakfield, a Spain-based company.[82] Sakfield was in charge of Puretunes.com, an online music store that gave users access to several hours of unlimited music downloading for as little as four dollars.[83] Citing agreements with two major Spanish performing rights societies, Puretunes.com claimed legitimacy under Spanish law.[84] Nevertheless, several recording companies filed a claim for copyright infringement in the District of Columbia.[85] Sakfield, citing insufficient evidence that it had transacted business with residents of the forum state, filed a motion to dismiss for lack of personal jurisdiction.[86] Despite Sakfield's attempt to electronically erase stored information, recovered records showed that

[72] *Id.* at 1121.
[73] *Id.* at 1123 (quoting Hanson v. Denckla*,* 357 U.S. 235, 250–51 (1958)).
[74] *Id.*
[75] *Id.* at 1124.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] 314 F. Supp. 2d 27 (D.C. 2004).
[82] *See id.* at 29.
[83] "Eight hours of unlimited downloading will cost $3.99, 48 hours will cost $9.99, and a month will cost $24.99, for example. Longer periods of time are also available." John Borland, *Spanish Site Offers Music-file Fiesta*, CNET NEWS.COM, May 19, 2003, *at* http://news.com.com/2100-1027-1007920.html.
[84] *Id*.
[85] *Sakfield*, 314 F. Supp. 2d at 29.
[86] *Id.*

approximately 241 Puretunes users were located in the District of Columbia.[87] Applying the *Zippo* standard, the court held that it was clear that Puretunes.com conducted business over the Internet by "maintain[ing] continuous and systematic contacts with the District of Columbia by entering into hundreds of contractual relationships with District residents through the Puretunes website and enabling the transfer of music files into the District."[88] Therefore, Sakfield purposefully availed itself of the benefits of the forum market, making it reasonable for the Spain-based company to anticipate being haled into court in the United States.[89]

By adapting the framework established in *International Shoe* to account for the unique characteristics of the Internet, the *Zippo* court established a flexible standard for personal jurisdiction over the Internet that has profoundly influenced personal jurisdiction doctrine.[90] Some have argued that the *Zippo* standard may have outlived its usefulness[91]—the middle ground of the standard's sliding scale continuum has become increasingly ambiguous as the large majority of websites today contain interactive features, such as Internet cookies. However, it remains the most influential standard for determining personal jurisdiction in Internet cases. It is therefore likely that the *Zippo* standard would be applied in any legal action brought against Allofmp3 in the United States.

3. *Personal Jurisdiction in the Allofmp3 Case: The Zippo Standard Applied*

The *Sakfield* case represents a situation that is factually similar to Allofmp3—both are foreign-based online music stores that claim legitimacy through agreements with local performing rights societies. Both companies also provide their users with extremely cheap alternatives for music, largely due to the fact that they do not directly compensate record labels or song writers. As in *Sakfield*, the court would likely utilize the *Zippo* standard in determining whether Allofmp3 purposefully avails itself to the United States through its business over the Internet.

In an obvious attempt to persuade courts that it does not purposefully avail itself of the benefits of foreign business, Allofmp3's website displays the following disclaimer:

> The user bears sole responsibility for any use and distribution of all materials received from AllOFMP3.com. This responsibility is dependent on the national legislation in each user's country of residence. The

[87] *Id.* at 33–34.
[88] *Id.* at 34.
[89] *Id.* at 35.
[90] Yokoyama, *supra* note 60, at 1165 ("As the lightening rod of Internet jurisdiction, *Zippo*, while a district court decision, has also profoundly influenced personal jurisdiction, albeit in the narrower realm of Internet activities.").
[91] *See* Yokoyama, *supra* note 60 at 1166–67 ("While courts and commentators alike initially found much to laud in the *Zippo* assertion that operating a passive website was an insufficient contact for purposes of personal jurisdiction, the *Zippo* rule has been attacked increasingly by a growing chorus of courts and commentators.").

> Administration of AllOFMP3.com does not possess information on the laws of each particular country and is not responsible for the actions of foreign users.[92]

It is unlikely such a disclaimer would carry much weight, though, as it is fairly clear that Allofmp3 targets international customers, including those in the United States. Allofmp3 not only offers versions of its website in both Russian and English languages,[93] but the website also prominently features international artists on its main page, including World Charts from the United States, United Kingdom, Germany and France. This type of solicitation does little to determine whether Allfomp3 actually conducts business in the forum, however, it is likely that this evidence alone will not be sufficient to subject Allofmp3 to jurisdiction in the United States.[94]

As in *Sakfield*, the court in the Allofmp3 case will likely require proof that the Russian service actually has customers who reside in the United States.[95] Given Allofmp3's popularity, however, this should not be an issue.[96] The exact number can easily be confirmed by examining Allofmp3's user records, similar to the method used by the court in *Sakfield*. These records would almost certainly establish that the Russian company purposefully avails itself of the benefits of United States customers.[97] Under the *Zippo* standard, it follows that Allofmp3 would be subject to personal jurisdiction in the United States.

Despite the assumption that a United States court will exercise jurisdiction over Allofmp3, several significant issues still remain. For example, will the court subject a Russian company to United States copyright law, or will it merely interpret and apply Russian copyright law? Alternatively, the court could dismiss the case altogether, citing *forum non-conveniens*. Ultimately, this choice of law issue will be critical in the court's determination of Allofmp3's fate.

B. CHOICE OF LAW ISSUES

The choice of law doctrine is often applied by courts to determine which nation's laws are to be applied in international disputes. The doctrine as it applies to international copyright disputes in the United States results

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[92] *Is it legal to download music from Allofmp3*, *supra* note 11.

[93] A spokesman for Allofmp3 stated that, "the website targets Russian-speaking users both inside and outside Russia, and that the English website is available to make it easier to access on computers outside Russia." Vauhini Vara, *Russian Sites Sell Song Downloads for Pennies, But Are They Legal*? WALL ST. J. ONLINE, Jan. 25, 2005, *at* http://online.wsj.com/article/SB110632225796232623.html.

[94] *See Sakfield*, 314 F. Supp. 2d at 32–33 (holding that simply offering to allow users to register for the service to receive 25 free music files is equivalent to active solicitation whether or not the defendant's advertising plan was specifically targeted towards the forum state. However, that alone would not be enough to constitute "doing business" in the forum state).

[95] *See id.* at 33.

[96] "The RIAA estimates that 11 million songs were illegally downloaded by US customers between June 2006 and October 2006 alone." Welte, *supra* note 15.

[97] In February 2005, MP3Search.ru, another popular Russian online music store comparable to Allofmp3, claimed to have over 700,000 visitors each week, of which 400,000 were non-Russian. Chapman, s*upra* note 38, at 269.

from the limitations of the United States Copyright Act with respect to foreign actions.[98] In fact, one of the fundamental principles of copyright law is that the Copyright Act has no extraterritorial application for actions occurring outside the United States.[99] The Supreme Court has stated that "[i]t is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" As a result, courts remain reluctant to subject potentially infringing actions occurring outside of United States borders to United States law.[100] Under the choice of law doctrine, a foreign action is generally subject to United States law only when there is a specific action taken within the United States affecting the foreign infringement.[101] However, courts are now being asked to settle a growing number of international disputes through the choice of law doctrine due to an increase in the ease and frequency of international transactions,[102] especially after the introduction of the Internet.[103] The application of the choice of law doctrine is critical to the outcome of an international dispute, as societies often differ when applying common legal principles.[104] Nevertheless, there is surprisingly very little guidance on the choice of law issue as it pertains to cases involving international copyright.[105]

There is disarray even amongst the many circuits of the United States court system as to how the choice-of-law doctrine should be applied to international copyright cases. The Ninth Circuit, for example, has been somewhat reluctant to apply United States copyright law to cases involving an extraterritorial act.[106] On the other hand, the Second Circuit has adopted a more expansive view of the choice-of-law doctrine by applying United States copyright law to international disputes that merely have an adverse effect on United States copyright interests.[107]

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[98] *See* Robert H. Thornburg, *Choice of Law in International Copyright: The Split of Authority Between the Second and Ninth Circuits regarding Extraterritorial Application of the Copyright Act*, 10 J. TECH. L. POL'Y 23, 24 (2005).

[99] *Id*. In general, United States copyright laws have no application to extraterritorial infringement. *Id*.; *see also* NIMMER ON COPYRIGHT, *supra* note 45, §17.02 at 17-19 (2006).

[100] Thornburg, *supra* note 98, at 24–25 (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).

[101] Thornburg, *supra* note 98, at 25.

[102] *See*, *e.g*., Itar-Tas Russian News Agency v. Russian Kurier, Inc., 153 F.3d 82, 88 (2d Cir. 1998); Creative Tech., Ltd. v. Aztech Sys., Ltd., 61 F.3d 696 (9th Cir. 1995).

[103] Graeme B. Dinwoodie, *International Intellectual Property Litigation: A Vehicle for Resurgent Comparativist Thought?*, 49 AM. J. COMP. L. 429, 438–39 (2001) ("Notions of conceptually defined places of conduct governing an infringement action become problematic when works are distributed, and allegedly infringing trademarks are used, on the [I]nternet.").

[104] *Id.* at 442. Even countries of similar economic backgrounds often have very different methods of dealing with common legal principles, such as defamation and copyright law. *Id.*

[105] Thornburg, *supra* note 98, at 23 ("[C]hoice of law issues in international copyright cases have been largely ignored in the reported decisions and dealt with rather cursorily by most commentators.") (quoting *Russian Kurier,* 153 F.3d at 88).

[106] Thornburg, *supra* note 98, at 25–28.

[107] Thornburg, *supra* note 98, at 28–33.

1. *The Ninth Circuit's Restrictive Choice of Law Policy*

The Ninth Circuit's restrictive interpretation of the choice of law doctrine has limited the application of domestic copyright law in cases involving an extraterritorial act.[108] The Ninth Circuit traditionally complied with the generally held principle that the Copyright Act had no extraterritorial application outside the United States.[109] Therefore, United States copyright law was only applicable in cases where there had been a specific action taken within the United States, even if that action was later completed in a foreign jurisdiction.[110] In *Peter Starr Productions Co. v. Twin Continental Films, Inc.*,[111] the court held that defendant's authorization within the United States to commit an actionable act in a foreign country constituted a specific action taken within the United States.[112] As a result, defendant was liable under United States copyright law.[113] However, the Ninth Circuit later took a more restrictive stance in *Subafilms, Ltd. v. MGM-Pathe Communications, Co.*[114] Citing the requirement of national treatment by both the Universal Copyright Convention and the Berne Convention, the Ninth Circuit held that "the applicable law is the copyright law of the state in which the infringement occurred, not that of the state of which the author is a national or in which the work was first published."[115] Therefore, the court essentially reversed its earlier holding in *Peter Starr Productions Co.* in holding that mere authorization within the United States no longer satisfied the subject matter jurisdiction requirements under the choice of law doctrine.[116]

The Ninth Circuit's interpretation of the choice of law doctrine is consistent with our nation's longstanding principle against the application of United States copyright law to extraterritorial infringement. Instead of taking transnational copyright disputes into its own hands, the Ninth Circuit has adopted a policy that relies heavily on the strong presence of international intellectual property law.[117] Multilateral treaties, such as the Berne Convention, have historically been successful in providing equal treatment for foreign copyright owners through the articulation of international copyright standards.[118] More recently, alternative dispute resolution mechanisms, such as the World Trade Organization, have also helped settle transnational disputes through the enforcement of these multilateral treaties.[119]

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[108] Thornburg, *supra* note 98, at 25–28.
[109] *See* Thornburg, *supra* note 98, at 25–26.
[110] *See* Thornburg, *supra* note 98, at 25–26.
[111] 783 F.2d 1440 (9th Cir. 1986).
[112] *Id. at* 1442–43.
[113] *See* Thornburg, *supra* note 98, at 25 (quoting NIMMER ON COPYRIGHT, *supra* note 45, §17.02 at 17-19 to 17-20 (2006)).
[114] Subafilms, Ltd. v. MGM-Pathe Commc'ns Co., 24 F.3d 1088 (9th Cir. 1994) (en banc), *cert. denied*, 513 U.S. 1001 (1994).
[115] *Id.* at 1097 (quoting NIMMER ON COPYRIGHT, *supra* note 45, at § 17.05 [A] at 17-39 (2002)).
[116] Thornburg, *supra* note 98, at 27; *Subafilms,* 24 F.3d 1088 at 1099.
[117] Dinwoodie, *supra* note 103, at 435.
[118] Dinwoodie, *supra* note 103, at 435.
[119] Dinwoodie, *supra* note 103, at 435.

However, multilateral treaties, especially one as liberal as the Berne Convention, often only specify minimum standards, granting tremendous freedom to the member states on whether to issue higher levels of protection.[120] This opens up the possibility for discrepancies in copyright law between member states, despite the existence of international standards. Furthermore, variations in social contexts—for example, the definition of the term "author" in different jurisdictions—allow for further complications in transnational disputes.[121]

Another drawback of the Ninth Circuit's restrictive choice of law policy is that it does very little to address the indirect economic impact that extraterritorial infringement might have on United States interests.[122] This shortcoming is compounded by the growing ease of international transactions in today's world. While the United States currently recognizes Russia as one of several countries on its "priority watch list" of nations that fail to issue adequate protection of intellectual property rights,[123] the Ninth Circuit's restrictive stance prevents many rights-holders from seeking relief in United States courts.

Just as courts, in landmark cases such as *International Shoe* and *Zippo,* had to consider the growing trend towards globalization, it might be necessary for the Ninth Circuit to also reconsider its restrictive choice of law policy. With international transaction costs at an all-time low, United States courts may be wise to take a number of transnational copyright disputes into their own hands rather than force copyright owners to rely solely on international copyright law.

2. *The Second Circuit's Expansive Choice of Law Policy*

The Second Circuit has taken a much more liberal approach to the choice of law doctrine by expanding the application of United States law to extraterritorial acts having an adverse effect on United States copyright interests.[124] The Second Circuit provided what many consider to be "one of the most detailed choice of law analyses seen in a modern copyright case"[125] with its decision in *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*[126] While many courts often chose to ignore the choice of law issues in international copyright cases, the Second Circuit attempted to articulate a standard approach to govern future choice-of-law cases.[127] In its analysis, the court asserted that the Berne Convention does not settle the issue of international ownership in copyright.[128] Instead, the national treatment requirement of the Berne Convention merely assures that a

[120] Dinwoodie, *supra* note 103, at 436.
[121] Dinwoodie, *supra* note 103, at 436.
[122] Thornburg, supra note 98, at 34.
[123] United States Department of State, *U.S.: China Has High Rate of Intellectual Property Infringement*, Apr. 29, 2005, *at* http://usinfo.state.gov/usinfo/Archive/2005/Apr/29-580129.html.
[124] Thornburg, *supra* note 98, at 28–33.
[125] Thornburg, *supra* note 98, at 29 (quoting Dinwoodie, *supra* note 103, at 439).
[126] Itar-Tas Russian News Agency v. Russian Kurier, Inc., 153 F.3d 82 (2d Cir. 1998).
[127] *See* Dinwoodie, *supra* note 103, at 439.
[128] *Russian Kurier*, 153 F.3d at 91.

nation's applicable copyright law will be applied uniformly to foreign and domestic authors alike.[129] The court held that choice of law should be determined by the law of the country with "the most significant relationship to the property and the parties."[130]

This newly developed choice-of-law standard was applied by the Second Circuit in *Shaw v. Rizzoli International Publications, Inc.*[131] The *Rizzoli* case involved a defendant based in Italy that assembled and distributed a catalog in the United States and Italy containing Marilyn Monroe photographs entitled, "Marilyn Monroe. The Life. The Myth."[132] The copyright owners of the photographs filed suit in United States courts, asserting that both domestic and Italian distributions were actionable under United States copyright law.[133] Rizzoli moved for partial summary judgment, contesting that the distribution of the photograph catalog in Italy did not constitute subject matter under United States copyright law.[134] The court held that, under the new analysis, only one single "predicate act" in the United States was required to implicate United States copyright law.[135] Therefore, while the Italian distribution of the catalog—entirely compiled and printed in Italy—failed to satisfy the predicate act requirement, the court held that the distribution of the work in the United States could constitute infringement under United States copyright law.[136]

The Second Circuit took another opportunity to expand the choice of law doctrine in *Films by Jove, Inc. v. Berov*.[137] In *Berov*, plaintiffs brought suit for copyright infringement in the United States against a Russian publishing group.[138] The works in question were approximately fifteen hundred animated films created by Plaintiff, a former Soviet state-owned film studio.[139] Despite the applicability of Russian copyright law, the United States district court held that it was an appropriate forum to resolve the copyright ownership issues under international copyright law.[140] Essentially, the district court further expanded the choice of law doctrine by holding that it was capable of interpreting and applying Russian copyright law.[141]

There is little doubt that many United States copyright owners would greatly benefit from the Second Circuit's expansion of the choice-of-law doctrine in international copyright cases. The expansive policy of the Second Circuit would not only enable rights-holders to seek relief in United States courts, but it would also subject many defendants to the more

[129] *Id.* at 89.
[130] *Id.* at 90.
[131] Shaw v. Rizzoli Int'l Publ'ns, Inc., 1999 U.S. Dist. LEXIS 3233 (S.D.N.Y. 1999).
[132] *Id*. at *5–*6.
[133] *Id*. at *6–*7.
[134] *Id*. at *8.
[135] *Id*. at *9.
[136] *Id*. at *12.
[137] 250 F. Supp. 2d 156 (E.D.N.Y. 2003).
[138] *Id.* at 158.
[139] *Id.*
[140] *Id.* at 192.
[141] Thornburg, *supra* note 98, at 33.

stringent standards of United States copyright law. Nevertheless, the policy poses significant risks as well. One of those risks is the threat that the expansion of jurisdiction by United States courts in international disputes will undermine the authority of foreign courts.[142] Foreign courts have an inherent right to decide international disputes where the infringing action occurred within their jurisdiction. By allowing United States courts to decide more international disputes—including sometimes interpreting foreign legislature—the United States is effectively taking away that right. The Second Circuit's choice of law policy, therefore, bears the significant risk of leading to judicial cacophony amongst several nations.

3. *The Choice-of-Law Doctrine Applied to Allofmp3*

Choice-of-law will undoubtedly be a critical issue in the RIAA's upcoming lawsuit against Allofmp3 in the United States. Given the large discrepancy between the circuits regarding choice-of-law in international copyright cases, the issue will likely be decided based on the venue of the case. It is therefore no surprise that the RIAA chose to file its lawsuit in the Second Circuit, where an expansive choice of law policy is likely to be applied. Applying the Second Circuit's policy, it is probable that the court would accept the case. Furthermore, as illustrated in *Rizzoli*, the court would also likely apply United States copyright law since Allofmp3 engages in the distribution of copyrighted works within the United States. Assuming this is the case, the next issue is whether Allofmp3 will be found guilty of copyright infringement under United States copyright law.

C. ALLOFMP3 AND COPYRIGHT INFRINGEMENT UNDER UNITED STATES COPYRIGHT LAW

There are three forms of copyright infringement under United States copyright law: direct, contributory, and vicarious. Direct infringement requires the "unauthorized exercise of one of the exclusive rights of the copyright holder."[143] There is no intent or any particular state of mind required under direct infringement.[144] This form of strict liability for copyright infringement is a bit surprising, especially considering that the RIAA admits that direct infringers are often unaware of committing any wrongdoing.[145]

Contributory infringement is copyright law's equivalent to the criminal act of aiding and abetting,[146] and it is founded on the theory that "one who

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[142] *See* Thornburg, *supra* note 98, at 34.
[143] Religious Tech. Ctr. v. Netcom On-line Comm. Servs., Inc., 907 F. Supp. 1361, 1367 (N.D. Cal. 1995).
[144] *Id.*
[145] Fedock, Note, *supra* note 51, at 959 (citing Recording Industry Association of America, *Backgrounder News Memo Debunking Myths Raised by Verizon in Court Dispute*, *at* http://www.riaa.com/news/filings/verizon_backgrounder.asp). In a case involving file-sharing software, the RIAA stated that "the majority of the users [of the various file-sharing programs] were unable to tell what files they were sharing, and sometimes incorrectly assumed they were not sharing any files when in fact they were sharing all [of the] files on their hard drive." Fedock, Note, *supra* note 51, at 959.
[146] Fedock, Note, *supra* note 51, at 959 (citing *In re* Aimster Copyright Litig., 334 F.3d at 651).

directly contributes to another's infringement should be held liable."[147] In order to prevail under contributory infringement, a copyright holder must first establish that another has directly infringed upon his copyright.[148] The owner must then establish that, with knowledge of the infringing activity, the defendant induces, causes, or materially contributes to the conduct.[149] The knowledge requirement is objective and applies when the defendant knows or has reason to know of the infringing activity.[150]

Vicarious infringement, derived from the legal principle of *respondeat superior*,[151] is similar to contributory infringement in that both involve a third party. Therefore, a copyright owner claiming vicarious infringement must first establish that another has directly infringed upon his copyright.[152] Once established, vicarious liability exists "when (1) the defendant has the right and ability to supervise the infringing conduct [of another] and (2) the defendant has an obvious and direct financial interest in the infringement."[153]

Secondary copyright infringement, namely contributory and vicarious infringement, has been brought to the forefront as courts have had to deal with the recent string of P2P cases. In *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*,[154] Grokster, a P2P software company, argued that it could not be liable for secondary liability because its software was designed in such a way that it was impossible for the company to gain knowledge of any specific infringing actions, even though ninety percent of files being transferred were copyrighted works.[155] Grokster, relying on *Sony Corp. v. Universal City Studios*,[156] further contended that its software was capable of substantial noninfringing uses.[157] In *Sony*, the Supreme Court held that Sony, a distributor of a product with infringing uses, would not be liable for secondary liability since its product was also capable of substantial noninfringing uses.[158] However, the Supreme Court in *Grokster* held that *Sony*'s limitation on secondary liability did not mean that a defendant could never be held liable for secondary infringement simply because its product was capable of substantial lawful use.[159] Instead, a distributor may still be held liable if evidence supports that there is an actual intent to cause

[147] Sega Enters. Ltd., v. Maphia, 948 F. Supp. 923, 932 (N.D. Cal. 1996).
[148] *Id.*
[149] Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971).
[150] *Maphia*, 948 F. Supp. at 933.
[151] A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1022 (9th Cir. 2001) (citing Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 262 (9th Cir. 1996)). Respondeat superior is the principle that holds an employer responsible for the actions of its employees.
[152] *Id.*
[153] Gordon v. Nextel Commc'ns., 345 F.3d 922, 925 (6th Cir. 2003).
[154] Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).
[155] *Id.* at 922.
[156] Sony Corp. v. Universal City Studios, 464 U.S. 417 (1984) (holding that secondary liability may not be based on presumed or imputed intent to cause infringement from a product's design).
[157] *Grokster*, 545 U.S. at 922–23.
[158] Although the majority of VCR owners used the product to infringe on copyrights, Sony was not held liable for secondary copyright infringement because its product had substantial noninfringing uses and there was no evidence that the company intended to market its product's infringing uses. *Sony*, 464 U.S. at 456.
[159] *Grokster*, 545 U.S. at 933–34.

infringing use.[160] The *Grokster* case therefore established that the intent of the defendant is an important factor in secondary copyright infringement analysis.

The RIAA's strongest claim against Allofmp3 is for direct infringement. Allofmp3 would be liable under direct infringement due to its unauthorized reproduction and distribution of copyrighted works, which are exclusive rights of both the record labels and song writers. Furthermore, given that direct infringement is a strict liability cause of action, the RIAA should have no problems establishing a prima facie case against Allofmp3 for this claim.

For a claim of contributory infringement, the RIAA would first need to identify an Allofmp3 user located in the United States in order to establish that a copyright has been directly infringed upon. The trade group would then need to establish that Allofmp3, with knowledge of its users' infringing activity, induces, causes, or materially contributes to the user's conduct. There is no question that Allofmp3 materially contributes to the user's conduct simply by making the copyrighted works available. However, since this is not a strict-liability cause of action, the issue will be whether Allofmp3 possesses knowledge of its users' infringement. As a result, Allofmp3's claims that it "does not possess information on the laws of each particular country"[161] plays a greater role in the company's defense against this claim. However, as in *Grokster*, the RIAA would likely prevail if it can show that Allofmp3 has the intention of appealing to infringing users in the United States. Furthermore, the RIAA can also prevail if it can show that Allofmp3 has reason to know of its users' infringement. At the very least, Allofmp3's purposeful availment to the United States should make the company responsible for becoming familiar with United States copyright law. It would therefore be surprising if Allofmp3 were able to escape liability through active avoidance. For those reasons, it is likely that a United States court will find that Allofmp3 is liable for contributory copyright infringement.

Vicarious infringement, similar to contributory infringement, first requires the existence of an Allofmp3 user located within the United States. Once this has been established, the RIAA must then establish that Allofmp3 has the right and ability to supervise the infringing conduct and that the company has an obvious and direct financial interest in the infringement. It is clear that Allofmp3, a profitable online music store, has an obvious and direct financial interest in its users's infringement. The issue of vicarious infringement will likely rest on whether Allofmp3 has the ability to supervise its users. As Allofmp3 is not an Internet service provider; rather its users are merely customers in a commercial online store and therefore likely possess limited privacy rights, it is likely that Allofmp3 has the right to supervise its users. While one of the benefits of the Internet is its

[160] *See id*. In *Grokster*, there was evidence that defendant marketed itself to users as a replacement to Napster, another peer-to-peer software company that had recently been found guilty of copyright infringement. *Id.* at 925.

[161] *Is it legal to download music from Allofmp3*, *supra* note 11.

ubiquitous nature—where information is freely available to anyone regardless of their location—this borderless nature can present issues as well. It might be difficult for Allofmp3 to restrict access of its services to users in foreign countries, such as the United States.[162]

While Allofmp3 could employ filtering techniques based on a user's Internet Protocol address, this tactic has not been proven to be entirely effective.[163] Additional measures to further restrict access have varying efficacy rates. For example, one method involves asking users to state their nationality—this particular method raises considerable honesty issues.[164] Furthermore, there is a possibility that measures meant to restrict access to Allofmp3's website by foreign users might also mistakenly restrict access to legitimate users as well.[165] While a court may still find that Allofmp3 is liable for vicarious copyright infringement, the RIAA will likely have the greatest difficulty with this claim.

It is likely that a court will find that Allofmp3 is liable for direct copyright infringement, with contributory and vicarious liability also likely to be shown. However, the next issue turns on the enforceability of such a United States court order. This question is especially critical given the foreign nature of the case—it is uncertain whether Allofmp3 has any assets in the United States for the court to award. By filing a lawsuit, however, the RIAA has shown that it is willing to invest in an expensive legal battle against a foreign-based company, even when an enforceable judgment is questionable at best. The question becomes: will Russia recognize and enforce any judgment granted against Allofmp3 by a United States court?

D. ENFORCEMENT ISSUES

In order to have a judgment recognized by a foreign jurisdiction, a court's exercise of jurisdiction must not be seen as exorbitant by foreign nations.[166] Applied to the case at hand, the Russian Federation must not deem a United States court's exercise of jurisdiction over Allofmp3 to be excessive in order for the judgment to have any binding effect in Russia.

The likelihood of foreign enforcement of a court judgment also depends on the type of relief granted. There is great resistance, for example, towards enforcing preliminary injunctions abroad since this type of remedy is not based on a full trial on the merits.[167] In the copyright

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[162] *See* Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme, 433 F.3d 1199, 1203 (9th Cir. 2006). In this case, a French court ordered Yahoo!, a U.S. Internet company, to restrict access to pages containing Nazi propaganda from French Internet users.

[163] *Id*. (stating that Yahoo! was only able to restrict access to 70% of its users located in France using this tactic).

[164] *Id.*

[165] *Id.* at 1216–17. The court did not rule on the validity of Yahoo!'s claim that restricting access to French Internet users could also potentially restrict access to Internet users in the United States. *Id*. at 1217.

[166] Symposium, *2003 Stanford Law & Technology Association Conference: Ideas Without Boundaries: Creating and Protecting Intellectual Property in the International Arena: Copyright's Long Arm: Enforcing U.S. Copyrights Abroad*, 24 LOY. L.A. ENT. L. REV. 45, 47–48 (2004).

[167] *Id.* at 48.

realm, even permanent injunctions would be difficult to enforce in a foreign jurisdiction since intellectual property rights are territorial in nature[168] as copyright infringement under United States copyright law might not necessarily be copyright infringement under another nation's copyright law. As a result, it would be extremely difficult for the RIAA to obtain any type of injunction against Allofmp3 in Russia.

While a United States court would have the authority to award local damages to the RIAA, it is unclear whether the Russian company has any local assets in the United States to award. While the RIAA could seek damages in Russia, this would present even more enforcement issues for the trade group. Given the territorial nature of intellectual property rights, a United States court seeking to award foreign monetary damages for infringement occurring outside of the United States would be required to apply the respective foreign country's laws, which would likely alter the court's judgment.[169] Another option, however, would be to seek assets in other jurisdictions where enforceability of the United States judgment is likely. For example, if the RIAA could enforce the United States judgment in any member state of the European Union, it could then seek assets of Allofmp3 throughout Europe.[170] These assets can range from capital, stocks, intellectual property rights, or even domain names registered in the European country.

While it is certainly possible for the RIAA to obtain a judgment against Allofmp3 in the United States, enforcement of that judgment will likely pose a significant obstacle for the trade group. As a result, the RIAA may find that an appeal to international intellectual property laws, such as bilateral agreements and international trade organizations, may be its most effective remedy.

IV. INTERNATIONAL INTELLECTUAL PROPERTY LAWS

The Berne Convention, originally started as a ten-nation agreement in 1886 designed to recognize copyright protection across national boundaries,[171] and has since become the premier multilateral copyright treaty.[172] The Berne Convention has been adopted by all of the world's most influential countries, with the United States joining in 1989 and the Russian Federation in 1995.[173]

A. THE BERNE CONVENTION

The Berne Convention is well known for its strong stance against copyright formalities. While United States copyright law was traditionally formed on strict formalities, such as the notice requirement, the Berne

[168] *See id.*
[169] *Id.* at 50.
[170] *Id.* at 51.
[171] NIMMER ON COPYRIGHT, *supra* note 45, § 17.01[B][1] at 17-5.
[172] NIMMER ON COPYRIGHT, *supra* note 45, § 17.01[B][2] at 17-11.
[173] NIMMER ON COPYRIGHT, *supra* note 45, § 17.01[B][1][a] at 17-6.

Convention specifically states that "the enjoyment and the exercise of [copyright] shall not be subject to any formality."[174] Instead, the Berne Convention requires both minimum standards and national treatment for all countries in the Berne Union.

Ideally, under these bilateral agreements, foreign copyright owners would be granted similar protections in the United States as American copyright owners were afforded in that foreign country.[175] The Berne Convention's minimum standards requirement, however, simply provides a standard baseline that Berne nations must accord to Berne nation claimants.[176] It is up to each member state to decide whether it will provide a higher level of protection for intellectual property rights-holders.[177] The Convention's national treatment requirement provides that member states must accord to foreign authors the same protection for their works that they provide their own authors.[178] Therefore, while national treatment provides equal protection for domestic and foreign authors while applying the member state's copyright law—it does not provide rights-holders with the protection that they would have received in their home state. Since copyright law differs greatly between nations, bilateral agreements do not always provide intellectual property rights-holders with the protection that one might expect.[179]

One way to increase the effectiveness of bilateral agreements is through the application of intergovernmental pressure.[180] Powerful organizations, such as the RIAA, can and should lobby the United States government to apply pressure on Russia for stricter enforcement of copyright laws.[181] One instrument that the United States may utilize to protect the interests of its rights-holders is the 1990 Agreement on Trade Relations (Trade Agreement).[182] Under this agreement, Russia is obliged to enforce its domestic copyright laws while also honoring its international copyright commitments.[183] The Trade Agreement has also created "appropriate channels" for both parties to discuss the interpretation and enforcement of copyright laws.[184] One effective way to ensure that the United States takes advantage of the opportunities afforded by the 1990 Agreement on Trade Relations is to approach the Office of the United States Trade Representative (USTR).

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[174] NIMMER ON COPYRIGHT, *supra* note 45, § 17.01[B][1][a] at 17-6.
[175] NIMMER ON COPYRIGHT, *supra* note 45, § 17.01[B][1][a] at 17-7.
[176] NIMMER ON COPYRIGHT, *supra* note 45, § 17.01[B][1][a] at 17-7.
[177] *See* Dinwoodie, *supra* note 103, at 436.
[178] NIMMER ON COPYRIGHT, *supra* note 45, § 17.01[B][1][a] at 17-7.
[179] NIMMER ON COPYRIGHT, *supra* note 45, § 17.01[B][1][a] at 17-7 to 17-8.
[180] Miller, *supra* note 25, at 1212.
[181] *See* Miller, *supra* note 25, at 1212.
[182] Agreement on Trade Relations, June 1, 1990, U.S.-U.S.S.R., 29 I.L.M. 949.
[183] Miller, *supra* note 25, at 1213.
[184] Miller, *supra* note 25, at 1213.

B. UNITED STATES TRADE REPRESENTATIVE (USTR)

The RIAA and other intellectual property groups recently petitioned the USTR to apply pressure on the Russian government to strengthen its copyright laws by designating the country as a Priority Foreign Country (PFC).[185] The United States government, as part of an annual investigation, evaluates whether a foreign government's efforts to protect intellectual property are adequate.[186] The RIAA asked the government to use Special 301,[187] a process allowing the USTR to "issue trade sanctions or otherwise limit market access against a country that inadequately protects United States intellectual property rights."[188] The RIAA recently issued a press release stating:

> The U.S.-Russia relationship must be built upon a mutual understanding of shared obligations and the application of the rule of law. The effective protection of American intellectual property has been sorely lacking in Russia. This resolution is significant because it expresses the will of the U.S. Congress that Russia must take effective action against those who would steal America's knowledge-intensive intellectual property-based goods and services. We must not enter into political arrangements with countries ill-prepared to adequately protect our greatest economic assets.[189]

This threat of trade sanctions has proven to be effective against other nations in the past.[190] The United States, for example, was very aggressive when China engaged in widespread piracy, threatening trade sanctions numerous times.[191] Despite the effectiveness of this tactic, however, the United States has been historically reluctant to utilize such a strategy against Russia.[192]

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[185] Recording Industry Association of America, *RIAA And Other Property Groups Ask U.S. Government To Cite Russia For Inadequate Intellectual Property Protections, Designate Nation As A 'Priority Foreign Country' Under Annual Trade Privileges Laws*, Feb. 16, 2006, *at* http://www.riaa.com/news/newsletter/021306.asp.

[186] *Id.*

[187] *Id.*

[188] Connie Neigel, *Piracy in Russia and China: A Different U.S. Reaction*, 63 LAW & CONTEMP. PROBS. 179, 188 (Autumn 2000).

[189] Recording Industry Association of America, *RIAA Lauds Senate Passage Of Measure To Stop Russian Intellectual Property Theft*, Dec. 22, 2005, *at* http://www.riaa.com/news/newsletter/122205.asp.

[190] *See* Neigel, *supra* note 188, at 196–98 (describing the U.S.'s trade restrictions against China); *see also* Eric Bangeman, *RIAA's next big target: Russia*, ARS TECHNICA, Dec. 27, 2005, http://arstechnica.com/news.ars/post/20051227-5849.html. Recently, the United States and Australia signed a historic free-trade agreement after Australia agreed to pass and enforce laws very similar to the Digital Millennium Copyright Act in the U.S. *See id.*

[191] Wayne M. Morrison, *China-U.S. Trade Issues*, CRS ISSUE BRIEF IB91121 FOR CONGRESS, Apr. 13, 2001, *available at* http://cnie.org/NLE/CRSreports/Economics/econ-35.cfm. The United States threatened to impose trade sanctions on China in November 1991 and February 1995 before last-minute negotiations resulted in an agreement between the two nations. *Id.*

[192] *See* Neigel, *supra* note 188, at 197.

The United States has placed Russia on several "Watch Lists" in the past, including the USTR Priority Watch List,[193] but the USTR has never elevated the nation to the Priority Foreign Country List or threatened trade sanctions.[194] Perhaps one of the primary reasons for this reluctance was the then-recent collapse of the Soviet Union.[195] The United States was a strong supporter of newly empowered President Yeltsin and was afraid that trade sanctions might have devastating effects on the Russian economy—perhaps even resulting in the nation's reversion to communism.[196] Nevertheless, the RIAA's recent petition to the USTR has forced the United States to reconsider the threat of trade sanctions against Russia. It will be interesting to see whether the United States will continue its reluctance to impose trade sanctions on Russia, at the expense of its own intellectual property system.

C. WORLD TRADE ORGANIZATION (WTO)

Another possible avenue for remedy for the RIAA is the WTO, the only global international organization dealing with the rules of trade between nations.[197] Established in 1995 under the WTO Agreement, the WTO is the successor to the General Agreement on Tariffs and Trade (GATT).[198] Two of the most important annexes included in the WTO Agreement are the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),[199] and the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).[200]

TRIPS essentially requires that all WTO members provide rights-holders with a minimum level of intellectual property protection and enforcement.[201] TRIPS also obligates all WTO members to update their laws as necessary in order to ensure compliance with key provisions of several international treaties, including the Berne Convention.[202]

Furthermore, TRIPS provides for the settlement of disputes within the WTO by utilizing the DSU.[203] The DSU establishes a system of clearly-defined rules for resolving disputes, including a right to appellate review.[204] Such a system allows for a more secure and predictable trading system.[205]

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[193] Miller, *supra* note 25, at 1213–14 ("The USTR first placed Russia on the "Priority Watch List" in 1997 because it believed that Russia was not fulfilling its obligations under the Trade Agreement.").
[194] Neigel, *supra* note 188, at 197.
[195] Neigel, *supra* note 188, at 197.
[196] Neigel, *supra* note 188, at 197.
[197] World Trade Organization, *What is the WTO?*, *at* http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Jan. 5, 2007).
[198] World Trade Organization, *The WTO in Brief: Part 1*, *at* http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr01_e.htm (last visited Jan. 5, 2007).
[199] *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 33 I.L.M. 1125, 1197 (2004) [hereinafter TRIPS].
[200] *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 33 I.L.M. 1125, 1226 (2004) [hereinafter DSU].
[201] *See* TRIPS, *supra* note 199, arts. 41–49.
[202] Miller, *supra* note 25, at 1218.
[203] Miller, *supra* note 25, at 1218.
[204] *See* DSU, *supra* note 200, at 1236–37, arts. 17–19.
[205] World Trade Organization, *Understanding the WTO: Settling Disputes*, *at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Jan. 5, 2007).

Under the DSU, a panel is arranged to hear alleged violations of TRIPS where bilateral consultations have failed to resolve the dispute.[206] The panel then has nine months to make a ruling,[207] and this ruling is binding on all parties.[208] A WTO member that fails to update their national laws in accordance to the panel's suggestion is subject to pay the required compensation or the suspension of trade concessions between the complainant and the member state.[209]

Although still in its infancy, the DSU has already been useful in resolving several TRIPS disputes.[210] Through the creation of an adversarial litigation process that places an emphasis on integrity, the DSU has created a process that WTO member states view as legitimate.[211] This dispute resolution procedure is, however, only available to WTO member states. While Russia has applied for accession into the WTO, the nation has thus far only been granted observer status.[212] The accession process is as follows:

> The accession process is comprised of four steps: (1) The government applying for membership must disclose all aspects of its trade and economic policies that have a bearing on WTO agreements; (2) parallel bilateral talks begin between the prospective new member and individual countries; (3) the working party finalizes the terms of accession; (4) the final package, consisting of the report, protocol and lists of commitments, is presented to the WTO General Council or the Ministerial Conference.[213]

Accession to the WTO is finally complete once a two-thirds majority of WTO members vote in favor of the applicant.[214]

The Russian Federation is currently in the process of bilateral market access negotiations, the latest of which took place in March 2006.[215] More recently, the United States and Russia have agreed on a binding blueprint for Russia to follow when it addresses issues of piracy and enforcement of intellectual property rights.[216] This blueprint provides that both the United

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[206] *See* DSU, *supra* note 200, at 1230, art. 6.
[207] DSU, *supra* note 200, at 1273–38, art. 20.
[208] *See* DSU, *supra* note 200, at 1238, art. 21(1).
[209] DSU, *supra* note 200, at 1239–41, art. 22.
[210] Miller, *supra* note 25, at 1219.
[211] Miller, *supra* note 25, at 1219.
[212] World Trade Organization, *Understanding the WTO: Members and Observers*, *at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Jan. 5, 2007).
[213] World Trade Organization, *How to Join the WTO: The Accession Process*, *at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm (last visited Jan. 5, 2007).
[214] *Id*.
[215] World Trade Organization, *Accessions: Russian Federation*, *at* http://www.wto.org/english/thewto_e/acc_e/a1_russie_e.htm (last visited Jan. 5, 2007).
[216] Office of the United States Trade Representative, *Trade Facts: Results of Bilateral Negotiations on Russia's Accession to the World Trade Organization (WTO)*, Nov. 19, 2006, *available at* http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2006/asset_upload_file151_9980.pdf.

States and Russia have agreed on "the objective of shutting down websites that permit illegal distribution of music and other copyrighted works," and specifically names Allofmp3 as an example of such a website.[217] According to the agreement, Russia must investigate, prosecute, and take enforcement actions against such websites, as well as work to enact legislation to stop collecting agencies from operating without the authorization of rights-holders by June 1, 2007.[218]

There is some debate as to whether Russia should even be permitted to join the WTO. Those opposed often cite Russia's inadequate intellectual property laws as their primary concern. The Russian Federation will not be allowed to join the WTO unless its laws meet the minimum requirements specified under TRIPS, a standard that current Russian law still fails to meet.[219] However, others argue that Russia should be admitted to the WTO regardless of its legal shortcomings, so that TRIPS standards may be enforced before WTO panels.[220] This would provide private copyright organizations, such as the RIAA, with another effective avenue for remedy against Russian entities. While both arguments have merit, the acceptance of Russia into the WTO may better serve the interests of intellectual property rights-holders worldwide by spurring quicker reform in the Russian legal system.

V. CONCLUSION

Foreign online music stores, such as the Russian Allofmp3, have quickly become one of the latest threats in the record industry's seemingly endless struggle with technology. The RIAA has already secured major legal victories against several P2P software companies under United States copyright law. However, its recent lawsuit against Allofmp3 brings the trade group's high profile legal battles into a brand new arena: the international forum. Nevertheless, the industry trade group still has numerous avenues available through which it may seek remedies against foreign companies. That is not to say, of course, that the RIAA's legal battles will be coming to an end anytime soon. With new technological threats constantly emerging on the horizon—for example, BitTorrent, a novel approach to P2P software applications that is quickly gaining acceptance[221]—it appears that the RIAA may be busy defending the rights of its members for quite some time to come.

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[217] *Id.*
[218] *Id.*
[219] Miller, *supra* note 25, at 1220.
[220] Miller, *supra* note 25, at 1221.
[221] *See* Greg Sandoval, *Paramount, Fox embrace BitTorrent*, CNET NEWS.COM, Nov. 29, 2006, *at* http://news.com.com/2100-1025_3-6139174.html.