Global Business & Development Law Journal

Volume 19
Issue 2 *Symposium Judicial Independence and Legal Infrastructure: Essential Partners for Economic Development*

Article 8

1-1-2007

Harmonization of International Copyright Protection in the Internet Age

Christian A. Camarce

Follow this and additional works at: https://scholarlycommons.pacific.edu/globe

 Part of the International Law Commons

Recommended Citation

Christian A. Camarce, *Harmonization of International Copyright Protection in the Internet Age*, 19 Pac. McGeorge Global Bus. & Dev. L.J. 435 (2006).
Available at: https://scholarlycommons.pacific.edu/globe/vol19/iss2/8

This Comments is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in Global Business & Development Law Journal by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

Harmonization of International Copyright Protection in the Internet Age

Christian A. Camarce[*]

TABLE OF CONTENTS

* J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2007; M.S., Electrical Engineering, University of Florida, 2000; B.S., Electrical Engineering, University of Florida, 1998. The author is deeply indebted to his wife for her patience and endless support; his parents and sister for their continuous encouragement to reach for the sky; and Jed Scully, Professor of Law and Director of Intellectual Property at the University of the Pacific, McGeorge School of Law, for sharing his scholarship and guidance on the rapidly-changing world of Copyright Law.

I. INTRODUCTION

The internet has essentially limitless boundaries.[1] From its early inception in the 1960s,[2] the internet has exploded over the last decade into a decentralized source of information for over a half-billion people worldwide.[3] The internet boom is due to technology's networking capabilities and widespread public availability, which enables people around the world to communicate with each other quickly and efficiently.[4]

Today, many internet users access databases of digital information through websites located around the world.[5] For example, a person may place digital content, like music or pictures, on his website for other internet users to copy and further disseminate.[6] The development of portable communication devices, such as laptops, personal digital assistants, and cellular phones, enable people to access the internet from virtually anywhere around the world.[7] Thus, the electronic means to copy and disseminate information over the internet may be done almost anywhere.

With the number of internet users rapidly growing, the potential for copyright infringement in cyberspace has grown.[8] Correspondingly, international courts are faced with new issues created by the unique nature of the internet.[9] For example, these issues include making music available on personal websites,[10] using copyrighted graphics in website designs,[11] and posting decryption software

---

1. *See* David Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1370 (1996) (noting that the cost and speed of electronic transmissions make the internet almost independent of physical location).

2. The birth of the internet began with the Advanced Research Projects Agency Network (ARPANET), created by U.S. Department of Defense in the 1960s. *See* Creation of the Internet, http://en.wikipedia.org/wiki/Internet (last visited Nov. 9, 2005).

3. *See* Press Release, Nielson NetRatings, Nielson NetRatings Reports a Record Half Billion People Worldwide Now Have Home Internet Access (March 6, 2002) (recording that 580 million people had internet access in 2002).

4. The internet is a communications network allowing electronic data to be transferred from one computer to another. Creation of the Internet, *supra* note 2.

5. J.A.L. STERLING, WORLD COPYRIGHT LAW 30 (Sweet & Maxwell Limited 2d ed. 2003) (1998).

6. *Id.*

7. *See id.*

8. *See* Internet Usage Statistics—The Big Picture, http://www.internetworldstats.com/stats.htm (last visited Mar. 20, 2006) (calculating that worldwide internet usage increased by over 182% between 2000 and 2005).

9. *See* Paul Edward Geller, *Conflict of Laws in Cyberspace: Rethinking International Copyright in a Digitally Networked World*, 20 COLUM.-VLA J.L. & ARTS 571, 573 (1996) (commenting that as internet technology grows, international courts will face new hurdles with respect to choice of law, where a judge's traditional notion of this issue would need to be rethought in the context of international copyright).

10. *See* Koda v. Lauritzen, (2001) 2002 E.C.D.R. 25 (2001) (VL.) (Den) (ruling that defendant infringed on author's copyright when it uploaded copyrighted songs onto a web server and created hyperlinks on its website to this music).

11. *See* Antiquesportfolio.com Plc. v. Rodney Ritchey & Co. Ltd., (2000) 2001 F.S.R. 23 (Ch.) (U.K.) (ruling that defendant's icon and navigation button designs on its website violated the copyright of a third-party).

in cyberspace.[12] Further, with the advent of new internet technologies, the scope of these copyright issues will only grow.[13]

There are numerous challenges posed to the protection of intellectual property rights relating to the nonterritorial nature of the internet. Most of these issues stem from the differing approaches taken by different states to intellectual property.[14] International organizations, like the World Intellectual Property Organization ("WIPO"), have attempted to harmonize copyright law among member states, but complications with jurisdiction, choice of law, and the enforcement of judgments nevertheless present difficulties for the WIPO members.[15]

In particular, member states of the WIPO often apply varying notions of domestic law to resolve these issues rather than apply a uniform law. For example, in the context of the internet, one state may broadcast copyright content owned by another state over the internet and not violate its own national law.[16] The broadcast of the copyrighted material, however, may violate the copyright laws of the right holder's state.[17] A uniform copyright law system is needed to resolve these types of issues.

The International Copyright Protection System ("ICPS") is a system of copyright protections designed to address the shortcomings of current copyright conventions.[18] The ICPS is composed of two main elements: the Draft

---

12. *See* Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001) (ruling that the posting of Corley's DVD decryption code on his personal website violated the antitrafficking and anticircumvention provisions of the Digital Millennium Copyright Act). Jon Johansen is a software programmer who wrote decryption code to circumvent the anticopying measures on DVDs, which enabled the copying of DVDs onto computers running on Linux platforms. *Id.* Other anti-circumvention software includes computer code enabling users to "hack" into peer-to-peer networks. John Borland, *Microsoft DRM Hack Revived?*, CNET NEWS.COM, Apr.15, 2005, http://news.com/2061-10799_3- 5673102.html (last visited Nov. 9, 2005).

13. A software tool called Gnutella allows the transfer of files between users without the need for a centralized server, which increases the difficulty of the record industry to target copyright infringers. Nikoltchev & Blazquez, *infra* note 258, at 26. Freenet operates similar to Gnutella, but P2P users are completely anonymous. *Id.*

14. *See* Introduction to the International Copyright Protection System, *infra* note 31 (observing that private international law issues of jurisdiction, choice of law, and enforcement of judgment are among the issues that need to be settled in order to ensure effective copyright protection).

15. The charter of the WIPO is to ensure that intellectual property rights are protected worldwide such that authors and inventors are rewarded for their ingenuity. General information about the WIPO, http://www.wipo. int/about-wipo/en/gib.htm (last visited Nov. 9, 2005).

16. *See* National Football League v. TVRadioNow Corp., 53 U.S.P.Q. 2d 1831 (W.D.Pa. 2000), *reprinted in* COPYRIGHT LAW DECISIONS 32, 117 (CCH Editorial Staff Publication 2001).

17. *See id.* at 32, 121 (ruling that Canadian website "streaming" transmissions from the United States violates U.S. copyright law).

18. *See* Introduction to the International Copyright Protection System, *infra* note 31 (stating that "main international instruments dealing with copyright and related rights (Berne Convention, Universal Copyright Convention, Rome Convention, TRIPS Agreement, and the WIPO Treaties 1996) provide the framework for the international establishment and recognition of these rights, but numerous aspects are left to national legislation, or await the conclusion of further international agreements").

International Copyright Code ("Draft Code")[19] and the Draft International Copyright Protection Agreement ("Draft Agreement").[20]

Under the Draft Code, member states may opt for the International Copyright Tribunal to hear their suit, where the tribunal would apply a uniform copyright law applicable to all parties.[21] Here, the state affected by the tribunal's judgment must abide by the ruling.[22] If a state chooses not to follow the uniform copyright law set forth by the Draft Code, then the Draft Agreement provides an alternative to the Draft Code. The Draft Agreement embraces the concepts of current international copyright conventions with emphasis on resolving private international law issues (namely, jurisdiction, choice of law, and enforcement of judgment) arising from transborder communication, like the internet.[23] The goals of the Draft Code and Draft Agreement are to increase the efficiency and effectiveness of copyright protection under current international conventions.[24]

This comment discusses the merits of the ICPS—the Draft Code and the Draft Agreement—as a possible solution to issues of jurisdiction, choice of law, and enforcement of judgment relating to copyright infringement on the internet. Using a series of international intellectual property cases, the Draft Code and Draft Agreement will be analyzed as a solution to these issues. The discussion of the Draft Code and Draft Agreement is not intended to be an exhaustive comparison to existing international copyright conventions. Rather, this discussion highlights those areas in which current copyright conventions fall short; in particular, areas involving the internet and peer-to-peer file sharing. In light of these shortcomings, the Draft Code and Draft Agreement will be discussed as potential solutions.

Part II of this comment introduces the ICPS—the Draft Code and the Draft Agreement—as an ideal uniform global copyright system designed to remedy private international law issues; in particular, issues concerning jurisdiction, choice of law, and enforcement of judgment. Part III discusses a series of copyright issues presented by the internet under current copyright law and the ICPS is proposed to resolve these issues. Lastly, this comment concludes that the ICPS is needed to effectively protect an author's copyright interests from infringement on the internet.[25]

---

19. Draft Code Provisions, http://www.qmipri.org/icc_code.html (last visited Nov. 9, 2005) [hereinafter Draft Code].

20. Introduction to Draft International Copyright Protection Agreement and Draft Agreement Provisions, http://www.qmipri.org/icpa.html (last visited Nov. 9, 2005) [hereinafter Draft Agreement].

21. Under the Draft Code, jurisdiction is established by Code states agreeing to litigate before the tribunal. Draft Code, *supra* note 19, at art. 20.

22. *See id.* at art. 14 (stating that "Code countries shall in their respective territories maintain the facilities for sustaining actions before the Tribunal and for enforcing confirmed Tribunal orders").

23. Introduction to the International Copyright Protection System, *infra* note 31.

24. *Id.*

25. *See* Andreas P. Reindl, *Choosing Law in Cyberspace: Copyright Conflicts on Global Networks*, 19 MICH. J. INT'L L. 799, 802 (1998) (suggesting that a broad choice of law encompassing transborder

II. THE INTERNATIONAL COPYRIGHT PROTECTION SYSTEM

Today, in the absence of a global agreement on a common copyright law, private international law issues involving copyright protection and the internet present a complex and burdensome set of legal issues for state courts.[26] Many of these problems, however, can be resolved by developing a body of law solely for the internet that recognizes a legal distinction between the "digital world" and the "real world."[27] This legal distinction would, for example, help resolve the jurisdictional issues arising from varying territorially-based laws applied in copyright infringement suits in cyberspace.[28] A body of law solely designed for the internet would not only remove the physical territoriality between parties, but also promote the development of new doctrines that encompass the unique characteristics of the internet.[29]

J.A.L. Sterling, a professor at Queen Mary Intellectual Property Research Institute at the University of London, recognized that, although current international copyright instruments provide a framework for the protection of an author's rights, a number of issues were left to be decided by national courts or by the implementation of future conventions.[30] These issues include jurisdiction, choice of law, and enforcement of judgments. In view of this, Sterling drafted the ICPS as research material to study and propose solutions to these issues.[31]

Since the ICPS is a research project, no states have enacted or ratified the ICPS. The concepts proposed by Sterling serve as possible solutions to copyright problems that face the international intellectual property community. The ICPS consists of two draft documents proposing solutions to jurisdiction, choice of law, and enforcement of law issues seen in international copyright litigation: the Draft Code and the Draft Agreement.[32]

---

communication, like the internet, and respecting a copyright owner's rights are significantly important in the digital age).

26. *See* Jane C. Ginsburg, *Global Use/Territorial Rights: Private International Law Questions of the Global Information Infrastructure*, 42 J. COPYRIGHT SOC'Y U.S.A. 318, 319-320 (1995) (questioning the complexity in litigation of a copyright infringement suit when the protected material is disseminated to many countries through electronic means, like the internet).

27. *See* Johnson & Post, *supra* note 1, at 1378 (suggesting that many of the jurisdictional and substantive issues introduced by transborder communication could be resolved by creating a law that distinguishes between cyberspace and the "real world").

28. *See id.* at 1383.

29. *Id.* at 1384.

30. Introduction to the International Copyright Protection System, *infra* note 31.

31. Introduction to the International Copyright Protection System, http://www.qmipri.org/icps_introduction.html (last visited Nov. 9, 2005).

32. *Id.*; Draft Agreement, *supra* note 20. Other companion documents to the Draft International Copyright Protection Agreement that provide a comprehensive approach to fill in the gaps of the WIPO Treaties 1996 include the Protocol on Interpretation of the WIPO Treaties 1996, the Protocol on Space Copyright Law and Extraterritorial Use of Protected Material, and the Protocol on Limitation of Liability of Service Providers. *Id.*

A. *Draft International Copyright Code*

The Draft Code views the international community as one state with one copyright law.[33] The objective of the Draft Code is to provide "international protection to owners of copyright and related rights in the digital era, taking into account in particular all forms of transborder communication, including the internet."[34] The Draft Code is a reflection of current international copyright conventions, embodied in a comprehensive international code, addressing differences in national laws and facilitating efficient litigation.[35] The Draft Code is based in large part on current international copyright conventions, including the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"); the Universal Copyright Convention; the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations ("Rome Convention"); the Trade-Related Aspects of Intellectual Property Rights Agreement ("TRIPS Agreement"); the WIPO Treaties; and the European Community "Copyright" Directives.[36] However, the Draft Code provides additional protection to "areas where these instruments are considered to fall short, and at the same time allow[s] countries to apply their particular local provisions in appropriate cases."[37]

1. Jurisdiction

Pursuant to the Draft Code, a Code state may choose to bring its action either under national law in a state court or under the provisions of the Draft Code before the International Copyright Tribunal.[38] In other words, the jurisdiction of the tribunal is not compulsory; rather, jurisdiction is established by Code states stipulating to litigate before the tribunal. Article 20 of the Draft Code establishes the International Copyright Tribunal, where tribunal judges are appointed by Code states.[39] Pursuant to Article 22(2), one judge adjudicates actions before the tribunal, and appeals from this tribunal are heard by the Appeals Division of the Tribunal.[40]

---

33. Introduction to Draft International Copyright Code, http://www.qmipri.org/icc_introduction.html (last visited Nov. 9, 2005).

34. *Id.*

35. The Draft Code embodies the pertinent provisions of important current international copyright provisions into a comprehensive whole, and at the same time, it endorses a method of electronic communication, E-Justice, to facilitate efficient litigation. STERLING, *supra* note 5, at 1296.

36. The Draft Code originated from the 1971 text of the Berne Convention, the 1971 text of the Universal Copyright Convention, the 1961 text of the Rome Convention, the 1994 text of the TRIPS Agreement, and the 1996 text of the WIPO Treaties. Introduction to Draft International Copyright Code, *supra* note 33.

37. *Id.*

38. *See* Draft Code, *supra* note 19, at art. 20 (stating that "the Tribunal has competence to hear and determine actions brought before it in accordance with this Code").

39. *Id.* at art. 22.

40. *Id.* at art. 20.

Two important advantages are available to Code states choosing to litigate before the International Copyright Tribunal. First, the parties are offered the convenience of litigating in their home state.[41] The tribunal utilizes an electronic system, called the "E-Justice" system, where court proceedings are conducted via open- or closed-circuit television.[42] The E-Justice system increases procedural efficiency and decreases litigation costs by allowing all phases to be conducted through electronic means.[43] Second, the Draft Code establishes a uniform set of rules regardless of the location of the harm.[44] This uniform system removes the ambiguities in various national instruments and proposes a uniform global copyright law.[45]

2. *Choice of Law*

The Draft Code establishes a uniform copyright law for Code states.[46] Articles 1 through 15 of the Draft Code set forth the substantive provisions of the instrument.[47] For example, Article 6 details the subject matter protected by the Draft Code, such as performances, sound recordings, movie image recordings, and wireless recordings.[48] The Draft Code also adopts a life-plus-seventy-years term of protection for copyright authors.[49] This copyright protection is the same as the term of protection legislated in recent years by both the European Union and the United States.[50] Article 13 of the Draft Code defines infringement as the "unauthorized use of the whole or any substantial part of an item of protected subject matter."[51]

Under the Draft Code, limitations are placed on the rights granted to authors. Similar to the WIPO Copyright Treaty of 1996 and the TRIPS Agreement, the Draft Code applies a "three-step test" in determining these limitations or exceptions.[52] The "three-step test" places a limitation or exception on an author's rights "(1) in certain special cases, (2) that do not conflict with a normal exploitation of the work and (3) that do not unreasonably prejudice the legitimate

---

41. The E-Justice System conducts proceedings electronically, where claimants remain in their home state for the duration of the tribunal proceeding. Introduction to Draft International Copyright Code, *supra* note 33.

42. STERLING, *supra* note 5, at 1296.

43. Introduction to Draft International Copyright Code, *supra* note 33.

44. *Id.*

45. STERLING, *supra* note 5, at 1296.

46. Introduction to Draft International Copyright Code, *supra* note 33.

47. Draft Code, *supra* note 19, at pt. I.

48. *Id.* at art. 6.

49. *Id.* at art. 11.

50. Introduction to Draft International Copyright Code, *supra* note 33.

51. Draft Code, *supra* note 19, at art. 13.

52. Introduction to Draft International Copyright Code, *supra* note 33.

interests of the author."[53] Article 22(3) of the Draft Code directs the International Copyright Tribunal to employ the "three-step test" when the tribunal considers domestic copyright provisions of Code states in making decisions.[54]

3. *Enforcement of Judgment*

Article 22(5) of the Draft Code empowers the International Copyright Tribunal to issue injunctions, order the destruction or disposal of infringing material, order the payment of damages, and make any other order that the tribunal considers justifiable under the circumstances of the case.[55] The tribunal, however, cannot enforce these penalties.[56] The Draft Code relies on the local courts to enforce the tribunal's orders in accordance with local rules.[57] Consequently, Code states must enact legislation to give effect to the tribunal's judgment.

In the event that the tribunal issues an erroneous judgment, the defendant may petition for the order to be discharged or varied in its application in the Code state. The local court may accordingly restrict the application of the order entirely or in part on the grounds that the order was wrongly issued, or that some limitation of or exception provided under the provisions of the Code applies.[58] The defendant has the burden to prove the tribunal's order was erroneous.[59]

B. *Draft International Copyright Protection Agreement*

The WIPO Copyright Treaty of 1996 attempted to update the current controlling law on copyrights in an attempt to resolve issues created by recent technological innovations.[60] The WIPO, however, did not specifically deal with certain legal issues arising from transborder communication like the internet.

Three draft documents are under development to help address these unresolved issues: (1) the Hague Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters; (2) the Draft Convention on Jurisdiction and Recognition of Judgments in Intellectual Property; and (3) the Draft Principles on Jurisdiction and Recognition of Judgments in Intellectual

---

53. STERLING, *supra* note 5, at 718.

54. Draft Code, *supra* note 19, at art. 22.

55. *Id.*

56. *See id.* at art. 14 (stating that "[e]nforcement of Tribunal orders in Code countries is effected through confirmed orders of the respective local courts in accordance with the provisions of Article 22").

57. *Id.* at art. 22 (stating that "[t]o be effective in a Code country, orders of the Tribunal must as provided by the Procedural Rules be confirmed by the local court of the Code country in which the order is to be enforced").

58. *Id.*

59. *Id.*

60. STERLING, *supra* note 5, at 707.

Property.[61] The Hague Draft Convention focuses on civil litigation of private rights, where the Draft Convention on Jurisdiction and Recognition of Judgments in Intellectual Property and the Draft Principles on Jurisdiction and Recognition of Judgments in Intellectual Property focus exclusively on intellectual property rights matters.[62] Sterling's Draft Agreement embraces the concepts from these three draft documents, while at the same time suggesting new proposals that focus on issues related to transborder communication and the internet.[63]

1. Jurisdiction

Under the Draft Agreement, member states nominate a court within their borders to hear and determine actions for copyright suits.[64] The corresponding rules on jurisdiction address four scenarios:[65]

(1) The harmful event that occurs within a member state where the action is brought;
(2) The harmful event that occurs within a member state other than the one in which the action is brought;
(3) The harmful event that occurs within a nonmember state; and
(4) The harmful event that occurs in places outside the jurisdiction of any state.

The Draft Agreement proposes jurisdictional rules for scenarios (1) and (2), but leaves the decision of jurisdiction to national law in scenarios (3) and (4).[66] For scenarios (1) and (2), the Draft Agreement proposes that a defendant who is domiciled in a member state may be sued in that state regardless of whether the harm occurred there.[67] A defendant, however, who is not domiciled in a member state, may be only sued in the state where the harm occurred or may occur.[68]

2. Choice of Law

In the context of the internet, where infringement may occur in a location other than the state of copyright origin, complications arise in applying the law of

61. Draft Agreement, *supra* note 20.

62. *Id.*

63. Chapter 2 discusses the rules on jurisdiction; Chapter 3 discusses the rules on applicable law; and Chapter 4 discusses the recognition and enforcement of judgments. *Id.*

64. *Id.* at art. 5.

65. *Id.* at art. 6.

66. *Id.* at ch. 2.

67. *Id.*

68. *See id.* at art. 6 (stating that "a person who is not present in the [m]ember [s]tate in which a harmful event has occurred or may occur may be sued in the nominated court of that [s]tate in respect of such harmful event or its threatened occurrence").

the forum where the harm occurred. In *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, the New York defendant copied and published about 500 articles from the plaintiff's Russian publications.[69] To determine the copyright ownership of the articles, the U.S. Court of Appeals applied Russian copyright law, even though the harm occurred in New York.[70] Courts in other jurisdictions have not adopted the same approach as the U.S. court in *Itar-Tass Russian News*.[71] For example, English courts determine copyright ownership under United Kingdom law, regardless of the copyright origin or the location of the harm.[72]

Article 10 of the Draft Agreement proposes that the applicable law for determining authorship, initial ownership, infringement, and term of protection should be that of the state where the harmful event occurred or may occur.[73] This is consistent with the Berne Convention.[74] In addition, Article 11 of the Draft Agreement states that in "questions of limitations of liability for infringement of rights, the nominated court shall apply the law of the country in which the harmful event occurred . . . subject to the provisions of this Agreement and its Protocols."[75] Therefore, member states should give effect to the Draft Agreement by enacting national laws that reinforce the provisions of the Agreement, if laws do not already exist.[76]

3. *Enforcement of Judgment*

Articles 13 and 14 of the Draft Agreement require the recognition and enforcement of judgments by member states.[77] The enforcement of judgment provisions under the Draft Agreement follows principles set forth in existing and developing draft conventions: the Draft Principles on Jurisdiction and Recognition of Judgments in Intellectual Property; the Draft Convention on Jurisdiction and Recognition of Judgments in Intellectual Property; the Hague Draft Convention on

69. Itar-Tass Russian News Agency v. Russian Kurier, Inc., 153 F.3d 82, 84-85 (2d Cir. 1998).

70. *Id.* at 92.

71. Draft Agreement, *supra* note 20, at ch. 3.

72. *Id.*

73. *Id.* at art. 10.

74. Today, the Berne Convention is one of seven treaties under the WIPO protecting an author's copyright, where 160 states are members to this treaty. Contracting parties to the Berne Convention, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15 (last visited Nov. 1, 2005). Article 5, section 2 of the Berne Convention states that "[t]he enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed." Article 5 of the Berne Convention, http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P109_16834 (last visited Nov. 9, 2005).

75. Draft Agreement, *supra* note 20, at art. 11.

76. *Id.* at art. 3; Further research is underway by J.A.L. Sterling and the Queen Intellectual Property Research Institute on choice of law issues under the Draft Agreement. *Id.* at ch. 3.

77. *Id.* at arts. 13 & 14.

Jurisdiction and Foreign Judgments in Civil and Commercial Matters; and the European Union Regulation.[78]

Sterling's Draft Agreement, however, adds an extra provision concerning the situation where the nominated court finds incompatibility with a judgment in light of "the copyright or related rights law of the [s]tate of the addressed court."[79] Article 15(b) sets forth situations where the court would find incompatibility in a judgment.[80] These situations include:

(1) where the item of subject matter recognized by the rendering court as protectable is not of a category of subject matter protected by the copyright or related rights law of the [s]tate of the addressed court;

(2) where the test of originality applied by the rendering court was based on a principle not recognized by the relevant law of the State of the addressed court; and

(3) if the rendering court had applied a limitation or exception applicable under the law of the [s]tate of the addressed court.[81]

III. INTERNATIONAL COPYRIGHT LAW ON THE INTERNET

In light of the complications arising from private international law issues, a potential solution will be proposed under the ICPS. Current copyright law on peer-to-peer file sharing technology will be also explored, and the ICPS will be proposed as a solution to hurdles introduced by this technology.

A. International Copyright Disputes—The Law as It Stands and the International Copyright Protection System

Litigation of copyright infringement suits involving the internet introduces issues of jurisdiction and choice of law when foreign parties are involved.[82] Jurisdictional analysis not only takes into account the location where the damage occurred, but also the location where the electronic data was uploaded onto a computer server and the location where the data was downloaded.[83] Then, to determine which law is applicable to internet-related cases, the court must also consider factors such as international comity and inconsistencies in national law.[84]

---

78. *Id.*

79. *Id.* at art. 15.

80. *Id.*

81. *Id.*

82. *See* Gutnick v. Dow Jones & Co., 210 Commonwealth L. Rep. 575 (2002) (Austl.) (finding jurisdiction over U.S. defendant and applying Australian copyright law).

83. *See id.* (finding jurisdiction since claimant downloaded alleged defamatory material in Australia).

84. *See id.* (applying Australian law even though alleged defamatory material was uploaded to a website

1. Jurisdiction

Due to the lack of uniform legislation for regulating transborder communications, national courts have been forced to adapt traditional notions of jurisdiction to adjudicate international copyright infringement suits.[85] For example, one U.S. court applied a traditional "minimum contacts" analysis to determine jurisdiction within the context of the internet.[86]

With varying national jurisdiction laws, a synchronization of jurisdictional law is required in order to accommodate technological developments.[87] The absence of this synchronization may lead to inconsistencies among national courts. These inconsistencies are illustrated by two international cases: *United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc.*[88] and *Mecklermedia Corp. v. D.C. Congress G.M.B.H.*[89] In light of the jurisdictional issues presented by these two cases, the ICPS provides a solution.

In *United Feature Syndicate, Inc.*, United Feature Syndicate, Inc., a U.S. newspaper distributor, brought a copyright infringement suit against its Canadian agents, Richard and Agnes Vroom. United Feature Syndicate claimed that their images were being displayed on Vrooms' website after the agency agreement between the two parties had expired.[90] The Vrooms contested the jurisdiction of the U.S. District Court, but the court maintained jurisdiction based on Vrooms' substantial "contacts" with New York.[91]

The Vrooms also argued that the action should be dismissed on the ground of forum non conveniens, since the evidence and witnesses were in Canada and the alleged acts of wrongdoing did not occur in New York.[92] In weighing the private and public interests to determine whether Canada would serve as a better forum than the United States, the court stated that the copyright infringement suffered

---

located in the United States).

85. *See* Shlomo Cohen, *Jurisdiction over Cross Border Internet Infringements*, 20(8) EUR. INTELL PROP REV 294, 294 (1998) ("[O]wing to lack of legislation dealing specifically with cross-border Internet related transactions, national courts are having to adapt traditional concepts of jurisdiction.").

86. In *Bensusan Restaurant Corp. v. King*, King alleged trademark infringement when Bensusan used the name of King's famous New York jazz club on his website. Bensusan Restaurant Corp. v. King, 126 F.3d 25, 25-29 (2d Cir. 1997). The Court of Appeals affirmed the district court ruling on the grounds that Bensusan did not have sufficient contacts with New York, and therefore, the New York district court did not have personal jurisdiction over the matter. *Id.*

87. *See* Shlomo, *supra* note 85, at 297 (suggesting that national courts are expanding traditional concepts of jurisdiction to accommodate for technological advancements; however, this expansion approaches the boundaries of jurisdictional standards).

88. 216 F.Supp.2d 198 (S.D.N.Y. 2002).

89. (1998) Ch. 40 (U.K.).

90. *United Feature Syndicate, Inc.*, 216 F.Supp.2d at 202-205.

91. *Id.* at 204-207 (finding that the Vrooms had extensive contacts with New York, such as extensive contract agreements with United Feature Syndicate, Inc., periodic visits to New York for sales meetings, and monthly payments of hundreds of thousands of dollars to United Feature Syndicate in New York).

92. *Id.* at 206.

by United Feature Syndicate was in New York.[93] By using a traditional minimum contacts analysis, the court held that they had jurisdiction over the Canadian defendant.[94]

Mecklermedia Corp., a trademark infringement case, provides insight into English jurisdictional law relating to intellectual property lawsuits, including copyright infringement on the internet.[95] In this case, Mecklermedia Corp., a U.S. corporation, brought a "passing off" or trademark suit against D.C. Congress G.M.B.H., a German company, in an English court.[96] Both parties advertised their business on the internet, and Mecklermedia alleged that D.C. Congress' internet activities harmed the goodwill of its trademark, "Internet World," in the United Kingdom.[97]

In its decision to preside over the matter between the two foreign parties, the English court relied on the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters ("Brussels Convention").[98] In particular, the court relied on Article 5(3) of the Brussels Convention, which permits a plaintiff to bring suit in the forum where the harmful event occurred.[99] D.C. Congress contended that the court lacked jurisdiction to hear the case because the alleged harm occurred in Germany rather than the United Kingdom.[100] The court held jurisdiction over the dispute because D.C. Congress' actions substantially harmed Mecklermedia's goodwill in the United Kingdom.[101]

In *United Feature Syndicate, Inc.* and *Mecklermedia Corp.*, the jurisdiction analyses applied by the U.S. and English courts, respectively, produced different results because the lawsuits were brought in forums applying different national laws.[102] The English court in *Mecklermedia Corp.* suggested "that it would be better if all questions [pertaining to international intellectual property matters] were decided by a single court [so] that multiple litigation should be avoided," but since this was not a viable option at the time, the court heard the matter pursuant to the Brussels Convention.[103] On the other hand, the U.S. court in

93. *Id.* at 207-209.

94. *Id.*.

95. *Mecklermedia Corp.*, (1998) Ch. at 40.

96. *Id.* (defining "passing off" as when the reputation of Party A is misappropriated by Party B, such that Party B misrepresents this reputation and damages the goodwill of Party A).

97. *Id.* at 47.

98. *Id.* at 49.

99. *Id.* at 50-53.

100. *Id.* at 50-52.

101. *Id.* at 56.

102. For example, suppose that United Feature Syndicate, Inc. was litigated in a non-minimum contacts jurisdiction, the court may not find personal jurisdiction because the Canadian defendant may argue that it did not avail itself to the laws of the forum. Further, in *Mecklermedia Corp.*, suppose that one of the parties was not a member of the Brussels Convention, the court may not be able to extend its jurisdiction over the matter. This is a possibility since the Brussels Convention has only twenty-eight members. Brussels Convention, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=19 (last visited Nov. 9, 2005).

103. *Mecklermedia Corp.*, (1998) Ch. 40, 56 (U.K.).

United Feature Syndicate, Inc. suggested that if the harm occurs within its territory, copyright issues should be litigated in a U.S. court since "[i]t is well-settled that the United States has an interest in protecting the intellectual property rights of its citizens."[104]

The ICPS resolves the differences in jurisdictional arguments presented by the defendants in *United Feature Syndicate, Inc.* and *Mecklermedia Corp.*[105] Pursuant to Article 6 of the Draft Code, the International Copyright Tribunal will have jurisdiction over the copyright claim in *United Feature Syndicate, Inc.* since the case involved the display of the claimant's images on Vrooms' website.[106] Assuming the parties were members of the Draft Code and chose to litigate before the tribunal, the tribunal would also maintain jurisdiction over the parties.[107]

Under the Draft Code, the U.S. court in *United Feature Syndicate, Inc.* would not be burdened with a forum non conveniens analysis, balancing public and private interests associated with litigating in a different forum, or with a minimum contacts analysis for jurisdiction.[108] The Draft Code resolves these burdens in two ways. First, as members of the Draft Code, the dispute would be judged under a common copyright system, regardless of the location of the alleged infringement.[109] As such, the court in *United Feature Syndicate, Inc.* would not need to analyze whether the defendant established minimum contacts within the forum because the defendant will have already availed itself to the uniform copyright law of the Draft Code.[110]

Second, the E-Justice system of the International Copyright Tribunal provides a convenient forum for the parties. For example, the tribunal's proceedings take advantage of modern technology by allowing pleadings, evidence, and other court proceedings to be transferred electronically to the tribunal.[111] The tribunal also conducts the proceedings via open or closed circuit television so the parties are not required to travel abroad for trial.[112]

---

104. United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc., 216 F.Supp.2d 198, 208 (S.D.N.Y. 2002).

105. In *United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc.*, the Canadian defendant contended that the New York court lacked personal jurisdiction. *Id.* at 204-207. Further, in *Mecklermedia Corp. v. D.C. Congress G.M.B.H.*, the German defendant argued that jurisdiction did not exist in the United Kingdom. *Mecklermedia Corp.*, (1998) Ch. at 50-52.

106. The subject matter protected under Article 6 includes "works" and "wireless broadcasts." Draft Code, *supra* note 19, at art. 6.

107. "The Tribunal has competence to hear and determine actions brought before it in accordance with this Code." *Id.* at art. 20.

108. *United Feature Syndicate, Inc.*, 216 F.Supp.2d at 206-209.

109. Introduction to Draft International Copyright Code, *supra* note 33.

110. *United Feature Syndicate, Inc.*, 216 F.Supp.2d at 207-209 (maintaining jurisdiction based on the Vrooms' substantial "contacts" with New York).

111. The E-Justice system established under the Draft Code permits all stages of litigation to be conducted through electronic means, thereby increasing procedural efficiency, and achieving savings in time and expense. Introduction to Draft International Copyright Code, *supra* note 33.

112. *Id.*

Likewise, the Draft Code also resolves the jurisdiction problems in *Mecklermedia Corp.*[113] The Draft Code establishes a common copyright system, which applies a uniform rule regardless of the location of the harm.[114] As such, the English court in *Mecklermedia Corp.* would not need to analyze whether the Brussels Convention is applicable in order to find jurisdiction because the matter would be decided by the International Copyright Tribunal.[115] Under Article 6 of the Draft Code, the tribunal's subject matter is broad and includes works, performances, and wireless broadcasts.[116] Thus, the Draft Code would likely have found jurisdiction over the dispute in *Mecklermedia Corp.*

Alternatively, in the instance that the parties choose not to litigate under the Draft Code, the Draft Agreement provides flexibility for the court in *United Feature Syndicate, Inc.* to find jurisdiction. Pursuant to Article 6 of the Draft Agreement, jurisdiction for a copyright infringement suit is proper in any member state.[117] In *United Feature Syndicate, Inc.*, if Canada and the United States are members of the Draft Agreement, then litigation could take place in either forum.[118] As a member of the Draft Agreement, the defendant in *United Feature Syndicate, Inc.* would have constructive notice that it may be subject to litigation in the United States for alleged copyright infringement.[119]

In *Mecklermedia Corp.*, if the United Kingdom, United States, and Germany are members of the Draft Agreement, then litigation can occur in any one of these three states.[120] This extends the choice of forum from the location of where the harm occurred, as enunciated in Article 5(3) of the Brussels Convention, to the location of any member state of the Draft Agreement.[121] The German defendant in *Mecklermedia Corp.* therefore would have little room to contest jurisdiction because under the Draft Agreement, a nominated English court would have been authorized to hear the suit.[122]

---

113. Mecklermedia Corp. v. D.C. Congress G.M.B.H., (1998) Ch. 40, 50-56 (U.K.) (maintaining jurisdiction through application of Brussels Convention).

114. Introduction to Draft International Copyright Code, *supra* note 33.

115. *Id.*

116. Draft Code, *supra* note 19, at art. 6.

117. Draft Agreement, *supra* note 20, at art. 6.

118. *See id.* (stating that "a person who is present in a [m]ember [s]tate may be sued in the nominated court of that [s]tate, in respect of a harmful event which occurred or may occur in that [s]tate or another [m]ember [s]tate).

119. The defendant in *United Feature Syndicate, Inc.* contended that the U.S. district court did not have jurisdiction because of the lack of minimum contacts and forum non conveniens. United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc., 216 F.Supp.2d 198, 204-207 (S.D.N.Y. 2002).

120. *See* Draft Agreement, *supra* note 20, at art. 6 (stating that "a person who is present in a [m]ember [s]tate may be sued in the nominated court of that [s]tate, in respect of a harmful event which occurred or may occur in that [s]tate or another [m]ember [s]tate).

121. *See id.*

122. In *Mecklermedia Corp. v. D.C. Congress G.M.B.H.*, the defendant argued that the harm occurred in Germany rather than the United Kingdom, and as a result, the English court lacked jurisdiction. Mecklermedia Corp. v. D.C. Congress G.M.B.H., (1998) Ch. 40, 50-52 (U.K.).

Article 3 of the Draft Agreement states that in agreeing to this convention, parties "will put [in] force in their respective national laws the provisions necessary to give effect to this Agreement and its Protocols, in so far as such provisions are not already part of such laws."[123] Therefore, Germany, the domicile of the defendant in *Mecklermedia Corp.*, should enact national laws to give effect to the Draft Agreement. The enactment of the English court's judgment by Germany furthers the Draft Agreement's objectives of harmonizing international copyright law.

The ICPS—the Draft Code and the Draft Agreement—is an ideal and harmonious approach to resolving jurisdiction issues that arise from copyright infringement suits involving the internet. The nonterritorial nature of the internet complicates the establishment of a court's jurisdiction because copyright infringement on the internet causes harm in a number of locations. The Draft Code establishes a tribunal that seeks to efficiently and conveniently resolve copyright issues in the international community by means of electronic communication.[124] The Draft Agreement harmonizes current international copyright laws on jurisdiction by providing alternate forums for litigation.[125] Therefore, the ICPS provides a solution to jurisdictional issues arising from the internet by establishing a multitude of options for parties to litigate their copyright suits.

2. *Choice of Law*

After the establishment of jurisdiction, the court determines the applicable law.[126] Currently, in the case where an alleged copyright infringement occurs in a foreign state, a state court chooses the applicable law between the law of the forum (lex fori) and the law of the place where the alleged infringement took place (lex loci delicti).[127] The application of territorially-based choice of law in internet proceedings creates confusion among member states of the Berne Convention.[128] In particular, Article 5, section 2 of the Berne Convention has been interpreted by many authorities as applying the law of the forum where the infringement or tort took place (lex loci delicti).[129] Other interpretations of the article, however, argue that the Berne Convention permits the forum to apply domestic copyright law (lex fori), even if the alleged infringement occurred

123. Draft Agreement, *supra* note 20, at art. 3.

124. Introduction to Draft International Copyright Code, *supra* note 33.

125. *See* Draft Agreement, *supra* note 20, at art. 6.

126. STERLING, *supra* note 5, at 128.

127. *Id.* at 128-129.

128. The effect of technology on the application of traditional notions of territorially-based choice of law poses serious issues in deciding copyright suits involving transborder communication, like the internet. Reindl, *supra* note 25, at 806.

129. *Id.* at 804.

abroad.[130] Although the former interpretation is more commonly used in court proceedings, complications still arise with regard to the location of the harm or infringement.[131] The nonterritorial nature of the internet creates common problems in the litigation of copyright infringement suits, especially when the harm occurs in more than one country.

National Football League v. TVRadioNow Corp.[132] and *Pearce v. Ove Arup Partnership Ltd.*[133] are two copyright infringement suits that illustrate choice of law issues in which the ICPS provides an ideal solution. In *National Football League v. TVRadioNow Corp.*, the National Football League ("NFL"), a U.S. corporation, broadcasted television programs (incorporating copyrighted material) from the United States.[134] TVRadioNow Corp., a Canadian entity, intercepted these transmissions, converted them into electronic data, and "streamed" the television programs on its iCraveTV.com website.[135] The NFL sought an injunction in a U.S. District Court, prohibiting TVRadioNow Corp. from streaming the NFL's copyrighted material on TVRadioNow's website.[136] TVRadioNow Corp. contended that its actions were permissible under Canadian law and the intended audience of the broadcast was in Canada, not the United States.[137]

Since the NFL sought relief in a U.S. court for infringement under the U.S. Copyright Act, the district court did not consider addressing issues of Canadian law.[138] The court relied on prior case law and rejected the application of Canadian law. The court had previously applied U.S. copyright law in similar instances involving extraterritorial electronic transmissions.[139] The court's stance in applying U.S. copyright law in the instant case was consistent with the U.S. district court's posture in *United Feature Syndicate, Inc.*, where "[i]t is well-settled that the United States has an interest in protecting the intellectual property rights of its citizens."[140]

In *Pearce v. Ove Arup Partnership Ltd.*, the claimant authored architectural drawings that were protected by British and Dutch copyrights.[141] The claimant

---

130. *Id.* at 805.

131. *See* Gutnick v. Dow Jones & Co., 210 Commonwealth L. Rep. 575 (2002) (Austl.) (maintaining jurisdiction and applying Australian law between U.S. defendant and Australian claimant over defamatory material downloaded from the internet).

132. National Football League v. TVRadioNow Corp., *reprinted in* COPYRIGHT LAW DECISIONS 32, 114 (CCH Editorial Staff Publication 2001).

133. Pearce v. Ove Arup Partnership Ltd., (1997) F.S.R. 641 (Ch.) (U.K.).

134. *National Football League*, 53 U.S.P.Q. 2d, *reprinted in* COPYRIGHT LAW DECISIONS, at 32, 117.

135. *Id.*

136. *Id.*

137. *Id.* at 32, 120-32.

138. *Id.* at 32, 121.

139. The U.S. District Court referred to *Los Angeles News Service v. Conus Communications Co.*, 969 F.Supp 579 (C.D. Cal 1997), where Canadian transmissions that reached into the United States violated the U.S. Copyright Act. *Id.*

140. United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc., 216 F.Supp.2d 198, 208 (S.D.N.Y. 2002).

141. Pearce v. Ove Arup Partnership Ltd., (1997) F.S.R.. 641, 644 (Ch.) (U.K.).

asserted that its drawings were copied from the design of a building in Rotterdam, Netherlands.[142] The copyright infringement suit was brought in an English court pursuant to the Brussels Convention.[143] The English court stated that Dutch law would apply since it was the copyright law under which the claimant was seeking protection.[144]

Before testing the merits of the case for the alleged copyright infringement, the English court determined that no relevant difference existed between Dutch and English copyright law; therefore, the court presided over the matter applying English law.[145] Applying English law to a Dutch copyright, the court ruled that the claimant did not show a sufficient degree of similarity between the plans to constitute copying.[146] On appeal, the English Court of Appeals reversed the trial court ruling on copying, but affirmed the trial court ruling on the application of English law.[147] The Court of Appeals held that it was within the purview of the court to adjudicate the Dutch copyright.[148] Although this case did not involve the internet, the copying of architectural drawings is analogous to the unauthorized use of copyrighted graphics in a website design.[149]

The conflict of law issues presented in *National Football League* and *Pearce* may be resolved by the Draft Code and Draft Agreement. The objective of the Draft Code is to treat the international community as one state with one common copyright law.[150] As such, TVRadioNow Corp., a Canadian entity, would not contest the choice of law in its dispute with the NFL.[151]The tribunal would hear the issues and base its decision on a uniform copyright law.[152]

Although *Pearce* did not involve the internet, the choice of law issues in this case presents two potential problems relating to copyright infringement in cyberspace that may be resolved by the Draft Code. First, the court's analysis of the two sets of architectural drawings involved significant factual inquiries and a high degree of subjectivity.[153]

---

142. *Id.*

143. Article 2 of the Brussels Convention allows claimant to bring suit in the state where at least one of the defendants is domiciled. *Id.* at 646-647. One of the defendants in *Pearce* was domiciled in the Netherlands, and therefore, jurisdiction may have also been found in that forum. *Id.*

144. *Id.* at 654.

145. *Id.*

146. *Id.* at 659.

147. Pearce v. Ove Arup Partnership Ltd., (1999)1999 I.L. Pr. 442 (C.A.)(U.K.).

148. *Id.*

149. *See* Antiquesportfolio.com Plc. v. Rodney Ritchey & Co. Ltd., (2000) 2001 F.S.R. 23 (Ch.) (U.K.) (ruling that defendant's icon and navigation button designs on its website violated the copyright of a third-party).

150. Introduction to Draft International Copyright Code, *supra* note 33.

151. National Football League v. TVRadioNow Corp., 53 U.S.P.Q. 2d 1831 (W.D.Pa. 2000), *reprinted in* COPYRIGHT LAW DECISIONS 32, 114 (CCH Editorial Staff Publication 2001).

152. Introduction to Draft International Copyright Code, *supra* note 33.

153. Pearce v. Ove Arup Partnership Ltd., (1997) 1997 F.S.R. 641, 654-659 (Ch.) (U.K.) (finding a nonsufficient degree of similarity to constitute copying based on the "look and feel" of the two sets of drawings provided by claimant and defendant).

Under the Draft Code, the International Copyright Tribunal would be an ideal forum to decide whether copying took place since it would provide consistency in analyzing copyright infringement suits by applying standards established from prior cases.[154] That is, the International Copyright Tribunal would be a single adjudicating authority to determine international copyright infringement issues; specifically, those issues involving the internet.[155]

Second, the English court's decision to apply its own copyright law may have been difficult if relevant Dutch law was not similar to English law.[156] The English court noted that other courts are reluctant to entertain disputes involving infringement of foreign intellectual property law due to the absence of prior case law and the lack of clarity in foreign law.[157] The court, however, asserted that if the claimant effectively maintains jurisdiction, then it deserves the right to choose its forum without the risk of forum non coveniens due to the application of a foreign law.[158] Under the Draft Code, the English court would avoid the issue of choosing an applicable law, especially a law foreign to the court, because a uniform copyright law would be used by the International Copyright Tribunal.[159]

If the parties choose not to litigate before the International Copyright Tribunal, the Draft Agreement results in the same choice of law decided by the courts in *National Football League* and *Pearce*. Under Article 10 of the Draft Agreement, the location of the alleged harm is determinative of the choice of law; as a result, the *National Football League* court would apply U.S. copyright law.[160] Similarly, the *Pearce* court would apply Dutch law since the alleged copyright infringement occurred in the Netherlands.[161]

The Draft Code provides a uniform copyright law that is applied by the International Copyright Tribunal.[162] The Draft Code settles issues concerning the applicable law.[163] Furthermore, national courts are spared from having to hear copyright infringement suits because these cases would be adjudicated by a third-party tribunal composed of judges elected by Code states.[164] The Draft Agreement, however, provides the same choice of law as Article 5, section 2 of the Berne Convention.[165] Similar to the Berne Convention, the Draft Agreement

154. STERLING, *supra* note 5, at 1296.

155. *Id.*

156. If English law was not similar to Dutch copyright law, then the English court would have been obligated to apply Dutch law in its proceeding. *Pearce*, 1997 F.S.R. at 654.

157. *Id.* at 651.

158. *Id.* at 651-652.

159. STERLING, *supra* note 5, at 1296.

160. Draft Agreement, *supra* note 20, at art. 10.

161. *Pearce*, 1997 F.S.R. at 654.

162. Introduction to Draft International Copyright Code, *supra* note 33.

163. *Id.*

164. Draft Code, *supra* note 19, at art. 20.

165. Article 5, section 2 of the Berne Convention states that the applicable law "shall be governed exclusively by the laws of the country where protection is claimed." Article 5 of the Berne Convention, http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P109_16834 (last visited Nov. 9, 2005).

applies the law of the forum where the alleged copyright infringement occurred.[166]

3. *Enforcement of Judgment*

Under the ICPS, the enforcement of a judgment depends on the state where the court order is enacted because criminal remedies may vary from state to state.[167] The ICPS authorizes the International Copyright Tribunal or the nominated court to issue injunctions, order the payment of damages, and order the seizure or destruction of infringing material.[168] The member state affected by the judgment must give effect to the ICPS by enacting national laws to serve the order, unless the judgment is inconsistent with the affected state's laws.[169]

Article 22 of the Draft Code states that "the defendant may petition for the [tribunal's] order to be discharged . . . [where] some limitation or exception provided under the law of the Code country applies."[170] Likewise, Article 15 of the Draft Agreement sets forth instances where the recognition of the nominated court's judgment would be incompatible with the laws of the addressed state.[171] One of these instances includes a "limitation or exception applicable under the law of the [s]tate of the addressed court."[172] *Yahoo!, Inc. v. La Ligue Contre Le Racisme Et l'Antisemitisme* is an example of where a judgment made by a foreign court could not be enforced in another state.[173]

In *Yahoo!, Inc.*, Yahoo!'s French auction website displayed Nazi and Third Reich related goods.[174] La Ligue Contre Le Racisme Et l'Antisemitisme ("LICRA"), a French nonprofit organization dedicated to eliminating anti-Semitism, sent a cease and desist letter to Yahoo!'s headquarters in California.[175] LICRA's letter claimed that Yahoo! violated French law that prohibited the sale of Nazi-related products in France.[176] LICRA threatened to bring action if Yahoo! did not cease sales of the anti-Semitic related goods on the Yahoo! French website.[177] When Yahoo! failed to remove the alleged contraband, a suit was

166. *See* Draft Agreement, *supra* note 20, at art. 6 (stating that "a person who is present in a [m]ember [s]tate may be sued in the nominated court of that [s]tate, in respect of a harmful event which occurred or may occur in that [s]tate or another [m]ember [s]tate).

167. STERLING, *supra* note 5, at 573-574.

168. Draft Code, *supra* note 19, at art. 22; Draft Agreement, *supra* note 20, at art. 8.

169. Draft Code, *supra* note 19, at art. 22; Draft Agreement, *supra* note 20, at art. 3.

170. Draft Code, *supra* note 19, at art. 22.

171. Draft Agreement, *supra* note 20, at art. 15.

172. *Id.*

173. Yahoo!, Inc. v. La Ligue Contre Le Racisme Et l'Antisemitisme, 169 F.Supp.2d 1181, 1194 (N.D. Cal. 2001).

174. *Id.* at 1184.

175. *Id.*

176. *Id.*

177. *Id.*

brought in a French court, which found that Yahoo! had violated French law since French citizens had access to Yahoo!'s auction website.[178]

The French court demanded that Yahoo! cease the sale of all Nazi propaganda and remove access to the propaganda on the Yahoo! website.[179] Yahoo! claimed that it could not comply with the French order without completely banning Nazi-related goods from its website, Yahoo.com.[180] Yahoo! asserted that the complete ban of Nazi-related material on its website violated its rights under the First Amendment of the U.S. Constitution.[181]

Yahoo! sought a declaration from a U.S. District Court supporting its assertions that the French order was unenforceable in the United States.[182] The court noted that the United States "generally recognize[s] foreign judgments and decrees unless enforcement would be prejudicial or contrary to the country's interest."[183] In this case, the district court ruled that Yahoo!'s First Amendment rights under the U.S. Constitution precluded the French court from regulating Yahoo!'s content of speech over the internet.[184] As a result, the French order could not be enforced in the United States.[185]

Under Article 22(3) of the Draft Code, judgments made by the International Copyright Tribunal will be based on the Code with consideration given to the national laws of the affected Code state.[186] Further, under Article 22(5)(b), the courts of the Code state affected by the tribunal's judgment must enforce the order.[187]

The defendant, however, may petition for the order to be "discharged or varied in its application" in the Code state on the ground that some limitation or exception applies.[188] Yahoo! would not be able to abide by the French order since compliance would be in violation of Yahoo!'s First Amendment rights under the U.S. Constitution.[189] Yahoo!'s contention that the French order violated its constitutional rights is a limitation or exception under the Code; as a result, the U.S. court would not enforce the order.[190] In this situation, the tribunal must show deference to U.S. law in formulating a judgment.

---

178. French citizens could view the auction of Nazi propaganda either through www.yahoo.com or www.yahoo.fr. *Id.*

179. *Id.* at 1185.

180. *Id.* at 1186.

181. *Id.*; The First Amendment of the U.S. Constitution states, in part, that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

182. *Yahoo!, Inc.*, 169 F.Supp.2d at 1181.

183. *Id.* at 1192 (citing Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971)).

184. *Id.* at 1194.

185. *Id.*

186. Draft Code, *supra* note 19, art. 22.

187. *Id.*

188. *Id.*

189. *Yahoo!, Inc.*, 169 F.Supp.2d at 1194.

190. *Id.*

Under Article 15(a)(iii) of the Draft Agreement, the recognition or enforcement of a judgment by a nominated court may be refused if "recognition or enforcement would be manifestly incompatible with the public policy of the [s]tate of the addressed court."[191] Article 15(b) establishes the grounds in which a state affected by the judgment of the nominated court would find enforcement incompatible with the public policy or laws of that state.[192] These grounds include the application of a limitation or exception by the nominated court on the state affected by the judgment.[193] Yahoo! sought a limitation or exception to the French court's order due to Yahoo!'s constitutional rights.[194] Pursuant to Article 15(b) of the Draft Agreement, Yahoo! would likely prevail on its petition to refuse the recognition or enforcement of the French court's order to remove Nazi-related material completely from its website.[195] Like the Draft Code, the Draft Agreement does not reach a compromise to satisfy the claims of both Yahoo! and LICRA.

The role of limitations and exceptions in international copyright conventions is to allow states to have individual approaches in developing national copyright law.[196] In the context of the dissemination of information on the internet, an issue arises when the information is permissible in one country but infringes on the law of another country.[197] This is similar to the controversy in *Yahoo!, Inc.*[198] Current international copyright conventions are faced with the daunting challenge of harmonizing the limitations and exceptions in national copyright law.[199] It is beyond the scope of this comment to engage this controversy, but it should be noted that, without harmonization of these limitations and exceptions in national copyright law, the ICPS faces the same challenges as current international copyright conventions.

B. Peer-to-Peer File Sharing on the Internet

Peer-to-peer ("P2P") file sharing on the internet presents one of the greatest challenges to contemporary copyright law.[200] With efficient compression technology and the availability of high-speed internet connections, P2P file sharing radically changes the way media is distributed. One of the most affected

191. Draft Agreement, *supra* note 20, at art. 15.

192. *Id*

193. *Id.*

194. *Yahoo!, Inc.*, 169 F.Supp.2d at 1186.

195. Draft Agreement, *supra* note 20, art. 15.

196. STERLING, *supra* note 5, at 468.

197. *Id.*

198. *Yahoo!, Inc.*, 169 F.Supp.2d at 1181.

199. STERLING, *supra* note 5, at 568.

200. Peer-to-peer file sharing over the internet has spawned widely litigated copyright infringement suits in the music industry. *See, e.g.*, A&M Records, Inc. v. Napster, 239 F.3d 1004 (9th Cir. 2000); In re: Aimster Copyright Litigation, 252 F.Supp.2d 634 (N.D. Ill. 2002); and Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 259 F.Supp.2d 1029 (N.D. Cal. 2003).

areas is the music industry and its experience with the distribution of songs in MPEG 1 Audio Layer 3 ("MP3") format.[201]

1. Peer-to-Peer File Sharing Copyright Infringement Cases

The P2P copyright infringement landscape has evolved in the international arena over the past five years. Two recent U.S. decisions illustrate the rapid change of copyright law occurring in this area: *A&M Records, Inc. v. Napster*[202] and *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*[203] Additionally, *Buma/Sterma v. Kazaa BV* is a Dutch case similar to these U.S. cases.[204] These three cases provide insight into the analysis taken by national courts to determine copyright infringement on P2P networks.

In *Napster*, the defendant, Napster, developed a computer network system using P2P file sharing technology, where internet users could search for MP3 files located on other users' computers.[205] Napster's computer servers facilitated the user's searches for music by storing lists of songs that could be found on other user's computers and providing a text search function for file names. It did not, however, store the actual MP3 files nor search the content of these files.[206] The claimants, A&M Records, Inc. and other music copyright holders, asserted that Napster directly infringed on their copyright.[207] Moreover, the claimants asserted that Napster was liable for contributory[208] and vicarious[209] copyright infringement. Napster argued that its file sharing service was exempt from copyright infringement on the basis of fair use.[210]

Applying a four-factor "fair use" test, the U.S. court ruled that users of a P2P music sharing network did not participate in a fair use activity.[211] The court also found Napster contributorily liable for copyright infringement because it

---

201. MPEG 1 Audio Layer 3 is a compression format for digital audio that discards audio data that is considered less important to the human ear. Overview of MP3, http://en.wikipedia.org/wiki/MP3 (last visited Nov. 9, 2005).

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

203. *Metro-Goldwyn-Mayer Studios, Inc.*, 259 F.Supp.2d at 1029.

204. Buma/Sterma v. Kazaa BV, 2004 Europ. Copyright and Design Rep. 16 (2003) (Netherlands).

205. *A&M Records, Inc.*, 239 F.3d at 1011.

206. Napster enabled searches in two ways: (1) through a search index maintained on Napster servers; and (2) through a "hotlist" function, where the user creates a list of other user's names and the Napster server notifies if any of the "hotlisted" users are on the network. *Id.* at 1012.

207. Plaintiffs must satisfy two requirements to establish a prima facie case for direct infringement: (1) ownership of the alleged infringed material; and (2) the defendant violates at least one of their exclusive rights under the U.S. Copyright Act. *Id.* at 1013.

208. "Contributory [copyright] liability requires that the secondary infringer 'know[s] or [has] reason to know' of direct infringement and assisted in the infringement." *Id.* at 1020.

209. Vicarious copyright liability has two elements: (1) capability to supervise infringing activity; and (2) direct financial benefit from the same infringing activity. *Id.* at 1022.

210. *Id.* at 1014.

211. The fair use analysis has four factors: (1) purpose and character of the use; (2) nature of the use; (3) the portion used; and (4) effect of use on the market. *Id.* at 1014-1018.

"knowingly assisted" users in infringing activities.[212] Specifically, Napster provided a service for internet users to find and download copyrighted music.[213] Further, the court ruled that Napster was vicariously liable for direct infringement since it had a direct financial interest in the user's infringing activities and failed to police these activities when it had the capability to do so.[214]

In *Grokster*, the defendant, Grokster, offered internet users a P2P file sharing program similar to Napster.[215] Metro-Goldwyn-Mayer Studios, Inc. ("MGM") and other motion picture and music copyright holders claimed that Grokster was liable for direct, contributory, and vicarious copyright infringement.[216] The Grokster P2P software maintained an index of music and media files on the user's computer, rather than on a centralized server like the Napster software.[217] Due to the difference between Grokster's search function on the user's computer and Napster's use of a central server to query for file names, the U.S. District Court found that Grokster did not actively or substantially contribute to the copyright infringement of the claimant's work.[218] Thus, the district court did not find Grokster liable for copyright infringement.[219]

Although Grokster's software can be thought of as a technology circumventing the centralized control issues in *Napster*, the U.S. Court of Appeals affirmed the district court ruling.[220] The Court of Appeals relied on the decision in *Sony Corp. of America v. Universal City Studios, Inc.*[221] to find that Grokster's software was "capable of substantial" or "commercially significant noninfringing uses."[222] Although Grokster had constructive knowledge that its software may be used for infringing purposes, this alone would not hold Grokster liable for contributory infringement.[223] The court also affirmed that Grokster was

---

212. *Id.* at 1020-1022.

213. *Id.*

214. *Id.* at 1022-1024.

215. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 259 F.Supp.2d 1029, 1032 (N.D. Cal. 2003).

216. *Id.* at 1034.

217. Grokster's P2P technology differs from Napster's file-sharing service because it uses a "supernode" scheme, which gathers information from other nodes (i.e., another P2P user's computer). *Id.* at 1040. Grokster's software "hopped" from "supernode" to "supernode" until the information is located. *Id.* The district court found that this process was independent of any control by Grokster. *Id.*

218. The Grokster P2P software indexed files on the user's computers rather than on a central server; this is similar to *Napster*. *Id.* at 1044.

219. *Id.* at 1046.

220. The Court of Appeals found that the Grokster software had other uses "significantly reducing the distribution costs of material in public domain and permissively shared art and speech, as well as reducing the centralized control of that distribution." Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 380 F.3d 1154, 1164 (9th Cir. 2003).

221. 464 U.S. 417, 442 (1984).

222. The Court of Appeals referred to a doctrine applied in *Sony* where contributory copyright infringement was not found because the Sony Betamax video tape recorder was "capable of commercially significant noninfringing uses [and] constructive knowledge of the infringing activity could not be imputed from the fact that Sony knew the recorders, as a general matter, could be used for infringement." *Id.* at 1160.

223. *Id.*

not liable for vicarious copyright infringement because Grokster's software did not operate like the centralized server in *Napster*, where information could be monitored and controlled.[224]

The U.S. Supreme Court, however, vacated the Court of Appeals ruling and found that the appeals court misapplied *Sony*.[225] The Court opined that the appeals court read *Sony* broadly and the theory of inducement was applicable in the present case.[226] The theory of inducement holds that liability can be found when one distributes a mechanism or device with the object of promoting infringement, "as shown by clear expression or other affirmative steps taken to foster infringement."[227] The Court considered three pieces of evidence to support its finding of inducement: (1) Grokster aimed to supply a copyright infringement market to former Napster users; (2) Grokster did not attempt to implement filtering tools or other mechanisms to reduce potential infringement; and (3) Grokster gained a financial benefit by selling advertising space.[228] In sum, these factors led the Court to rule that substantial evidence existed to find inducement.[229] The Supreme Court remanded the case to the Court of Appeals.[230]

Kazaa is a Dutch case that is similar to *Grokster*.[231] Buma/Sterma, the copyright holder for nearly all of the music in the Netherlands, alleged that Kazaa BV, a P2P manufacturer, infringed on its exclusive rights of reproduction and distribution.[232] Like *Grokster*, the Kazaa P2P software did not depend on interaction with a central server, which makes it difficult to detect and trace a user's activities.[233] The Dutch Supreme Court affirmed the lower court's decision and found that, due to the decentralized nature of Kazaa's P2P technology, it was not possible for Kazaa to implement blocking software to prevent the unlawful exchange of files.[234] As a result, the Court upheld the lower court ruling that Kazaa was not liable for copyright infringement.[235]

---

224. *Id.* at 1165.

225. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 125 S.Ct. 2764, 2782-2783 (2005) (finding substantial evidence of inducement and remanded the case to the Ninth Circuit Court of Appeals).

226. *Id.* at 2779-2780.

227. *Id.* at 2780.

228. *Id.* at 2781-2782.

229. *Id.* at 2782.

230. *Id.* at 2782-2783 (remanding case to the Ninth Circuit Court of Appeals). The Ninth Circuit remanded the case to the U.S. District Court for the Central District of California. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 259 F.Supp.2d 1029, 1029 (2005) (remanding case to district court).

231. Both the Grokster and Kazaa P2P software tools used the "supernode" technology of querying user's information for files. Buma/Sterma v. Kazaa BV [NR] [Supreme Court of the Netherlands], 19 December 2003, E.C.D.R. 16 (NL).

232. *Id.*

233. *Id.* at 191.

234. *Id.*

235. *Id.* at 192-193.

2. Peer-to-Peer File Sharing and the International Copyright Protection System

The *Napster*, *Kazaa*, and *Grokster* cases represent a rapidly growing area of law concerning P2P technology. First, the *Napster* court found the P2P manufacturer liable since Napster had reason to know of its user's infringing activities and failed to police the exchange of copyrighted material.[236] Second, the *Kazaa* court did not find the P2P manufacturer liable because, unlike the software in *Napster*, Kazaa's software used a decentralized network to query for searches among its users.[237] Lastly, the *Grokster* court did not find the manufacturer liable for its P2P technology, which was similar to the software used in *Kazaa*; rather, the court found Grokster liable on the theory of inducement.[238] From these cases, the P2P technologies used in *Kazaa* and *Grokster* are not unlawful, but liability may still be found on the theory of inducement in the United States.

With various interpretations of infringement in the area of P2P technology, a uniform global copyright system is needed to harmonize national law.[239] The harmonization of international law in these cases may be achievable through the ICPS—the Draft Code and the Draft Agreement. There are three advantages to evaluating P2P issues present in *Napster*, *Grokster*, and *Kazaa* under the Draft Code. First, the International Copyright Tribunal would preside over the issue using its E-Justice electronic communication system.[240] As mentioned previously, the conveniences of litigation under the Draft Code place a low burden on copyright holders to bring litigation against potential P2P manufacturers that pose a threat of copyright infringement.

Second, a uniform copyright law would be applied to P2P cases, where inconsistencies in national law may be avoided.[241] For example, even though Kazaa and Grokster used similar P2P technologies, the *Grokster* court found the P2P manufacturer liable on the theory of inducement.[242] The *Kazaa* court did not consider this type of liability and primarily focused on the decentralized nature of the P2P technology.[243] The International Copyright Tribunal, using a uniform copyright law, would maintain consistency in applying theories of liability in P2P copyright infringement cases.[244] In turn, the tribunal may also formulate future standards and rules for liability that harmonize with national laws.[245]

---

236. A&M Records, Inc. v. Napster, 239 F.3d 1004, 1020-1024 (9th Cir. 2000).

237. *Buma/Sterma*, 2004 E.C.D.R. at 189.

238. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 125 S.Ct. 2764, 2782 (2005).

239. J.A.L. Sterling suggests that P2P copyright suits are an area of law where international agreement would be highly desirable. Draft Agreement, *supra* note 20.

240. Introduction to Draft International Copyright Code, *supra* note 33.

241. *Id.*

242. *Metro-Goldwyn-Mayer Studios, Inc.*, 125 S.Ct. at 2782.

243. *Buma/Sterma*, 2004 E.C.D.R. at 191.

244. The tribunal would be a single adjudicating entity determining international copyright infringement over the internet, and as a result, it will establish standards and guidelines to determine copyright infringement

Third, under Article 22 of the Draft Code, the tribunal may order the P2P manufacturer to cease and desist from the P2P service or order the payment of damages.[246] With a common copyright law and adjudication one of suits by a single tribunal, the Draft Code offers the advantage of consistent remedies.

Under the Draft Agreement, jurisdiction may be claimed in the state where the harm occurred or any other member state.[247] Here, the claimants in a P2P copyright infringement suit have a wide range of options because litigation can be held in any of the member states.[248]

The choice of law, however, may pose difficulties for the claimant. The Draft Agreement provides that the claimant must apply the law of the location where the harmful event occurred.[249] In the context of P2P file sharing, with the potential of numerous internet users around the globe illegally downloading copyrighted material, the location of harm could be in multiple locations. The nominated court, as a result, may need to apply a foreign law in the copyright infringement suit.[250]

3. Potential Solutions to Peer-to-Peer File Sharing Issues

Despite the *Grokster* decision, file sharing is still alive,[251] and some believe that the decision is a loss for the entertainment industry.[252] The Grokster P2P technology spawned the creation of other derivative P2P software tools such as eDonkey,[253] Shareaza,[254] and BitTorrent.[255] eDonkey notifies its users that the software is intended to be used for the exchange of non-protected or public domain information; that the software tool does not monitor the exchange of information; and that copyright laws should be followed.[256] The activity of copyright infringement over P2P networks, despite warnings from manufacturers, remains as pervasive as ever before.[257]

---

in future cases. STERLING, *supra* note 5, at 1296.

245. *Id.*

246. Draft Code, *supra* note 19, at art. 22.

247. Draft Agreement, *supra* note 20, at art. 6.

248. *Id.*

249. *Id.*

250. Pearce v. Ove Arup Partnership Ltd., (1999) 1999 I.L. Pr. 442 (C.A.)(U.K.).

251. *See* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 125 S.Ct. 2764, 2782 (2005) (finding substantial evidence on the theory of inducement but not ruling the P2P technology as unlawful).

252. Andrew Kantor, *Despite Reports, Grokster Decision Is a Win for File Sharing*, USA TODAY, July 1, 2005, http://www.
usatoday.com/tech/columnist/andrewkantor/2005-07-01-grokster-decision_x.htm (last visited Nov. 15, 2005).

253. eDonkey P2P software, http://www.edonkey2000.com (last visited Nov. 15, 2005).

254. Shareaza P2P software, http://www.shareaza.com (last visited Nov. 15, 2005).

255. BitTorrent P2P software, http://www.bittorrent.com (last visited Nov. 15, 2005).

256. eDonkey's Copyright Message, http://www.edonkey 2000.com/copyright.html (last visited Nov. 15, 2005).

257. "College students remain among the most active users and abusers of file-sharing technology."

Since P2P manufacturers, like eDonkey, developed their marketing strategy to circumvent the inducement issues seen in *Grokster*, claimants will have to start pursuing end-users for copyright infringement. The advancement of P2P technology will make it difficult for record and movie industries to prosecute those who set up file-sharing systems.[258] Freenet, for example, preserves the anonymity of users in a P2P network.[259] Since the file transfer leaves no electronic trace behind, Freenet makes copyright enforcement practically impossible.[260] This type of emerging internet technology introduces great challenges for lawmakers and national courts to protect the rights of copyright holders.[261]

Due to copyright protection challenges with P2P file sharing over the internet, solutions must be formulated to protect the copyright holder's rights.[262] Three techniques have been developed to address copyright infringement due to P2P file sharing over the internet: Digital Rights Management ("DRM"); Metering and Royalty Collection System; and Digital Subscription Services.

DRM technologies control who and how users view digital content.[263] For example, an internet user may purchase a song from iTunes, an online music store.[264] iTunes implements a DRM technology to limit the consumer's control of songs: the song may be only copied onto five computers; the song may be only played on an iPod[265] or other Apple devices; and the song can be only "burned" onto a compact disc up to seven times.[266] DRM technology, however, creates obstacles in fair use[267] and the development of future technologies, such as digital

---

Jason E. Lane & Robert M. Hendrickson, *Digital Copyrights and Students File Sharing: Education Responsibilities and Legal Liability for Schools, Colleges, & Universities*, 199 ED. LAW REP. 19, 19 (2005).

258. Susanne Nikoltchev & Francisco Javier Cabrera Blazquez, *MP3: Fair or Unfair Use?*, FOCUS: Copyright Law in the Digital Age, Nov. 2000, at 26.

259. The Free Network Project (Freenet), http://freenet.source forge.net (last visited Nov. 15, 2005).

260. Nikoltchev & Blazquez, *supra* note 258.

261. *Id.*

262. Giovanna Fessenden, *Peer-to-Peer Technology: Analysis of Contributory Infringement and Fair Use*, 42 IDEA 391, 406-408 (2002).

263. Digital Rights Management is an "umbrella" term referring to "[a]ny technology used to protect the interests of owners of content and services (such as copyright owners). Typically, authorized recipients or users must acquire a license in order to consume the protected material—files, music, movies—according to the rights or business rules set by the business owner." Microsoft Security Glossary, http://www.microsoft.com/security/glossary.mspx (last visited Nov. 15, 2005).

264. Itunes Online Music Store, http://www.apple.com/itunes/ (last visited Nov. 15, 2005).

265. An iPod is a MP3 player manufactured by Apple Computer, Inc. Which iPod are you?, http://www.apple.com/ipod/ (last visited Nov. 15, 2005).

266. Itunes Online Music Store–Terms of Agreement, http://www.apple.com/support/itunes/legal/terms.html (last visited Nov. 15, 2005).

267. Similar to the time-shifting technology of the VCR, P2P technology is "capable of commercially noninfringing uses [and] constructive knowledge of the infringing activity could not be imputed from the fact that Sony knew the [VCRs], as a general matter, could be used for infringement." Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984); The Digital Millennium Copyright Act endorses the use of copyright protection and limits copying of certain digital content. Dodes, *infra* note 277, at 313.

music players.[268] Skeptics argue that this technology is ineffective in stopping copyright infringement on the internet and that "DRM may be part of the problem, pushing frustrated consumers into the arms of unauthorized channels like Kazaa."[269]

A second approach to resolving the P2P file sharing dilemma is the creation of a metering and royalty collection system.[270] Under this system, licenses would be issued to P2P services, like Napster and Kazaa, for unlimited distribution of copyrighted material over a period of time without fear of litigation.[271] In turn, the agency operating the collection system would compensate copyright holders.[272]

The metering and royalty collection system provides many advantages, including an efficient method of licensing music over the internet, a decrease in the policing of copyright infringement over P2P file sharing networks, and an efficient method to compensate artists.[273] On the other hand, the royalty system introduces complications for copyright holders who demand a higher premium for their license.[274] The system also introduces difficulties in establishing varying rates for different types of work.[275] Despite these issues, a royalty system "may be the only way to provide copyright holders with a definite system from online music distribution while ensuring that technology developers are able to obtain licenses for music."[276]

A third approach to remedying copyright infringement due to P2P file sharing is to embrace the technology and develop methodologies that benefit all parties involved—the artists, recording companies, technology developers, and consumers.[277] For instance, MusicNet is an online music subscription service.[278] It is partnered with record industry's major labels to provide internet users with a wide variety of songs.[279] Unlike a P2P network, MusicNet delivers digital content directly to the end-user and not through a file sharing "supernode" technology.[280]

---

268. Fred von Lohmann, *Digital Rights Management: The Skeptics' View*, Electronic Frontier Foundation, http://www.eff.org/IP/DRM/20030401_drm_skeptics_view.pdf (last visited Nov. 15, 2005).

269. *Id.*

270. Aric Jacover, *I Want My MP3! Creating a Legal and Practical Scheme to Combat Copyright Infringement on Peer-to-Peer Internet Applications*, 90 GEO. L.J. 2207, 2250-2251 (2002).

271. *Id.*

272. *Id.* at 2251.

273. *Id.* at 2251-2252.

274. *Id.* at 2252.

275. *Id.*

276. *Id.*

277. Jeffrey L. Dodes, *Beyond Napster, Beyond the United States: The Technological and International Legal Barriers to On-Line Copyright Enforcement*, 46 N.Y.L. SCH. L. REV. 279, 315 (2002-2003).

278. MusicNet, http://www.musicnet.com/ (last visited Nov. 15, 2005).

279. MusicNet is partnered with recording industry labels such as Universal, Sony/BMG, and EMI. *Id.* MusicNet's catalog consists of over 2,000,000 songs and over 25,000 independent labels. *Id.*

280. *Id.* Grokster's P2P technology implemented a "supernode" scheme, which gathers information from other nodes (i.e., computer users). Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 259 F.Supp.2d 1029, 1040 (N.D. Cal. 2003). Grokster's software "hops" from "supernode" to "supernode" until the information is located. *Id.*

The main disadvantage of MusicNet is that the service does not give the consumer ownership rights over the downloaded song because the consumer "rents" the song.[281] Once a song is downloaded, it cannot be transferred between computers.[282] Further, an additional fee is required to "burn" the downloaded song onto a CD.[283] Unlike a Kazaa- or Grokster-type P2P technology, the limitations of MusicNet severely restrict the user's control over the downloaded material.[284]

Under the ICPS, the DRM, metering and royalty collection, and digital subscription services systems impose no issues with jurisdiction or choice of law. Under the Draft Code, Code states may bring their copyright infringement suit before the International Copyright Tribunal under the three systems, where a uniform copyright law would be applied. Likewise, under the Draft Agreement, jurisdiction of the copyright infringement suit may take place in any member state, where the location of the alleged infringement is determinative of the choice of law.

Enforcement of judgment creates difficulty under the DRM and digital subscription services systems. Under the doctrine of fair use, consumers are permitted to make copies of legally-attained copyrighted material for personal use.[285] Fair use, on the other hand, does not permit unlimited copying.[286] A policy decision must be made to balance the consumer's use of legally-attained copyright material and the copyright owner's rights.[287] In this context, member states may balance these competing interests differently, resulting in a refusal to enforce the judgment under Article 22(5)(b) of the Draft Code or Article 15(a)(iii) of the Draft Agreement.[288] This issue of public policy is similar to *Yahoo!, Inc. v. La Ligue Contre Le Racisme Et l'Antisemitisme*.[289]

---

281. Dodes, *supra* note 277, at 316 ("Once a consumer stops paying for their subscription all of the music files they have downloaded through the service are disabled.").

282. Jefferson Graham, *Net Music Services Finally Giving Users Something to Sing About*, USA TODAY, Feb. 26, 2003, http://www.usatoday.com/life/music/news/2003-02-26-music-services_x.htm (last visited Nov. 15, 2005).

283. *Id.*

284. In P2P services, like Grokster or Kazaa, the internet user is not limited in the use of the downloaded material; that is, the internet user may make multiple copies of digital content without restriction.

285. Dodes, *supra* note 277, at 313.

286. *Id.*

287. *Id.*

288. Article 22 of the Draft Code states that "the defendant may petition for the [tribunal's] order to be discharged or varied in its application in the Code country, on the ground that the order was wrongly issued, or that some limitation of or exception provided under the law of the Code country applies, and the local court may accordingly restrict the application of the order entirely or in part." Draft Code, *supra* note 19, art. 22. Article 15 of the Draft Agreement states that the recognition of enforcement of a judgment by a nominated court may be refused if "recognition or enforcement would be manifestly incompatible with the public policy of the [s]tate of the addressed court." Draft Agreement, *supra* note 20, at art. 15.

289. Yahoo!, Inc. v. La Ligue Contre Le Racisme Et l'Antisemitisme, 169 F.Supp.2d 1181, 1194 (N.D. Cal. 2001).

Enforcement of judgment, on the other hand, does not create difficulties under the metering and royalty collection system. Contract disputes, rather than copyright infringement claims, would likely arise from this licensing system because once a license is issued, permission is granted for the unlimited distribution of copyrighted material.[290] Typical contract disputes may include whether a license was issued properly or whether the collection agency compensated copyright holders. Here, the choice of law would be contract law, where the International Copyright Tribunal analyzes the claim pursuant to the terms of the contract. Assuming the tribunal is competent to interpret the terms of the contract for the metering and royalty system, member states of the Draft Code and Draft Agreement would likely enforce the judgment made by the tribunal.[291]

The metering and royalty system is an ideal system for copyright protection over P2P file sharing networks because it allows for the wide distribution of digital content without fear of litigation.[292] Due to the contractual nature of the system, international courts, like the International Copyright Tribunal, are less likely to face challenges with public policy imposed by different states.[293] Rather, the courts would determine copyright infringement suits based on breach of contract claims.[294]

IV. CONCLUSION

The ICPS not only provides an ideal and harmonious solution to issues arising from current international copyright law, but also provides a solution to issues emerging from internet technologies like P2P file sharing.

The Draft Code institutes a global copyright system that adopts the use of modern technology, while providing effective recognition and enforcement of an author's rights. The E-Justice system provides a convenient forum to adjudicate copyright infringement cases under a uniform global copyright law. As a result, legal proceedings are not burdened with issues of jurisdiction, choice of law, or enforcement of judgment.

---

290. Jacover, *supra* note 270.

291. Draft Code, *supra* note 19, at art. 14.

292. Jacover, *supra* note 270.

293. This is inapposite of the potential public policy issues (i.e., fair use) seen in the use of DRM technology and digital subscription services.

294. The metering and royalty system, however, may still be vulnerable to computer programmers "hacking" into systems, such that music may be distributed without payment, similar to computer programs decrypting DRM technology. Jacover, *supra* note 270, at 2248 (commenting that DRM technologies face serious threats of countermeasures designed to decrypt digital content embedded with DRM security features). In 2003, Jon Johansen developed a software program to circumvent the copying limitations on downloaded songs from iTunes. Borland, *supra* note 12. Johansen is the same software programmer who wrote decryption code to circumvent the anticopying measures on DVDs. Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001). Circumvention methods are also being developed to access P2P file sharing networks (like Napster), such as purchasing music from the file sharing service, and downloading the digital content onto a Linux platform. Borland, *supra* note 12.

The Draft Code may potentially shape international law with respect to P2P file sharing and other emerging internet technologies. The Draft Code establishes a tribunal of judges elected from Code states. These judges bring a wealth of experience and knowledge on copyright infringement in cyberspace and have the opportunity to harmonize international copyright law with national laws. Further, the International Copyright Tribunal caters to private international law issues arising from the nonterritorial nature of the internet.

Additionally, the Draft Agreement complements current international copyright conventions by proposing solutions to gaps in these conventions. In particular, the Draft Agreement focuses on gaps involving jurisdiction, choice of law, and enforcement of judgment issues. With the emergence of new internet technologies, emphasis on this area of law is needed.

Therefore, the International Copyright Protection System is an ideal approach to resolve jurisdiction, choice of law, and enforcement of judgment issues disputed in copyright infringement cases involving the internet.