

NOTES

INTERNET FILE-SHARING: SWEDISH PIRATES CHALLENGE THE U.S.

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I. INTRODUCTION

Peer-to-peer file-sharing poses a significant challenge to the enforcement of copyright laws. The music industry's battle against the sharing of music files over the Internet has been widely publicized and debated ever since the emergence of Napster in the late 1990s. Technological advances, such as BitTorrent¹ networking, now also make it fast and easy to swap movies, TV shows, software, and video games for free over the Internet. As a result, file-sharing has become a concern for broad segments of the entertainment and media industries, and the television and movie industries now face the same threat as the music industry did when Napster emerged. Recognizing the danger that online piracy poses

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¹ See Part II for a discussion of BitTorrent technology.

to its traditional business models, the entertainment industry has initiated numerous lawsuits against peer-to-peer companies, Internet service providers, and individual users.² Courts and legislators in the United States have been sympathetic, and numerous peer-to-peer sites have been shut down.³

However, due to the global reach of the Internet, the entertainment companies have had to take their fight around the globe. Some of the most prominent and popular file-sharing sites on the Internet, such as the Pirate Bay and Kazaa,⁴ originated in Sweden. The relatively liberal stance towards file-sharing in Sweden poses a challenge to the effort to crack down on such activities. The Pirate Bay, the world's largest BitTorrent tracker,⁵ has survived concerted efforts by the Motion Picture Association of America (MPAA) and the U.S. government to shut it down.⁶

This Note compares the legal approach in Sweden to file-sharing with the legal stance in the United States. Differences in the laws make it difficult for the entertainment industry to pursue similar tactics in Sweden as it has done in the United States. For example, while the U.S. Supreme Court decision in *Grokster* established liability for "one who distributes a device with the object of promoting its use to infringe copyright,"⁷ it has not been established that such secondary liability violates Swedish copyright law. Without such secondary liability it is hard to shut down a site such as the Pirate Bay that does not itself provide any copyright-protected material but only enables individual users to find each other and swap such material.

² Key U.S. cases in the entertainment industry's legal fight against file-sharing include *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Recording Industry Ass'n of America, Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003); and *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). These cases will be discussed in more detail in Part III.

³ Napster, Grokster, SuprNova, LokiTorrent, and eDonkey are just a few examples of popular file-sharing sites that have been closed down.

⁴ Kazaa was created by a Swede, Niklas Zennström, and a Dane, Janus Friis. James Gosling, *The Skype Guys*, TIME, May 8, 2006, at 148.

⁵ INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA), 2007 SPECIAL 301 REPORT 527 (2007), available at <http://www.iipa.com/rbc/2007/2007SPEC301SWEDEN.pdf>; Alexa Internet, http://www.alexa.com/data/details/traffic_details?url=thepiratebay.org (last visited Mar. 17, 2007).

⁶ Frank Ahrens, *U.S. Joins Industry in Piracy War: Nations Pressed on Copyrights*, WASH. POST, June 15, 2006, at A1. See also Ann Harrison, *The Pirate Bay: Here to Stay?* WIRED MAG., Mar. 13, 2006, available at <http://www.wired.com/news/technology/0,70358-0.html> (discussing how the Pirate Bay has eluded MPAA's crackdown on peer-to-peer sites).

⁷ 545 U.S. at 919.

While the political clout and economic significance of the entertainment industry in the U.S. has given it a dominant role in shaping copyright laws, the political strength of copyright owners and end-users are more evenly balanced in Sweden. File-sharing has sparked an intense national debate in the country, and it became an important topic in the last national elections. Support for file-sharing has become an organized political movement, and several mainstream politicians and newspaper editorials have argued that Sweden should not adopt as restrictive a stance as the U.S.⁸

Both Sweden and the U.S. are post-industrial societies where intellectual property represents a large share of the economy.⁹ In fact, Sweden receives the highest per capita amount in the world from receipts of royalties and license fees.¹⁰ Moreover, the Swedish music industry has during the last 30 years proved remarkably successful in generating worldwide hits.¹¹ In fact, Sweden is the third largest exporter of music in the world, after the U.S. and the United Kingdom.¹² Thus, both Sweden and the U.S. benefit economically from intellectual property rights and have similar interests in protecting such rights. By contrast, developing countries

⁸ See, e.g., Editorial, *Upgradera lagboken*, DAGENS NYHETER (Swed.), Oct. 31, 2006, available at <http://www.dn.se/DNet/jsp/polopoly.jsp?a=584775>; Editorial, *Ladda ner!*, *Expressen*, (Swed.), Mar. 17, 2005, available at <http://expressen.se/index.jsp?a=256482>.

⁹ In 2003, intellectual property and IP support industries “represented approximately 17.3 percent of total U.S. economic activity and approximately one-fifth of private economic activity.” Council of Economic Advisers, THE ANNUAL REPORT, in 7 ECONOMIC REPORT OF THE PRESIDENT 218–19 (2006).

¹⁰ UNITED NATIONS DEVELOPMENT PROGRAM, HUMAN DEVELOPMENT REPORT 2006, 327–30 (2006). Sweden also spends a higher percentage of its GDP on research and development (“R&D”) than any other country in the world. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD SCIENCE, TECHNOLOGY, AND INDUSTRY SCOREBOARD 2005 16–17 (2005), available at <http://lysander.sourceoecd.org/vl=6100349/cl=13/nw=1/rpsv/scoreboard/>. In 2003, Sweden spent 4.0% of its GDP on R&D while the U.S. spent 2.6% of GDP on R&D. *Id.*

¹¹ ABBA, Roxette, Ace of Base, Europe, Neneh Cherry, the Cardigans, Eagle Eye Cherry, Mando Diao, and the Hives are just a few examples of artists who have achieved international success. Swedish songwriters, such as Max Martin, have also written numerous popular hits for international artists such as Britney Spears, N’SYNC, Backstreet Boys, and Kelly Clarkson. Other Swedish songwriters have written hits for artists such as Madonna, Carrie Underwood, and Celine Dion. See, e.g., Swedish Performing Rights Society, The World Loves Swedish Music, <http://www.stim.se/stim/prod/stimv4eng.nsf/AllDocuments/24C223D893EDEB21C125716F003901BE> (last visited at Feb. 20, 2007).

¹² Dag Rosander, *Svensk musikexport ökar kraftigt*, SVENSKA DAGBLADET (Swed.), Apr. 21, 2004, available at http://www.svd.se/dynamiskt/naringsliv/did_7325751.asp. On a per capita basis, Sweden is the largest music exporter in the world. *Id.* See also Export Music Sweden, The Export Performance of the Swedish Music industry—An Update for the Year 2004, available at http://www.exms.com/export/export_performance_MI2005.pdf.

have less incentive to protect such rights since they are not themselves net-beneficiaries—for example, China today or the U.S. in the 19th Century (when it was a notorious copyright violator).¹³ Considering that the economic interests of both the U.S. and Sweden are similarly aligned, this Note will explore domestic reasons why the two countries have taken such different legal positions on how strongly to enforce copyrights against peer-to-peer file-sharing.

Part II of this Note provides a brief background on peer-to-peer technology. Part III then describes the current U.S. law regarding file-sharing. Part IV examines the Swedish copyright law and also analyzes the impact of recent Swedish court cases. Domestic factors affecting attitudes in Sweden toward file-sharing are discussed in Part V. Part VI draws some lessons from the Swedish experience. Finally, Part VII discusses different solutions for dealing with peer-to-peer piracy.

The Note concludes that the U.S. may find it difficult to export its approach to file-sharing to other countries. An overly aggressive approach may spark a backlash and could prove counterproductive. Domestic circumstances make it unlikely that Sweden will take the same stance as the U.S. in cracking down on Internet file-sharing. Instead, there seems to be a willingness to explore legal file-sharing solutions, as well as to consider some alternative ways of compensating copyright holders. In this regard, Sweden might prove to be a harbinger of things to come in other parts of the world.

II. BRIEF BACKGROUND ON FILE-SHARING TECHNOLOGY

File-sharing technology has gone through three distinct stages.¹⁴ The first stage occurred with the rise of Napster in the late 1990s. Napster enabled the transmission of MP3 music files between its users.¹⁵ When a registered user connected to Napster,

¹³ See JAMES J. BARNES, *AUTHORS, PUBLISHERS AND POLITICIANS: THE QUEST FOR AN ANGLO-AMERICAN COPYRIGHT AGREEMENT 1815-1854* 50 (1974). “As a country, nineteenth-century America was akin to a present-day underdeveloped nation which recognizes its dependence on those more commercially and technologically advanced, and desires the fruits of civilization in the cheapest and most convenient ways. Reprinting English literature seemed easy and inexpensive, and so America borrowed voraciously.” *Id.*

¹⁴ Seth Schiesel, *File Sharing's New Face*, N.Y. TIMES, Feb. 12, 2004, at G1, available at <http://query.nytimes.com/gst/fullpage.html?res=9805E2DE133AF931A25751C0A9629C8B63>.

¹⁵ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001).

software installed on the user's computer would search the user's computer and communicate to Napster's servers the names of all available MP3 files on that computer.¹⁶ In this way, Napster's central servers would maintain a complete list of every available song on every computer connected to Napster at any given time.¹⁷ Users would search this centralized directory and pick a song they wanted to download. The Napster server would then communicate to the requesting user the Internet address of the "host" user.¹⁸ The computer of the requesting user would use this information to connect to the "host" user and download the song from that computer "peer-to-peer."¹⁹

With the demise of Napster, the second stage of file-sharing began. New, more decentralized file-sharing networks, such as Kazaa, Grokster, and Morpheus, came to the fore. Kazaa and Grokster used FastTrack technology, while Morpheus used Gnutella technology.²⁰ In these more decentralized systems, the user would send the request for files directly to other computers on the network and not to a centralized server.²¹ These peer-to-peer systems would "use no servers to intercept the content of the search requests or to mediate the file transfers conducted by users of the software, there being no central point through which the substance of the communications passes in either direction."²²

The advent of BitTorrent revolutionized file-sharing and represents the third generation of peer-to-peer systems on the Internet.²³ BitTorrent enables users to swap much larger files than were possible in previous systems. Instead of mainly sharing relatively small MP3 files containing individual songs, BitTorrent makes it fast and easy to swap the huge files necessary for movies, TV-shows, video games, and software. While it would have taken

¹⁶ *Id.* at 1012.

¹⁷ Marshall Brain, *How Gnutella Works*, Howstuffworks, <http://computer.howstuffworks.com/file-sharing1.htm> (last visited Jan. 27, 2007).

¹⁸ *Napster*, 239 F.3d at 1012.

¹⁹ *Id.*

²⁰ Brad King, *Kazaa: A Copyright Conundrum*, WIRED MAG., Mar. 4, 2002, available at <http://www.wired.com/news/business/1,50788-1.html>. These were the two peer-to-peer systems that the U.S. Supreme Court evaluated in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 921 (2005).

²¹ *Grokster*, 545 U.S. at 92–22.

²² *Id.* at 922.

²³ See, e.g., Schiesel, *supra* note 14 (providing an overview of BitTorrent technology and a profile of its founder Bram Cohen).

hours to swap a standard one-hour episode of a TV show in Kazaa, it can be done in minutes using a BitTorrent application.²⁴

In the previous peer-to-peer systems the transfer of a file occurred between one uploader and one downloader at a time.²⁵ This created bottlenecks, since broadband providers allowed downloading at fast speeds but uploading only at slow speeds.²⁶ BitTorrent instead cuts up a file into many smaller pieces that get uploaded and downloaded between a “swarm” of many users at the same time, enabling much faster speed.²⁷ Moreover, under prior peer-to-peer systems most users would download files but refuse to upload.²⁸ In BitTorrent, users download and upload at the same time.²⁹ When someone has received a single piece of the file, the computer will instantaneously begin to offer it to others.³⁰ This architecture creates a self-reinforcing cycle: “the more popular a file is the faster it downloads.”³¹ The system is completely decentralized. However, it is not anonymous. The Internet protocol (IP) addresses of the users are viewable.³²

III. LEGAL RESPONSE TO PEER-TO-PEER PIRACY IN THE UNITED STATES

The explosive success of the original Napster alarmed the music industry, and record companies quickly filed lawsuits.³³ The companies alleged that Napster was a “contributory and vicarious copyright infringer,” enabling the users of Napster to commit direct copyright infringement.³⁴ Napster asserted the affirmative defense of fair use³⁵ against the charge that Napster users directly

²⁴ Clive Thompson, *The BitTorrent Effect*, WIRED MAG., Jan. 2005, available at <http://www.wired.com/wired/archive/13.01/bittorrent.html> [hereinafter Thompson, *BitTorrent*].

²⁵ Clive Thompson, *A Better Way to Share Files*, WIRED MAG., Jan. 2005, available at <http://www.wired.com/wired/archive/13.01/bittorrent.html?pg=5>.

²⁶ Thompson, *BitTorrent*, *supra* note 24.

²⁷ Schiesel, *supra* note 14.

²⁸ Thompson, *BitTorrent*, *supra* note 24.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Schiesel, *supra* note 14. The ability to view the IP addresses has been key to the entertainment industry’s efforts to sue individual file-sharers engaged in piracy. However, as discussed in Parts III and IV, the industry has encountered some difficulties in linking these IP addresses with the names of the individual users.

³³ *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000).

³⁴ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001).

³⁵ Fair use is set out in Section 107 of the Copyright Act:

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infringed copyrighted material.³⁶ The Ninth Circuit upheld the district court's finding that the users of Napster did not engage in non-commercial fair use but instead in commercial use "because (1) 'a host user sending a file cannot be said to engage in a personal use when distributing that file to an anonymous requester' and (2) 'Napster users get for free something they would ordinarily have to buy.'"³⁷ Having thus found the defense of fair use insufficient, the court went on to hold that the record companies had made out a sufficient case for contributory and vicarious liability against Napster. The court based liability on the fact that Napster through its centralized database had the ability to supervise users and "could block infringers' access to a particular environment for any reason whatsoever"³⁸ The court found that Napster had failed to use this ability to adequately police the system.³⁹

The second generation of file-sharing systems appears to have taken the *Napster* ruling to heart.⁴⁰ As discussed in Part II, these are decentralized networks without any central servers able to control the activities of the users. When these systems emerged it was

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 107 (2007).

³⁶ *Napster*, 239 F.3d at 1014.

³⁷ *Id.* at 1015 (quoting *Napster*, 114 F. Supp. 2d at 912).

³⁸ *Id.* at 1023.

³⁹ *Id.* at 1024.

⁴⁰ See ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT: CASES AND MATERIALS 882, (Foundation Press, 7th ed. 2006). In fact, in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, District Judge Wilson noted, "Defendants may have intentionally structured their businesses to avoid secondary liability for copyright infringement." 259 F. Supp. 2d 1029, 1046 (C.D. Cal. 2003).

thus not clear whether the distributors of software enabling such networks could be held liable for the copyright infringement of the users of the network, as Napster had been. This issue was determined in the important *Grokster* case,⁴¹ which ultimately reached the U.S. Supreme Court. In *Grokster*, motion picture studios and record companies sued Grokster, which employed FastTrack technology, and StreamCast Networks, which distributed the Morpheus software based on Gnutella technology.⁴² The district court ruled for the defendants, holding that they did not “have actual knowledge of infringement at a time when they can use that knowledge to stop the particular infringement.”⁴³ The two companies only distributed software that enabled file-sharing, but they did not facilitate “the exchange of files between users in the way Napster did.”⁴⁴ The Court said the software could be used for significant lawful purposes as well as unlawful ends, and it therefore concluded that the two companies were “not significantly different from companies that sell home video recorders or copy machines, both of which can be and are used to infringe copyrights.”⁴⁵

The district court referred to the Supreme Court’s decision in the important “Betamax case.”⁴⁶ It noted that the “sale of video cassette recorders (‘VCR’s) did not subject Sony to contributory copyright liability, even though Sony knew as a general matter that the machines could be used, and were being used, to infringe the plaintiffs’ copyrighted works.”⁴⁷ In “Betamax,” the Supreme Court held that “the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes.”⁴⁸ One such non-infringing use of the Betamax video recorder was “time-shifting,” which occurs when somebody uses the device “to record a program he cannot view as it is being televised and then . . . watch[es] it once at a later time.”⁴⁹

⁴¹ *Grokster*, 545 U.S. 913.

⁴² *Id.* at 921.

⁴³ *Grokster*, 259 F. Supp. 2d at 1037.

⁴⁴ *Id.* at 1041.

⁴⁵ *Id.* at 1043.

⁴⁶ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

⁴⁷ *Grokster*, 259 F. Supp. 2d at 1035.

⁴⁸ *Sony*, 464 U.S. at 442.

⁴⁹ *Id.* at 421.

The Ninth Circuit affirmed the district court's decision in *Grokster*.⁵⁰ However, the Supreme Court took a different view. It adopted the inducement doctrine from patent law and held that Grokster and StreamCast were secondarily liable for the copyright violations of the end users because the companies had "induced" such infringement.⁵¹ The Supreme Court explained that the Betamax defense did not apply when the evidence shows intentional infringement or promotion of infringement:⁵² "We hold that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties."⁵³ The Court noted three factors that showed inducement by the defendants: "they promoted their services' ability to enable illegal file swapping; their business plans depended on a high volume of unauthorized copying by end users; and they declined to devise means, or even to permit others to employ means, to filter out infringing uses."⁵⁴

Grokster was an important victory for the entertainment companies. However, during the early setbacks in the lower courts, the industry developed an alternative strategy to stop file-sharing: suing individual users. In September of 2003, the Recording Industry Association of America (RIAA) began filing lawsuits against individual file-sharers.⁵⁵ At first these actions ran into public relations difficulties when it was revealed that the industry was suing a twelve-year-old honors student and a 66-year-old retired school-teacher whose computer could not even run the file-trading program that she was accused of using.⁵⁶ The industry continued to file suits, but it made efforts to refine its tactics in order to weed out cases that might be the result of mistaken identity or that could generate bad publicity.⁵⁷

In order to file these lawsuits, the RIAA had to identify the individual file-sharers. It could easily obtain the IP addresses of

⁵⁰ *Grokster*, 380 F.3d 1154.

⁵¹ *Grokster*, 545 U.S. at 936–37.

⁵² *Id.* at 935–36.

⁵³ *Id.* at 919.

⁵⁴ GORMAN & GINSBURG, *supra* note 40, at 882.

⁵⁵ Amy Harmon, *The Price of Music: The Overview; 261 Lawsuits Filed on Music Sharing*, N.Y. TIMES, Sep. 9, 2003, at A1.

⁵⁶ John Schwartz, *Record Industry Warns 204 Before Suing On Swapping*, N.Y. TIMES, Oct. 18, 2003, at C1.

⁵⁷ *Id.*

file-sharers and then trace those addresses to their Internet Service Providers.⁵⁸ However, only the Internet Service Providers could link the IP address with the names of the end-users.⁵⁹ RIAA insisted that it, under the subpoena provision of Digital Millennium Copyright Act,⁶⁰ had the right to demand that the Internet Service Providers disclose the identities linked to the IP addresses of alleged file-sharers.⁶¹ After Verizon refused to comply with the subpoenas, the RIAA filed suit. The D.C. Circuit Court of Appeals rejected RIAA's argument and held that the subpoena provision of the Digital Millennium Copyright Act "does not authorize the issuance of a subpoena to an ISP acting as a mere conduit for the transmission of information sent by others."⁶² This decision forced the RIAA to file more cumbersome John Doe lawsuits and then ask the court to require the Internet Service Provider to reveal the name associated with an IP address.⁶³ Although such "John Doe actions are more costly and time consuming,"⁶⁴ it has not deterred the music and movie industries from continuing to file lawsuits against individual file-sharers.⁶⁵

The next stage in the legal battle in the U.S. against file-sharing is likely to come against a BitTorrent site. Industry organizations have been successful in shutting down several such sites.⁶⁶ The few BitTorrent sites that still remain in the U.S., such as Isohunt and TorrentSpy, have instituted policies of removing torrents that are alleged to infringe copyrights.⁶⁷ Despite the policy of removing torrents upon request, these sites are still being sued.⁶⁸ These cases will test the scope of the *Grokster* decision. With such

⁵⁸ Recording Indus. Assoc. of Am., Inc. v. Verizon Internet Servs., Inc., 351 F.3d 1229, 1232 (D.C. Cir. 2003).

⁵⁹ *Id.*

⁶⁰ 17 U.S.C. § 512(h) (2007).

⁶¹ *Recording Indus. Assoc. of Am.*, 351 F.3d at 1231.

⁶² *Id.* at 1237.

⁶³ In re Charter Communications, Inc., Subpoena Enforcement Matter, 393 F.3d 771, 782 (8th Cir. 2005) (Murphy, J., dissenting) (agreeing with the D.C. Circuit's holding in *RIAA v. Verizon*).

⁶⁴ *Id.*

⁶⁵ Electronic Frontier Foundation reports that RIAA had sued over 20,000 individuals as of July of 2006. Electronic Frontier Foundation, *How Not to Get Sued for Filing Sharing*, <http://www.eff.org/IP/P2P/howto-notgetsued.php> (last visited Mar. 3, 2007).

⁶⁶ See, e.g., Quinn Norton, *Secrets of the Pirate Bay*, WIRED MAG., Aug. 16, 2006, available at <http://www.wired.com/news/technology/0,71543-0.html> [hereinafter Norton, *Secrets*].

⁶⁷ *Id.*

⁶⁸ *Id.*

removal polices in place it will be harder to argue that the sites “induce” copyright infringement. Just as the second generation of file-sharing networks looked to the *Napster* decision to design their systems, these BitTorrent sites seem to have studied the *Grokster* decision in order to design a liability-free system.⁶⁹

IV. LEGAL RESPONSE TO PEER-TO-PEER PIRACY IN SWEDEN

Until July 1, 2005, it was not explicitly illegal in Sweden to download copyrighted material for private use.⁷⁰ However, uploading such material on the Internet without the permission of the copyright owner was prohibited.⁷¹ The Swedish Parliament amended the Swedish copyright law significantly on July 1, 2005 in order to comply with EU Directive 2001/29/EC.⁷² The amended Copyright Act makes it illegal to download pirated material or any other material that has been posted on the Internet without the owner’s permission.⁷³

⁶⁹ BitTorrent has significant non-infringing uses. It is used, for example, by Linux groups and video game companies to distribute software. Thompson, *BitTorrent*, *supra* note 24. Thus, BitTorrent would fall under the Betamax exception unless there is evidence of intentional infringement or inducement of infringement as was found in *Grokster*.

⁷⁰ Proposition [Prop.] 2004/05:110 Upphovsrätten i informationsområdet—genomförande av direktiv 2001/29/EG, m.m. [government bill] 2 (Swed.), available at <http://www.regeringen.se/sb/d/108/a/40699>. See also Harrison, *supra* note 6.

⁷¹ Prop. 2004/05:110 at 50.

⁷² Lag om ändring i lagen (1960:729) on upphovsrätt till litterära och konstnärliga verk [Act (2005:359) of May 26, 2005, Amending the Act (1960:729) on Copyright in Literary and Artistic Works] (Svensk författningssamling [SFS] 2005:359) (Swed.), translation available at <http://www.sweden.gov.se/content/1/c6/01/51/95/69b07709.pdf>. For the full text of Directive 2001/29/EC [hereinafter EU Copyright Directive], see 2001 O.J. (L 167) 10, available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/l_167/l_16720010622en00100019.pdf. One of the main purposes of this EU Directive was to incorporate two treaties adopted under the auspices of the World Intellectual Property Organisation (WIPO) in December of 1996: the “WIPO Copyright Treaty” and the “WIPO Performances and Phonograms Treaty.” *Id.* at 11. “Those Treaties update the international protection for copyright and related rights significantly, not least with regard to the so-called ‘digital agenda’, and improve the means to fight piracy world-wide.” *Id.*

⁷³ Article 12 of the Swedish Copyright Act, which under some circumstances allows the making of copies for private purposes, was amended significantly. The new Article 12 provides:

Anybody is entitled to make, for private purposes, one or a few copies of works that have been made public. As regards literary works in written form the making of copies may, however, concern only limited parts of works, or such works of limited scope. The copies must not be used for purposes other than private use This Article does not confer a right to make copies of a work when the copy that constitutes the real master copy has been prepared or has been made available to the public in violation of Article 2.

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Following the developments in the U.S., organizations representing the entertainment industry began suing individual file-sharers even before the new law took effect.⁷⁴ They brought individual cases against file-sharers who had uploaded material to the Internet and made it available to other file-sharers.⁷⁵ The first such case was decided in the fall of 2005.⁷⁶ The district court convicted a man for having made the Swedish motion picture “Hip Hip Hora” available on the Internet.⁷⁷ The man was fined 16,000 Swedish kronor (about \$2,300).⁷⁸ However, the court of appeals overturned the conviction a year later.⁷⁹ The court of appeals ruled that the technical evidence was insufficient to prove that the movie had been uploaded from the defendant’s computer.⁸⁰ The court held that an IP address by itself was insufficient to link the defendant to the uploading of the movie.⁸¹ Thus, police and prosecutors would have to provide stronger evidence than just IP addresses in order to convict file-sharers. The court of appeals’ holding suggests that physical evidence, such as a computer’s hard-drive, might be necessary for a conviction to be upheld. However, in order to find such evidence, the police would have to obtain a warrant to enter a suspect’s home. Swedish law only allows such searches if the crime is serious enough to potentially lead to a prison sentence.⁸² In no

2 ch. 12 § Lag om upphovsrätt till litterära och konstnärliga verk [Act on Copyright in Literary and Artistic Works] (Svensk författningssamling [SFS] 1960:729) (Swed.), *translation available at* <http://www.sweden.gov.se/content/1/c6/01/51/95/69b07709.pdf> [hereinafter Swedish Copyright Act]. Article 2 gives the copyright holder “the exclusive right to exploit the work by making copies of it and by making it available to the public . . .” *Id.* Thus, the Copyright Act makes it unlawful to download material that has been posted on the Internet in violation of Article 2. *See also* MINISTRY OF JUSTICE, COPYRIGHT: A BRIEF OVERVIEW OF THE SWEDISH COPYRIGHT SYSTEM 13 (2006), *available at* <http://www.sweden.gov.se/content/1/c6/05/67/65/ac3af6b4.pdf>.

⁷⁴ *See, e.g., Sweden Convicts First File-sharer*, BBC NEWS, Oct. 25, 2005, *available at* <http://news.bbc.co.uk/2/hi/technology/4376470.stm>.

⁷⁵ *See, e.g., Jenny Sköld & German Bender-Pulido, Fildelare fick dagsböter*, DAGENS NYHETER (Swed.), Oct. 25, 2005, *available at* <http://www.dn.se/DNet/jsp/polopoly.jsp?a=478942>.

⁷⁶ *Sweden Convicts First File-sharer*, *supra* note 74.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Svea Hovrätt [HovR] [Court of Appeals] Mål Nr. B 8799-05, 2006-10-02.

⁸⁰ Alexandra Hernadi, *Fildelare frias*, SVENSKA DAGBLADET (Swed.), Oct. 2, 2006, *available at* http://www.svd.se/dynamiskt/inrikes/did_13777907.asp.

⁸¹ Carl Thulin, *Fildelare frias*, DAGENS INDUSTRI (Swed.), Oct. 2, 2006, *available at* <http://di.se/Index/Nyheter/2006/10/02/203832.htm?src=XLink>.

⁸² Rättegångsbalken [RB] [Swedish Code of Civil Procedure] 28:1, *translation available at* <http://www.sweden.gov.se/content/1/c6/02/77/78/30607300.pdf>. “If there is reason to be-

case against individual file-sharers has the defendant been sentenced to anything more than a fine.⁸³ This situation has led to a “Catch 22” for the police and prosecutors: without a conviction leading to a prison sentence, they will have a hard time establishing enough evidence against file-sharers, since they will be unable to obtain house warrants.⁸⁴

An additional obstacle to prosecuting file-sharers in Sweden is that the privacy laws in Sweden are more stringent than in the U.S. Internet Service Providers only have to reveal the name associated with a particular IP address to police and prosecutors if a person is suspected of having committed a crime that can lead to a prison sentence or probation.⁸⁵ The EU Copyright Directive that sparked the amendment of the Swedish Copyright Act in 2005 provides language that can be interpreted as giving Internet Service Providers more direct responsibility for what their customers disseminate online.⁸⁶ However, Sweden chose not to adopt any provisions requiring Internet Service Providers to reveal to rights holders the

lieve that an offence punishable by imprisonment has been committed, houses, rooms, or closed storage spaces may be searched to look for objects subject to seizure or to detect other information of potential importance to the inquiry of the offence.” *Id.*

⁸³ See, e.g., Heléne Almqvist, Fildelare fälld för musik utlagd på nätet, DAGENS NYHETER (Swed.), Oct. 18, 2006, available at <http://www.dn.se/DNet/jsp/polopoly.jsp?a=581631>; TT, Fildelare fick dagsböter, SVENSKA DAGBLADET (Swed.), June 12, 2007, available at http://www.svd.se/nyheter/inrikes/artikel_236829.svd.

⁸⁴ TT, *Bakgrund: Fildelning*, DAGENS NYHETER (Swed.), Oct 18, 2006, available at <http://www.dn.se/DNet/jsp/polopoly.jsp?a=581624>. See also Daniel Westman, *Bevisfrågor vid upphovsrättsintrång genom fildelning m.m.*, 88 LOV&DATA 36 (2006), available at <http://www.juridicum.su.se/iri/dawe/Bevisfr%E5gor%20vid%20upphovsr%E4ttintr%E5ng.htm>.

⁸⁵ 6 ch. 22§ Lag om elektronisk kommunikation [The Electronic Communications Act] (Svensk författningssamling [SFS] 2003:389) (Swed.), translation available at http://www.pts.se/Archive/Documents/EN/The_Electronic_Communications_Act_2003_389.pdf.

⁸⁶ The Directive provides, “Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.” Directive 2001/29/EC, art. 8, §3, O.J. (L167) 18. Section 59 of the Preamble further explains:

In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party’s infringement of a protected work or other subject-matter in a network.

2001 O.J. (L 167) 10, available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/l_167/l_16720010622en00100019.pdf.

identities behind IP addresses of suspected infringers.⁸⁷ After stating that such measures would raise privacy concerns, the Swedish Government noted that the EU Copyright Directive did not explicitly contain such provisions.⁸⁸

In 2004, the EU passed the Directive on the Enforcement of Intellectual Property Rights.⁸⁹ Article 8 of the Directive provides that

judicial authorities may order that information on the origin and distribution networks of the goods or services which infringe an intellectual property right be provided by the infringer and/or any other person who: . . . (c) was found to be providing on a commercial scale services used in infringing activities.⁹⁰

The Swedish Department of Justice is debating whether this language means that rights organizations should be able to request that a court orders the Internet Service Providers to reveal the names of alleged infringers.⁹¹ Such a change would bring the Swedish Copyright Law closer to the U.S. It would open up the possibility of civil actions, since police and prosecutors no longer would be the only actors allowed to request courts to order Internet Service Providers to reveal the name of alleged infringers. However, it is far from certain that such legislation would be passed by the Parliament. The language of the Enforcement Directive seems only to require Internet Service Providers to reveal information when the infringing activities of the individual file-sharer are on a “commercial scale.”⁹² Thus, the Enforcement Directive

⁸⁷ See, e.g., Thord Eriksson, *Ny fildelningslag räcker inte*, DAGENS NYHETER (Swed.), May 23, 2005, available at <http://www.dn.se/DNet/jsp/polopoly.jsp?a=417796>.

⁸⁸ Prop. 2004/05:110 *supra* note 70, at 342.

⁸⁹ Directive 2004/48/EC, 2004 O.J. (L157) 45 [hereinafter Enforcement Directive].

⁹⁰ *Id.* at art. 8, §1.

⁹¹ Mats Carlbom, *Upphovsmän kan få jaga fildelare*, DAGENS NYHETER (Swed.), Feb. 4, 2007, available at <http://www.dn.se/DNet/jsp/polopoly.jsp?a=614086>.

⁹² Article 8, §1 of the Directive provides in full:

Member States shall ensure that, in the context of proceedings concerning an infringement of an intellectual property right and in response to a justified and proportionate request of the claimant, the competent judicial authorities may order that information on the origin and distribution networks of the goods or services which infringe an intellectual property right be provided by the infringer and/or any other person who:

(a) was found in possession of the infringing goods on a commercial scale;

(b) was found to be using the infringing services on a commercial scale;

(c) was found to be providing on a commercial scale services used in infringing activities; or

does not seem to require Sweden to change the law with respect to the vast majority of file-sharers who swap files for their own personal pleasure and not for “indirect economic or commercial advantage.”⁹³

Overall, the campaign against individual file-sharers has so far enjoyed only limited success in Sweden. The cases brought against individuals have been widely publicized in the press, and most file-sharers are therefore aware that police and prosecutors might have difficulty proving their guilt if they deny having swapped any copyrighted files. A spokesman for Piratbyrå, ⁹⁴ a pro-piracy think tank, asserts that file-sharers in Sweden are not worried about being caught, stating that “[m]ore people are hit by lightning every year than are caught file-sharing.”⁹⁵

The most high-profile action against file-sharing in Sweden was not against an individual user, but against the BitTorrent site the Pirate Bay. On May 31, 2006, the police raided the Pirate Bay’s offices and confiscated its computers.⁹⁶ The site had long been the target of complaints from the Motion Picture Association of America (MPAA) and major Hollywood studios for facilitating piracy. The Pirate Bay had gained worldwide notoriety by openly embracing piracy and mocking threats of legal actions by posting the complaints and cease-and-desist letters on its website.⁹⁷ The same day the police raided the Pirate Bay, the MPAA triumphantly sent out a press release headlined, “Swedish Authorities Sink Pirate Bay: Huge worldwide supplier of illegal movies told no safe harbors for facilitators of piracy!”⁹⁸ Three days later the Pirate

(d) was indicated by the person referred to in point (a), (b) or (c) as being involved in the production, manufacture or distribution of the goods or the provision of the services.

Enforcement Directive, *supra* note 89, art 8, §1.

⁹³ Enforcement Directive, *supra* note 89, pmb1 §14.

⁹⁴ The Pirate Bay initially began as a part of Piratbyrå [the Pirate Bureau] in 2003. However, the two organizations are today separate entities. Quinn Norton, *A Nation Divided Over Piracy*, WIRED MAG., Aug. 17, 2006, available at <http://www.wired.com/news/culture/0,71544-0.html> [hereinafter Norton, *Divided*].

⁹⁵ Carlbom, *supra* note 91.

⁹⁶ *Police Hit Major BitTorrent Site*, BBC NEWS, June 1, 2006, available at <http://news.bbc.co.uk/2/hi/technology/5036268.stm>.

⁹⁷ Complaints posted on the website include letters from Warner Bros. Records, Inc., Microsoft Corporation, and DreamWorks SKG. See <http://thepiratebay.org/legal> (last visited Jan 27, 2007).

⁹⁸ Press Release, Motion Picture Association of America (May 31, 2006), available at http://www.mpa.org/press_releases/2006_05_31.pdf.

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Bay was up and running again.⁹⁹ The site was first hosted in the Netherlands but soon moved back to Sweden.¹⁰⁰ The raid did nothing to diminish the Pirate Bay's popularity, which attracts over one million unique visitors a day.¹⁰¹

As will be discussed in Part V, the raid would quickly have important political ramifications, but it is less clear what the legal outcome will be. The prosecutor in the case, in a memorandum from November 30, 2005, raised doubts about the possibility of successfully prosecuting the site under current Swedish law.¹⁰² It seems clear that a court in the U.S. following the standard laid out in *Grokster* would have no difficulty holding a site such as the Pirate Bay secondarily liable for copyright infringement. The people behind the Pirate Bay not only "induced" copyright infringement, they openly encouraged piracy and viewed the site as an attack on current intellectual property laws.¹⁰³ However, the issue of secondary liability for copyright infringement has not yet been tested by a Swedish court. In 2006, a Norwegian court found that "linking to illegal content was contributory infringement."¹⁰⁴ Courts in Sweden may cite precedent in Norway, but it is not binding authority.¹⁰⁵

Overall, the legal actions have not been particularly successful in stemming file-sharing in Sweden. Although some evidence shows that there was a temporary drop in file-sharing following the

⁹⁹ Quinn Norton, *Pirate Bay Bloodied But Unbowed*, WIRED MAG., June 6, 2006, available at <http://www.wired.com/news/culture/0,71089-0.html> [hereinafter Norton, *Bloodied*].

¹⁰⁰ Norton, *Secrets*, *supra* note 66.

¹⁰¹ Norton, *Secrets*, *supra* note 66. As of February 18, 2007, Alexa Internet reported that of the visitors to the Pirate Bay around 20% were from the United States and about 12% from Sweden. http://www.alexa.com/data/details/traffic_details?url=ThePirateBay.org (last visited Feb. 18, 2007). However, persons from other countries can buy Swedish IP addresses from "darknet" services such as "Relakks" in order to surf "anonymously" on the Internet. Andrew Lavalley, *Service Aims to Cloak Internet Use By Routing Traffic Through Sweden*, WALL ST. J., Aug. 24, 2006, at A10. Such persons would be counted as Swedish in the Alexa data.

¹⁰² Memorandum from Håkan Roswall, Prosecutor, to Göran Hellstrand (Nov. 30, 2005), available at http://svt.se/content/1/c6/61/24/40/piratebay_aklagarpm.pdf. See also Andrew Brown, *Idealistic Pirates at Bay over Swedish File Sharing*, GUARDIAN (U.K.), July 27, 2006, available at <http://technology.guardian.co.uk/online/insideit/story/0,,1830625,00.html>.

¹⁰³ See, e.g., Norton, *Bloodied*, *supra* note 99.

¹⁰⁴ Norton, *Secrets*, *supra* note 66.

¹⁰⁵ *Id.*

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enactment of the new laws on July 1, 2005,¹⁰⁶ later surveys show that the number of file-sharers has continued to grow.¹⁰⁷ The entertainment industry's failure to win the political battle and sway public opinion will be discussed in the section below.

V. DOMESTIC FACTORS

Although the debate over file-sharing had raged in Sweden for several years, the raid against the Pirate Bay elevated the topic to one of the top political issues in the country. The raid sparked demonstrations in Sweden's two largest cities: Stockholm and Gothenburg.¹⁰⁸ Both sides of the debate were well-organized and spoiling for a fight, but both would soon emerge weakened and with diminished credibility. Not long after the raid, the media revealed that the U.S. government had pressured Sweden to take action against file-sharing sites such as the Pirate Bay and had threatened Sweden with the possibility of trade sanctions if it failed to do so.¹⁰⁹ The media also revealed correspondence between the Motion Picture Association of America and the Swedish Ministry of Justice showing American pressure.¹¹⁰ These revelations caused a strong backlash against the government, which was seen by many as caving in to foreign pressure.¹¹¹ The Committee on the Constitution in the Parliament also launched an investigation into whether the Minister of Justice had committed the crime of "minis-

¹⁰⁶ See Carl Thulin, *Nya lagen gav nedladdningsras*, DAGENS INDUSTRI (Swed.), Sep. 27, 2005, available at <http://di.se/Nyheter/?page=%2fAvdelningar%2fArtikel.aspx%3fArticleID%3d2005%5c09%5c26%5c158156%26words%3dnedladdningsras%26SectionID%3dIT%26menusection%3dITTelekom%3bITTelekomNyheter>.

¹⁰⁷ Tobias Brandel, *Allt fler ägnar sig åt fildelning*, SVENSKA DAGBLADET (Swed.), Dec. 19, 2006, available at http://www.svd.se/dynamiskt/kultur/did_14290159.asp.

¹⁰⁸ Gunnar Sörbring, *700 Demonstrerade mot jakten på fildelare*, DAGENS NYHETER (Swed.), June 3, 2006, available at <http://www.dn.se/DNet/jsp/polopoly.jsp?a=549899>.

¹⁰⁹ Ann Persson, *USA-hot bakom fildelningsrazzia*, DAGENS NYHETER (Swed.), June 20, 2006, available at <http://www.dn.se/DNet/jsp/polopoly.jsp?a=554160>. See also Frank Ahrens, *U.S. Joins Industry in Piracy War; Nations Pressed on Copyrights*, WASH. POST, June 15, 2006, at A1.

¹¹⁰ Letter from John G. Malcolm, Executive Vice President, MPAA, to Dan Eliasson, State Secretary, Swedish Ministry of Justice, Mar. 22, 2006, available at http://svt.se/content/1/c6/61/24/40/pirate_mpa.pdf; Letter from Dan Eliasson, State Secretary, Swedish Ministry of Justice, to John G. Malcolm, Executive Vice President, MPAA (Apr. 11, 2006), available at http://svt.se/content/1/c6/61/24/40/pirate_justit.pdf.

¹¹¹ See, e.g., Henrik Brors, *Han riskerar att framstå som USA:s knähund*, DAGENS NYHETER (Swed.), June 21, 2006, available at <http://www.dn.se/DNet/jsp/polopoly.jsp?a=554478>.

terstyre” by intervening in the Pirate Bay case.¹¹² The Swedish Constitution makes it illegal for a Cabinet Minister to intervene in a specific law enforcement case.¹¹³

The image of the people behind the Pirate Bay was also tarnished. They had portrayed themselves as idealists fighting for a free Internet, but a Swedish newspaper revealed that the Pirate Bay was able to charge large sums of money for the advertisements on the site.¹¹⁴ In fact, established businesses such as Wal-Mart have advertised on the site.¹¹⁵ Ad revenues and the issue of the profitability of the site also have legal implications.¹¹⁶ Punishment is affected by whether defendants have acted out of a motive to make money, and a conviction would more likely lead to prison instead of fines if a profit motive is established.¹¹⁷ Moreover, a court might be more likely to find secondary liability if there is a profit motive behind the site. For example, the U.S. Supreme Court listed profit as one of its three factors for finding “inducement” in *Grokster*.¹¹⁸

The raid against the Pirate Bay and the debate that followed made it clear that file-sharers had become an important political force in Sweden. Twenty percent of Swedes between the ages of 16 and 74—or 1.3 million people—have used a file-sharing program on the Internet at least once.¹¹⁹ An opinion poll published in June 2006 showed that 48 percent of Swedes thought that it should be

¹¹² Tove Nandorf, *Bodström KU-anmäld för fildelarrazzia*, DAGENS NYHETER (Swed.), June 21, 2006, available at <http://www.dn.se/DNet/jsp/polopoly.jsp?a=554357>.

¹¹³ Regeringsformen [RF] [Constitution] 11:7 (Swed.), translation available at http://www.riksdagen.se/templates/R_PageExtended___6328.aspx. “No public authority, including the Riksdag and the decision-making bodies of local authorities, may determine how an administrative authority shall decide in a particular case relating to the exercise of public authority vis-à-vis a private subject or a local authority, or relating to the application of law.” *Id.*

¹¹⁴ Staffan Olsson, *Pirate Bay drar in miljonbelopp*, SVENSKA DAGBLADET (Swed.), July 8, 2006, available at http://www.svd.se/dynamiskt/inrikes/did_13148881.asp. See also Brown, *supra* note 102. However, Gottfrid Svartholm, a co-founder of the Pirate Bay, claims that the site yields only enough revenue to cover operating costs. Steven Daly, *Pirates of the Multiplex*, VANITY FAIR, Mar. 2007, at 278, 286, available at <http://www.vanityfair.com/ontheweb/features/2007/03/piratebay200703>.

¹¹⁵ Paul O'Mahony, *Wal-Mart Docks in Pirate Bay*, THE LOCAL (Swed.), Jan. 16, 2007, available at <http://www.thelocal.se/6114/20070116/>.

¹¹⁶ Memorandum, *supra* note 102.

¹¹⁷ *Id.*

¹¹⁸ 545 U.S. at 940.

¹¹⁹ Press Release, Statistics Sweden [SCB], *Två av tre män surfar dagligen*, (Dec. 18, 2006), available at http://www.scb.se/templates/pressinfo___187176.asp [hereinafter Press Release, Statistics Sweden]. This survey was conducted in the first quarter of 2006. *Id.*

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legal to download copyright-protected music and films over the Internet, while 34 percent thought it should be illegal.¹²⁰ Moreover, three out of four first-time voters¹²¹ said they supported file-sharing even if it was illegal.¹²² Several of the major Swedish parties started to shift their positions in the run-up to the general elections in September 2006, expressing a willingness to re-evaluate Swedish copyright laws and investigate alternative ways of compensating copyright holders.¹²³ Moreover, both the former Prime Minister, the Social Democrat Göran Persson, and the current Prime Minister, the conservative Fredrik Reinfeldt, made comments during one of the televised debates that indicated that they might be open to liberalizing the laws regarding file-sharing.¹²⁴ However, the Pirate Party (Piratpartiet), which was formed on New Year's Day 2006, and aims to abolish copyright and patent laws,¹²⁵ received a weak election result of less than one percent.¹²⁶ This result suggests that even though a significant percentage of the population supports file-sharing, the issue is not important enough to cause them to cast a vote based solely on that issue.

¹²⁰ Jennie Danielsson, *Varannan vill ladda ner lagligt*, GÖTEBORGS-POSTEN, June 14, 2006, available at <http://www.gp.se/gp/jsp/Crosslink.jsp?d=913&a=281260>. Views on file-sharing do not follow the regular left-right divide in Sweden. Opinion polls suggest that support for file-sharing is equally divided between supporters of the center-right coalition and the center-left coalition. *Id.*

¹²¹ Individuals between the ages of 18 and 21.

¹²² Kenan Habul & Karin Johansson, *Tre av fyra unga stöder fildelning*, SYDSVENSKAN (Swed.), June 8, 2006, available at <http://sydsvenskan.se/val2006/article164134.ece>. Statistics Sweden reports that there were 430,000 eligible first-time voters in Sweden in 2006 compared to a total of 6.8 million voters—thus, comprising six percent of all eligible voters. Press Release, Statistics Sweden [SCB], *Fler förstagångsväljare vid 2006 års riksdagsval*, (Sep. 5, 2005), available at http://www.scb.se/templates/pressinfo___144592.asp. See also Ivar Ekman, *Politicians Smell Votes in Sweden's File-sharing Debate*, INT'L HERALD TRIB., June 18, 2006, available at <http://www.iht.com/articles/2006/06/18/business/levies.php>.

¹²³ Tove Nandorf, *Partierna börjar svänga i fildelningsfrågan*, DAGENS NYHETER (Swed.), June 8, 2006, available at <http://www.dn.se/DNet/jsp/polopoly.jsp?a=551095>. See also Ekman, *supra* note 122.

¹²⁴ Marcus Jerräng, *Utspelet om fildelning ska locka förstagångsväljarna*, COMPUTER SWEDEN, Sep. 13, 2006, available at <http://www.idg.se/2.1085/1.76702>.

¹²⁵ Gwladys Fouché, *Pirates Pursue a Political Point*, THE GUARDIAN (U.K.), Feb. 9, 2006, available at <http://arts.guardian.co.uk/news/story/0,,1705179,00.html>.

¹²⁶ The Swedish Election Authority reports that the Pirate Party received 34,918 votes, which represents 0.63% of the votes cast. "Val till riksdagen: slutlig sammanräkning," <http://www.val.se/val/val2006/slutlig/R/rike/ovriga.html> (last visited Mar. 19, 2007). Considering the "online buzz" the Pirate Party had received around the globe, this result was seen as disappointing. Quinn Norton, *Voters Keelhaul Pirate Party*, WIRED MAG., Sep. 18, 2006, available at <http://www.wired.com/news/technology/0,71809-0.html>.

It might seem surprising that Sweden has received “notoriety as a piracy safe haven”¹²⁷ and a “rogue nation”¹²⁸ with respect to file-sharing given the country’s reputation as a stable, law-abiding nation.¹²⁹ Several factors appear to have contributed to the country becoming a hot-bed for Internet piracy. First, Sweden is generally one of the world’s earliest adopters of new technologies.¹³⁰ Internet file-sharing caught on early and by the time any actions were taken against file-sharing, the practice had already become entrenched. In fact, “Sweden has faster broadband with deeper penetration than just about anywhere in the world. That, combined with the techno-friendly attitude that pervades Scandinavia and a government slow to take any kind of action, allowed file-sharing to root deeply in practice and popular culture.”¹³¹

Second, Swedish culture has been subsidized for decades since its small population of nine million makes it difficult to support a thriving movie, theater, and music industry in Swedish.¹³² Funding of Swedish movies and music has thus not been strictly based on commercial grounds.¹³³ There is therefore an openness to funding entertainment and culture in alternative ways. Moreover, the two most popular television stations are the commercial-free, public-service channels TV1 and TV2, which are entirely paid for by tele-

¹²⁷ IIPA, *supra* note 5, at 527.

¹²⁸ Norton, *Divided*, *supra* note 94 .

¹²⁹ See, e.g., David Brooks, Op-Ed, *The Culture of Nations*, N.Y. TIMES, Aug. 13, 2006, available at <http://select.nytimes.com/2006/08/13/opinion/13brooks.html?n=Top/Opinion/Editorials%20and%20Op-Ed/Op-Ed?Columnists/David%20Brooks>. In fact, Sweden has often been held up as a model society. For example, The British newspaper *The Guardian* proclaimed Sweden to be “[t]he most successful society the world has ever known.” Polly Toynbee, Comment, *The Most Successful Society the World has Ever Known*, GUARDIAN (U.K.), Oct. 25, 2005, available at <http://www.guardian.co.uk/Columnists/Column/0,,1599939,00.html>.

¹³⁰ See, e.g., *Scandinavia Tops ICT Charts*, FOREIGN DIRECT INVESTMENT MAG., Oct. 5, 2006, at 18, available at http://www.fdimagazine.com/news/printpage.php/aid/1785/Scandinavia_tops_ict_charts.html; Gerard Tellis, Stefan Stremersch & Eden Yin, *The International Takeoff of New Products: The Role of Economics, Culture, and Country Innovativeness*, 22:2 MARKETING SCI 188, 205 (2003).

¹³¹ Norton, *Divided*, *supra* note 94. Statistics Sweden reports that 56% of people in the ages of 16-74 have broadband connections at home. Press Release, Statistics Sweden, *supra* note 119.

¹³² See, e.g., COUNCIL OF EUROPE/ERICARTS, SWEDEN/1. HISTORICAL PERSPECTIVE: CULTURAL POLICIES AND INSTRUMENTS, available at <http://www.culturalpolicies.net/web/sweden.php?aid=1>.

¹³³ See, e.g., Jeff Leeds, *The New Ambassadors*, N.Y. TIMES, Nov. 12, 2006, at 2.1 (mentioning that the rock group the Hives used to receive subsidies from the Swedish Government).

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vision licenses in a similar fashion to the BBC in the United Kingdom.¹³⁴

Third, although private property rights have been established for centuries in Sweden, property rights are in some respects not viewed in as absolute terms as in the United States and continental Europe.¹³⁵ Swedish property law has traditionally allowed non-property owners some limited rights. Trespassing on private property has been allowed in Sweden for hundreds of years. The so-called “*Allemansrätten*,” or the “Rights of Common Access,” allows persons to walk—and even camp—on privately-owned land, as long as they do not harm the land or interfere with the activities of landowners.¹³⁶

Fourth, the famed Swedish Welfare State provides numerous things for free.¹³⁷ For example, university education, health care,

¹³⁴ SVT, *The Swedish Public Service Broadcaster—Sveriges Television* (SVT), http://svt.se/svt/jsp/Crosslink.jsp?d=10775&a=159227&lid=puff_159902&lpos=lasMer (last visited, Mar. 20, 2007). The license fee of about 200 euros per year finances both public service radio and television. During prime time (6-11 p.m.) the market share of the public service TV channels is 41.3 %. In 2006, 86 of the 100 most popular TV programs came from the public service channels. *Id.*

¹³⁵ See, e.g., Lars Carlsson, *Keeping Away from the Leviathan: The Case of the Swedish Forest Commons*, UNESCO Management of Social Transformations (MOST), Discussion Paper No. 51, 13 (2001), available at <http://unesdoc.unesco.org/images/0012/001220/122041eo.pdf>. “From time immemorial the country people of Sweden have regarded certain lands as their common property. These were mainly forest lands, waters, and pastures outside the cores of the villages. The so-called “Everyman’s right,” i.e., legal right of access to private land, is a contemporary reminder of this situation.” *Id.* at 13. The process of turning common lands into private property was never as complete in Sweden as in many other countries and some commons remain even today. *Id.* at 13–15. Interestingly, several scholars have analogized recent extensions of intellectual property rights to the historic enclosure movement in England. James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 L. & CONTEMP. PROBS. 33, 37 n.12 (2003). Thus, it is noteworthy that Sweden has adopted a slightly different stance in both of these periods.

¹³⁶ “*Allemansrätten* gives everyone the usufructuary right to trespass on private lands, pick berries, mushrooms, and flowers, camp for a few nights etc. as long as no damage is done and respects are paid to gardens etc.” Departementserien [Ds] 1995:15 Hushållning med knappa naturresurser Exemplen allemansrätten, fjällen och skotertrafik i naturen [government report series] 97 (Swed.), available at <http://www.regeringen.se/content/1/c6/03/62/05/6eb823cb.pdf>. The Swedish Environmental Protection Agency notes important limitations to the Right of Access: “Residents are entitled to be left in peace within the areas immediately surrounding their homes, which are not always fenced off. If private areas are open to view, you must keep at a substantial distance so as not to disturb. Also, your presence in the countryside should in no way interfere with the activities of landowners.” NATURVARDSSVERKET, COMMON SENSE AND THE RIGHT OF PUBLIC ACCESS 3 (2004).

¹³⁷ Of course, these services are not provided for free but are paid for by taxes. The Organization for Economic Cooperation and Development (OECD) reports that Sweden has the highest total tax revenue as a percentage of GDP in the world. OECD, OECD

and child care are primarily funded through taxes and then provided for free or at a minimum cost to everyone.¹³⁸ The library system is also extensive, allowing one to borrow books, movies, and music for free.¹³⁹ People in Sweden have thus grown accustomed to getting things “for free.” These factors have created an environment where some people are open to exploring alternative ways of compensating copyright holders. Such alternative ways will be discussed in Part VII, below.

VI. SWEDISH LESSONS

So far it is not clear what solutions Sweden will pursue with regards to file-sharing. After the elections in the fall of 2006, the debate subsided somewhat as the government commissioned a study on approaches to encourage legal file-sharing.¹⁴⁰ However, there are many important lessons that can be drawn from the Swedish case.

The Swedish experience shows that the approach to file-sharing in United States might not work as well abroad. An overly-aggressive approach might cause a backlash, as it did when it was revealed that American pressure was behind the raid against the Pirate Bay. Moreover, countries outside of the United States have felt under siege by American culture for years.¹⁴¹ The market for

FACTBOOK 2006 193 (2006), available at <http://titania.sourceoecd.org/pdf/fact2006pdf/09-03-01.pdf>.

¹³⁸ See, e.g., Swedish Institute, *Sweden in Brief: The “Home of the People”* (Oct. 23, 2002), available at http://www.sweden.se/templates/cs/CommonPage___2714.aspx.

¹³⁹ The Swedish libraries are also making an increasing number of materials available online, such as e-books and music files. These files are protected by Digital Rights Management (DRM), which protects against illegal copying and disables the file when the borrowing period expires. See e-biblioteket Musikklassiker, http://www.btj.se/btjcgi/ebook/ewinfo.cgi?session_id=97722398&bib_id=0101&type=7#19 (last visited at Mar. 20, 2007). Despite this protection, three of the largest record companies—EMI, Warner, and Universal—have chosen not to participate. Sony BMG and several smaller companies are participating. Tobias Brandel, *Få skivbolag ställer upp på digitala lån*, SVENSKA DAGBLADET (Swed.), Mar. 23, 2006, available at http://www.svd.se/dynamiskt/kultur/did_12191099.asp. Swedish law provides Public Lending Rights, requiring that Swedish authors are compensated a certain amount for each loan. Förordning om Sveriges Författarfond (Svensk författningssamling [SFS] 1962:652) (Swed.). These funds are administered by the Swedish Authors Association. The compensation for digital music files is administered differently. In that case, the public libraries pay a yearly fee, which depends on the number of inhabitants in the municipality. Brandel, *supra* note 139.

¹⁴⁰ Carlbom, *supra* note 91.

¹⁴¹ See, e.g., Russell Smandych, *Cultural Imperialism and Its Critics: Rethinking Cultural Domination and Resistance*, in CULTURAL IMPERIALISM: ESSAYS ON THE POLITICAL ECONOMY OF CULTURAL DOMINATION 3, 3 (Bernd Hamm & Russel Smandych eds., 2005).

Swedish-speaking movies and television shows is small since there are only nine million Swedish speakers in the world.¹⁴² It is therefore much harder for Swedish movies or TV series to recover their costs. However, Hollywood movies and U.S. television shows have a huge worldwide market and can spread costs over hundreds of millions of consumers.¹⁴³ A Swedish television channel is faced with the dilemma of spending large sums on producing, for example, a series of its own or buying an American series at a lower cost.¹⁴⁴ The prospect of large Hollywood studios crumbling from online piracy therefore might not be seen as much of a threat outside of the United States but more as a leveling of the global playing field. The U.S. must be cautious about appearing overly aggressive. From a U.S. perspective, it would likely be more prudent to let local rights organizations advocate for measures against piracy than to threaten countries such as Sweden with trade sanctions.

Copyright is ultimately “a balancing of interests between Owners’ rights to exploit and be compensated for creating original works with End Users’ rights to access and use those works both for individual End Users’ personal benefit and the benefit of society as a whole.”¹⁴⁵ The Preamble of the WIPO Copyright Treaty also recognizes “the need to maintain a balance between the rights of authors and the larger public interest, particularly education, re-

¹⁴² The market for Swedish culture might be larger if the other Nordic countries are taken into consideration. There have been several co-productions between the Nordic countries. See Peter Cowie, A Brief History of Scandinavian Film—Part 2, <http://technology.guardian.co.uk/online/insideit/story/0,,1830625,00.html>. http://www.criterionco.com/asp/in_focus_essay.asp?id=11&eid=247 (last visited Mar. 21, 2007). Still, the five Nordic countries together only have a population of slightly less than 25 million.

¹⁴³ See, e.g., Shekhar Kapur, *The Asians Are Coming*, GUARDIAN (U.K.), Aug. 23, 2002, available at <http://arts.guardian.co.uk/fridayreview/story/0,12102,778838,00.html> (“American culture has been able to dominate the world because it has had the biggest home market. When you have a huge home market, you can use that as a springboard and capture the markets around the world.”).

¹⁴⁴ Nevertheless, the prevalence of American television shows appears to have declined somewhat around the world. See Suzanne Kapner, *U.S. T.V. Shows Losing Potency Around the World*, N. Y. TIMES, Jan. 2, 2003, at A1. American movies do not seem to have experienced a similar decline. See Neal Gabler, *The World Still Watches America*, N. Y. TIMES, Jan. 9, 2003, at A27.

¹⁴⁵ Robert Piasentin, *Unlawful? Innovative? Unstoppable?: A Comparative Analysis of the Potential Legal Liability Facing P2P End-Users in the United States, United Kingdom and Canada*, 14 INT’L J. L. & INFO. TECH. 195, 210 (2006). See also DIGITAL CONNECTIONS COMMITTEE OF THE COMMITTEE FOR ECONOMIC DEVELOPMENT, PROMOTING INNOVATION AND ECONOMIC GROWTH: THE SPECIAL PROBLEM OF DIGITAL INTELLECTUAL PROPERTY 15–16 (2004), available at http://www.ced.org/docs/report/report_dcc.pdf.

search and access to information”¹⁴⁶ Several commentators have noted that in the United States this balance increasingly has been shifting in favor of rights holders in recent years.¹⁴⁷ Industry organizations hold significant political sway and have successfully lobbied Congress to implement pro-owner legislation, such as the extension of the length of copyright protection and the controversial Digital Millennium Copyright Act of 1998.¹⁴⁸ In Sweden, the political strength of rights holders and end-users are more evenly balanced. Both rights holders and file-sharers are well organized and have been able to exert political pressure.

Nevertheless, copyright laws in Sweden are not only affected by domestic factors; international considerations also are important. Sweden is unlikely to want to be seen as a haven for lawlessness and disrespect of copyright laws. The changes to the Swedish Copyright Act in 2005 were a result of an EU directive, which, in turn, was an attempt to implement the new international obligations under the 1996 WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.¹⁴⁹ The government’s position is that current law fulfills the obligations Sweden has under international treaties.¹⁵⁰ International legal developments are likely to influence Swedish law in the future as well. In particular, new EU legislation may affect Swedish policy. As discussed in Part IV, the Enforcement Directive¹⁵¹ passed by the EU in 2004 could affect whether Internet Service Providers will have to reveal the names associated with IP addresses of alleged copyright infringers in civil actions. Ultimately, Sweden is unlikely to pursue a policy that significantly diverges from other industrialized countries, but instead is likely to work within EU directives and international treaties. However, such obligations leave room for interpretation and some deviations in national policies could remain.

¹⁴⁶ WIPO Copyright Treaty pmbl., Dec 20, 1996, S. Treaty Doc. No. 105-17 (1997), available at http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P87_12240.

¹⁴⁷ See, e.g., Piasentin, *supra* note 145, at 210; John Schwartz, *Rethinking Web Piracy: Restrictions May Backfire, Report Warns*, INT’L HERALD TRIBUNE, Mar. 1, 2004, at 1.

¹⁴⁸ Piasentin, *supra* note 145, at 210.

¹⁴⁹ EU Copyright Directive, *supra* note 72, at 11.

¹⁵⁰ As part of the changes to the Copyright Right Act in 2005, the Government reviewed Sweden’s treaty obligations and suggested the changes deemed necessary for compliance. Prop. 2004/05:110, *supra*, note 70, at 3 & 13 chs.

¹⁵¹ Enforcement Directive, *supra* note 89.

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Sweden and the other Nordic countries are generally some of the earliest adapters of new technology.¹⁵² New file-sharing technology such as BitTorrent networks might therefore have reached widespread popularity in Sweden earlier than in other countries. Sweden might therefore also be in a good position to explore alternative solutions in handling the file-sharing dilemma.

VII. ALTERNATIVE SOLUTIONS

A. *Collective Solutions*

The most commonly mentioned solution to compensate copyright holders is to impose a levy or a tax. Such a levy could be collected in a manner similar to the television license fees that Sweden and many other European countries impose.¹⁵³ An alternative way would be to impose a levy as part of the price for broadband connections.¹⁵⁴ The money collected through such levies would then be distributed to the rights holders depending on the popularity of their respective works.¹⁵⁵ Collecting societies would administer the distribution of the money to the rights holders.¹⁵⁶ In fact, the Swedish Copyright Act already imposes a levy on blank recording media, such as cassettes, CDs, or DVDs,¹⁵⁷ in order to compensate rights holders for the private copying that the law allows.¹⁵⁸

¹⁵² See, e.g., U.S. COMMERCIAL SERV., U.S. DEP'T OF COMMERCE, DOING BUSINESS IN SWEDEN, http://www.buyusa.gov/sweden/en/doing_business.html (last visited Mar. 21, 2007). "Sweden is considered an ideal test market, though an expensive one, because of the high regard for U.S. products coupled with fact that Swedes are "early adapters"; being quick to start or follow trends. *Id.* A frequent strategy is to "waterfall" products through Sweden to the rest of Europe." *Id.*

¹⁵³ See Ekman, *supra* note 122. This article also discusses efforts in France to impose such a levy in order to legalize file-sharing. *Id.*

¹⁵⁴ See Norton, *Divided*, *supra* note 94.

¹⁵⁵ See Fred von Lohmann, *Voluntary Collective Licensing for Music File Sharing*, COMM. ACM, Oct. 2004, at 21–22.

¹⁵⁶ See, e.g., Piasentin, *supra* note 145, at 227. The best-known collecting society in Sweden is Svenska Tonsättares Internationella Musikbyrå (STIM), or the Swedish Performing Rights Society, which represents authors and publishers of music. Bildkonst Upphovsrätt i Sverige (BUS), or Visual Arts Copyright Society in Sweden, represents visual artists. In the U.S., the best-known performing rights society is the ASCAP, or the American Society of Composers, Artists and Performers. For an overview of collecting societies in the U.S., see Meghan Dougherty, *Voluntary Collective Licensing: The Solution to the Music Industry's File Sharing Crisis?*, 13 J. INTELL. PROP. L. 405, 411–19 (2006).

¹⁵⁷ 2a ch. 26k § Lag om upphovsrätt till litterära och konstnärliga verk [Act on Copyright in Literary and Artistic Works] (Svensk författningssamling [SFS] 1960:729) (Swed.), translation available at <http://www.sweden.gov.se/content/1/c6/01/51/95/69b07709.pdf>.

¹⁵⁸ Proposition [Prop.] 2004/05:110, *supra* note 70, at § 8.5.1. See also MINISTRY OF JUSTICE, *supra* note 73, at 14.

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This levy is administered and distributed by a collecting society.¹⁵⁹ The Swedish Green Party, which advocates making downloading of files legal, suggests raising the levy on blank media as one way to reimburse rights holders.¹⁶⁰ Of course, different levies could be combined in order to compensate rights holders for piracy. For example, a higher levy on blank media could be combined with a tax on broadband connections.

However, a levy or tax also would have to be paid by people who use the Internet but are not interested in file-sharing. This problem exists for the current blank media levy in Sweden as well. It affects both people who transfer non-protected material, such as their own photos to a CD, and people who record copyrighted material, such as a television show, to a blank DVD.¹⁶¹ An alternative solution would therefore be to only impose a levy on Internet access for people who want to share files. However, such a modification would, of course, require monitoring, and the fees would have to be even higher since fewer people would pay into the system. Finally, such a levy or tax would mean payouts to the pornographic industry—something that might not be politically feasible.¹⁶²

Proponents of collective solutions often point to the introduction of the radio as an analogous situation to what the entertainment companies face today with the onslaught of Internet file-sharing.

Broadcast radio set the precedent in the early 20th Century, giving rise to collecting societies like ASCAP, BMI, and SESAC as mechanisms songwriters could use to bring broadcast radio in from the copyright cold. Songwriters originally viewed radio exactly the way the music industry views KaZaA users today—pirates. After trying to sue radio out of existence, the songwriters ultimately chose to rely instead on a collecting society they formed voluntarily to collect fees from concert venues, ballrooms, and the like called ASCAP, or the American Society of

¹⁵⁹ 2a ch. 26m § Lag om upphovsrätt till litterära och konstnärliga verk [Act on Copyright in Literary and Artistic Works] (Svensk författningssamling [SFS] 1960:729) (Swed.). COPYSWEDE, which concludes agreements in new media fields—such as satellite and cable transmissions—manages the system. MINISTRY OF JUSTICE, *supra* note 73, at 22.

¹⁶⁰ Mats Carlbom, *Mp vill släppa privat nedladdning fri*, DAGENS NYHETER (Swed.), Sept. 11, 2006, available at <http://www.dn.se/DNet/jsp/polopoly.jsp?a=571933>.

¹⁶¹ For a discussion of the levy on blank media in Canada, see Piasentin, *supra* note 145, at 226–29. The article points out that this levy causes “businesses that require large numbers of blank recording media for file storage, manufacturing or other purposes” to effectively subsidize copyright content industries. *Id.* at 229.

¹⁶² Norton, *Divided*, *supra* note 94.

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Composers, Authors, and Publishers, and later BMI and SE-SAC. Radio stations interested in broadcasting music stepped up, paid a fee, and in return got to play whatever music they liked, using whatever technology worked best.¹⁶³

The broadcast model created a system of voluntary collective licensing. Under such a system “songwriters and copyright owners grant to performance rights societies a license to sublicense the rendition of public performances of their musical works.”¹⁶⁴ Another option would be for the government to create a compulsory licensing system, forcing rights holders to grant such licenses to collecting societies.¹⁶⁵

A major critique against collective license schemes is that it would be hard to strike a balance between compensating rights holders and not making Internet access prohibitively expensive.¹⁶⁶ It is far from certain that such a balance could be reached. Most of the proponents of such schemes discuss ways to solve the problems of the music industry where production costs are relatively low.¹⁶⁷ It is less certain that such a system would be sufficient to pay for the production costs of major Hollywood movies.¹⁶⁸ For example, the Electronics Frontier Foundation estimates that a fee of \$5 a month in the United States would be sufficient to adequately compensate music rights holders and allow the record companies to make a reasonable profit.¹⁶⁹ However, considering that movies,

¹⁶³ von Lohmann, *supra* note 155, at 22.

¹⁶⁴ AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 961 (3d ed. 1996) (1992).

¹⁶⁵ Piasentin, *supra* note 145, at 227. Such compulsory licenses have been common both in Sweden and the United States. For a discussion of the different compulsory license schemes in the U.S., see Michael Botein & Edward Samuels, *Compulsory Licenses in Peer-to-Peer File Sharing: A Workable Solution?* 30 S. ILL. U. L.J. 69 (2005).

¹⁶⁶ Piasentin, *supra* note 145, at 228.

¹⁶⁷ The MPAA’s representative in Sweden, Attorney Monique Wadsted, states, “They like to talk about music; they have a problem with [talking about] movies, because movies cost a lot to make.” Norton, *Divided*, *supra* note 94. The Electronic Frontier Foundation (EFF), an advocacy group in the U.S. supporting voluntary collective file-sharing, also focuses their analysis on music. See ELECTRONIC FRONTIER FOUNDATION, A BETTER WAY FORWARD: VOLUNTARY COLLECTIVE LICENSING OF MUSIC FILE SHARING, http://www.eff.org/share/?f=collective_lic_wp.html (last visited at Feb. 20, 2006).

¹⁶⁸ In 2006, the average cost of a movie by a member of the MPAA was \$65.8 million. Ian Mohr, *Box Office, Admissions Rise in 2006*, VARIETY, Mar. 6, 2007, available at <http://www.variety.com/article/VR1117960597.html?categoryid=13&cs=1>.

¹⁶⁹ The Electronic Frontier Foundation explains:

Starting with just the 60 million Americans who have been using file-sharing software, \$5 a month would net over \$3 billion of pure profit annually to the music industry—no CDs to ship, no online retailers to cut in on the deal, no payola to radio conglomerates, no percentage to KaZaA or anyone else. Best

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television shows, games, and software now also are swapped online, much larger fees would have to be imposed.

B. *Digital Rights Management*

One way the entertainment industry has dealt with piracy is the development of Digital Rights Management (DRM) technologies. DRM technology can be used to control either the access to a work or the use of a work.¹⁷⁰ Access to a work can be limited by, for example, requiring a password.¹⁷¹ DRM systems controlling the use of a work might involve limitations on the particular device on which the work, such as a song or a movie, can be played. For example, the songs bought on Apple's iTunes online music store can only be played on Apple's iPod players and only on up to a maximum of five different computers.¹⁷²

The WIPO Copyright Treaty provides protection for such devices, obligating signatories to provide:

Adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.¹⁷³

As part of the changes to the Swedish Copyright Act in 2005, the Swedish Parliament added provisions based on the WIPO Copyright Treaty and made it unlawful to circumvent technological measures, such as a digital lock or encryption.¹⁷⁴ In the U.S., the Digital Millennium Copyright Act (DMCA) prohibits any

of all, it's an evergreen revenue stream—money that just keeps coming, during good times and bad, so long as fans want digital music online. The pie grows with the growth of music sharing on the Internet, instead of shrinking. The total annual gross revenues of the music industry today are estimated at \$11 billion. But that's *gross* revenues. A collective licensing regime for file-sharing can promise \$3 billion in annual *profits* to the record labels—more than they've ever made.

ELECTRONIC FRONTIER FOUNDATION, *supra* note 167.

¹⁷⁰ Mark Tratos, *The Impact of the Internet & Digital Media on the Entertainment Industry*, in 862 PRACTICING LAW INSTITUTE: PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES 129, 129–130 (2006).

¹⁷¹ Piasentin, *supra* note 145, at 224.

¹⁷² Steve Jobs, CEO, Apple, Inc., Thoughts on Music, (Feb. 6, 2007), <http://www.apple.com/hotnews/thoughtsonmusic/> (last visited Feb. 20, 2007).

¹⁷³ WIPO Copyright Treaty, *supra* note 146, art. 11.

¹⁷⁴ 6a ch. 52d § Lag om upphovsrätt till litterära och konstnärliga verk [Act on Copyright in Literary and Artistic Works] (Svensk författningssamling [SFS] 1960:729) (Swed.).

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“[c]ircumvention of copyright protection systems.”¹⁷⁵ Thus, it would appear that DRM measures have strong support both in international law and in Swedish law.

A problem with DRM systems is that they also may limit legitimate use. The Swedish Copyright Act therefore makes clear that the restrictions “do not apply when someone, who in a lawful way has access to a copy of a work protected by copyright, circumvents a technological measure in order to be able to watch or listen to the work.”¹⁷⁶ Thus, it would appear that someone who has bought a song on iTunes and then circumvents the DRM in order to play it on a regular MP3 player does not violate Swedish law.

In fact, the DRM restrictions imposed by iTunes have come under legal scrutiny across Europe because they restrict legitimate use.¹⁷⁷ Early in 2007, the Norwegian consumer ombudsman ruled that iTunes DRM restrictions violated Norwegian consumer laws.¹⁷⁸ Government consumer protection agencies in Sweden, Finland, the Netherlands, France, and Germany have made similar claims.¹⁷⁹ As a response, Apple CEO Steve Jobs publicly urged the large record companies to abolish their requirement that all music sold online have DRM systems.¹⁸⁰ Mr. Jobs asserted that “DRMs haven’t worked, and may never work, to halt music piracy.”¹⁸¹ In fact, DRM might have been counterproductive, since it has made the songs bought on legal sites, such as iTunes, less attractive than illegally downloaded songs that play in a multitude of players.

Considering the increasing resistance to the DRM restrictions employed by Apple, it is uncertain if this is a viable way to fight piracy. Entertainment companies could face a significant backlash from consumers if they make the use of their products overly restricted. People expect to be able to play their movies and music that they have purchased in different types of devices and to be able to make copies for private use—for example, by transferring songs from their CDs to their MP3 players. Another problem is that all DRM systems, no matter how sophisticated, face the likeli-

¹⁷⁵ 17 U.S.C. § 1201 (2007).

¹⁷⁶ 6a ch. 52d § Lag om upphovsrätt till litterära och konstnärliga verk [Act on Copyright in Literary and Artistic Works].

¹⁷⁷ Bertrand Benoit et al., *Apple’s iTunes Hits a Sour Note in Europe*, FIN. TIMES, Jan. 29, 2007, at 23.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*; Ekman, *supra* note 122.

¹⁸⁰ Jobs, *supra* note 172.

¹⁸¹ *Id.*

hood of being cracked by “computer geeks” across the globe. Some therefore argue that DRM systems have become more of a hassle for law-abiding users than for people who engage in online piracy.¹⁸²

C. *New Business Models*

Notwithstanding Apple’s recent legal troubles in Europe, the popularity of iTunes illustrates that there is a large market for legal distribution of media content online. In order to successfully fight online piracy, the entertainment industry needs to come up with solutions that satisfy the consumer demand for “reasonably priced, hassle-free” alternatives.¹⁸³ The president of Disney-ABC has recognized that piracy is becoming one of the key competitors for the television industry: “Piracy is a business model. It exists to serve a need in the market—specifically, consumers who want TV content on demand. Piracy competes for consumers the same way we do: through quality, price, and availability.”¹⁸⁴

However, the movie and television industries have so far failed to come up with attractive alternatives. Download services such as Movielink, CinemaNow, and Unbox have been hampered by technical restrictions and limited content offerings.¹⁸⁵ In early 2007, Qflix, a new DVD download system endorsed by the major Hollywood studios, was launched.¹⁸⁶ This service makes 65,000 DVD titles available.¹⁸⁷ Fears about piracy have been overcome by incorporating the same Content Scramble System (CSS) encryption that is used on pre-recorded DVDs.¹⁸⁸ However, consumers would have to install a Qflix-certified DVD burner in order to record their own DVDs at home.¹⁸⁹ This service is a step in the right

¹⁸² See, e.g., Fred von Lehmann, Digital Rights Management: The Skeptic’s View, http://www.eff.org/IP/DRM/20030401_drm_skeptics_view.pdf (last visited Mar. 21, 2007).

¹⁸³ MPAA President Dan Glickman quoted in Daly, *supra* note 114, at 287.

¹⁸⁴ Anne Sweeney, President, Disney-ABC Television, Keynote Address at the MIPCOM Audiovisual Content Market, Cannes, France: The Today & Tomorrow of TV & the New Entertainment Consumer (Oct 9, 2006), available at <http://www.mipcom.com/App/homepage.cfm?appname=100495&linkid=24118&moduleid=411&date=1&campaignid=11612&iUserCampaignID=35523692>.

¹⁸⁵ Daly, *supra* note 114, at 287.

¹⁸⁶ Chris Nuttall, *Film Studios Okay New DVD Format*, FIN. TIMES, Feb. 4 2007, available at <http://www.ft.com/cms/s/ec364e08-b490-11db-b707-0000779e2340.html>.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ How Qflix Works, <http://qflix.com/overview/howqflixworks.html> (last visited Feb 21, 2007).

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direction because it utilizes one of the major advantages of online distribution: it makes vastly more titles available than the few hundred titles that most retail stores offer.¹⁹⁰ Nevertheless, until most computers come with compatible DVD burners installed, it is unlikely that consumers will go through the hassle of installing DRM-restricted burners themselves.

The entertainment industry has a long history of resisting technological innovation. As mentioned above, it fought both the introduction of the radio and the VCR. Jack Valenti, the former President and CEO of the MPAA, predicted that the VCR would do to the American film industry what “the Boston strangler [did] to the woman home alone.”¹⁹¹ Despite such doomsday scenarios, however, sales of film and music actually rose following the introduction of home taping, and the movie industry flourished.¹⁹²

The increasing merger of the Internet and television could represent a similar opportunity.¹⁹³ Joost—the new project by the Scandinavian duo Niklas Zennström and Janus Fris, the creators of Kazaa and Skype¹⁹⁴—might represent one potential solution. Using a peer-to-peer platform, Joost provides free on-demand TV content to its viewers.¹⁹⁵ The service also provides other functions: users can rate shows, import instant-messaging buddy lists, and chat with friends while watching the same program.¹⁹⁶ The service is financed by “advertising breaks—no more than three minutes per hour—either before, during or after a show, depending on the market.”¹⁹⁷ This business model could prove attractive for adver-

¹⁹⁰ Nuttall, *supra* note 186. The service also intends to install kiosks at retail stores where consumers can burn movies and print labels and covers. *Id.*

¹⁹¹ *Home Recording of Copyrighted Works, Hearing Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice.*, 97th Cong. 8 (1982) (commentary by Jack Valenti, Chairman of the Motion Picture Association of America).

¹⁹² See, e.g., Amanda Witt, *Burned in the USA: Should the Music Industry Utilize Its American Strategy of Suing Users to Combat Online Piracy in Europe?* 11 COLUM. J. EUR. L. 375, 403 (2005).

¹⁹³ See, e.g., The Economist, *What's on Next; The Future of Television*, THE ECONOMIST, Feb. 10, 2007, at 74, available at http://economist.com/business/displaystory.cfm?story_id=E1_RGSDNSJ.

¹⁹⁴ Gosling, *supra* note 4. Skype is a peer-to-peer program that lets its 136 million worldwide users make phone calls for free between computers and for a very low rate to regular phones. Spencer Reiss, *Why Joost is Good for TV*, WIRED MAG., Jan. 17, 2007. In 2005, Mr. Zennström and Mr. Fris sold Skype to eBay for \$2.6 billion. Economist, *supra* note 193.

¹⁹⁵ Reiss, *supra* note 194.

¹⁹⁶ See Economist, *supra* note 193.

¹⁹⁷ *Id.*

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tisers since they can target their spots based on “location, time of day, viewing habits, and opt-in profile information”¹⁹⁸ Being developed in Europe, the service is also mindful of strong privacy laws, and no identifying data is stored in the central database.¹⁹⁹ “Personal information is stored only on the user’s own PC.”²⁰⁰ In order to attract content providers and alleviate piracy concerns, the service uses industry-grade X.509 encryption.²⁰¹ Interestingly, Viacom entered into an agreement to supply content to Joost²⁰² just weeks before it sued YouTube for copyright infringement.²⁰³ At this stage, it is too early to know if Joost’s business model of providing free on-demand content will prove successful. Nevertheless, the creation of Joost suggests that new business models likely will be created that will capitalize on peer-to-peer technology while still generating revenues to compensate content providers. By coming up with attractive consumer offerings, the entertainment industry will likely continue to thrive in the future—just as it did after the introduction of radio and the VCR.

Collective licensing, DRM, and new business models are not mutually exclusive solutions, but are likely to co-exist. Just as public-service television channels have been able to successfully compete with commercial channels in countries such as Sweden and the United Kingdom, collective licensing schemes might co-exist with private business alternatives on the Internet. As television and the Internet increasingly merge, the public-service TV stations such as SVT²⁰⁴ and BBC are likely to increase their presence on the Internet. In fact, the BBC has already struck a deal with Azureus to make its programming available on the file-sharing site Zudeo.²⁰⁵

¹⁹⁸ Reiss, *supra* note 194.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Press Release, Joost, Viacom to be Key Content Partner with Joost, the World’s First Online Global TV Distribution Platform (Feb. 20, 2007), *available at* http://press.joost.com/2007/02/viacom_to_be_key_content_partn.html (last visited Mar. 22, 2007).

²⁰³ The Economist, *War is Declared: Viacom and YouTube*, *ECONOMIST*, Mar. 15, 2007, *available at* http://economist.com/business/displaystory.cfm?story_id=E1_RRVGTQQ. Although YouTube has become widely popular, it has so far not proven to be a particularly successful business model; in 2006, the company only took in a paltry \$15 million in revenue. *Id.*

²⁰⁴ Sveriges Television (SVT) is the Swedish public-service broadcaster. *See* SVT, *supra* note 134.

²⁰⁵ BBC News, *BBC Moves to File-sharing Sites*, *BBC NEWS*, Dec. 20, 2006, *available at* <http://news.bbc.co.uk/2/hi/technology/6194929.stm>.

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In the future, it seems feasible that the voluntary collective licensing schemes supporting public service television may be transformed to also support Internet services. However, to rely solely on such collective licensing schemes or on, for example, a levy on Internet access or some other tax does not seem to be an optimal solution. To pay for all of the content available on the Internet, such a fee would have to be very high. For example, a levy on broadband access would make such services prohibitively expensive and inhibit technological progress by making the Internet less accessible to large segments of the population.

Some reliance on DRM technology might also remain. However, DRM is hardly a panacea for dealing with peer-to-peer file-sharing. The reaction in Europe against iTunes' DRM restrictions suggests that this is not a viable option on its own. Consumers are likely to reject solutions where their use of products is severely circumscribed or monitored. Nevertheless, some technological restrictions, such as the encryption used by Joost, might remain in order to stem piracy.²⁰⁶ Ultimately, however, the solution to peer-to-peer piracy is likely to come from forcing the market to come up with new attractive business models that satisfy both consumers and rights holders. Hasty legislative measures that try to crack down on file-sharing or mandate restrictive DRM measures could have unintended consequences and put a damper on technological innovation.²⁰⁷ Therefore, governments need to be somewhat wary of the entertainment industries' demand for protective measures.

VIII. CONCLUSION

The global nature of the Internet makes it impossible for the United States to curtail peer-to-peer piracy solely through its own legal measures. Moreover, the U.S. stance on file-sharing might not translate well to other countries. Domestic circumstances in Sweden make it unlikely that it will take a similarly aggressive stance in shutting down peer-to-peer sites and suing individual users. Instead, there seems to be a willingness to explore legal alternatives to peer-to-peer piracy. Considering that there are no

²⁰⁶ DRM used by free services, such as Joost or the public libraries in Sweden (*see supra* note 139), of course, are likely to cause less consumer resistance than DRM on a product that the consumer has purchased.

²⁰⁷ *See* DIGITAL CONNECTIONS COUNCIL OF THE COMMITTEE FOR ECONOMIC DEVELOPMENT, PROMOTING INNOVATION AND ECONOMIC GROWTH: THE SPECIAL PROBLEM OF DIGITAL INTELLECTUAL PROPERTY 45 (2004).

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easy, quick-fix solutions, Sweden's softer, wait-and-see approach may be prudent. Overly restrictive measures aimed at protecting the entertainment industry might hamper innovation. Instead, it is important to maintain a balance between compensating copyright holders and allowing market forces to continue to spur change. New viable technologies, business models, and revenue streams will surely emerge.