

VICARIOUS AND CONTRIBUTORY LIABILITY FOR INTERNET HOST PROVIDERS: COMBATING COPYRIGHT INFRINGEMENT IN THE UNITED STATES, RUSSIA, AND CHINA

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This Comment argues that, in an effort to facilitate a considerable reduction in copyright infringement, internet host providers (IHPs) should be subject to vicarious and/or contributory liability when they assist and profit from public access to infringed material.

INTRODUCTION

Courts in Russia and China find it difficult to shut down websites that are responsible for making infringed materials available to the public for widespread distribution. Part of the problem is that Russian and Chinese efforts to comply with bilateral and multilateral intellectual property (IP) treaties are inadequate. To induce a tighter grip on copyright infringers, the United States pressured Russia to submit to an agreement calling for a “copyright hotline,” which allows both nations to swap copyright information.² Russia’s agreement is one of several key elements it must satisfy to join the World Trade Organization (WTO), as the United States continually blocked Russia’s entry due to copyright abuses.³ In addition, the United States recently brought a complaint before the WTO regarding China’s alleged inability to punish copyright infringers.⁴ While progress is incremental in both nations, Russian and Chinese failures to garner domestic compliance with their IP laws demonstrate that they must work to improve enforcement.

This Comment argues that internet host providers (IHPs), meaning web hosts who offer web space and file storage, should be subject to vicarious and/or contributory liability if they assist and profit from public access to infringed material. Part I explores difficulties faced by the United States (U.S.), Russia, and China in their efforts to combat copyright infringement. Part II compares and contrasts U.S. copyright laws regarding digital copyright infringement with those of Russia and China. Part III evaluates domestic enforcement mechanisms employed in the United States, Russia, and China to combat copyright infringement. Part IV argues that it is futile to expend inordinate amounts of time and resources prosecuting end-users for copyright infringement. Finally, Part V concludes that extending vicarious and/or contributory liability to

¹ The author is a third year law student at the University of Wisconsin Law School. Many thanks to the following people for their constructive feedback and for their support: The Martin family, Colin Kennedy, and Katherine Lund.

² See OFFICE OF THE U.S. TRADE REPRESENTATIVE, RESULTS OF BILATERAL NEGOTIATIONS ON RUSSIA’S ACCESSION TO THE WORLD TRADE ORGANIZATION (WTO): ACTION ON CRITICAL IPR ISSUES (2006), *available at* http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2006/asset_upload_file151_9980.pdf, [hereinafter RESULTS OF BILATERAL NEGOTIATIONS].

³ See OUT-LAW.COM, *Russia and US Set Up Copyright Hotline*, Nov. 28, 2006, http://www.theregister.co.uk/2006/11/28/us_russia_copyright_hotline.

⁴ Ben Blanchard, *China Warns U.S. Piracy Case Will Harm Trade Ties*, REUTERS, Apr. 24, 2007, *available at* <http://www.reuters.com/article/internetNews/idUSPEK10366920070424>.

IHPs induces them to take greater steps to identify, prevent, and substantially eliminate copyright infringement via the internet.

I. DOMESTIC AND INTERNATIONAL INTELLECTUAL PROPERTY COMPLIANCE ISSUES IN THE UNITED STATES, RUSSIA, AND CHINA

Internet file sharing of software, music, and movies increased exponentially over the years thanks to popular peer-to-peer programs such as BearShare, Limewire, and the notorious Napster.⁵ However, copyright infringement does not end with peer-to-peer programs. Websites such as Russia's www.allofmp3.com brazenly offer illegal music downloads for pennies on the dollar and deny copyright holders their rightful profits.⁶ Accordingly, the U.S. battle against copyright infringement on both the internet and the street corner rages on at home and overseas.

A. COPYRIGHT INFRINGEMENT BATTLE IN THE UNITED STATES

Recently, Microsoft has taken steps to ensure that its software is legally obtained both domestically and abroad. For example, in summer 2007, the Federal Bureau of Investigation (FBI) and China's Public Security Bureau raided a Chinese company suspected of pirating Microsoft software.⁷ To curb copyright infringement of its products, Microsoft hired fake customers to solicit dealers in Gujarat, India to install illegal copies of Windows onto their computers.⁸ Once the dealers complied with the customers' requests, Microsoft sent each dealer a notice demanding compensation.⁹

Illegal distribution of software is not the only problem the United States faces. In 2007, the Motion Picture Association of America (MPAA) demanded that the United Kingdom crack down on piracy.¹⁰ Hollywood boasted earnings of \$4.2 billion at the U.S. box office in the fall of 2007, but the industry doubts similar future earnings due to copyright infringement.¹¹ According to Dan Glickman, President of the MPAA, "90 percent of illegal copies of films that are in circulation were originally recorded using camcorders in cinemas."¹² New York District Attorney Richard Brown implemented a raid that seized thousands of counterfeit DVDs in

⁵ See Yinka Adegoke, *Despite Lawsuits, Digital Music Downloads Grow*, REUTERS, Feb. 7, 2008, available at <http://uk.reuters.com/article/burningIssues/idUKN2629538420070206>.

⁶ See generally John Borland, *MP3s for Pennies? Russian Cops Say No*, CNET NEWS.COM, Feb. 22, 2005, http://www.news.com/MP3s%20for%20pennies%20Russian%20cops%20say%20no/2100-1027_3-5586034.html (discussing the fact that [allofmp3.com](http://www.allofmp3.com) makes illegal music downloads easy and affordable to consumers); CNN.com, *Court Acquits allofmp3.com Site Owner*, Aug. 15, 2007, <http://www.cnn.com/2007/TECH/biztech/08/15/russia.site.reut/index.html> (discussing all of [mp3.com](http://www.mp3.com)'s plans to reopen their website after a Russian court found the site's owner not guilty of copyright infringement).

⁷ See Henry Chesbrough, *Microsoft Should Welcome Piracy in India and China*, BUSINESS WEEK ONLINE, July 25, 2007, available at http://www.businessweek.com/innovate/content/jul2007/id20070725_504325.htm.

⁸ *Id.*

⁹ *Id.*

¹⁰ See Matthew Garrahan, *Film Industry Demands UK Piracy Crack*, FIN. TIMES, Sept. 4, 2007, available at http://us.ft.com/ftgateway/superpage.ft?news_id=fto090420071726281714&page=2.

¹¹ *Id.*

¹² *Id.*

Jamaica, New York.¹³ In the raid, Brown employed specially trained “DVD-sniffing dogs” paid for by the MPAA as part of its “war on copyright infringement.”¹⁴ The raid yielded about two million pirated discs worth more than \$3.5 million.¹⁵

Still, distribution of copyrighted music is arguably the greatest challenge to both the United States and the international community when it comes to copyright infringement.¹⁶ According to a report prepared by the International Federation of the Phonographic Industry (IFPI), in 2005, global trafficking of pirated music was worth an estimated \$4.5 billion. Furthermore, in 2005, “almost 20 billion tracks were illegally swapped or downloaded on the internet.”¹⁷ The IFPI report details many ways in which music may be pirated, from “CD-R¹⁸ Piracy” and “Pressed CD¹⁹ Piracy,” to “Internet Piracy,” including peer-to-peer networks, “BitTorrents,”²⁰ and illegal websites.²¹ In September 2007, the Recording Industry Association of America (RIAA) charged two Marshall University students in federal court for illegally sharing music files online.²² The complaints against Tristan Hicks and Jonathan Shrewsberry claimed that Hicks shared over 500 audio files over the internet and that Shrewsberry distributed 240 files.²³ The RIAA sent 3,329 letters to colleges whose internet networks had allegedly engaged in copyright infringement.²⁴ Spokesperson for the RIAA, Cara Duckworth, said that “these lawsuits not only serve as a deterrent, but they also raise awareness to the [copyright] law and the consequences of breaking it.”²⁵

¹³ See *Thousands of Counterfeit DVDs Were Seized From Three Retailers*, CONSUMER ELECTRONICS DAILY, Aug. 31, 2007, available at 2007 WLNR 17343105.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See generally Eric Bangeman, *A \$13 Billion Fantasy: Latest Music Piracy Study Overstates Effect of P2P*, ARS TECHNICA, Aug. 22, 2007, <http://arstechnica.com/news.ars/post/20070822-a13-billion-fantasy-latest-music-piracy-study-overstates-effect-of-p2p.html> (discussing the fact that, among the many ways in which the music industry suffers losses due to piracy, studies show that peer-to-peer programs can increase rather than decrease music sales).

¹⁷ IFPI, *The Many Faces of Music Piracy*, in THE RECORDING INDUSTRY 2006 PIRACY REPORT (2006), available at <http://www.mipi.com.au/documents/piracy-report2006.pdf>.

¹⁸ Industrialaudio.com, Professional Audio Glossary (GENERAL), <http://www.industrialaudio.com/glossary.html> (last visited Oct. 20, 2007) (“CD-R stands for ‘CD-Recordable,’ and refers to a CD that can be burned. Recordable CDs can be one of two types - CD-R discs, which can only be written one time, and CD-RW discs, which can be written and erased numerous times.”).

¹⁹ Megalodon.com, CD Manufacturing . . . Everything You Ever Wanted to Know, <http://www.megalodon.com/CD-manufacturing-info.html> (last visited Oct. 20, 2007) (“In CD pressing, all the data is put onto the disc in one “stamping” step (plating, actually). The disc shape is then created by injection molding. Once they are molded, pressed CDs are either silkscreened or offset printed, then inserted into their packaging.”).

²⁰ PCMAG.com, | Home | Expert Help | Encyclopedia | BitTorrent, http://www.pcmag.com/encyclopedia_term/0,2542,t=BitTorrent&i=38716,00.asp (last visited Oct. 20, 2007) (“Released in the summer of 2001, BitTorrent is similar to KaZaA and other distributed swapping services where users download from other users and do not use a centralized directory as in the original Napster service. However, BitTorrent is also different than all of them because it makes every downloading user an uploading user.”).

²¹ IFPI, *supra* note 17, at 4-5.

²² See Andrew Clevenger, *MU Students Sued Over Copyrights*, CHARLESTON GAZETTE, Sept. 21, 2007, at 1C, available at 2007 WLNR 18570523.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

The United States is not the only country struggling to staunch the proliferation of copyright infringed music. Among a dozen countries, Russia and China are the top two copyright infringement violators on the U.S. Trade Representative's (USTR) Priority Watch List.²⁶

B. CURRENT COPYRIGHT INFRINGEMENT BATTLE IN RUSSIA

Russian IP protection and enforcement are a source of major concern for the United States. Of particular concern is the website www.allofmp3.com, which Russia was unable to shut down until 2007.²⁷ Since its creation in 2000, [allofmp3.com](http://www.allofmp3.com) purportedly earned up to \$14 million per year from Russian buyers alone.²⁸ After a Russian court acquitted the website's owner of copyright infringement, the owner announced plans to resume the site's operations.²⁹ According to Yevgeny Ariyevich, a specialist in IP law and an international partner at Baker & McKenzie, "since the [website] owners . . . obtained a favorable decision, and there is yet no verdict forcing them to close the site, they can [operate]."³⁰

Despite statements to the contrary, Russia appears to be doing little to combat its copyright infringement problem.³¹ Purportedly, Russian officials undermine copyright infringement laws by tipping off the subjects of raids before moving in on them.³² According to Eric Schwartz, Vice President and Special Counsel for the International Intellectual Property Alliance (IIPA), "although Russian officials said they raided twenty-one [optical disk] plants [in 2006], none of the plants were shut down, and no plant owners were prosecuted."³³

C. CURRENT COPYRIGHT INFRINGEMENT BATTLE IN CHINA

Despite efforts to flush out and prosecute IP violators, piracy and counterfeiting in China continues to thrive, not just in the area of music, but also in movies, clothes, computer software, and medicinal drugs.³⁴ One of the major reasons for China's inability to control piracy is its failure to uphold its administrative enforcement policies and criminal remedies.³⁵ According to the USTR, "China's own 2004 data showed that it channeled more than 99 percent of copyright

²⁶ U.S. TRADE REPRESENTATIVE, USTR PRIORITY WATCH LIST, http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/2006_Special_301_Review/asset_upload_file353_9337.pdf (last visited Feb. 13, 2009) [hereinafter 2006 USTR PRIORITY WATCH LIST].

²⁷ *See Court Acquits allofmp3.com Site Owner*, *supra* note 6. *But see also Russian Pirate Music Site to Reopen*, REUTERS, Aug. 28, 2007, <http://www.reuters.com/article/internetNews/idUSL2838421720070828?feedType=RSS&feedName=internetNews> (last visited Feb. 13, 2009).

²⁸ Tai Adelaja, *AllofMp3 Set to Resume Operations After Closure*, ST. PETERSBURG TIMES, Sep. 4, 2007, at 69, available at http://www.sptimes.ru/index.php?action_id=2&story_id=22881.

²⁹ *Id.*

³⁰ *Id.*

³¹ Grant Gross, *Trade Groups Target Russian Piracy*, INFOWORLD, May 2, 2006, http://www.infoworld.com/article/06/05/02/78002_HN russianpiracy_1.html.

³² *Id.*

³³ *Id.* *See generally* IFPI, GOOD BUSINESS PRACTICES FOR OPTICAL DISC MASTERING & MANUFACTURING PLANTS, available at http://www.ifpi.org/content/library/good_business_practices.pdf (last visited Feb. 13, 2009) ("Optical disk plants copy and sometimes distribute sound recordings.").

³⁴ 2006 USTR Priority Watch List, *supra* note 26.

³⁵ *Id.*

and trademark cases into its administrative systems and turned less than one percent of cases over to the police.”³⁶ Consequently, China has managed to maintain a substantial data haven³⁷ that is virtually impenetrable to criminal enforcement.³⁸ Despite U.S. claims, Vice Premier Wu Yi maintains that the USTR “has totally ignored the massive strides that China has made” and points out that “988 people were arrested for IP infringement last year and . . . courts heard 6,441 IP cases.”³⁹

II. U.S., RUSSIAN, AND CHINESE DOMESTIC AND INTERNATIONAL COPYRIGHT LAWS

To appreciate why the United States regards Russian and Chinese IP compliance as unacceptably weak, this section compares the domestic IP laws of the United States, China, and Russia as well as the various international treaties of which each nation is a member. While copyright infringement of digital materials affects a variety of media, including movies and software, the remainder of this discussion will focus on music.

A. U.S. COPYRIGHT LAW

Two main pieces of U.S. legislation outline the permissible use of an auditory work: the Copyright Act of 1976 (Copyright Act)⁴⁰ and the Digital Millennium Copyright Act of 1998 (DMCA).⁴¹

The Copyright Act protects the rights of original copyright holders in “musical works” and “sound recordings,” in addition to “literary works” and “motion pictures.”⁴² Sections 106 through 122 of the Copyright Act grants copyright holders many rights, including the “exclusive right” to reproduce their work “in copies or phonorecords,”⁴³ to “prepare derivative works,”⁴⁴ to sell, rent, lease, or lend copies or phonorecords of their work, and to perform or display their work in public.⁴⁵ The Copyright Act renders violations of Sections 106 through 122 illegal and

³⁶ *Id.*

³⁷ *Id.* See Jeremy N. Geltzer, Note, *The New Pirates of the Caribbean: How Data Havens Can Provide Safe Harbors on the Internet Beyond Governmental Reach*, 10 SW. J.L. & TRADE AM. 433, 435 (2004) (“A data haven provides a safe harbor beyond the reach of any government’s jurisdiction and offers its users maximum security and minimal regulation.”).

³⁸ 2006 USTR Priority Watch List, *supra* note 26.

³⁹ *Id.*

⁴⁰ See generally 17 U.S.C. § 101 (2006).

⁴¹ See generally H.R. 2281, 105th Cong. (1998).

⁴² 17 U.S.C. § 102(a).

⁴³ *Id.* § 107. See FindLaw.com, Copyright Basics, <http://smallbusiness.findlaw.com/copyright/copyright-basics/copyright-definitions.html> (last visited Oct. 27, 2007) (A phonorecord is “a material object in which sounds are fixed and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. A phonorecord may include [material objects such as] a cassette tape, an LP vinyl disk, [or] a compact disk . . .”).

⁴⁴ 17 U.S.C. § 101 (“A ‘derivative work’ is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization . . . or any other form in which a work may be recast, transformed, or adapted.” *Id.* Examples of derivative works include “editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship . . .”).

⁴⁵ See generally 17 U.S.C. §§ 106-122.

copyright infringers will be subject to applicable civil and criminal penalties.⁴⁶ Under the Copyright Act, however, there are limited circumstances where an individual is immune from liability.⁴⁷ “Fair Use” is one such circumstance and it involves “reproduction in copies or phonorecords” for a variety of permissible uses, such as educational purposes.⁴⁸

One of the most pervasive copyright infringement problems in the United States is the development of sophisticated technology that allows individuals to copy or reproduce auditory works. The most well known reproductive method is the MPEG Audio Layer 3 (mp3), a form of “audio compression technology” that “compresses CD-quality sound . . . while retaining most of the original fidelity.”⁴⁹ In the Copyright Act, Congress anticipated this use of innovative reproduction technology when it defined “copies” to include “material objects, other than phonorecords, in which a work is fixed by *any method now known or later developed*” and methods of “perceiv[ing], reproduc[ing], or otherwise communicat[ing], achieved *either directly or with the aid of a machine or device*.”⁵⁰

Regarding civil and criminal penalties, the Copyright Act provides for equitable relief such as temporary and permanent injunctions,⁵¹ confiscation, and destruction of illegal copies,⁵² and recovery of actual damages and lost profits.⁵³ Courts have considerable discretion in awarding civil action damages.⁵⁴ For example, if the copyright owner satisfies her burden of proving willful infringement, a court can award up to \$150,000 in damages.⁵⁵ However, where the infringer “was not aware and had no reason to believe that his or her acts constituted an infringement of copyright,” the court may reduce statutory damages to as little as \$200.⁵⁶ Criminal penalties under the Copyright Act include anywhere from one to ten years imprisonment or in certain circumstances, the imposition of both fines and imprisonment.⁵⁷

The creation of the DMCA was in response to the growing popularity of the internet, coupled with reservations of copyright holders who were reluctant to make their work available on the internet and ISPs who were fearful of liability that could result from the misuse of the services they provide.⁵⁸ In passing the DMCA, Congress sought to achieve a compromise between the concerns shared by copyright holders and ISPs. It amended the Copyright Act to

⁴⁶ *Id.* §§ 501(a), 502-506.

⁴⁷ *See generally* *Id.* §§ 107-112, 117, 119, 121-122.

⁴⁸ *Id.* § 107.

⁴⁹ The Free Dictionary, MP3, <http://computing-dictionary.thefreedictionary.com/MP3> (last visited Feb. 14, 2009). (An example of mp3 compression is the act of turning a large 40 megabyte CD audio track into a smaller 4 megabyte mp3 file. *Id.* This type of conversion is called “ripping” and so-called “ripping software is available as a stand-alone program or a function in a software-based media player such as iTunes and Windows Media Player”).

⁵⁰ 17 U.S.C. § 101 (emphasis added).

⁵¹ *See* 17 U.S.C. § 502(a).

⁵² *Id.* § 503(a)-(b).

⁵³ *Id.* § 504(b).

⁵⁴ *Id.* § 504(c)(2).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *See generally* 18 U.S.C. § 2319 (2006) (explicating the varying amounts of fines and prison terms associated with violations of Title 17 section 506 of the United States Code).

⁵⁸ Mike Scott, Note, *Safe Harbors Under the Digital Millennium Copyright Act*, 15 N.Y.U.J. LEGIS. & PUB. POL’Y 99, 99 (2005-2006).

include greater civil and criminal penalties for copyright infringement and implemented the Online Copyright Infringement Liability Limitation Act (OCILLA).⁵⁹ OCILLA does not expressly include liability for IHPs, however.⁶⁰

The DMCA incorporates two international intellectual property treaties: the World Intellectual Property Copyright Treaty (WIPO) and the WIPO Performances and Phonograms Treaty (WIPO-PPT).⁶¹ Both WIPO and WIPO-PPT require “member states to prevent circumvention of technological measures used to protect copyrighted works, and to prevent tampering with the integrity of copyright management information.”⁶² In this regard, the DMCA supplemented copyright holders’ rights by adding Chapter 12 to the Copyright Act.⁶³ Chapter 12, section 1201 addresses technical “measures that prevent unauthorized *access* to a copyrighted work and measures that prevent authorized *copying* of a copyrighted work.”⁶⁴ For example, a record label’s implementation of anti-piracy software in all CDs it distributes is a measure used to prevent the unauthorized copying of a work.⁶⁵ Under the DMCA, “making or selling devices or services that are used to circumvent either category of technological measure is prohibited” notwithstanding fair use and other exceptions.⁶⁶

Thus, by accounting for novel technologies that can circumvent IP laws, U.S. copyright law helps protect the rights of copyright holders, both domestic and foreign, by upgrading civil and criminal penalties.

B. RUSSIAN COPYRIGHT LAW

Russia’s main copyright statute is the Law of the Russian Federation on Copyright and Neighboring Rights No. 5351-I of July 9, 1993 (CNR).⁶⁷ Under this law, a copyright holder enjoys “economic rights” and “moral rights.”⁶⁸ Similar to those rights afforded to copyright holders under the U.S. Copyright Act, Russian copyright holders enjoy economic rights that include the exclusive right to reproduce, distribute, or give a public showing or performance of the work and the right to translate and adapt the work.”⁶⁹ Moral rights include “the right to have

⁵⁹ U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY 1-2, *available at* <http://www.copyright.gov/legislation/dmca.pdf> (last visited Feb. 14, 2009). [Hereinafter referred to as U.S. COPYRIGHT SUMMARY: DMCA].

⁶⁰ Online Copyright Infringement Liability Limitation Act, H.R. 2281, 105th Cong. Title II, § 512(c) (1998), *available at* <http://www.copyright.gov/legislation/pl105-304.pdf> [hereinafter OCILLA].

⁶¹ U.S. COPYRIGHT SUMMARY: DMCA, *supra* note 59, at 1.

⁶² *Id.* at 3.

⁶³ *Id.*

⁶⁴ *Id.* at 3-4 (This distinction allows for continued fair use of copyrighted works by authorized individuals under Copyright Act, section 107).

⁶⁵ *See generally*, Tia Hall, *Music Piracy and the Audio Home Recording Act*, 2002 DUKE L. & TECH. REV. 0023 *available at* <http://www.law.duke.edu/journals/dltr/articles/pdf/2002DLTR0023.pdf> (discussing any anti-piracy techniques employed by copyright owners and U.S. legislature to combat copyright infringement).

⁶⁶ U.S. COPYRIGHT SUMMARY: DMCA, *supra* note 59, at 4.

⁶⁷ *See generally* ЗАКОН ОБ АВТОРСКОМ ПРАВЕ И СМЕЖНЫХ ПРАВАХ [Russian Federation Law on Copyright and Neighboring Rights], 1993 (amended 2004) No. 5351-I (Russ.), *available at* <http://www.gipsr.org/node/307> [hereinafter Russian Law on Copyright and Neighboring Rights].

⁶⁸ *Id.* pt. II, arts. 15-16.

⁶⁹ *Id.* pt. II, art. 16(2).

his authorship of the work recognized.”⁷⁰ Also similar to U.S. IP laws, Russian IP laws provide individuals with immunity from liability under certain circumstances. For example, Russia’s CNR holds that, “the use of a work by other individuals . . . is possible only with the permission of the author and payment of royalty,” and provides immunity from liability when a copyrighted work is for “personal use and quotation.”⁷¹ Title V of the CNR sheds some light on the issue of auditory works and phonograms and the consequences of their illegal use. Under Title V, Article 48, “copyright or neighboring rights” infringers are “liable to civil, criminal, and administrative sanctions . . .”⁷²

Civil remedies under Title V include reinstatement of a copyright holder’s rights, reimbursement of damages, and destruction of counterfeit copies of the work.⁷³ Under the CNR, copyright holders have the option of receiving the infringer’s profits in lieu of a damages award.⁷⁴ The CNR, like the U.S. Copyright Act, allows for the recovery of additional damages under certain circumstances.⁷⁵

Article 146 of the Russian Criminal Code governs criminal penalties for copyright violations.⁷⁶ Penalties include fines “up to US \$5,800, compulsory labor,” or imprisonment of up to five years.⁷⁷ If the damages achieve an especially large scale defined as “five hundred minimum rates of the remuneration of labor,”⁷⁸ (roughly U.S. \$8,500) then the infringer faces up to five years imprisonment and fines “up to U.S. \$17,000.”⁷⁹ Thus, Russia imposes shorter periods of imprisonment for copyright infringement than the U.S, but requires comparatively harsher fines on criminal infringers, in addition to “compulsory labor,” which is the equivalent of community service.⁸⁰

Administrative sanctions include fines from “fifteen to twenty times the minimum wage (between U.S. \$675 and U.S. \$900)”⁸¹ [and] confiscation of counterfeited copies of works and

⁷⁰ *Id.* pt. II, art. 15(1).

⁷¹ Gorodissky & Partners, *IP Legislation in Russia: Copyright and Neighboring Rights*, <http://www.gorodissky.com/454524/> (last visited November 3, 2007). See also Russian Law on Copyright and Neighboring Rights, *supra* note 67, at pt. II, art. 19, para. 1.

⁷² See Russian Law on Copyright and Neighboring Rights, *supra* note 67, pt. V, art. 48(1).

⁷³ Gorodissky & Partners, *supra* note 71.

⁷⁴ See Russian Law on Copyright and Neighboring Rights, *supra* note 67, art. 49(2)-(3).

⁷⁵ *Id.* pt. V, art. 49(2). Article 49 provides that “the owners of the exclusive rights shall be entitled to demand at their choice from the infringer, instead of payment of damages, payment of compensation.” The owners of the exclusive rights are “entitled to demand from the infringer a payment of compensation for each case of illegal use of the works or objects of related rights or for committing the offence on the whole.”

⁷⁶ See Ugolovnyi Kodeks [UK] [Criminal Code] pt. II, sec. VII, ch. 19, art. 146 (Russ.), available at <http://www.russian-criminal-code.com/PartII/SectionVII/Chapter19.html> (last visited Feb. 16, 2009) [hereinafter Russian Criminal Code].

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ MARINA I. DREL, EUR. BANK FOR RECONSTRUCTION AND DEV., RECENT DEVELOPMENTS IN RUSSIAN TRADEMARK AND COPYRIGHT LEGISLATION: AN UPDATE FROM A PRACTISING LAWYER 29-30, <http://www.ebrd.com/pubs/legal/lit041e.pdf> (last visited Feb. 16, 2009).

⁸⁰ Also compare 18 U.S.C. § 2319 (2006) with Russian Criminal Code, *supra* note 76, pt. II, sec. VII, ch. 19, art. 146.

⁸¹ *Minimum Wage to Raise in Russia Next Year*, KOMMERS., Dec. 11, 2006, available at http://www.kommersant.com/p729126/r_528/mrot_minimum_wage/ (The Russian minimum wage is currently 1100

phonograms.”⁸² Sanctions under the Russian Administrative Code apply not only to individual infringers, but also to legal entities.⁸³ Authorities can fine legal entities, such as corporations, “three hundred to four hundred times the minimum wage (between U.S. \$13,500 and U.S. \$18,000)⁸⁴ accompanied by confiscation of counterfeited copies of works and phonograms.”⁸⁵

In addition to economic and moral rights, copyright holders enjoy so-called “neighboring rights.”⁸⁶ The protections afforded under neighboring rights did not extend to foreign copyright holders until 2004.⁸⁷ Prior to 2004, the CNR held that once a work’s copyright expires, it “fall[s] . . . into the] public domain” and if the work has “never enjoyed protection on the territory of the Russian Federation,” it is considered public domain.⁸⁸ The 2004 amendment to the CNR solved this problem by removing the second sentence of Article 28, which excluded foreign works not originating in Russia from protection and by revamping Article 35 to include the “related rights of foreign natural persons . . . in compliance with international treaties to which the Russian Federation is a party.”⁸⁹

While the 2004 amendment solved one problem with respect to the rights of foreign copyright holders under Russian law, a loophole remained. Russia’s definition of a “copy of a work” is not as inclusive as the definition under the U.S. Copyright Act.⁹⁰ The U.S. Copyright Act definition covers intangible objects such as mp3s and accounts for methods of reproduction achieved “either directly or with the aid of a machine or device.”⁹¹ In contrast, the Russian CNR defines “copy of a work” as “a copy of the work in any *material* form.”⁹² In other words, the U.S. Copyright Act definition includes digital copying of music into mp3s and downloading mp3s, while the Russian definition does not. Under Article 48 of the CNR, “copies of a work or phonogram that are manufactured or distributed in violation of copyright or neighboring rights shall be deemed counterfeit copies.”⁹³ Given the fact that the Russian definition of “copy of a

rubles per month. 1000 rubles is roughly US \$45 per month (computation via currency calculator). Fifteen to twenty times that amount is between approximately US \$675 and US \$900).

⁸² Kodeks RF ob Administrativnykh Pravonarusheniakh [KOAP] [Code of Administration Violations] sec. II, ch. 7, art. 7.12 (Russ.), *available at* <http://www.russian-offences-code.com/SectionII/Chapter7.html> (last visited Feb. 16, 2009) [hereinafter Russian Code of Administrative Violations].

⁸³ *Id.* art.7.12(1)

⁸⁴ *See generally Minimum Wage to Raise in Russia Next Year*, *supra* note 81. The Russian minimum wage is currently 1100 rubles per month. *Id.* 1100 rubles per month is roughly US \$45 per month (computation via currency calculator). Three hundred to four hundred times that amount is between approximately US \$13,500 and US \$18,000.

⁸⁵ Russian Code of Administrative Violation, *supra* note 81, art. 7.12(1).

⁸⁶ *See generally* Russian Law on Copyright and Neighboring Rights, *supra* note 67, pt. III.

⁸⁷ *Id.* pt. III, art. 35, para. 4.

⁸⁸ *Id.* pt. II, art. 28(1)-(3). *See also* USLegal.com, Public Domain Law & Legal Definition, <http://definitions.uslegal.com/p/public-domain/> (last visited Jan. 23, 2009). “Public domain is the status of publications, artwork, music, science, inventions, products, and processes that are not protected under patent or copyright.” *Id.*

⁸⁹ Russian Law on Copyright and Neighboring Rights, *supra* note 67, pt. III, art. 35(4); Gorodissky & Partners, *supra* note 71. *See also* Russian Law on Copyright and Neighboring Rights, *supra* note 67, pt. III, art. 35(4).

⁹⁰ Russian Law on Copyright and Neighboring Rights, *supra* note 67, pt. I, art. 4.

⁹¹ Compare 17 U.S.C. § 101 (2006) (definition of a copy of a work), with Russian Law on Copyright and Neighboring Rights, *supra* note 67, pt. I, art. 4 (also defining a copy of a work).

⁹² Russian Law on Copyright and Neighboring Rights, *supra* note 67, pt. I, art. 4. (emphasis added).

⁹³ *Id.* pt. V, art. 48 (3).

work” regards only copies in *material* form, it follows that downloading and distributing mp3s is outside the purview of Article 48.

In addition, Russian IHPs that provide web storage for sites like allofmp3.com are not liable for storing copyright infringed mp3s on their servers because the CNR does not account for internet piracy. Although Title II of the DMCA does not expressly target IHPs, U.S. copyright law still acknowledges internet piracy by specifically addressing ISP liability for infringed on-line material.⁹⁴ The U.S. Copyright Act requires ISPs to “expeditiously . . . remove, or disable access to” infringed material when they discover that “a person other than the service provider” makes the material “available on-line without the authorization of the copyright owner.”⁹⁵ The CNR calls for no such action.

C. CHINESE COPYRIGHT LAW

The governing copyright laws in China are the Copyright Law of the People’s Republic of China (CL-PRC) and the Implementing Rules for the Copyright Law of the PRC (Implementing Rules).⁹⁶ The CL-PRC, similar to U.S. copyright law, covers a host of materials including oral, literary, musical, and artistic works, as well as sound recordings.⁹⁷ The Implementing Rules supplement the CL-PRC with provisions ranging from administrative remedies to ownership, inheritance, and the acquisition of copyright protection.⁹⁸

The CL-PRC affords copyright holders many of the same rights as U.S. holders.⁹⁹ For example, as part of a Chinese copyright holder’s economic rights, such holder has the exclusive right to reproduce his or her performances by means of sound recording, video recording, or photography.¹⁰⁰ Chinese copyright holders enjoy exclusive moral rights that include the right to indicate their name, a pseudonym, or no name on the original or copies of the work.”¹⁰¹ Similar to U.S. copyright law, Chinese copyright law includes various limitations on the rights of copyright holders and individual immunities from liability.¹⁰² Section 4 of the CL-PRC provides that central or local government agencies legally established schools and their teachers libraries, museums, and other cultural institutions open to the public may reproduce copyrighted works under certain circumstances.¹⁰³

Regarding copyright infringement of auditory works, Article 46 of the CL-PRC does not specifically address music, but it grants copyright holders the moral right to prohibit others from

⁹⁴ See 17 U.S.C. § 512(c) (2006).

⁹⁵ *Id.* §§ 512(b)(2)(E), 512(b)(1)(A).

⁹⁶ See generally Regulations for the Implementation of the Copyright Law of the People’s Republic of China (1991), available at <http://www.lawinfochina.com.ezproxy.library.wisc.edu/index.asp?Succ=1> (search for Regulations for the Implementation of the Copyright Law of the People’s Republic of China) [Hereinafter Implementation Rules for the Copyright Law of the PRC].

⁹⁷ Implementation Rules for the Copyright Law of the PRC, *supra* note 96, ch. I, art. 3, (1)-(4), ch. IV, sec. 3, arts. 39-41.

⁹⁸ See generally Implementation Rules for the Copyright Law of the PRC, *supra* note 96..

⁹⁹ See generally Implementation Rules for the Copyright Law of the PRC, *supra* note 96, ch. III.

¹⁰⁰ *Id.* ch. II, sec. 1, art. 10(5).

¹⁰¹ *Id.* ch. II, sec. 1, art. 10(2), sec. 2, art. 11.

¹⁰² *Id.* ch. II, sec. 4, arts. 22-23.

¹⁰³ *Id.* ch. II, sec. 4, art. 22(6)-(8).

modifying or otherwise changing the content or form of their work.¹⁰⁴ Thus, in a situation where an individual seeks to make a profit from selling illegally copied mp3s, a Chinese music artist could argue that the CL-PRC prevents others from rendering her audio CDs to mp3 format because such an act is unauthorized and therefore an illegal modification or change to her work. However, under Article 22 of the CL-PRC, copyright holders' exclusive rights to reproduction give way to an individual's lawful use of their work.¹⁰⁵ For example, an individual in China can buy a music CD and copy the CD's audio files to mp3 format, so long as the number of mp3s reproduced are proportionate in relation to the work as a whole.¹⁰⁶ In other words, as long as the buyer confines the reproduction to that which is necessary for personal rather than public consumption, it is a lawful use of the artist's work. Hence, even if an individual can copy an audio CD into mp3s for personal use, such person under Article 41 cannot lawfully make those mp3s available to others; and under Article 65, such individual cannot make a profit off the reproduction without the copyright holder's consent.¹⁰⁷

On October 27, 2001, the National People's Congress of China amended the CL-PRC to reduce the differences between domestic Chinese copyright law and the provisions of certain international agreements, such as WIPO and WIPO-PPT.¹⁰⁸ The 2001 amendment was largely an effort to prepare China for entry into the WTO and to provide greater legal protection for foreign and Chinese copyright holders.¹⁰⁹ Under the 2001 amendment, copyright protection extends to foreign copyright holders if one of the following applies (1) the works are first published in China, or (2) they are published in China within thirty days after their first publication in a territory outside China's jurisdiction; or if the work enjoys protection in the foreign national's country, copyright protection will attach via (3) "treaty or agreement, or under the domestic acts, regulations, or standard practice of" the foreign national's country.¹¹⁰ Like Russia's 2004 amendment to the CNR, China's 2001 amendment recognizes the need to legitimize the moral and economic rights of domestic copyright holders and foreign nationals.

Another goal of the 2001 amendment was to strengthen civil remedies proscribed by the CL-PRC.¹¹¹ Under Chapter VI of the CL-PRC, injured parties may, demand that the infringer, at its own expense, publish in a newspaper or magazine all or part of a judgment concerning said infringement or apply to the customs authorities to suspend the release of import or export goods that infringe on their copyright.¹¹² Under Article 47, if a person unlawfully infringes on another person's economic rights" whether intentionally or by negligence, such person "shall be liable for damages."¹¹³ If the injured party cannot prove actual damages under Article 47, such party is permitted to "request that the court, based on the seriousness of the matter, set compensation at

¹⁰⁴ *Id.* ch. IV, sec. 3, art. 39, ch. V, art. 46(4), (8).

¹⁰⁵ *Id.* ch. II, sec. 4, art. 22.

¹⁰⁶ *Id.* ch. II, sec. 4, art. 22(1).

¹⁰⁷ *Id.* ch. IV, sec. 3, art. 41.

¹⁰⁸ Law Offices of Wang & Wang, *China Copyright Law*, http://www.wangandwang.com/china_copyrights.htm (last visited Jan. 28, 2009).

¹⁰⁹ Chen Chao, *China Amends Copyright Law*, China.org.cn, Nov. 16, 2001, <http://www.china.org.cn/english/2002/Nov/22246.htm> (last visited Jan. 28, 2009). "Reports from Xinhua News Agency and China NPC News, edited and translated for china.org.cn by Chen Chao . . ." *Id.*

¹¹⁰ On file with author.

¹¹¹ See Chen Chao, *supra* note 109.

¹¹² Implementation Rules for the Copyright Law of the PRC, *supra* note 96, ch. V, art. 47.

¹¹³ *Id.*

an amount of not less than 10,000 and not more than one million New Taiwan Dollars” (roughly U.S. \$300 and U.S. \$31,000 respectively).¹¹⁴ Additionally, if the infringing activity was intentional and egregious, compensation may increase to five million New Taiwan Dollars (roughly \$155,000).¹¹⁵

Under CL-PRC, there are also criminal penalties and administrative sanctions. Criminal infringers face up to five years imprisonment and an additional fine of up to two million New Taiwan Dollars (roughly U.S. \$62,000) for unauthorized reproduction of copyrighted materials with intent to sell or rent the items. Criminal infringers face up to five years imprisonment, plus a fine of up to five million New Taiwan Dollars (roughly U.S. \$155,000) for unauthorized reproduction of copyrighted materials onto optical disks.¹¹⁶ Administrative remedies for copyright infringement, similar to U.S. and Russian law, include the use of warnings and injunctions as well as confiscation of infringed materials and the imposition of fines.¹¹⁷ Thus, compared with the U.S., China’s criminal penalties are on par, while its civil remedies are comparatively more demanding in terms of the maximum amount of fines imposed on infringers.¹¹⁸

While China’s copyright infringement laws appear to uphold the rights of both foreign and domestic copyright holders, its statutory definition of what constitutes a “copy of work” offers a different impression. Under the CL-PRC, China’s definition of a “copy of work” is defined in terms of reproduction.¹¹⁹ “Reproduce” under Article 10(5) means to reproduce directly, indirectly, permanently, or temporarily a work by means of printing, reprography, sound recording, video recording, photography, handwritten notes, or otherwise.¹²⁰ The definition of “reproduce” under Article 3 does not expressly address whether the act of downloading illegal mp3s is an unauthorized reproduction of copyrighted materials. One could argue that by downloading illegal mp3s, she is not *reproducing* the work as defined under Chinese law and, since Chinese law only addresses unauthorized reproduction, she is effectively immune from liability. Still, China’s definition may be broad enough to include the illegal copying and downloading of mp3s, since one could argue that such acts are contained within Article 3’s catch-all phrase, “or otherwise.”

China’s Administrative Measures on Internet Copyright Protection (AMICP) attempts to make up for this oversight. Effective May 30, 2005, the AMICP states that an [ISP] will be liable for administrative penalties if it knowingly transmits copyright-infringing material over its

¹¹⁴ On file with author.

¹¹⁵ *Id.* See also Quote.com, Foreign Exchange Calculator, <http://cn.quote.com/us/forex/convert.action> (last visited Jan. 30, 2009). According to Quote.com’s currency calculator, 10,000 New Taiwan Dollars (TWD) is roughly U.S. \$300, 1 million TWD is roughly U.S. \$31,000, and 5 million TWD is roughly \$155,000. *Id.*

¹¹⁶ Implementation Rules for the Copyright Law of the PRC, *supra* note 96, ch. V, arts. 47-48. See also Quote.com, *supra* note 115. According to Quote.com’s currency calculator, 2 million TWD is roughly U.S. \$62,000. *Id.*

¹¹⁷ Implementing Rules for Copyright Law of the PRC, *supra* note 98, ch. VI.

¹¹⁸ Compare 17 U.S.C. §§ 502-504 (2006) with Implementation Rules for the Copyright Law of the PRC, *supra* note 96, ch. V.

¹¹⁹ Compare 18 U.S.C. § 2319 with Implementation Rules for the Copyright Law of the PRC, *supra* note 96, ch. I, art. 3.

¹²⁰ Implementation Rules for the Copyright Law of the PRC, *supra* note 96, ch. II, sec. I, art. 10(5).

network (e.g., by hosting a website that contains infringing material).¹²¹ Under the AMICP liability attaches to an ISP if it fails to remove copyright infringed material upon the request of a copyright holder.¹²²

Thus, unlike Russian IP law, the Administrative Measures make an effort to force ISPs to be mindful of possible copyright infringement violations by its customers. In China, ISPs are responsible for removing infringed materials from internet servers. Such removal directly penalizes illegal music downloaders who lose access to the materials. Accordingly, the Administrative Measures supplement the CL-PRC to sustain the rights of domestic and foreign copyright holders. However, while the Administrative Measures address the storage of infringed materials on internet servers by treating ISPs as IHPs, U.S., Russian, and Chinese IP legislation do not expressly address IHP liability. Thus, in all three nations, IHPs remain unaccountable.

D. BILATERAL AND MULTILATERAL AGREEMENTS AMONG THE UNITED STATES, RUSSIA, AND CHINA

The U.S. IP relationship with Russia and China is marked not only by differences in respective IP legislation, but also by various compliance issues with bilateral and multilateral IP agreements. As discussed below, the common denominator for the United States, Russia, and China under these IP agreements is implementation and enforcement of tougher IP rights for nationals and non-nationals alike.

1. INTERNATIONAL AGREEMENTS

The United States, Russia, and China are parties to three major international IP agreements: the Trade-Related Agreement on Intellectual Property Rights (TRIPS), WIPO Copyright Treaty, and the Berne Convention of the Protection of Literary and Artistic Works (Berne Convention). The WTO promulgated both TRIPS and WIPO, while the Berne Convention existed long before the WTO.¹²³ The United States and China, as members of the WTO, must abide by its international agreements, including TRIPS and WIPO.¹²⁴ Although Russia is still in the process of joining the WTO, it is a member of TRIPS and WIPO and as such it must abide by their provisions.¹²⁵

¹²¹ Measures for the Administrative Protection of Internet Copyright (May 30, 2005), *available at* <http://www.lawinfochina.com.ezproxy.library.wisc.edu/index.asp?Succ=1> (search for Measures for the Administrative Protection of Internet Copyright) [Hereinafter MAPIC]. See Implementing Rules for the Copyright Law of the PRC, *supra* note 96, ch. II, sec. I, art. 10(5). An ISP can act as an IHP by providing storage space for web materials. See *infra* Section IV.B, at 30 (for a discussion on early cases involving liability of ISPs acting as IHPs).

¹²² MAPIC, *supra* note 121, art. 11; Embassy of the U.S. - Beijing, China, IPR Toolkit, <http://beijing.usembassy-china.org.cn/copyright.html> (last visited Feb. 17, 2009).

¹²³ World Trade Organization, *Intellectual property: protection and enforcement*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm (last visited Jan. 30, 2009) [hereinafter WTO *Intellectual Property*].

¹²⁴ See World Trade Organization, *Members and Observers*, http://www.wto.org/English/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Jan. 28, 2009).

¹²⁵ See *Russia Likely to Join WTO Next Autumn*, CHINAVIEW.CN, Dec. 19, 2007, http://news.xinhuanet.com/english/2007-12/19/content_7281846.htm. “If everything proceeds as expected, Russia may become a WTO member in the third quarter of 2008.” *Id.*

The TRIPS agreement seeks to provide “more order and predictability” in the area of international IP rights and their enforcement, as well as more efficient dispute resolution.¹²⁶ TRIPS addresses the manner in which member-states should enforce their domestic IP rights.¹²⁷ For example, Article 14 of TRIPS holds that member nations must recognize the right of sound recording producers to prevent others from pirating their performances.¹²⁸ Since the United States, Russia, and China are parties to the TRIPS agreement,¹²⁹ all three nations are required to afford copyright protections “to the nationals of other Members.”¹³⁰ As previously discussed, both Russia and China have implemented various amendments to their domestic copyright legislation to provide for such reciprocity.¹³¹ Part III of the TRIPS agreement, which deals exclusively with “Enforcement of Intellectual Property Rights,” generally directs member nations to provide “fair and equitable” enforcement procedures and remedies in the areas of civil, administrative, and criminal law.¹³² Under Article 69, member nations “agree to cooperate with each other with a view to eliminating international trade in goods infringing intellectual property rights.”¹³³ To this end, each member must readily exchange information on the trade of copyright infringed goods and establish contact points in their administrations.¹³⁴ Further, the TRIPS agreement inserted a myriad of new or higher standards to strengthen certain provisions of the Berne Convention.¹³⁵

The United States, Russia, and China, as parties to the Berne Convention, agree to implement and enforce certain copyright provisions.¹³⁶ Article 3 of the Berne Convention grants copyright protection to individuals regardless of their nationality.¹³⁷ Though a national of a member-state may enjoy such protection regardless of whether her work is published, a non-national must either publish the work within her country or publish the work “simultaneously in a country outside the Union.”¹³⁸ Furthermore, under Article 36, member nations must take

¹²⁶ WTO *Intellectual Property*, *supra* note 123. See also Agreement on Trade Related Aspects of Intellectual Property Rights, December 15, 1993, 33 I.L.M. 81 (1994), arts. 63-64, *available at* http://www.wto.org/english/docs_e/legal_e/27-trips.pdf [hereinafter TRIPS].

¹²⁷ TRIPS *supra* note 126, arts. 63-64.

¹²⁸ *Id.* arts.14, 1.

¹²⁹ See WTO, TRIPS: Frequently Asked Questions,

http://www.wto.org/english/tratop_e/trips_e/tripfq_e.htm#Who'sSigned (last visited Feb. 5, 2009). “All the WTO agreements [with some exceptions] apply to all WTO members . . . The TRIPS agreement is part of that package. Therefore it applies to all WTO members.” *Id.*

¹³⁰ TRIPS, *supra* note 126, arts. 1 & 3.

¹³¹ See e.g. Article 35 of Russia’s Copyright and Neighboring Rights law *supra* note 67 (incorporating July 20, 2004 amendments) and Article 4 of China’s Implementation Rules for the Copyright Law of the PRC, *supra* note 96 (incorporating October 27, 2001 amendments).

¹³² TRIPS, *supra* note 126, arts. 41-49, 61.

¹³³ *Id.* art. 69.

¹³⁴ *Id.*

¹³⁵ WTO *Intellectual Property*, *supra* note 123.

¹³⁶ World Intellectual Prop. Org. [WIPO], Contracting Parties to the Berne Convention, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15 (last visited Feb. 16, 2009).

¹³⁷ Berne Convention for the Protection of Literary and Artistic Works art. 3, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. TREATY DOC. NO. 99-27 (1986), *available at* http://www.wipo.int/export/sites/www/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf.

¹³⁸ *Id.*

“measures necessary to ensure the application of” the Convention.¹³⁹ Once a member state ratifies the Convention, it must tailor its domestic law to give effect to the Convention’s provisions.¹⁴⁰

WIPO Copyright Treaty addresses the scope of rights that member nations derive from copyright protection and the limitations on those rights.¹⁴¹ Under Article 18, “each Contracting Party shall . . . assume all of the obligations under this Treaty.”¹⁴² Such obligations include, but are not limited to, providing “adequate and effective legal remedies”¹⁴³ within each member nation to punish copyright violators and to ensure “that enforcement procedures are available under their law.”¹⁴⁴ As parties to WIPO, the United States, Russia, and China are each expected to comply with WIPO’s provisions.¹⁴⁵

2. BILATERAL AGREEMENTS

The United States and Russia are parties to a binding bilateral intellectual property rights (IPR) agreement regarding Russia’s accession to the WTO.¹⁴⁶ Under the U.S.-Russia Bilateral Market Access Agreement, which entered into force in November 2006, Russia agreed to fight optical disc piracy and internet piracy and promised to deter copyright violators through criminal penalties.¹⁴⁷ Russia also promised to strengthen border enforcement against the traffic of counterfeit goods and to bring its laws into compliance with the TRIPS Agreement and other international IPR standards.¹⁴⁸ Russia agreed to eliminate production of counterfeit optical media and promised to shut down websites that distribute copyrighted materials such as music.¹⁴⁹ Because Russia showed a significant effort to curb copyright infringement in 2007, it received U.S. approval to join the WTO.¹⁵⁰

The United States and China are parties to a bilateral agreement entitled “1992 Memorandum of Understanding” in which China agreed to bring its domestic IP legislation into conformity with the Berne Convention.¹⁵¹ The Memorandum is not itself a legal commitment, rather it demonstrates a common line of understanding between the United States and China

¹³⁹ *Id.* art. 36.

¹⁴⁰ *Id.*

¹⁴¹ See generally WIPO Copyright Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17 (1997), 36 I.L.M. 65 (1997), available at http://www.wipo.int/export/sites/www/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf.

¹⁴² *Id.* art. 18.

¹⁴³ *Id.* art. 12(1); see also *Id.* art. 11.

¹⁴⁴ *Id.* art. 14(2).

¹⁴⁵ WIPO, WIPO Copyright Treaty Contracting Parties, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16 (last visited Feb. 16, 2009).

¹⁴⁶ See generally RESULTS OF BILATERAL NEGOTIATIONS, *supra* note 2 (describing the terms of the agreement).

¹⁴⁷ *Id.* at 1.

¹⁴⁸ *Id.* at 1-2.

¹⁴⁹ *Id.*

¹⁵⁰ *Russia Has U.S. Backing in Its WTO Bid – Economics Minister*, RIA NOVOSTI, July 9, 2007, <http://en.rian.ru/russia/20070907/77275055.html>.

¹⁵¹ Memorandum of Understanding on the Protection of Intellectual Property art. 3, U.S.-P.R.C., Jan. 17, 1992, 34 I.L.M. 676, 680-81 (1995), available at http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005362.asp. [hereinafter 1992 Memorandum of Understanding].

regarding IP protection and compliance.¹⁵² Under Article 5 of the Memorandum, the United States and China agreed to “provide effective procedures and remedies to prevent or stop, internally and at their borders, infringement of intellectual property rights and to deter further infringement.”¹⁵³ In 1995, the United States and China also entered into a bilateral IPR agreement that required a crack down on CD factories.¹⁵⁴

III. DOMESTIC ENFORCEMENT MECHANISMS IN THE UNITED STATES, RUSSIA, AND CHINA

Despite various accomplishments achieved by China and Russia under their respective bilateral and multilateral agreements with the United States, both nations remain high on the USTR Priority Watch List for copyright infringement violations.¹⁵⁵ As discussed below, both nations lack either the means or the drive necessary to enforce domestic IP laws.

A. IP ENFORCEMENT IN THE UNITED STATES

There are five government agencies with authority to enforce domestic and international copyright laws: the United States Copyright Office, the Department of Justice (DOJ), the U.S. Customs Service, the Office of the USTR, and the Department of Commerce.¹⁵⁶ The focus of this section is on the efforts made by the principal IP enforcement authority, the DOJ.

The DOJ has the authority to enforce all U.S. federal criminal laws, including copyright law.¹⁵⁷ The DOJ’s Civil Division handles claims arising from commercial issues such as contract and patent disputes and Division attorneys handle a myriad of cases that involve billions of dollars in claims and recoveries.¹⁵⁸ The DOJ’s Criminal Division develops and enforces the application of all federal criminal laws.¹⁵⁹ In 2005, the number of defendants the DOJ charged with IP violations increased by 98 percent, nearly twice that of the previous year.¹⁶⁰ The DOJ is also home to the Intellectual Property Task Force (IPTF), which launched in April 2004 as part of the DOJ’s Computer Crime & Intellectual Property Section.¹⁶¹

¹⁵² See generally *id.*

¹⁵³ *Id.* art. 5.

¹⁵⁴ See Agreement Regarding Intellectual Property Rights, P.R.C.-U.S., Feb. 26, 1995, 34 I.L.M. 881 (1995) (describing the Chinese Action Plan); Trade Compliance Ctr., Chinese Implementation of the 1995 Enforcement Agreement (June 17, 1996), http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005361.asp (stating that Chinese authorities closed fifteen pirate CD factories).

¹⁵⁵ 2006 USTR PRIORITY WATCH LIST, *supra* note 26.

¹⁵⁶ U.S. Patent and Trademark Office [USPTO], Domestic IP Enforcement, <http://www.uspto.gov/web/offices/dcom/olia/globalip/domesticip.htm> (last visited Feb. 7, 2009).

¹⁵⁷ *Id.*

¹⁵⁸ United States Department of Justice [USDOJ], Civil Division, <http://www.usdoj.gov/civil/index.html> (last visited Feb. 8, 2009).

¹⁵⁹ USDOJ, Criminal Division, <http://www.usdoj.gov/criminal/> (last visited Feb. 7, 2009).

¹⁶⁰ USDOJ, PROGRESS REPORT OF THE DEPARTMENT OF JUSTICE’S TASK FORCE ON INTELLECTUAL PROPERTY 24 (2006), [http://www.usdoj.gov/criminal/cybercrime/2006IPTFProgressReport\(6-19-06\).pdf](http://www.usdoj.gov/criminal/cybercrime/2006IPTFProgressReport(6-19-06).pdf) [hereinafter 2006 IPTF PROGRESS REPORT].

¹⁶¹ USDOJ, Computer Crime & Intellectual Property Section: Intellectual Property Policy and Programs, <http://www.usdoj.gov/criminal/cybercrime/ippolicy.html> (last visited Feb. 9, 2009).

The IPTF instituted two intra-agency efforts to combat IP infringement: the Strategy Targeting Organized Piracy (STOP) initiative, and the National IP Law Enforcement Coordination Council (NIPLECC).¹⁶² STOP, which began in 2004, is a combined effort of the Departments of Justice, Commerce, and Homeland Security, the Office of the USTR, the USPTO, and the Food and Drug Administration.¹⁶³ STOP's goal is to reduce piracy on a global scale and increase public awareness of intellectual property rights.¹⁶⁴ NIPLECC, on the other hand, ensures that the Executive Branch's IP priorities are clear to Congress and the American public.¹⁶⁵ NIPLECC submits annual reports to Congress that describe actions taken by Council members to safeguard IP rights.¹⁶⁶

IPTF criminal enforcement efforts center on the Computer Crime and Intellectual Property Section (CCIPS) and the Computer Hacking and Intellectual Property Program (CHIP) of the DOJ.¹⁶⁷ CHIP Units prosecute a variety of claims including trademark violations, copyright infringement, and Internet fraud.¹⁶⁸ The CCIPS is a "nationwide anti-piracy and anti-counterfeiting effort" created solely to prosecute IP crimes.¹⁶⁹ In addition to IP prosecution, CCIPS attorneys administer the DOJ's anti-piracy strategies and legislative priorities and provide around-the-clock advice and guidance to Assistant United States Attorneys.¹⁷⁰

In 2004, the DOJ led the largest international IP enforcement effort in history against organized online music piracy via Operation FastLink and Operation Site Down.¹⁷¹ Each undercover FBI operation included twelve countries and targeted elite criminal organizations known as "warez release groups," which are the first to distribute copyrighted material over the Internet.¹⁷² FBI efforts resulted in over 200 searches and numerous arrests worldwide that included the seizure of hundreds of thousands of pirated material valued at more than \$100 million.¹⁷³ As of 2006, the DOJ obtained convictions against sixty people in the United States in connection with warez trafficking.¹⁷⁴ In January 2005 through "Operation Gridlock," the DOJ secured its first criminal conviction for piracy via peer-to-peer networks when two operators of Direct Connect distribution centers pled guilty in Washington, D.C., to charges of conspiracy to commit criminal copyright infringement.¹⁷⁵ On May 19, 2006, the DOJ landed another victory when three members of music piracy groups received sentences of up to fifteen months.¹⁷⁶ The

¹⁶² 2006 IPTF PROGRESS REPORT, *supra* note 160, at 17.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 18.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 18-21.

¹⁶⁸ *Id.* at 20.

¹⁶⁹ *Id.* at 18.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 26; *see also* Press Release, USDOJ, Justice Department Announces International Internet Piracy Sweep (Apr. 22, 2004), <http://www.usdoj.gov/criminal/cybercrime/fastlink.htm> (describing the outcome of Operation FastLink).

¹⁷² 2006 IPTF PROGRESS REPORT, *supra* note 160, at 26; *see also* Press Release, USDOJ, *supra* note 170 ("In addition to attacking piracy globally, Operation FastLink struck at all facets of the illegal software, game, movie, and music trade online, which is commonly referred to as the 'warez scene.'").

¹⁷³ 2006 IPTF PROGRESS REPORT, *supra* note 160, at 26.

¹⁷⁴ *Id.* at 27.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

music piracy groups obtained individual songs and albums in mp3 format and distributed them to computer servers across the globe before their commercial release in the United States.¹⁷⁷ Upon distribution, these copyrighted songs reached peer-to-peer and other public file-sharing networks within a matter of hours.¹⁷⁸

A number of non-governmental agencies participate in the effort to protect and enforce IP rights. Organizations such as the MPAA and RIAA advocate investigations and indictments. In 2005, the MPAA's anti-piracy investigators joined forces with international law enforcement agencies to conduct nearly 43,000 raids and seized over 81 million illegally manufactured discs.¹⁷⁹ The MPAA shutdown over 100 elite distributors of copyrighted materials and eliminated seven of the world's largest Internet piracy groups.¹⁸⁰ Since 2003, the RIAA has brought more than 21,000 copyright infringement claims in the United States.¹⁸¹

B. IP ENFORCEMENT IN RUSSIA

IP enforcement in Russia consists mainly of legislative efforts to introduce tougher penalties against IP infringement; to prevent infringed materials from making their way into the country by strengthening custom officials' authority; and to bring existing IP legislation into compliance with its international IP agreements. Russia increased the number of criminal IP enforcement actions from 2,924 in 2005 to over 4,500 in 2006 and increased the number of criminal convictions from 1,450 in 2005 to 1,600 in 2006.¹⁸² In 2006, the Office of the USTR expressed its belief that, "Russia is committed to more aggressive actions."¹⁸³

However, according to Chris Israel, U.S. Coordinator for IP Enforcement, Russia is still not doing enough to combat IP infringement, despite its 2006 bilateral IP agreement with the United States.¹⁸⁴ In 2007, Israel testified before the Senate Committee on the Judiciary that, "poor enforcement of IPR in Russia is a pervasive problem. Russia is experiencing high rates of piracy."¹⁸⁵ According to Israel, "prosecution and adjudication of IP cases remains sporadic and inadequate in Russia . . . [although] . . . Russian authorities have initiated some enforcement actions in 2006, which included raids on some optical disc production facilities and investigation of Internet sites."¹⁸⁶ Russia pledged to adjust provisions of its IP legislation to better reflect those of its international agreements, but the USTR's 2007 Special 301 Report maintains that,

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ MOTION PICTURE ASS'N OF AMERICA, 2005 U.S. PIRACY FACT SHEET 5 (2005), <http://www.mpaa.org/USPiracyFactSheet.pdf>.

¹⁸⁰ *Id.*

¹⁸¹ Bruce Gain, *RIAA Says Lawsuits Cannot Be the Complete Answer to Music Piracy*, TG DAILY, July 23, 2007, <http://www.tgdaily.com/content/view/33022/120/>.

¹⁸² RESULTS OF BILATERAL NEGOTIATIONS, *supra* note 2, at 3.

¹⁸³ *Id.*

¹⁸⁴ *Examining U.S. Government Enforcement of Intellectual Property Rights: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 12-13 (2007) (statement of Chris S. Israel, U.S. Coordinator for International Intellectual Property Enforcement, U.S. Department of Commerce), *available at* http://www.stopfakes.gov/pdf%5CCoordinators_Testimony.pdf.

¹⁸⁵ *Id.* at 12.

¹⁸⁶ *Id.*

“Part IV [of the Russian Civil Code] still contains provisions that raise serious concerns regarding consistency with WTO and other international agreements.”¹⁸⁷

In December 2005, Congressman Lamar Smith, in his opening statement at an oversight hearing before the U.S. House of Representatives, maintained that the Russian government was all talk and no action and predicted that Russia would become “the next China.”¹⁸⁸ Congressman Smith noted that, “[the Russian] record stands in stark contrast to the countless assurances, guarantees, and commitments to honor their obligations that have been made to the most senior officials of the United States Government.”¹⁸⁹ Congressman Smith pointed to “[o]ne of the most offensive examples of intransigence . . . reported in the December 1st edition of the Moscow Times.”¹⁹⁰ In that article, Alexander Kotenkov, representative to then President Vladimir Putin, stated at a conference devoted to the fight against piracy that he “often purchased illegally-made discs for plane trips, paying the equivalent of \$3.12 for a DVD that contains five or six films.”¹⁹¹ Mr. Kotenkov then blamed copyright holders for piracy by stating that Russian citizens are “not at fault for being unable to buy licensed discs, because the costs of legitimate discs are too high.”¹⁹² Congressman Smith maintained that he would continue to oppose Russia’s accession to the WTO, unless Russia demonstrates “a real, sustained, and verifiable commitment by the highest levels of [its] government to protect the legitimate rights of intellectual property owners.”¹⁹³ Today, Congressman Smith’s complaint remains true.

C. IP ENFORCEMENT IN CHINA

China has established IP enforcement institutions that augment the Chinese Government’s efforts to combat copyright infringement. Key IP enforcement institutions in China include: the Hong Kong Department of Justice (HKDOJ), the IP Office of Guangdong Province (in mainland China), and the National Copyright Administration of China (NCAC).

Although the HKDOJ has six divisions, the most pertinent are the Prosecution Division, Civil Division, and Law Drafting Division.¹⁹⁴ In addition to prosecuting trials and appeals, the Prosecution Division gives professional advice to local and governmental law enforcement agencies responsible for IP prosecution.¹⁹⁵ With over 100 lawyers, it is the largest division in the

¹⁸⁷ OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2007 SPECIAL 301 REPORT 23 (2007), http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_Special_301_Review/asset_upload_file230_11122.pdf [hereinafter 2007 USTR SPECIAL 301 REPORT].

¹⁸⁸ *International IPR Report Card—Assessing U.S. Government and Industry Efforts to Enhance Chinese and Russian Enforcement of Intellectual Property Rights: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 2 (2005) (opening statement of Rep. Lamar Smith, Chairman, Subcomm. on Courts, the Internet, and Intellectual Property), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_house_hearings&docid=f:24927.pdf.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ DEP’T OF JUSTICE, THE GOV’T OF THE H.K. SPECIAL ADMIN. REGION, THE LEGAL SYSTEM IN HONG KONG, <http://www.doj.gov.hk/eng/legal/index.htm> (last visited Jan. 31, 2009).

¹⁹⁵ *Id.*

HKDOJ.¹⁹⁶ The IP Office of Guangdong Province has similar objectives.¹⁹⁷ In 2004, the Hong Kong IP Department and the Guangdong Province IP Office joined forces to come up with “major cooperation activities” to enhance protection of IP rights.¹⁹⁸ For example, both offices launched the “No Fakes Scheme” in four cities in Guangdong Province.¹⁹⁹ As part of the No Fakes Scheme, the Guangdong IP Office promoted the “No Fakes Pledge” in Guangdong Province through the use of “No Fakes Stickers” that advocated buying only genuine goods.²⁰⁰ Both offices jointly promoted an ad campaign launched simultaneously in Guangdong and Hong Kong in 2004.²⁰¹ The Hong Kong government lauded the ad campaign as, “the first ever jointly-sponsored public interest advertisement [on IP rights] involving agencies in Hong Kong and the Mainland.”²⁰²

The NCAC, headquartered in Beijing, investigates copyright infringement cases nationwide.²⁰³ In late 2005, the NCAC led a special operation to combat network infringement and piracy involving the illegal, public distribution of audio-visual products.²⁰⁴ The special operation also involved the investigation and imposition of penalties in cases alleging illegal distribution of copyrighted music, movies, and software via internet for profit.²⁰⁵ By December 2005, law enforcement officials shut down seventy-six websites, confiscated thirty-nine servers, ordered 137 websites to delete copyright infringed materials, and brought eighteen criminal prosecutions.²⁰⁶ Nevertheless, China’s overall record of accomplishment for enforcement remains inadequate.

According to the USTR Special 301 Report, despite the efforts of China’s IP enforcement agencies, “the shared goal of significantly reducing IPR infringement throughout China has not yet been achieved.”²⁰⁷ The Report acknowledges China’s accession to the WIPO Internet Treaties, the country’s dedication to anti-piracy campaigns, and the increase in the number of IPR cases in Chinese courts, but the Report says that in 2006, “overall piracy and counterfeiting levels in China remained unacceptably high.”²⁰⁸ According to the Report, the illegal trade in optical discs “continues to thrive” and “[s]mall retail shops continue to be the major commercial outlets for pirated movies and music . . . and roaming vendors offering cheap pirated discs

¹⁹⁶ DEP’T OF JUSTICE, THE GOV’T OF THE H.K. SPECIAL ADMIN. REGION, ORGANISATION CHART OF THE PROSECUTIONS DIVISION, <http://www.doj.gov.hk/eng/about/pd.htm> (last visited Jan. 31, 2009).

¹⁹⁷ See generally Intellectual Property Office of Guangdong Province, <http://www.gdipo.gov.cn/> (last visited Jan. 4, 2008).

¹⁹⁸ INTELLECTUAL PROP. DEP’T, THE GOV’T OF THE H.K. SPECIAL ADMIN. REGION, THIRD GUANGDONG/HONG KONG EXPERT GROUP MEETING ON THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS 1 (2004), http://www.ipd.gov.hk/eng/whats_new/news/third_meeting.pdf.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ GreatWallIP.com, National Copyright Administration of the People’s Republic of China, <http://www.greatwallip.com/cn/firm.asp?id=33> (last visited Jan. 31, 2009).

²⁰⁴ Yan Xiaohong, Deputy Comm’r of Nat’l Copyright Admin., Address on the National Copyright Administration of China’s Anti-Piracy Efforts (Feb. 15, 2005), available at <http://www.china-embassy.ch/ger/fyrth/t235877.htm>.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ 2007 USTR SPECIAL 301 REPORT, *supra* note 187, at 18.

²⁰⁸ *Id.*

continue to be visible in major cities across China.”²⁰⁹ Moreover, the Report maintains that, “internet piracy is increasing, as is piracy over closed networks such as those of universities.”²¹⁰

According to the Special 301 Report, “[i]nadequate IPR enforcement is a key factor” contributing to China’s meager performance.²¹¹ The Report holds that Chinese government agencies are unable to enforce effectively the rights of IP holders because of “poor coordination . . . local protectionism and corruption, high thresholds for initiating investigations and prosecuting criminal cases, lack of training, and inadequate and non-transparent processes.”²¹² Further, China’s fierce criminal penalties are ineffective as a deterrent because enforcement officials underutilize such penalties.²¹³ According to the Report, “infringers continue to consider administrative seizures and fines as a cost of doing business,” because China prefers to route the vast majority of its IP enforcement cases through administrative channels and administrative penalties are simply too lax.²¹⁴

The Special 301 Report finds that, “[a] number of gaps remain to be filled for China to meet the challenges of Internet piracy and fully implement the WIPO Internet Treaties.”²¹⁵ The Report also found that, “China could benefit from further clarification that certain Internet ‘deep linking’ and other services that effectively encourage or induce infringement are unlawful.”²¹⁶ Further, the report proposes three solutions. China should (1) ensure that ISPs remove copyrighted material immediately upon notice from copyright holders by upholding stronger administrative penalties; (2) induce ISPs to immediately suspend or terminate the accounts of serious or repeat infringers; and (3) encourage ISPs to comply with requests from copyright holders asking for information about alleged infringers.²¹⁷

IV. END-USER, ISP, AND IHP LIABILITY

The situation in Russia and China demonstrates that, without proper enforcement, laws against copyright infringement are largely ineffective. As the discussion below demonstrates, even with proper enforcement mechanisms, if a nation’s efforts and resources are misdirected, their efficacy is seriously crippled.

A. END-USER LIABILITY IN THE UNITED STATES

Recent casualties in the U.S. battle against copyright infringement have many wondering, “How far is too far?” and “Is it really worth it?” In 2003, twelve-year-old Brianna LaHara from New York City was one of 261 people sued in federal court for copyright infringement.²¹⁸

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* at 19.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 20.

²¹⁷ *Id.*

²¹⁸ FOXNEWS.com, *12-Year-Old Sued for Music Downloading*, September 09, 2003, available at <http://www.foxnews.com/story/0,2933,96797,00.html> (last visited Jan. 5, 2008).

According to LaHara, she “thought it was OK to download music because [her] mom paid a service fee for it.”²¹⁹ LaHara then went on to ask, “Out of all people, why did they pick me?”²²⁰ The RIAA did not have a direct answer for her.²²¹ RIAA spokesperson Amy Weiss responded, “We are taking each individual on a case-by-case basis.”²²² According to then president of the RIAA, Cary Sherman, “nobody likes playing the heavy and having to resort to litigation . . . but when your product is being regularly stolen, there comes a time when you have to take appropriate action.”²²³ LaHara’s mother paid a \$29.99 service charge when she signed up for KaZaA, a music-swapping service, three months prior to the RIAA’s suit.²²⁴ Although Brianna and others faced penalties of up to \$150,000 per song, the RIAA dropped the charges against LaHara in exchange for \$2,000.²²⁵ In lieu of litigation, the RIAA offers amnesty to music downloaders that come forward and agree to abate their illegal activity.²²⁶

A more significant triumph for the RIAA occurred on October 4, 2007 when a jury found Jammie Thomas, a single mother from Duluth, Minnesota, guilty of copyright infringement because she shared twenty-four songs on the internet.²²⁷ The jury fined Thomas \$220,000.²²⁸ Generally, people accused of illegal uploading or downloading by the RIAA settle their cases out of court.²²⁹ As such, the RIAA’s lawsuit with Thomas represents the first time that it has gone toe-to-toe with an accused “music pirate” in a jury trial.²³⁰ Thomas attempted to appeal the ruling on the ground that the record companies involved sustained minimal damages.²³¹ The RIAA, in response aggressively asserted, “it is unfortunate that the defendant continues to avoid responsibility for her actions. We will continue to defend our rights.”²³²

Is it worth it to target end-users like LaHara and Thomas?²³³ The answer to this question is not dependent on age, sex, occupation, or other personal characteristics of the end-user. While it is reasonable to be sympathetic to LaHara because of her age and to Thomas, due to her status as a single mother, the fact remains that both defendants engaged in copyright infringement.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* See John Borland, *RIAA Settles With 12-year-old Girl*, CNET.com, Sept. 9, 2003, available at http://www.news.com/RIAA-settles-with-12-year-old-girl/2100-1027_3-5073717.html (last visited Jan. 5, 2008).

²²⁶ *Id.*

²²⁷ Jennifer E. King, *Make Sure Your Music is Legal: Don’t Be The Music Industry’s Next Target*, Lawyers.com, <http://research.lawyers.com/Music-Piracy---Make-Sure-Your-Music-Is-Legal.htm?cnn=yes> (last visited Jan. 2, 2008). See also Mark Raby, *Jammie Thomas’s Music Download Appeal Fails*, TG Daily, Dec. 5, 2007, <http://www.tgdaily.com/content/view/35129/118/> (last visited Jan. 2, 2008).

²²⁸ *Id.*

²²⁹ *Id.* “The music industry has become so aggressive about pursuing infringers that it even offers a website (p2plawsuits.com) where accused infringers can settle claims before they go to court.” *Id.*

²³⁰ *Id.*

²³¹ Mark Raby, *Jammie Thomas’s Music Download Appeal Fails*, TGDAILY, Dec. 5, 2007, <http://www.tgdaily.com/content/view/35129/118/> (last visited Jan. 2, 2008).

²³² *Id.*

²³³ See Techterms.com, *End User*, <http://www.techterms.com/definition/enduser> (last visited Jan. 5, 2008). “An end user is the person that a software program or hardware device is designed for. The term is based on the idea that the ‘end goal’ of a software or hardware product is to be useful to the consumer.” *Id.*

Across the nation, courts agree that when a person uses a computer program for the purpose of obtaining and/or distributing copyrighted material without the copyright holder's permission, there is ample ground to sue such a person.²³⁴ Rather, the question is whether, in the end, the hard line pursuit of end-users like LaHara and Thomas is truly effective. It is understandable that non-governmental agencies like the RIAA want to send a message to would-be infringers, but it is important to analyze the efficacy of this message.

After the RIAA's claim against LaHara in 2003, it was reported that, "the number of Internet users in the United States who download music has been sliced in half."²³⁵ However, in 2004, Download.com found that KaZaA had been downloaded over 310 million times, with 2.5 million copies the week of January 4, 2004 alone.²³⁶ In 2004, other companies that distributed file-sharing software claimed their businesses suffered only minimal impacts.²³⁷ Wayne Rosso, former president of Grokster,²³⁸ noted that, "new technologies [are] being developed—encrypted downloads, for example, [that] will bolster confidence among online downloaders."²³⁹ According to global consumer research, more than nineteen billion songs were illegally downloaded in 2005.²⁴⁰ Eric Garland of the web consulting firm Big Champagne found that over one billion mp3s are illegally traded each month."²⁴¹ Russ Crupnick of the research group NPD estimated that the number of U.S. households engaged in peer-to-peer (P2P) illegal trades in 2005 rose seven percent and the number of illegal downloads were up by 24 percent.²⁴² In 2005, the RIAA successfully shut down many file-swapping companies such as Grokster and KaZaA, but it is clear that this did not completely eliminate the file-sharing network.²⁴³ According to Rosso, "if you've got the software you can still file-share. The [court] rulings just means [*sic*] you can't distribute (the software) anymore."²⁴⁴ In 2007, RIAA President Mitch Bainwol said, "P2P remains an unacceptable problem [and] the folks engaged in the practice are doing more of it."²⁴⁵

Then why not target ISPs more aggressively than end-users? ISPs provide the medium whereby end-users can obtain file-sharing programs to download and distribute copyrighted works. Further, ISPs are in a prime position to cut off or to threaten to cut off a user's internet access because he or she abuses the internet to engage in illegal activity. The RIAA and other non-governmental agencies have recognized that ISPs are a rational target, but only to induce the

²³⁴ See generally *Arista Records LLC v. Greubel*, 453 F. Supp. 2d 961 (N.D. Tex. 2006); *Atl. Recording Corp. v. Serrano*, NO. 07-CV-1824 W, 2007 U.S. Dist. LEXIS 95203 (S.D. Cal. 2007); *BMG Music v. Gonzales*, 430 F.3d 888 (7th Cir. 2005).

²³⁵ Jon Bonne, *Big Drop Seen In Music Downloads*, MSNBC, Jan. 4, 2004, available at <http://www.msnbc.msn.com/id/3860823/> (last visited Jan. 5, 2008).

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ See generally *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

²³⁹ Jon Bonne, *supra* note 235.

²⁴⁰ IFPI.ORG, *supra* note 17 at 4.

²⁴¹ Yinka Adegoke, *supra* note 5 at 1.

²⁴² *Id.*

²⁴³ *Id.* at 2.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

disclosure of infringers' identities.²⁴⁶ Section 512(h) of the DMCA permits this type of action.²⁴⁷ The Bush Administration and the DOJ applauded efforts by the RIAA to obtain infringers' information from ISPs.²⁴⁸ However, as the discussion below will demonstrate, IHP liability should be preferred over ISP liability.

B. VICARIOUS AND CONTRIBUTORY LIABILITY OF ISPs ACTING AS IHPs IN THE UNITED STATES

Contributory liability deals with intentional inducement or encouragement of direct infringement, while vicarious liability involves the receipt of a profit "from direct infringement while declining to exercise a right to stop or limit it."²⁴⁹ Contributory infringement requires that the infringer actively "encourage direct copyright infringement," such as through advertisements or public instructions on how to engage in the infringing activity.²⁵⁰ Such steps must demonstrate the infringer's clear intent that his or her product be used to infringe.²⁵¹ Where one makes, sells, or otherwise distributes a product that is capable of copyright infringement, "a showing that infringement was encouraged overcomes the law's reluctance to find liability when a defendant merely sells [such a product] for some lawful use."²⁵² If a distributor has, "knowledge of potential copyright infringement or of actual infringing uses" that alone is not enough to subject the distributor to liability.²⁵³ However, simple distribution of a product can create liability where the distributor "intended and encouraged the product to be used to infringe."²⁵⁴ If so, the infringer is culpable not only for the encouragement of infringement, but also for the product's distribution as an infringement tool.²⁵⁵ In addition to the above requirements for liability, the individual(s) who acquired the product from the distributor must also engage in "actual infringement."²⁵⁶

One of the earliest cases dealing with the question of vicarious and contributory liability for ISPs is the California District Court case *Religious Technology Center v. Netcom*.²⁵⁷ In 1995, the Church of Scientology accused Netcom, an ISP, of allowing an Internet newsgroup to make the Church's copyrighted materials available on the Internet via a local bulletin board service (BBS).²⁵⁸ The BBS, an internet message board, received internet access from Netcom.²⁵⁹ On

²⁴⁶ See generally *Recording Indus. Ass'n v. Charter Commc'ns., Inc.*, 393 F.3d 771 (8th Cir. 2005); *Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Serv.*, 351 F.3d 1229 (App. D.C. 2003).

²⁴⁷ U.S. Copyright Summary: DMCA, *supra* note 59 at 9.

²⁴⁸ WIRED.com, *U.S. Backs RIAA in ISP Fight*, Apr. 20, 2003, available at <http://www.wired.com/entertainment/music/news/2003/04/58558> (last visited Jan. 5, 2008).

²⁴⁹ *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005).

²⁵⁰ *Id.* at 936 (quoting *Oak Indus., Inc. v. Zenith Elec. Corp.*, 697 F. Supp. 988, 992 (N.D. Ill. 1988)).

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.* at 937.

²⁵⁴ *Id.* at 940 n.13.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Religious Tech. Ctr. v. Netcom On-Line Commc'n. Servs.*, 923 F. Supp. 1231 (Cal. Dist. Ct. 1995).

See generally BitLaw.com, *A Resource on Technology Law: ISP Liability*, available at <http://www.bitlaw.com/internet/isp.html#recent> (last visited Jan. 6, 2008).

²⁵⁸ *Id.* at 1231, 1238-41. See also *id.* at 1238 n.2.

²⁵⁹ *Id.* at 1238 n.2; 1239 n.5-6. See also Wikipedia, *Bulletin Board System*, http://en.wikipedia.org/wiki/Bulletin_board_system (last visited Feb. 20, 2008).

the issue of vicarious liability, the Court acknowledged that neither Netcom nor the BBS received direct monetary gains from posting the Church's materials on the message board.²⁶⁰ However, regarding contributory liability, the Court denied Netcom's motion for summary judgment and reasoned that, if Netcom knew or should have known about the infringed materials stored on its server and failed to remove them, such an omission could constitute contributory infringement.²⁶¹ Prior to the litigation, the Church asked Netcom to prevent continued postings of the protected materials, but Netcom refused.²⁶²

The Court held that the issue of whether Netcom had sufficient knowledge of the infringing activity presented a question of fact for a jury to resolve.²⁶³ Further, the Court found that Netcom allowed the infringed material to remain on its system, that such allowance furthered the material's global distribution, and that Netcom retained some control over the system's use.²⁶⁴ Therefore, the Court concluded that it would be fair to hold Netcom liable for contributory infringement if the Church could demonstrate that Netcom knew of the infringed postings and, nevertheless, continued to support their distribution to the public.²⁶⁵ Before the Court could decide the issue of contributory infringement, however, the parties settled.²⁶⁶

With a BBS, a modem dials into a server owned by the ISP to access files on the server.²⁶⁷ Thus, Netcom acted as an IHP by hosting the website that contained the Church's copyrighted materials. The internet has evolved significantly since the days of Netcom and the BBS is largely outdated.²⁶⁸ Today, users are no longer required to go to an ISP's hosted sites to access information stored there. Modern ISPs are generally conduits for internet access, leaving the task of web storage to IHPs. Thus, from today's perspective, *Netcom* is more like a case involving an IHP rather than an ISP.

In cases subsequent to *Netcom*, courts have adopted a similar approach to contributory and vicarious liability of ISPs acting as IHPs.²⁶⁹ In addition, courts have had the added benefit of relying upon provisions of the DMCA, which became effective three years after *Netcom*. In the Ninth Circuit case *Ellison v. Robertson*, Harlan Ellison, a science fiction and short story writer, sued Stephen Robertson in April 2000 for electronically scanning a number of Ellison's works, converting them to digital files and "uploading the files onto the USENET newsgroup 'alt.binaries.e-book.'"²⁷⁰ When Robertson uploaded Ellison's works to USENET, he essentially distributed the materials throughout the network to servers across the globe, including servers belonging to America Online (AOL).²⁷¹ AOL subscribers had direct access to infringed copies

²⁶⁰ *Id.* at 1244-45. See also BitLaw.com, *supra* note 257.

²⁶¹ *Id.* See also *Religious Tech. Ctr. v. Netcom On-Line Commc'n. Servs.*, 907 F. Supp. 1361, 1373-76 (Cal. Dist. Ct. N.D. 1995) (motion for summary judgment).

²⁶² *Netcom*, 923 F. Supp at 1240-41.

²⁶³ *Netcom*, 907 F. Supp. at 1373-76.

²⁶⁴ *Id.* at 1375-76.

²⁶⁵ *Id.*

²⁶⁶ BitLaw.com, *supra* note 257.

²⁶⁷ Wikipedia, Bulletin Board System, http://en.wikipedia.org/wiki/Bulletin_board_system (last visited Feb. 20, 2008).

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Ellison v. Robertson*, 357 F.3d 1072, 1074-76 (9th Cir. 2004).

²⁷¹ *Id.* at 1075.

of Ellison's works.²⁷² Thus, Ellison also sued AOL and alleged contributory and vicarious infringement.²⁷³ Around the time Robertson's infringing activity took place, AOL maintained a policy of storing and retaining USENET files on its servers temporarily for two weeks.²⁷⁴ Although AOL is an ISP, it acted as an IHP in this case because it not only provided the internet access necessary to visit its server, but also stored Ellison's data on the server.

As to vicarious infringement, the Court found that AOL could have, "derived a direct financial benefit from the infringement and [that AOL had] the right and ability to supervise the infringing activity."²⁷⁵ The Court reasoned that the infringed material on AOL's servers acted as a "draw for customers" and that the availability of Ellison's material to the public constituted a financial benefit.²⁷⁶ However, in AOL's case, the Court concluded that there was "no evidence that AOL customers either subscribed because of the available infringing material or canceled subscriptions because it was no longer available."²⁷⁷

Regarding contributory infringement, Ellison's complaints of copyright infringement were ignored because AOL changed its email address from copyright@aol.com to aolcopyright@aol.com in the fall of 1999 and waited until April 2000 to register the new address with the U.S. Copyright Office.²⁷⁸ AOL also received and subsequently ignored a phone call from John Miller, an AOL subscriber, who reported "the existence of unauthorized copies of works by various authors."²⁷⁹ From this, the Court reasoned that a jury "could certainly find that AOL had reason to know that infringing copies of Ellison's works were stored on their USENET servers" and that AOL is liable for contributory infringement.²⁸⁰ As for material contribution, the Court relied on the conclusion in *Netcom* that:

providing a service that allows for the automatic distribution of all USENET postings, infringing and non-infringing, can constitute a material contribution when the [ISP] knows or should know of infringing activity on its system yet continues to aid in the accomplishment of [the direct infringer's] purpose of publicly distributing the postings.²⁸¹

AOL's willful inaction demonstrated a material contribution to the infringement of Ellison's works.²⁸² Thus, *Netcom* and *Ellison* held that IHPs can be vicariously and/or contributorily liable when they know infringed material is on their servers and they fail to remove them.

C. ABSENCE OF ISP AND IHP LIABILITY IN RUSSIA

²⁷² *Id.*

²⁷³ *Id.* at 1077-79.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 1078.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

In Russia, cases brought against individual internet users for illegal music downloads are rare.²⁸³ No Russian ISP or IHP has seen the inside of a Russian courtroom to date.²⁸⁴ Russia directs its anti-piracy efforts mainly toward illegal disc manufacturers, customs enforcement, and only recently, the owners of illegal mp3 websites like allofmp3.com. U.S. Trade Representative, Susan Schwab, demanded that Russia shut down the website before it could accede to the WTO.²⁸⁵

However, once allofmp3.com was charged, the Russian judge, Yekaterina Sharapova, found that the prosecution presented insufficient evidence of copyright infringement and dismissed the case against Denis Kvasov, head of MediaServices, which owns allofmp3.com.²⁸⁶ Judge Sharapova agreed with Kvasov's argument that he "was within the law because the site paid part of its income to ROMS, a Russian organization [sic] which collects and distributes fees for copyright holders."²⁸⁷ Once Kvasov's operations became legal, MediaServices launched an allofmp3.com spin-off called mp3sparks.com.²⁸⁸ According to Mark Mulligan, an analyst at JupiterResearch, the fact that shutting down allofmp3.com resulted in the opening of a copycat site by the same company shows that Russia needs to do more to protect copyright holders.²⁸⁹ Mulligan postulated that the lawsuit "could also be interpreted as cosmetic action by a government that is intent on satisfying WTO accession requirements but less keen on changing Russian new media copyright practices."²⁹⁰

The Court dismissed the case against Kvasov for three main reasons. First, Russia's copyright laws say little, if anything, about copyright infringement via the internet.²⁹¹ As of 2008, Russia has maintained the status quo in this regard and, at the same time, has obtained U.S. permission to accede to the WTO. Unless Russia takes steps to introduce legislation specifically targeting internet piracy, illegal website operators like Kvasov will continue to flourish in Russia. Second, as discussed above, Russia's definition of a "copy of work" leaves substantial room for would-be infringers to argue that the definition does not apply to their acts of illegal reproduction.²⁹² Finally, there is a serious lack of enforcement in Russia. A nation's IP legislation is hamstrung without the means and the drive to enforce it.²⁹³ It will be hard for Russia to convince the international community that it is committed to ending piracy within its borders when some of its highest government officials, including former president Vladimir Putin, openly regard copyright infringement of music and movies as permissible for economic reasons.²⁹⁴

D. VICARIOUS AND CONTRIBUTORY LIABILITY FOR ISPs ACTING AS IHPs IN CHINA

²⁸³ My research indicates there have not been any cases brought in Russia against end-users for downloading.

²⁸⁴ My research yields no case law or other authority to the contrary.

²⁸⁵ *Russian Download Site Shut Down*, BBC NEWS, July 3, 2007, <http://news.bbc.co.uk/2/hi/technology/6264266.stm> (last visited Feb. 2, 2009).

²⁸⁶ *Court Acquits allofmp3.com Site Owner*, *supra* note 27.

²⁸⁷ *Id.*

²⁸⁸ *Russian Download Site Shut Down*, *supra* note 285.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *See supra* sec. II. B.

²⁹² *Id.*

²⁹³ *See supra* Sec. III. B.

²⁹⁴ *Id.*

Unlike Russia, China has litigated against ISPs for copyright infringement. According to Chief Judge Lu Guoqiang, Chinese courts' interpretation of their copyright laws now include the stipulation "that the copyright law applies to digital works [and] [w]hen works are disseminated to the public over the internet, the methods of use of such works is covered under the Copyright Law."²⁹⁵ Chinese courts recognize that, "if internet service providers (ISPs) infringe on copyrights through internet use, or if they use the internet to help others carry out an infringing activity . . . the courts [can] use the copyright law and may make a finding of collective responsibility for the infringement."²⁹⁶ Under Chinese copyright law, ISPs that know of and fail to abate copyright infringing activity will be subject to liability alongside the infringing user.²⁹⁷

In December 1999, the Beijing First Intermediate People's Court (BFIPC) presided over the third known copyright infringement suit in China regarding ISP liability.²⁹⁸ In *Wang Meng, et al. v. Beijing Cenpok Intercom Technology Co., Ltd.*, or the *Beijing Online* case, the defendant Cenpok appealed the lower court's ruling in favor of plaintiff Wang Meng, a celebrity writer.²⁹⁹ The lower court found that Cenpok, a prominent internet firm, did not have authorization to post Meng's works on the Internet.³⁰⁰ The BFIPC affirmed the lower court's ruling which ordered Cenpok to pay \$3,200 in compensatory damages.³⁰¹ At the time BFIPC made its ruling, the law in China did not specifically address the question of whether works posted on the Internet were copyrightable.³⁰²

The Court construed Article 10, subsection 5 of the CL-PRC to include electronic works.³⁰³ Subsection 5 says that the right of exploitation is "the right of exploiting one's work by reproduction, live performance . . . translation, annotation, compilation *and the like*."³⁰⁴ The Court regarded the phrase "and the like" as inclusive rather than exclusive, and rejected Cenpok's claim that internet postings "should be treated as fair use . . . because no profit taking [was] involved."³⁰⁵ The BFIPC rejected Cenpok's arguments that:

[I]t has no control over the actual content of its site . . . it provided a disclaimer and quickly removed the contents in question once it learned of the potential infringement . . .³⁰⁶

²⁹⁵ Lu Guoqiang, *Recent Developments in Judicial Protection for Intellectual Property in China*, OXFORD INTELL. PROP. RES. CENTRE ELECTRONIC-J. INTELL. PROP. RTS., 2001, at 4, <http://www.oiprc.ox.ac.uk/EJWP0301.pdf>.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ Andy Y. Sun, *Beijing Appeal Court Ruled on a Major Case: Copyright Liability for Internet Service Providers Determined*, APLI UPDATE (Asian Pac. Legal Inst., Ellicott City, Md.), Jan. 2000, at 1, available at <http://apli.org/ftp/APLIUpdate1.pdf>.

²⁹⁹ *Id.*

³⁰⁰ *Id.* Once again, we see an ISP acting as an IHP. Not only does Cenpok offer internet access, but it also hosted a website containing copyright infringed works that were stored on its web servers.

³⁰¹ *Id.* at 1-2.

³⁰² *Id.* at 2.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 3.

Even if Cenpok was not vicariously liable because it did not profit from the infringing activity, it was nevertheless subject to contributory liability because it hosted the infringing material, exercised control over it, and made the material available for public distribution.

V. VICARIOUS AND CONTRIBUTORY LIABILITY FOR IHPs PAVES THE WAY FOR SUBSTANTIALLY REDUCED INTERNET PIRACY

Up to this point, the discussion has centered on ISPs acting as IHPs rather than on individual consumers, because ISPs are in comparatively better positions to reduce internet piracy. Since ISPs acting as IHPs have been involved in litigation alleging contributory and vicarious liability, it follows that IHPs themselves can easily become viable targets. By extending such liability to IHPs, the United States, Russia, and China will substantially reduce copyright infringement over the internet.

A. CRITIQUE OF LEGISLATION INVOLVING ISP/IHP LIABILITIES AND IMMUNITIES IN THE UNITED STATES, RUSSIA, AND CHINA

The discussion below covers legislation involving ISP and IHP liability in the United States, Russia, and China. Part one explores key sections of the DMCA and the possibility of using the DMCA to assert liability against IHPs. Part two highlights the lack of legislation in Russia calling for ISP or IHP liability. Part three will evaluate Chinese ISP liability laws and end with a discussion of how China could expand its existing legislation to include IHP liability.

1. THE U.S. DIGITAL MILLENNIUM COPYRIGHT ACT (DMCA)

Section 512 of the DMCA imposes four limitations on ISP liability for copyright infringement based on “(1) transitory communications, (2) systems caching, (3) storage of information on systems or networks at direction of users; and (4) information location tools.”³⁰⁷ Each limitation encapsulates restrictions on the availability of injunctive relief and immunity from monetary damages.³⁰⁸ If an ISP’s activities do not allow for immunity under section 512, that fact alone is not enough to make it liable for copyright infringement.³⁰⁹ The copyright holder still bears the burden of proof and the ISP is free to exhaust possible defenses, such as fair

³⁰⁷ U.S. COPYRIGHT SUMMARY: DMCA, *supra* note 59, at 8. A transitory communication can be an ISP’s creation of temporary copies of materials for storage purposes, transmission and routing of information over the ISP’s network, or information passed over a connection provided by the ISP via internet. 17 U.S.C. § 512(a)(1)-(5) (2006). System caching includes both temporary and automatic storage of material on an ISP’s system or network. *Id.* § 512(b)(1)(C). Information stored at the direction of an internet user will not be the basis for ISP liability, provided the ISP had no actual knowledge of the user’s infringing liability. *Id.* § 512(c)(1)(A)(i). Information location tools include internet links and search engines leading to websites that contain infringed material. *Id.* § 512(d). The act of referring or linking users to such internet tools will not be the basis for ISP liability, provided the ISP had not actual knowledge of the infringing activity. *Id.* § 512(d)(1)(A)-(B).

³⁰⁸ U.S. COPYRIGHT SUMMARY: DMCA, *supra* note 59, at 9.

³⁰⁹ *Id.*

use.³¹⁰ Further, section 512 includes privacy protections that shield ISPs from having to choose between immunity from liability and the preservation of its subscribers' personal information.³¹¹

To qualify for immunity from liability, an entity must meet the definition of "service provider" as it is defined under section 512(k)(1)(A).³¹² Under that section, a service provider must be "an entity offering the transmission, routing, or providing of connections for digital online communications . . . without modification to the content of the material as sent or received."³¹³ Under section 512(k)(1)(B), the term "service provider" is more broadly defined as "a provider of online services or network access, or operator of facilities."³¹⁴ To be eligible for immunity, a service provider must have a termination policy in place where its service is engaged in copyright infringing activity and it must not interfere with "standard technical measures."³¹⁵ Under section 512(i)(2), standard technical measures refers to measures "that are used by copyright owners to identify and protect copyrighted works," such as copyright symbols and copyright protection software.³¹⁶ Under section 512(b)(2)(E), a service provider must immediately "remove or disable access to" infringed material when it knows a subscriber is distributing such material on the internet without the copyright holder's consent.³¹⁷

The DMCA does not expressly use the term "internet host provider," but IHPs can fit within its definition of "service provider."³¹⁸ Web hosting services (IHPs) qualify as a type of online service provider because IHPs "host" an individual's website and provide storage space for web content (via a server) to be uploaded by that individual.³¹⁹

For example, a company called AllWebCo helps businesses build and host websites.³²⁰ AllWebCo allows companies to register domain names and choose a web hosting package which

³¹⁰ *Id.*

³¹¹ *Id.* There is no provision for immunity under section 512 that requires an ISP to monitor its customers in violation of the law (such as the Electronic Communication Privacy Act). *Id.*

³¹² *Id.*

³¹³ 17 U.S.C. § 512(k)(1)(A).

³¹⁴ *Id.* § 512(k)(1)(B).

³¹⁵ *Id.* § 512(i)(2); U.S. COPYRIGHT SUMMARY: DMCA, *supra* note 59, at 9.

³¹⁶ 17 U.S.C. § 512(i)(2).

³¹⁷ *Id.* § 512(b)(2)(E).

³¹⁸ Blythe A. Holden et al., Berkman Ctr. for Internet & Soc'y at Harvard L. Sch., *Copyright and Digital Media in a Post-Napster World* 6 (2003), available at <http://cyber.law.harvard.edu/home/uploads/254/2003-05.pdf>; See *generally Perfect 10, Inc. v. CCBill, LLC*, 340 F.Supp.2d 1077 (C.D.Cal. 2004) (considering a provider of web hosting to be a service provider in its determination of whether the web hoster was eligible for limited liability under the DMCA).

³¹⁹ *Id.* at 6. Interview with Dean G. Martin, Serv. Manager, Display Sys., Inc., in Dallas, Tex. (Jan. 8, 2008). Mr. Martin has over nine years of experience helping customers create and host web pages. Mr. Martin worked as an independent contractor before joining Display Systems in 2007. According to Mr. Martin, an IHP server "is a computer that handles data transfer and storage for the user. It is the medium between the customer and the IHP whereby the customer's content is delivered to the IHP for storage." *Id.* Such content includes, for example credit card information from shopping cart pages and email exchanges between a customer and a merchant. *Id.* IHPs have complete access to a customer's server logs and all uploaded content and they monitor traffic (rate of uploads and downloads) as well as sites accessed by links on the customer's webpage. *Id.*

³²⁰ AllWebCo, *Start a Web Site at Allwebco*, <http://allwebco.com/gettingstarted.shtml> (last visited Jan. 8, 2008).

includes unlimited email and FTP³²¹ access, free search engine submissions, and on-line shopping carts.³²² AllWebCo can also build a business's website.³²³ After creating the website and registering a domain name, a business can upload the completed website (content thereof) to AllWebCo's server space.³²⁴ To save money, individuals with experience can build their own webpages, register their own domains names, and request that an IHP, such as AllWebCo, host their complete webpage and its content.

While ISPs generally *provide* access to the internet, an IHP such as AllWebCo is "a provider of online services"³²⁵ that *require* internet access. Accordingly, under the DMCA, IHPs are responsible for the content that their customers upload and store on their servers. Virtually all IHPs require their costumers to review and subsequently agree to policy and service guidelines that contain disclaimers on the upload of unlawful content to their servers. For example, AllWebCo's policy maintains that "all [of their services] may be used for lawful purposes only; [and the] transmission, storage, or presentation of any information, data, or material in violation of any United States Federal, State or City laws is prohibited."³²⁶ According to AllWebCo, such information, data, or material includes copyrighted material such as "pirated software, hackers programs or archives, Warez Sites . . . [and Mp3s] if being illegally distributed."³²⁷ Thus, it is clear that the terms of the DMCA apply to IHPs, because IHPs are service providers.

2. LACK OF LEGISLATION CALLING FOR IHP LIABILITY IN RUSSIA

In Russia, both ISPs and IHPs have managed to remain under the radar where vicarious and contributory liability is concerned. There are no major statutes in Russia focusing on either ISP or IHP liabilities or immunities for copyright infringement. Still, Russia is subject to WIPO and TRIPS.³²⁸ As a member of WIPO and TRIPS, Russia has an obligation to provide "fair and equitable"³²⁹ IP enforcement procedures and remedies and "agree to cooperate [with other member nations] with a view to eliminating international trade in goods infringing intellectual property rights."³³⁰

The internet is the universal supplier of copyright infringed materials because it is the easiest and most accessible conduit. Thus, when a person from Sweden accesses a website like allofmp3.com and downloads illegal mp3s from that website it might classify as "international

³²¹ FTP is "short for *File Transfer Protocol*, the protocol for exchanging files over the Internet . . . FTP is commonly used to download a file from a server using the Internet or to upload a file to a server (e.g., uploading a Web page file to a server)." Webopedia, *FTP*, <http://www.webopedia.com/TERM/FTP.html> (last visited Jan. 8, 2008).

³²² AllWebCo, *supra* note 320; *see also* AllWebCo, *AllWebCo Website Hosting Packages Features*, <http://allwebco.com/features.shtml> (last visited Jan. 8, 2008) (detailing various hosting packages a business can choose from at varying monthly rates).

³²³ *See* AllWebCo, *AllWebCo Website Hosting Packages Features*, <http://allwebco.com/features.shtml> (last visited Jan. 8, 2008).

³²⁴ *See* AllWebCo, *Start a Web Site at Allwebco*, <http://allwebco.com/gettingstarted.shtml> (last visited Jan. 8, 2008).

³²⁵ 17 U.S.C. § 512(k)(1)(B) (2006).

³²⁶ AllWebCo, *AllWebCo's Service Guidelines*, <http://www.allwebco.com/policies.shtml> (last visited Jan. 25, 2009) (detailing AllWebCo's policies and service guidelines regarding the upload of unlawful content).

³²⁷ *Id.*

³²⁸ *See supra* Part II.D.1.

³²⁹ TRIPS, *supra* note 126, art. 41, para. 2.

³³⁰ *Id.* at art. 69; *see also* WIPO, *supra* note 141, art. 11-12, 14.

trade in goods infringing intellectual property rights.”³³¹ Under WIPO and TRIPS, Russia is responsible for providing fair and equitable remedies to IP infringement. By amending its legislation to create vicarious and contributory liability for IHPs, Russia can comply with its international and bilateral IP agreements.

3. CHINA’S ADMINISTRATIVE MEASURES ON INTERNET COPYRIGHT PROTECTION (AMICP) AND THE SPC INTERPRETATIONS

As for China, there are two pieces of legislation dealing with Internet piracy and liability of ISPs (1) the Administrative Measures on Internet Copyright Protection (AMICP) and (2) Interpretations on Several Questions Concerning the Application of Law to Dispute Cases Involving Computer Internet Copyright (SPC Interpretations).

The MAPIC specifically targets ISPs.³³² According to the MAPIC, “Where an Internet information service provider clearly knows an Internet content provider’s tortuous act of infringing upon other’s copyright through Internet, or fails to take measures to remove relevant contents after receipt of the copyright owner’s notice although it does not know it clearly . . . the copyright administration department may . . . order the infringer to stop the tortious [sic] act, and may impose” penalties.³³³ Consequently, China is treating ISPs as IHPs because wrongful activity under the MAPIC includes hosting infringed web material. In other words, the MAPIC is easily applicable to IHPs. Under the Administrative Measures, an ISP can also be penalized for failure to remove such infringing materials after receiving a take-down notice from the copyright owner that meets all of the conditions set forth in the Measures.³³⁴ Thus, IHPs could be held liable for failing to comply with AMICP’s takedown requirements.

On November 22, 2000, China’s Supreme People’s Court issued the SPC Interpretations.³³⁵ The SPC Interpretations provide guidance about the correct application of China’s copyright law to internet disputes.³³⁶ Similar to the AMICP’s provisions, the SPC Interpretations requires an ISP to remove copyright infringing content if copyright holders place the ISP on notice or if the ISP discovers the infringing content on its own.³³⁷ Under the SPC Interpretations, if ISPs “infringe on copyrights through internet use” or assist others in doing so, Chinese copyright law permits its courts to render both the ISP and the copyright infringer liable for damages.³³⁸

As it exists, China’s internet piracy legislation is applicable to IHPs. Unless China widens its net to include IHPs, many host providers will not be accountable for failure to terminate their contributory, infringing relationship with illegal websites akin to Russia’s *allofmp3.com*.

³³¹ TRIPS, *supra* note 126, art. 69.

³³² See *supra* Part II.C; see also MAPIC, *supra* note 121, art. 11.

³³³ MAPIC, *supra* note 121, art. 11.

³³⁴ *Id.*, arts. 11, 14.

³³⁵ Guoqiang, *supra* note 295, at 4.295.

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.*

B. HOW VICARIOUS AND CONTRIBUTORY LIABILITY FOR IHPs CAN SUBSTANTIALLY REDUCE INTERNET PIRACY

With the internet, the spread of copyrighted material has increased exponentially. Officials target ISPs not only for their deep pockets, but also for their information (such as IP addresses) that allow greater latitude in prosecution of infringers. Still, ISPs are generally unwilling to divulge the identities associated with their customers.³³⁹ Where an ISP knows of an infringing activity and fails to take appropriate steps to stop it, the ISP should be responsible for the infringement that results. However, litigating against ISPs and their downloading customers will not suppress the growing amount of copyright infringement. While ISPs and end-users have the potential to exacerbate the problem, neither entity is the *source* of the problem. Rather, the sources of the problem are the individuals responsible for illegally copying software, music, and movies, and the IHPs that permit their widespread distribution. Thus, it is reasonable to target IHPs that make it possible for websites like allofmp3.com and other file sharing websites to take root and thrive.

IHPs should be vicariously and/or contributorily liable for knowingly storing copyright infringed materials and failing to take necessary steps to stop the infringement. The longer the infringed content sits on the IHP's server, the more opportunities end-users have to download illegal materials when they visit sites hosted by that IHP.³⁴⁰ In comparison to ISPs, ISPs are far removed from the activities of copyright infringers. While ISPs provide internet access, IHPs capitalize on this internet access by providing storage space to website administrators. IHPs are generally in a stronger position to flag and shut down copyright infringers because the IHPs host the infringing content on their servers. IHPs also stand to profit from continued use of their servers because customers enter into an agreement whereby the customer will pay a monthly or annual fee to the IHP for the right to store their websites and uploaded materials onto IHP databases. In other words, IHPs have a fiscal incentive to keep those customers, but should not profit from their customers' illegal activity. Hence, IHPs may be subject to vicarious liability for infringed content that is stored on their servers.³⁴¹

It is within an IHP's capability to oversee the use of its servers and enforce its policies against illegal uploads. In addition to monitoring traffic, IHPs determine whether their services are properly used.³⁴² For example, a red flag is raised when an administrator of an IHP notices that a particular customer's webpage is experiencing an unusually high rate of downloads. The customer may be using the website for illegal activities.³⁴³ According to Dean Martin, a Service Manager for Display Systems, Inc., "an IHP administrator has access to all files uploaded by a customer. Administrators can view every object that is uploaded to the server, including

³³⁹ See Jay Lyman, *RIAA Showdown Set, FCC Rules Blasted*, TECHNEWSWORLD, Sept. 15, 2003, available at <http://www.technewsworld.com/story/31585.html>; Roy Mark, *ISPs Ignore RIAA's New P2P Ploy*, Jan. 16, 2004, <http://www.internetnews.com/xSP/article.php/3300211>.

³⁴⁰ Contributory liability is concerned with one's intentional inducement or encouragement of direct infringement. See *supra* Part IV.B.

³⁴¹ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005). Vicarious liability involves the receipt of a profit "from direct infringement while declining to exercise a right to stop or limit it." *Id.*

³⁴² See Interview with Dean G. Martin, *supra* note 319.

³⁴³ *Id.*

mp3s.”³⁴⁴ In Martin’s experience, “the moment we learn that our servers are being used to facilitate illegal activity, we will take appropriate steps to remedy the situation, whether that means issuing a warning, removing the illegal content, canceling the customer’s contract,” or a combination thereof.³⁴⁵ Thus, IHPs are also subject to contributory liability when they know, or should know, of their customers’ infringing activity and nevertheless allow the infringement to continue.

While it can be extremely difficult to locate the actual persons responsible for illegally copying and distributing movies, software, and music, it is not difficult to locate and shut down websites that provide the infringed materials for download. By virtue of the services they provide, IHPs make it possible for potential infringers to upload and distribute copyrighted works. Where an IHP knows of the infringement and fails to stop it, the IHP should be accountable. By eliminating misuse of their servers by copyright infringers, IHPs in the United States, Russia, and China can substantially reduce the proliferation of pirated materials over the internet.

C. WHAT THE UNITED STATES, RUSSIA, AND CHINA SHOULD DO TO COMBAT COPYRIGHT INFRINGEMENT VIA INTERNET

Extending vicarious and contributory liability to IHPs for failing to take appropriate IP protection measures will pressure web hosts to stop the proliferation of infringed material. In this respect, the United States, Russia, and China should expand its IP enforcement efforts to include IHPs. The number of illegal downloaders in these countries will continue to increase unless infringing websites become inaccessible to end-users. IHPs, as service providers, are well within the grasp of the U.S.’s DMCA and China’s AMICP and SPC Interpretations. Russia, having no explicit internet piracy laws, should upgrade its IP legislation to account for this threat in addition to expanding its enforcement efforts to include IHPs. Targeting IHPs in itself is insufficient to effect a substantial reduction in copyright infringement. However, should the United States, Russia, and China augment pre-existing enforcement efforts to include IHP liability, each nation will ensure that, of all the ways an individual could access infringed material, illegal websites will not be one of them.

CONCLUSION

Domestic and international copyright infringement continues to spiral out of control and is gaining momentum everyday. As we have seen in the United States, copyright infringers, like Brianna LaHara and Jammie Thomas, can be accountable for their actions. Still, end-users and perhaps even ISPs are lost causes from a global perspective. Both have the potential to exacerbate the rampant, illegal distribution of copyrighted works, but copyright infringement continues because end-users and ISPs are not the source of the problem. Rather, access to a medium such as the internet, whereby one can easily provide the public with unbridled access to infringed materials, is the root problem. We may never be able to find and prosecute all persons responsible for illegally copying and distributing the infringed materials. We live in a digital age and as such, we are constantly finding ourselves one step behind the latest technological advents.

³⁴⁴ *Id.*

³⁴⁵ *Id.*

Illegal downloaders and hackers will likely become wiser and learn new and more effective ways to conceal their activities. Nevertheless, we can still implement stronger methods for preventing access to and the spread of copyright infringed materials over the internet. To this end, the United States, Russia, and China should bring their copyright laws into uniformity regarding IHP liability. In so doing, each nation affords itself greater latitude to target the source problem by pressuring IHPs to be mindful of what their customers are up to, and identify and weed out copyright infringers who abuse their internet access.