

# BUCCANEERS AND BUCKS FROM THE INTERNET: PIRATE BAY AND THE ENTERTAINMENT INDUSTRY

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*“Music itself is going to become like running water or electricity.” –David Bowie*

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## INTRODUCTION

Each day, over two million people<sup>1</sup> log onto The Pirate Bay, a website that provides its users with a myriad of movies, music, television shows, and other media files.<sup>2</sup> What separates The Pirate Bay from other file sharing services is

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1. Bobbie Johnson, *How Three Swedish Geeks Became Hollywood's Number One Enemy*, GUARDIAN UNLIMITED, Aug. 25, 2007, at 9.

2. The Pirate Bay, <http://www.thepiratebay.org> (last visited Nov. 3, 2008).

its blatant disregard for copyright laws.<sup>3</sup> While most file sharing services at least purport to respect copyright laws to avoid lawsuits, The Pirate Bay openly opposes such laws and ridicules anyone who dares to ask for compliance.

The entertainment industry has been waging a war against piracy nearly as long as it has existed, and Internet downloading is just the latest method of replication and distribution. The ease and economy of copying digital files, however, makes this conduct more threatening to the industry than earlier, lower-tech piracy. Numerous other downloading services came and went before The Pirate Bay, and most were forced to cease operation because of the entertainment industry's lawsuits.<sup>4</sup> However, unlike the defunct services before it, The Pirate Bay presents new questions of liability and enforcement because of the website's headquarters in Sweden, the cutting-edge technology it utilizes, and its popularity as the flagship of the international anti-copyright movement.

An undeniable tension exists as the law attempts to protect copyright interests without stifling technological development or sacrificing privacy. This tension has only intensified as technology has continued to develop. Indeed the evolution of American copyright law may be rapidly approaching a dead-end.<sup>5</sup> With each new interpretation of copyright liability, most recently the contributory liability doctrine as articulated in *U.S. v. Grokster*,<sup>6</sup> a new, cutting-edge and legally evasive technology emerges. These new

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3. See *ThePirateBay.org*, About Pirate Bay, <http://thepiratebay.org/about> (last visited Nov. 3, 2008).

4. *Napster* is the most famous casualty of the war against peer-to-peer downloading. Napster was file-sharing software that allowed users to download files from each other's computers through peer-to-peer technology. Napster software was available free of charge, and, at one point, it had 20 million members. Napster was sued by all major record labels and several recording artists. The Ninth Circuit held that Napster was liable for contributory infringement because it knowingly encouraged and enabled users' direct infringement. After the judgment, Napster attempted to convert its service into one where users pay for songs, but it still filed for bankruptcy in 2002. See *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (ND Cal. 2000), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001). For a concise treatment of *Napster's* impact on copyright law, see Jeff Sharp, *Coming Soon to Pay-Per-View: How the Digital Millennium Copyright Act Enables Content Owners to Circumvent Educational Fair Use*, 40 AM. BUS. L.J. 1, 54 (2002).

5. See Bryan H. Choi, Note, *The Grokster Dead-End*, 19 HARV. J. LAW & TECH 393, 393 (2006).

6. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*, 545 U.S. 913, 939-941 (2005).

technologies are often designed to comply with the law's letter while flouting its spirit, typically resulting in a change in the law, either by statute or court decision, which only perpetuates the cycle. Therefore, American copyright law persists in inadequately addressing the copyright threat without hindering technological development or breaking down privacy barriers. This inadequacy, coupled with the international sociopolitical anti-copyright movement, calls for an innovative, international solution.

This Comment proposes that the entertainment industry end the futile fight against piracy by embracing the pirates and integrating what used to be called piracy into its business model. By offering an affordable, legitimate, high quality alternative, the entertainment industry can recapture many of the consumers it has lost to piracy. Pirates will always exist, but most people prefer a reliable, legal source of media, and if the entertainment industry adapts to provide its content through desirable distribution channels, it can thwart the pirates at their own game. In addition, by adapting to piracy rather than fighting it, the need for legal reform is avoided, which also preempts complicated international legal issues. Finally, unlike many other current solutions, piracy as a business model need not invade individual privacy nor stifle technological development, rather, technological development is promoted by encouraging the design of better products.

Part I of this Comment will examine the history of The Pirate Bay. Part II will then discuss current American copyright law and its inadequacy in dealing with the issues presented by The Pirate Bay. Finally, Part III will provide an overview of possible solutions to protect copyright and argue that the best solution is to integrate piracy into the entertainment industry's business model.

## PART I. THE PIRATES & THEIR BAY

When Gottfrid Svartholm volunteered to help create a BitTorrent tracker for Swedish anti-copyright organization Piratbyrå in the summer of 2003, he wanted to make abundantly clear that, unlike many file sharing predecessors, this program had not even the slightest intention of recognizing copyright laws. Thus, he named it "The Pirate Bay" to ensure Piratbyrå's disdain for intellectual property

law would be unmistakable.<sup>7</sup> The Pirate Bay (“the Bay”) separated from Piratbyrån to form its own entity in October 2004,<sup>8</sup> and Fredrik Neij and Peter Sunde joined to improve the technology and develop the website.<sup>9</sup> Soon after, Swedish law student Mikael Viborg became legal advisor<sup>10</sup> and suggested displaying all legal threats in a gallery on the website.<sup>11</sup> In case any confusion remained about the Bay’s stance on intellectual property laws, the gallery of legal threats and mocking replies clearly demonstrates the pirates’ true intent.<sup>12</sup>

With the demise of Napster,<sup>13</sup> Oink,<sup>14</sup> Grokster,<sup>15</sup> and countless other short-lived file sharing services, it may come as a shock to many Americans that the Bay has enjoyed almost continuous operation for nearly three years.<sup>16</sup> A

7. See Quinn Norton, *Secrets of the Pirate Bay*, WIRED, Aug. 16, 2006, <http://www.wired.com/science/discoveries/news/2006/08/71543?currentPage>. “He [Svartholm] chose the name Pirate Bay to make clear what the site was there for: no shame, no subtlety. These people were pirates. They believed the existing copyright regime was a broken artifact of a pre-digital age, the gristle of a rotting business model that poisoned culture and creativity. The Pirate Bay didn’t respect intellectual property law, and they’d say it publicly.” *Id.* at 2.

8. See ThePirateBay.org, About Pirate Bay, <http://thepiratebay.org/about> (last visited Nov. 3, 2008).

9. See Norton, *supra* note 7, at 2.

10. *Id.*

11. *Id.* To read the threatening letters of Microsoft, Apple, Warner Brothers, the Motion Picture Association of America, and various other entertainment artists and companies, see The Pirate Bay Legal, <http://thepiratebay.org/legal.php> (last visited Nov. 3, 2008).

12. See ThePirateBay.org, Legal Threats Against The Pirate Bay, <http://thepiratebay.org/legal> (last visited Nov. 3, 2008).

13. See Choi, *supra* note 5, at 393.

14. Oink was a BitTorrent tracker based in Britain that was raided and shut down by police after complaints by record-company interest groups. Oink was an invite-only website, where only high-quality sounds could be uploaded and shared. Oink was shut down by British and international authorities in October of 2007. The Bay has vowed to reopen Oink. See Zack Frederick, *Police Squeal on Oink: Popular BitTorrent Tracking Website Raided*, THE CALIFORNIA AGGIE ONLINE, (Nov. 1, 2007), <http://media.www.californiaaggie.com/media/storage/paper981/news/2007/11/01/ArtsEntertainment/Police.Squeal.On.Oink-3071350.shtml>; Monty Phan, *Oink Users Recall Defunct Song-Swap Site’s Strange, Stringent Rules*, WIRED, (Oct. 26, 2007), <http://www.wired.com/entertainment/music/news/2007/10/oink>.

15. See Norton, *supra* note 7 & Part II.

16. Police have twice attempted to shut down the Bay. The first attempt came in the form of a raid on ten of the Bay’s headquarters in May of 2006, sending the website offline for three days. See Dan Frommer, *Cops Sack Swedish Piracy Cove*, FORBES MAGAZINE, May 31, 2006, <http://www.forbes.com/technology/2006/05/31/piracy-internet->

combination of ambiguous copyright laws and a cultural legitimization of file sharing in Sweden, as explained in Section A, and the legal slipperiness of the BitTorrent technology, outlined in Section B, enables the Bay's uninterrupted existence.

### A. Sweden: *The Perfect Bay for Pirates*

A bay offers shelter from the turbulent ocean's seas. Sweden is a perfect bay for pirates from the storms raging over internet piracy because of Sweden's relatively relaxed copyright laws.<sup>17</sup> Prior to 2005, European file swappers viewed Sweden as a safe haven.<sup>18</sup> The Swedes enacted a Copyright Act in 2005<sup>19</sup> in response to the Economic Commission's European Copyright Directive to implement a

raid\_cx\_df\_0531pirates.html. Swedish news reported that the United States prompted the raid by giving Sweden an ultimatum; the Swedish state secretary later verified this claim. See Louis Roper, *US Government behind Pirate Bay raid*, THE LOCAL, June 2, 2006 <http://www.thelocal.se/article.php?ID=3969&date=20060602>; Steven Daly, *Pirates of the Multiplex*, VANITY FAIR, March 2007, at 278. After three days, the Bay was up and running from the Netherlands, and it now claims to have a backup plan to re-launch its servers from the Netherlands within seconds, should another Swedish raid occur. See Quinn Norton, *Pirate Bay Bloodied But Unbowed*, WIRED, June 6, 2006, <http://www.wired.com/science/discoveries/news/2006/06/71089>. The raid only increased the Bay's popularity by increasing its visibility. See *Police Raid Doubles Pirate Bay's Popularity*, THE LOCAL, June 11, 2007, <http://www.thelocal.se/6496/20070222/>. Prosecutors have filed charges against the individuals behind the Bay for being accessories to copyright infringement, but the Bay doubts their success and points to the fact that no copyrighted content is actually housed on the website. See *Prosecutor to Press Charges Against Pirate Bay*, THE LOCAL, May 4, 2007, <http://www.thelocal.se/7205/>. The case is set to go to trial, but it most likely will not be heard until summer 2008. See *Pirate Bay Case Unlikely to be Heard Before Summer*, THE LOCAL, Feb. 7, 2008, <http://www.thelocal.se/9911/20080207/>.

The police's second attempt occurred when police claimed the Bay was hosting pornographic images through its website. However, according to Fredrik Neij, the Bay was never even contacted about the alleged violations. See *Pirate Bay faces block over child porn*, THE LOCAL, July 7, 2007, <http://www.thelocal.se/7818/20070707/>; Jan Libbenga, *Another investigation into Pirate Bay child porn*, THE REGISTER, Sept. 3, 2007, [http://www.theregister.co.uk/2007/09/03/another\\_pirate\\_bay\\_police\\_case/](http://www.theregister.co.uk/2007/09/03/another_pirate_bay_police_case/).

17. Steven Daly, *Pirates of the Multiplex*, VANITY FAIR, March 2007, at 278.

18. See Bruce Gain, *Europe Goes Gently on P2P Piracy*, WIRED, July 9, 2005, <http://www.wired.com/entertainment/music/news/2005/07/68109>.

19. Lag om upphovsrätt till litterära och konstnärliga verk (SFS 1960:729), <http://www.sweden.gov.se/sb/d/3288/a/19575;jsessionid=allUWPasbJog>. The Ministry of Justice released an interpretive pamphlet. See Copyright: A brief overview of the Swedish System, <http://www.bib.slu.se/kurser/sss/skriva/upphovsratten/eupphov.html>.

unified copyright protection regime.<sup>20</sup> However, to the Swedish government, the laws of both the United States and United Kingdom are far more “rigid” than its own.<sup>21</sup> Likewise, enforcement of the Copyright Act is a challenge because most Swedish courts are still reluctant to impose criminal sanctions on file sharers.<sup>22</sup> In addition, the police do not consider intellectual property crimes at the top of their busy agenda.<sup>23</sup> Efforts aimed at copyright infringement tend to focus more on the sources of leaked information than distributors like the Bay.<sup>24</sup> Therefore, the Bay has continued operation because of relaxed Swedish laws and also because the police are either overburdened with the investigation of other crimes or are more concerned with targeting the source of copyright leaks.

No change in Swedish copyright law or enforcement is in sight. A new legislative attempt to tighten up enforcement has been rejected by the Swedish Data Inspection Board due to perceived privacy issues.<sup>25</sup> Although the Board is only advisory, and thus its opinion is not binding on Swedish lawmakers,<sup>26</sup> it is very influential. Therefore, Swedish copyright law not only is more conducive to file sharing than United States and British law, but no change is in sight for the near future.

The Internet plays a pivotal role in Swedish culture.

20. See European Union Final Directive On Copyright, <http://cryptome.org/eu-copyright.htm> (last visited Nov. 3, 2008). For a discussion of the Directive and an argument that it is possibly invalid, see Bernt Hugenholtz, *Why the Copyright Directive is Unimportant, and Possibly Invalid*, Institute for Information Law (2000), <http://www.ivir.nl/publications/hughenholtz/opinion-EIPR.html>.

21. Bruce Gain, *Europe Goes Gently on P2P Piracy*, WIRED, July 9, 2005, <http://www.wired.com/entertainment/music/news/2005/07/68109>. For example, whereas the criminal sentence for a violation of copyright law in the U.S. or Britain can be up to 10 years, it is only two years in Sweden.

22. *Id.* In addition, according to Piratbyrån member Rasmus Fleischer, hunting Internet pirates is just not a top priority for law enforcement officials in Sweden. “It has in many ways been obvious to the public that the anti-piracy lobby is also operating in their own, very doubtful, legal gray zone,” said Fleischer. “They are dependent on the existence of police officers willing to give priority to the hunting of file sharers over real criminality.” Ann Harrison, *The Pirate Bay: Here to Stay?*, WIRED, March 13, 2006, <http://www.wired.com/science/discoveries/news/2006/03/70358>.

23. *Id.*

24. *Id.*

25. *Bureaucrats Slam Proposed Piracy Law*, THE LOCAL, Oct. 4, 2007, <http://www.thelocal.se/8692/20071004/>.

26. See The Swedish Data Inspection Board, <http://www.datainspektionen.se/english/> (last visited Nov. 3, 2008).

Sweden possesses one of the most developed Internet infrastructures in the world and encourages Internet use by offering a national tax credit to computer purchasers.<sup>27</sup> Promoting Internet use is also a political issue: Internet access for the entire population is a popular campaign premise for Swedish political parties.<sup>28</sup> Nearly 80% of the population is online, a figure that has nearly doubled since 2000.<sup>29</sup>

Perhaps not surprisingly in light of this environment, Sweden is also home to a burgeoning anti-copyright movement and subculture. Sweden even has a political party, Piratpartiet, dedicated solely to the reform of intellectual property law.<sup>30</sup> The country is also home to the anti-copyright “think tank” Piratbyrå<sup>31</sup> and its associated network, The Artliberated Network.<sup>32</sup> Therefore, to many Swedes the Bay represents more than just a downloading website; it symbolizes the country’s robust anti-copyright movement and its commitment to free file sharing.<sup>33</sup> In essence, with a

27. Quinn Norton, *Pirate Bay Bloodied but Unbowed*, WIRED, June 6, 2006, <http://www.wired.com/science/discoveries/news/2006/06/71089>.

28. Mathias King, *The APC European Internet Rights Project Country Report — Sweden*, (2002), at 1, [http://europe.rights.apc.org/c\\_rpt/sweden.html](http://europe.rights.apc.org/c_rpt/sweden.html).

29. INTERNET WORLD STATS USAGE AND POPULATION STATISTICS: SWEDEN (2007), <http://www.internetworldstats.com/eu/se.htm>.

30. See The Pirate Party, [http://www.piratpartiet.se/the\\_pirate\\_party](http://www.piratpartiet.se/the_pirate_party) (last visited Nov. 3, 2008). The Pirate Party’s agenda is described as “[t]he reform of copyright laws, the abolishing of patents and working against installing more regulations, and remove the Data Retention Act, that are seriously threatening citizens’ privacy are the only articles in the Pirate Party agenda.” History and Overview, <http://www.piratpartiet.se/international> (last visited Nov. 3, 2008). It has 3,131,767 members registered on its website. See ThePirateBay.org, <http://thepiratebay.org/about> (last visited Nov. 3, 2008); Quinn Norton, *A Nation Divided Over Piracy*, WIRED, Aug. 17, 2006, <http://www.wired.com/science/discoveries/news/2006/08/71544>;

The Pirate Party has spread to the United States and sought registration as a political party in Utah. See K.C. Jones, *Anti-Copyright Pirate Party Seeks Official Recognition*, INFORMATIONWEEK, Aug. 13, 2007, <http://www.informationweek.com/story/showArticle.jhtml?articleID=201500109>.

31. Piratbyrå, <http://piratbyran.org/> (last visited Nov. 3, 2008).

32. Artliberated, <http://www.artliberated.org> (last visited Nov. 3, 2008). The goal of Artliberated is to “work to change and reform the relationship between the artist and companies, in the public interest of free flow of information and ideas.” About Artliberated.org, <http://www.artliberated.org/?p=about> (last visited Nov. 3, 2008).

33. See Quinn Norton, *A Nation Divided Over Piracy*, WIRED, Aug. 17, 2006, <http://www.wired.com/science/discoveries/news/2006/08/71544>.

Lawyers, academics and pirates agree: File sharing is an institution here. Sweden has faster broadband with deeper penetration than just about

culture that largely regards the Internet as a forum for free exchange, it is no surprise that the legality of file sharing is a debate that has only recently arrived in Sweden.<sup>34</sup>

### *B. BitTorrent: Legally Elusive*

Copyright infringement liability is either direct or secondary. Direct liability attaches to the individual who has engaged in infringing activity<sup>35</sup> while secondary liability holds one party liable for the infringement of other parties.<sup>36</sup> The secondary liability doctrine comes in two forms: contributory infringement and vicarious liability. Contributory infringement is fault-based liability, and therefore some proof of either knowledge of or intent to induce direct infringement is necessary.<sup>37</sup> However, for vicarious liability, knowledge is not an element; rather, courts look to the level of the defendant's control of the infringer's acts and whether the defendant received a financial benefit.<sup>38</sup>

In essence, although the lines between direct infringement, secondary infringement, and vicarious liability are often blurred,<sup>39</sup> secondary liability generally turns on the intent and control of one party over potential copyright

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.

See also Ann Harrison, *supra* note 22.

To international observers, The Pirate Bay's defiant immunity from copyright lawyers is somewhat baffling. But in Sweden, the site is more than just an electronic speak-easy: It's the flagship of a national file-sharing movement that's generating an intense national debate, and has even spawned a pro-piracy political party making a credible bid for seats in the Swedish parliament.

34. Quinn Norton, *Secrets of the Pirate Bay*, WIRED, Aug. 16, 2006, <http://www.wired.com/science/discoveries/news/2006/08/71543?currentPage>.

35. See, e.g., *Baxter v. MCA, Inc.*, 812 F.2d 421, 423 (9th Cir. 1987).

36. See 3 MELVIN B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.04[A][3][a], at 12-89 (1995).

37. "One who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer." *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971); see also *21st Century Copyright Law in the Digital Domain Symposium*, 13 MICH. TELECOMM. & TECH. L. REV. 247, 252-53 (2006).

38. *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs.*, 907 F. Supp. 1361, 1375 (N.D. Cal. 1995).

39. As one district court judge observed, "the lines between direct infringement, contributory infringement and vicarious liability are not clearly drawn . . ." *Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F.Supp. 429, 457-58 (C.D. Cal. 1979).



infringement by others.<sup>40</sup> For example, courts shut down Napster on contributory infringement grounds because plaintiffs demonstrated Napster's knowledge of direct infringement by its users.<sup>41</sup> In addition, vicarious liability was also found because Napster had the right to supervise the infringer's conduct and derived a financial benefit from infringement.<sup>42</sup> Therefore, had Napster merely provided a service while remaining completely ignorant of any infringement, the secondary liability claim may have failed.

In contrast, BitTorrent technology is difficult to challenge under secondary liability theories because it does not require knowledge or intent of the facilitator as clearly as other file sharing technologies, such as the peer-to-peer file sharing utilized by Napster.<sup>43</sup> BitTorrent operates by breaking large files into smaller pieces, much like pieces of a puzzle.<sup>44</sup> When a user searches for a file, BitTorrent finds each piece from other users and simultaneously assembles them into a complete file.<sup>45</sup> BitTorrent technology also forces its users to make files available for others. As soon as a user begins collecting pieces of a file, the BitTorrent client makes these accessible by other users seeking the same file.<sup>46</sup> Thus, the files are derived from several different sources and are constantly shared between numerous BitTorrent users. File sharers find BitTorrent more attractive because downloads are faster, and thus larger files, such as movies, are obtainable in record time.<sup>47</sup>

In essence, as a BitTorrent tracker, the Bay operates much like a search engine. It merely points users to the files, without hosting any actual content on its own servers. BitTorrent is not illegal in Sweden, and the secondary liability doctrine under Swedish law is untested in Swedish

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40. See 3 MELVIN B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.04[A][3][a], at 12-89.

41. *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1020 (9th Cir. 2001).

42. *Id.* at 1022-24.

43. See Bryan H. Choi, Note, *The Grokster Dead-End*, 19 HARV. J. LAW & TECH 393, 402 (2006) (arguing that because BitTorrent is "merely a delivery mechanism" that does not clearly demonstrate intent, liability can only be placed on direct infringers).

44. See Bobbie Johnson, *National: FAQ BitTorrent*, LONDON GUARDIAN, Aug. 25, 2007, at 9.

45. *Id.*

46. See *The Torrent Becomes a Flood*, PERSONAL COMPUTER WORLD, July 12, 2007.

47. See Bobbie Johnson, *National: FAQ BitTorrent*, LONDON GUARDIAN, Aug. 25, 2007, at 9.

courts.<sup>48</sup> The operators of The Pirate Bay not only recognize the legal ambiguity presented by torrent trackers but also rely on it to maintain operation.<sup>49</sup>

## PART II. THE INABILITY OF U.S. LAW TO THWART THE PIRATES

Under United States copyright law as applied in a U.S. jurisdiction, there is little doubt that the Bay would be held liable for infringement under the secondary liability doctrine, especially as articulated in *MGM Studios Inc. v. Grokster, Ltd.*<sup>50</sup> However, U.S. law does not apply. Because the Bay is based in Sweden, under the Berne/TRIPs international copyright protection regime, the law of the country where the infringement allegedly takes place applies. Therefore, Swedish law, not U.S. law, governs the dispute.<sup>51</sup> In addition, even if U.S. law did apply, the Bay's popular following, commercial success, and dedication to maintaining its website—no matter what corner of the world it is forced to host from—demonstrate that more than liability under U.S. law is necessary to stop the Bay's infringing activity.

Traditionally, U.S. copyright laws have been enforced by private lawsuits. Some statutes, such as the No Electronic Theft Law Act,<sup>52</sup> provide for criminal liability for infringement; however most enforcement tends to be through civil suits rather than criminal prosecutions. Perhaps more

48. Quinn Norton, *Pirate Bay Bloodied But Unbowed*, WIRED, June 6, 2006, <http://www.wired.com/science/discoveries/news/2006/06/71089>.

49. According to Mikael Viborg, legal advisor to the Pirate Bay, torrent trackers are perfectly legal under Swedish statutory and case law. Pirate Bay will continue to operate until Swedish laws are changed: "[u]ntil the law is changed so that it is clear that the trackers are illegal, or until the Swedish Supreme Court rules that current Swedish copyright law actually outlaws trackers, we'll continue our activities. Relentlessly." Ann Harrison, *The Pirate Bay: Here to Stay?*, WIRED, Mar. 13, 2006, <http://www.wired.com/science/discoveries/news/2006/03/70358>.

50. 545 U.S. 913, 937 (2005).

51. See Paul Edward Geller, INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 3[1][a][i] (Matthew Bender & Company, Inc. 2007).

52. No Electronic Theft Act, Pub. L. No. 105-147 (1997) (codified in sections of 17 & 18 U.S.C.). See also Karen H. Bernstein, *The No Electronic Theft Act: The Music Industry's New Instrument in the Fight Against Internet Piracy*, 7 UCLA ENT. L. REV. 325 (2000) (discussing criminal liability under the Act); Xiaomin Huang, Peter Radkowski III & Peter Roman, *Computer Crimes*, 44 AM. CRIM. L. REV. 285 (2007) (highlighting federal, state, and international developments in computer-related crime, including the Act).

critically, copyright law enforcement depends on “gatekeeper”<sup>53</sup> liability. Due to the costs associated with pursuing individual infringers, copyright holders tend to sue those who provide the product on a larger scale (the “gatekeepers”), such as book publishers, record manufacturers, and film studios.<sup>54</sup>

In fact, the evolution of case law in the United States, from *Sony Corp. of America v. Universal City Studios*<sup>55</sup> to *Grokster*<sup>56</sup> shows repeated efforts to stretch copyright laws to expand gatekeeper liability, despite challenges presented by the latest developments in technology. What was once a cut-and-dry analysis of when a company could be held liable for contributory infringement is now a complicated debate, with individual privacy rights being balanced against intellectual property rights, a tension evident in *Groskter*.<sup>57</sup>

In *Sony*, copyright owners of television programs brought suit against manufacturers of home video tape recorders alleging that such recorders were used to record copyrighted works appearing on televisions and thus infringed on the copyrights.<sup>58</sup> The copyright holders argued the manufacturers were liable for the infringement on the theory that, but for the sale and marketing of such recorders, the infringement would have not occurred.<sup>59</sup> *Sony* recognized the delicate balancing of interests between technological development and intellectual property, a pervasive theme in this line of case law.<sup>60</sup> However, the Court held that there is no liability when one

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53. Tim Wu, *When Code Isn't Law*, 89 VA. L. REV. 679, 711 (2003).

54. *Id.* See also Jane C. Ginsburg, *Putting Cars on the "Information Superhighway": Authors, Exploiters, and Copyright in Cyberspace*, 95 COLUM. L. REV. 1466, 1488 (1995) (discussing why copyright enforcement is rarely against individuals).

55. 464 U.S. 417 (1984). In *Sony*, the broadcasting industry attempted to hold *Sony* contributorily liable for copyright infringement because its new betamax video recorder enabled end-users to videotape television. *Id.* at 456. Although the claim was ultimately unsuccessful, *Sony* represents one of many attempts to hold the gatekeeper liable instead of the individual.

56. 545 U.S. 913 (2005).

57. “The tension between the two values is the subject of this case, with its claim that digital distribution of copyrighted material threatens copyright holders as never before, because every copy is identical to the original, copying is easy, and many people (especially the young) use file-sharing software to download copyrighted works. This very breadth of the software’s use may well draw the public directly into the debate over copyright policy.” *Id.* at 928-929.

58. 464 U.S. 417, 419-425 (1984).

59. *Id.* at 420.

60. *Id.* at 456.

markets technology that is “capable of substantial non-infringing uses.”<sup>61</sup> Therefore, Sony was protective of technological development, so long as the technology had the potential for substantial non-infringing uses.

The defendants in *Grokster* argued that Sony should be applied to legitimize peer-to-peer file sharing software.<sup>62</sup> Unlike Sony, the Court did not devote its primary focus to the technology’s capabilities of non-infringing use. Rather, *Grokster* held that two peer-to-peer file sharing software providers could be contributorily liable because they had extensive knowledge of its users’ infringements, they actively targeted infringers, and they made no attempt to filter copyrighted files or diminish copyright infringements.<sup>63</sup> The Court articulated the test for contributory infringement as “intentionally inducing or encouraging direct infringement” and the test for vicarious infringement as “vicariously profiting from direct infringement while declining to exercise a right to stop or limit it.”<sup>64</sup> Each distributor’s intent to promote infringement was demonstrated by its efforts to target former users of Napster, a similar service that had lost most of its users after it was found liable for copyright infringement.<sup>65</sup> Therefore, *Grokster* held that the distributors could be liable for contributory infringement, regardless of the software’s lawful uses, if the software was distributed with the primary, even if not exclusive, purpose of promoting its ability to infringe copyright.<sup>66</sup> Intent, and not knowledge, was sufficient to establish contributory liability, despite the capability for non-infringing uses.<sup>67</sup>

There is little doubt that under the *Grokster* standard, the Bay would be liable for contributory infringement. The Bay intentionally induces direct infringement by providing its service and refusing to monitor the presence of copyrighted

61. *Id.*

62. 545 U.S. at 922.

63. *Id.* at 926-927.

64. *Id.* at 930.

65. *Id.* at 925-927. See *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff’d in part, rev’d in part*, 239 F.3d 1004 (Cal. App. 9th 2001).

66. *Grokster*, 545 U.S. at 941. However, the Court warned that liability depends on more than just mere knowledge that a device could be used to infringe; active steps must be taken to foster infringement. *Id.* at 937-38.

67. “In the Supreme Court’s words, contributory liability is now not based on knowledge, but on intent.” *21st Century Copyright Law in the Digital Domain Symposium*, 13 MICH. TELECOMM. & TECH. L. REV. 247, 253 (2006).

content. It also encourages direct infringement by posting legal threats and ridiculing those who request copyright compliance.<sup>68</sup> In addition, intent is clearly demonstrated by the Bay's logo: a pirate ship. However, if the pirate theme is not a sufficiently blatant indication of the Bay's intent, its disclaimer of responsibility for any copyrighted material being transmitted and its message to users that "[a]ny complaints from copyright and/or lobby organizations will be ridiculed and published at the site"<sup>69</sup> clearly shows the Bay will not take any affirmative steps to filter copyrighted content from its service.

Vicarious liability is a little less obvious since the Bay operates through donations only and does not charge for its services.<sup>70</sup> Therefore, whether the Bay enjoys a financial benefit from infringement is questionable.<sup>71</sup> Nevertheless, with the overwhelming evidence supporting contributory liability and inducement, it is clear that under U.S. law, the Bay would have long been put out of business.

Despite this, contributory liability is losing favor among many scholars who argue that it is not a viable doctrine because of its chilling effect on technological development.<sup>72</sup> Although the *Grokster* Court found potential liability, it could not ignore the obvious tension between copyright protection and technological development.<sup>73</sup> The Court sidestepped the

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68. *Supra* note 11.

69. About The Pirate Bay, <http://thepiratebay.org/about> (last visited Nov. 3, 2008).

70. Although the Bay does not charge for its service, it has admitted to accepting money from a politically-motivated sponsor. See Jan Libbega, *The Pirate Bay admits links with right-wing benefactor*, THE REGISTER, May 7, 2007, [http://www.theregister.co.uk/2007/05/07/pirate\\_bay\\_accepted\\_right\\_wing\\_money/](http://www.theregister.co.uk/2007/05/07/pirate_bay_accepted_right_wing_money/). In addition, the Bay displays advertisement banners on their website, including a Wal-Mart ad. See Michael Learmonth, *Wal-Mart ads target pirates: Banners placed next to illegal download searches*, VARIETY, Jan. 10, 2007, <http://www.variety.com/article/VR1117957046.html?categoryid=18&cs=1>; Adam Ewing, *Pirate bay ads could lead to clampdown*, THE LOCAL, July 5, 2006, <http://www.thelocal.se/4254/20060705/>.

71. For a discussion of the vicarious liability doctrine, see Douglas Lichtman and William Landes, *Indirect Liability for Copyright Infringement: An Economic Perspective*, 16 HARV. J. L. & TECH 395 (2003).

72. See, e.g., Brief for Sixty Intellectual Property and Technology Law Professors and the United States Public Policy Committee of the Association for Computing Machinery as Amici Curiae Supporting Respondents, *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (No. 04-480).

73. "The more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the tradeoff." *Grokster*, 545 U.S. at 928.

issue, but it will inevitably be forced to once again balance copyright against technological innovation when yet another novel method of infringement is presented to it. At what point must copyright protection give way to technological development?

Absent secondary liability, a direct infringement theory would have to focus on the original infringers—the individual downloaders. However, BitTorrent technology, due to its disaggregated, decentralized nature, is especially challenging to link back to the original offender.<sup>74</sup> Unlike file sharing technologies of the past, there is no centralized server that houses the copyrighted content. Similarly, because files are broken into countless pieces and reassembled instantaneously from countless users, liability is no longer as obvious as it once was with peer-to-peer file sharing. In addition, even if copyright holders are somehow able to target individual infringers, an onslaught of lawsuits against individuals, especially if they are sympathetic, could turn public opinion against copyright efforts and even encourage greater infringement.<sup>75</sup> Therefore, direct infringement liability for BitTorrent users is not only unrealistic but could also have the opposite effect of increasing infringement.

A third possibility is political pressure brought by the United States on Sweden. The Bay, however, is fully prepared for such a challenge from the United States. Should the U.S. somehow convince Sweden to shut the Bay down, the pirates are ready to re-launch in another corner of the world.<sup>76</sup> Thus, the Bay is an international contender, and more than just a United States judgment is needed to stop it. In addition, the Bay does not operate its service to earn a quick buck. Rather, its founders are invested in what they view as a philosophical and ideological war over intellectual property

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74. See Bryan H. Choi, Note, *The Grokster Dead-End*, 19 HARV. J. L. & TECH 393 (2006).

75. See *infra*, note 100.

76. The Bay has a backup plan: "The various servers' locations are obscured behind a load balancer configured to lie, the crew says. Once the failsafe is triggered, a determined adversary with an international team of litigators might be able to track down the servers, but by that time -- according to the plan -- the pirates will have deployed mirrors in even more countries. In theory, the corporate lawyers will eventually tire of this game of international copyright Whack-A-Mole." Quinn Norton, *Secrets of the Pirate Bay*, WIRED, Aug. 16, 2006, <http://www.wired.com/science/discoveries/news/2006/08/71543?currentPage=1>.

rights and freedom of expression.<sup>77</sup> A group that steadfastly believes in its cause will not abandon it just because a larger nation flexes its muscles; if anything, United States interference may only heighten its dedication.<sup>78</sup> Therefore, liability under United States law is not enough; an international solution is necessary.

### PART III. IF YOU CAN'T BEAT 'EM, JOIN 'EM

The war against piracy, with the multi-million dollar livelihood of the entertainment industry at stake, has turned into a guerilla fight with both sides employing novel weapons. While the entertainment industry uses robots to crawl across the Internet and detect infringement,<sup>79</sup> the Bay hacks into its rivals' websites.<sup>80</sup> The following Section examines possible solutions to the war against piracy and argues why the entertainment industry's adoption of piracy into a business model is ultimately the most logical solution.

#### A. Private Anti-Piracy Firms

Private enforcement groups, such as MediaDefender,<sup>81</sup>

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77. Bay founder Peter Sunde reflected this view of a battle against the U.S. when he told The Guardian Unlimited: "The US government is losing popularity every day in Europe, and people don't want to see us give in to them." Bobbie Johnson, *How Three Swedish Geeks Became Hollywood's Number One Enemy*, GUARDIAN UNLIMITED, Aug. 25, 2007, at 9. Another Bay administrator described the ideology behind the Bay: "All of us who run the [the Bay] are against the copyright laws and want them to change . . . . We see it as our duty to spread culture and media. Technology is just a means to doing that." Ann Harrison, *The Pirate Bay: Here to Stay?*, WIRED, March 13, 2003, <http://www.wired.com/science/discoveries/news/2006/03/70358>.

78. In response to the Swedish government's intent to press charges against The Bay, Tobias Andersson of The Pirate Bay said, "Whatever the outcome, we will continue. If we are outlawed in Sweden we will continue elsewhere. There will be no downtime." See *Prosecutor to Press Charges Against Pirate Bay*, THE LOCAL, May 4, 2007, <http://www.thelocal.se/7205/20070504/>.

79. For a discussion of automated web crawlers, see Sonia K. Katyal, *The New Surveillance*, 54 CASE W. RES. 297, 331 (2003).

80. The Bay recently took over the website of the International Federation of the Phonographic Industry ("IFPI"), one of the loudest voices in the war against piracy. The IFPI filed a complaint with the World Intellectual Property Organization against the Bay for "cyber-squatting" in bad faith. James Savage, *Pirates Take Over Arch-enemy's Website*, THE LOCAL, Oct. 16, 2007, <http://www.thelocal.se/8806/20071016/>.

81. MediaDefender, <http://www.mediadefender.com/> (last visited Nov. 3, 2008). See also Nate Anderson, *Peer-to-peer Poisoners: A Tour of MediaDefender*, ARS TECHNICA, March 18, 2007,

Web Sheriff<sup>82</sup> and MediaSentry,<sup>83</sup> specialize in countermeasures to Internet piracy. Although they present technologically novel ways of combating pirates, their potential as a permanent solution is limited by the dubious legality of their techniques and the sophistication and dedication of their targets.

Private firms generally use four anti-piracy techniques: decoying, spoofing, swarming, and interdiction. Decoying is the use of blank files or files containing only a movie trailer inserted into file sharing networks.<sup>84</sup> These files look just like the real thing but do not contain the sought-after copyrighted content.<sup>85</sup> Therefore, according to MediaDefender, although this solution does not completely eradicate piracy, it strongly discourages it because it may be easier to “find a needle in a hay stack” than locate a functional file among a sea of decoys.<sup>86</sup> Spoofing is designed to derail a search for a particular file and direct the file seeker to a nonexistent location.<sup>87</sup> Swarming involves placing chunks of files that contain static or nothing into BitTorrent networks so the download process is slowed by the dummy file.<sup>88</sup> Interdiction prevents files from being distributed by slowing the spread of new media files within the first few days of the file’s leak.<sup>89</sup> Yet another technique involves enabling the download to

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<http://arstechnica.com/articles/culture/mediadefender.ars>.

82. Web Sheriff, <http://www.websheriff.com/websheriff/> (last visited Nov. 3, 2008). Web Sheriff president relies on “relationship building” with BitTorrent tracking websites to combat piracy. See Greg Sandoval, *Web Sheriff Doing it Different than MediaDefender*, CNet News Blog, [http://www.news.com/8301-10784\\_3-9784193-7.html](http://www.news.com/8301-10784_3-9784193-7.html) (Sept. 25, 2007, 7:17 EST). The article notes that Web Sheriff has “civil relationships with everyone except The Pirate Bay.” *Id.*

83. MediaSentry, <http://www.mediasentry.com/index3.html> (last visited Nov. 3, 2008). At least two European courts have held that MediaSentry’s data gathering techniques violate European privacy laws. See Jan Libbenga, *File-swappers’ Identities Protected by Dutch Court*, THE REGISTER, July 14, 2006, [http://www.theregister.co.uk/2006/07/14/fileswappers\\_protected/](http://www.theregister.co.uk/2006/07/14/fileswappers_protected/).

84. See MediaDefender, Inc., <http://www.mediadefender.com/> (last visited Nov. 3, 2008); see also Danny Bradbury, *Can Stuck Torrents Beat Pirates?*, THE GUARDIAN, Apr. 12, 2007, <http://www.guardian.co.uk/technology/2007/apr/12/piracy.newmedia>.

85. *Id.*

86. Nate Anderson, *Peer-to-peer Poisoners: a Tour of MediaDefender*, ARS TECHNICA, March 18, 2007, <http://arstechnica.com/articles/culture/mediadefender.ars>.

87. *Id.*

88. *Id.*

89. *Id.*



proceed to 97% and then never releasing the remaining parts.<sup>90</sup> Thus, all these techniques are designed to frustrate users into seeking legitimate sources of sought-after content, at least long enough for a profit to be made by media producers.<sup>91</sup>

However, the long-term effectiveness of these methods is doubtful. As users become aware of the defunct file, they flag it so other users know to avoid it.<sup>92</sup> In addition, the Bay has blocked commercial users from its tracker if they do not obtain prior authorization.<sup>93</sup> Thus, if private firms cannot gain access to infringement websites, they cannot use their anti-piracy tactics. Likewise, because many Internet pirates are sophisticated hackers, anti-piracy firms are susceptible to interference by pirates skilled at hacking. Hackers have accessed MediaDefender's website at least three times in an attempt to gain incriminating information against the firm.<sup>94</sup> Therefore, because sophisticated, dedicated, computer-savvy hackers operate most infringement websites, the effectiveness of private enforcement firms is limited.

In addition, the legality of the methods used by private enforcement services is questionable. Specifically, a MediaDefender's employee's leaked e-mails<sup>95</sup> revealed

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90. See Danny Bradbury, *Can stuck torrents beat pirates?*, THE GUARDIAN, Apr. 12, 2007,

<http://www.guardian.co.uk/technology/2007/apr/12/piracy.newmedia>.

91. *Id.*

92. *Id.*

93. See Usage policy for The Pirate Bay tracker system, *available at* <http://thepiratebay.org/policy> (last visited Nov. 3, 2008). For a discussion of other counter-measures used by The Bay, see *The Pirate Bay Wants MediaDefender to Walk the Plank to Bankruptcy*, TorrentFreak, <http://torrentfreak.com/the-piratebay-wants-mediadefender-to-walk-the-bankruptcy-plank/> (July 4, 2007).

94. See Kim Zetter, *Hackers Smack Anti-Piracy Firm Again and Again*, WIRED, Sept. 18, 2007, <http://www.wired.com/politics/security/news/2007/09/mediadefender>.

95. The leak appears to be the result of hackers commissioned by, MediaDefender-Defenders to access the employee's Gmail account. A search on the owner of the domain name for MediaDefender-Defenders.com reveals that The Pirate Bay co-founder, Frederick Neij of Stockholm, Sweden is the owner. See the Regfish.com domain name report, *available at*

<http://www.networksolutions.com/whois/results.jsp?domain=mediadefender-defenders.com> (last visited Nov. 3, 2008). The leaked e-mails contained information about a secret video upload service, MiiVi, that provided access to downloads of copyrighted content. Pro-piracy groups, including The Pirate Bay, allege that MiiVi was used to entrap copyright infringers. In addition, the e-mails also referenced agreements to supply information about users of pornographic content to the New York

questionable tactics, bringing the company under the media's microscope.<sup>96</sup> The leak prompted the Bay to take its own action against MediaDefender, filing a complaint with the Swedish police against Swedish subsidiaries of major music and movie studios that allegedly employed MediaDefender.<sup>97</sup> The allegations included "infrastructural sabotage, denial of service attacks, hacking, and spamming."<sup>98</sup>

Even if such tactics are legal, they are problematic. Because private firms are unregulated and also have an economic incentive to prevent infringement, the potential for over-enforcement exists.<sup>99</sup> With overzealous pirate hunters, respect for privacy could be cast aside in the heat of the pursuit. Thus, as the legal battle suggests, the methods of private anti-piracy firms are not clearly legal and raise privacy concerns.

### *B. United States Legal Reform*

Implementing reform in the United States would not prevent international infringers, but it may at least curb domestic infringement. By making copyright infringement a more serious offense in the United States, domestic infringers may be less eager to patronize websites such as the Bay. Perhaps the most obvious method of raising the severity of an

Attorney General's office. See Ryan Paul, *Leaked Media Defender e-mails Reveal Secret Government Project*, ARS TECHNICA, Sept 16, 2007, <http://arstechnica.com/news.ars/post/20070916-leaked-media-defender-e-mails-reveal-secret-government-project.html>. MediaDefender denied the MiiVi allegations. See Jacqui Cheng, *MediaDefender denies entrapment accusations with fake torrent site*, ARS TECHNICA, (July 6, 2007), <http://arstechnica.com/news.ars/post/20070706-mediadefender-denies-entrapment-accusations-with-fake-torrent-site.html>.

96. See Greg Sandoval, *MediaDefender is a Wake-up Call for Entertainment Sector*, CNet News Blog, Sept. 20, 2007, [http://www.news.com/8301-10784\\_3-9782192-7.html](http://www.news.com/8301-10784_3-9782192-7.html).

97. See John Leyden, *Pirate Bay Sues Media Giants for 'Sabotage'*, THE REGISTER, Sept. 24, 2007, [http://www.theregister.co.uk/2007/09/24/pirate\\_bay\\_counterstrike/](http://www.theregister.co.uk/2007/09/24/pirate_bay_counterstrike/). For an interview with a Pirate Bay administrator describing The Pirate Bay's view of the lawsuit, see Posting of Ernesto to TorrentFreak, <http://torrentfreak.com/the-piratebay-details-charges-070926/> (last visited Nov. 3, 2008).

98. *Id.* See also *Sweden Pirate Bay files complaint vs MediaDefender*, REUTERS UK, Sept. 24, 2007, <http://uk.reuters.com/article/mediaNews/idUKN2431401520070924?pageNumber=1>.

99. "[T]he problem of piracy has led some private entities to respond even more forcefully than necessary, seeking to destroy not only the peer-to-peer networks that have sprouted across the Internet, but the very boundaries of privacy, anonymity, and autonomy in cyberspace." Katyal, *supra* note 77, at 339.

infringement violation is to increase criminal penalties. Jail sentences for infringers would certainly send a deterrent message, as would larger fines, or the destruction of offenders' computers.<sup>100</sup>

But would the penalty fit the crime? Copyright infringement is a serious offense, but it rarely deserves a jail sentence<sup>101</sup> or thousands of dollars in fines.<sup>102</sup> It seems fundamentally unfair to subject a person who downloaded his favorite new song to the same sentence as someone who committed a more dangerous crime, such as driving while intoxicated. In addition, culpability is not quite as obvious when the violator of the law is not some hard-edged felon but a twelve-year-old girl<sup>103</sup> or a seventy-one-year-old

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100. Although the destruction of one's personal property raises obvious constitutional concerns, Senator Orin Hatch, R-Utah, suggested just that during a Senate Judiciary Committee hearing on copyright abuse. See *Senator Takes Aim at Illegal Downloads*, USA TODAY, June 19, 2003, [http://www.usatoday.com/tech/news/techpolicy/2003-06-18-hatch-wants-computers-dead\\_x.htm](http://www.usatoday.com/tech/news/techpolicy/2003-06-18-hatch-wants-computers-dead_x.htm).

101. Representative John Carter, R-Texas, suggested jailing college students who downloaded copyrighted material to send a clear message that piracy is a serious offense. See Katie Dean, *Marking File Traders as Felons*, WIRED, March 19, 2003, <http://www.wired.com/entertainment/music/news/2003/03/58081>.

102. A \$222,000 judgment was recently awarded against a mother of two who makes only \$36,000 a year. She is currently appealing it. See *Judge Asked to Reconsider \$222,000 Award*, THE NEW YORK TIMES, Oct. 15, 2007, [http://www.nytimes.com/aponline/technology/AP-Downloading-Music.html?\\_r=1&oref=slogin](http://www.nytimes.com/aponline/technology/AP-Downloading-Music.html?_r=1&oref=slogin).

103. Twelve-year-old Brianna LaHara was sued by the Recording Industry of America ("RIAA") for downloading songs through the now defunct file sharing service Kazaa. Her mother paid \$29.99 for a "subscription," which led the family to believe their downloads were perfectly legal. See *Twelve Year Old Girl Sued for Music Downloading*, FOX NEWS, Sept. 9, 2003, <http://www.foxnews.com/story/0,2933,96797,00.html>. The press portrayed the RIAA as monsters, suing helpless little Brianna (who acquired over 1,000 files illegally). See Nate Mook, *RIAA Sues 261, Including 12-Year-Old Girl*, BETANEWS, Sept. 9, 2003, <http://www.betanews.com/article/1063159635>. LaHara's mother eventually settled with the RIAA for \$2,000, which disgusted many media outlets. See Ashley Vance, *RIAA Keeps 12 Year Old Girl Quiet with \$2,000 Bill*, THE REGISTER, Sept. 10, 2003. "The pigopolists no doubt prepared a contingency plan should any toddlers, pre-teens or bedridden seniors get caught in their web of lawsuits." *Id.*; Richard Menta, *The RIAA Settles Fast With 12-year-old Trader*, MP3NEWSWIRE.NET, Sept. 10, 2003, [http://www.mp3newswire.net/stories/2003/brianna\\_laHara.html](http://www.mp3newswire.net/stories/2003/brianna_laHara.html). "The headlines might well have said 'RIAA Molests Children' rather than 'RIAA Sues 12-year old.' That was the maelstrom brought about by the national media coverage when pre-teen Brianna LaHara received notice that the record industry lobby was suing her for stealing." *Id.* See also John Newton, *Students Help Each Other Defeat RIAA*, AGORA VOX, Oct. 15, 2007, [http://www.agoravox.com/article.php3?id\\_article=6971](http://www.agoravox.com/article.php3?id_article=6971).

grandfather.<sup>104</sup>

Another possible domestic legal reform is to shift liability to the online service provider.<sup>105</sup> The Digital Millennium Copyright Act (“DMCA”)<sup>106</sup> creates a safe harbor for an online service provider<sup>107</sup> that does not have prior notice of the infringing material.<sup>108</sup> However, the Act could be modified to remove the safe harbor and thus expose service providers to greater liability for failure to thwart infringement. A service provider is in a better position to prevent infringement than individual file-sharers since it has more control over a greater volume of information transmission than the individual subscriber.<sup>109</sup> Likewise, service provider liability is compatible with U.S. copyright law’s history of imposing liability on the gatekeeper.<sup>110</sup>

Nonetheless, requiring service providers to actively

104. Durwood Pickle, 71, was also targeted by the RIAA’s onslaught of lawsuits. He claimed his grandchildren used his computer when they visited him. See *Music Firms Target 12-year-old*, BBC NEWS, Sept. 10, 2003, <http://news.bbc.co.uk/1/hi/entertainment/music/3096340.stm>.

105. See I. Trotter Hardy, *The Proper Legal Regime for “Cyberspace,”* 55 U. PITT. L. REV. 993, 1042-46 (1994) (arguing for strict ISP liability); *contra* Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 CARDOZO ARTS & ENT. L.J. 345, 399-410 (1995) (opposing ISP liability under existing copyright law).

106. 17 U.S.C.S. § 512 (2008).

107. “Service provider” is defined as “an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received” and “a provider of online services or network access, or the operator of facilities therefore.” 17 U.S.C.S. § 512(k)(1)(A)-(B) (2007).

108. See 17 U.S.C.S. § 512(c)(1)(A).

109. In August of 2008, Italy attempted to deal with the Bay by requiring service providers to block access to the Pirate Bay website. The Bay responded by arguing such a block was an assault on freedom of speech and also encouraged Italian users to bypass the block by visiting the site from an alternate IP address. Phillip Willan, *Judge Blocks Access to Pirate Bay*, PCW BUSINESS CENTER, Aug. 16, 2008, [http://www.pcworld.com/businesscenter/article/149904/judge\\_blocks\\_access\\_to\\_pirate\\_bay.html](http://www.pcworld.com/businesscenter/article/149904/judge_blocks_access_to_pirate_bay.html). Since the judge’s decision, the website has only become more popular, with the Bay reporting a five percent increase in Italian web traffic. Chris Snyder, *Pirate Bay Block Backfires in Italy...Because of the Media?*, WIRED, Aug. 15, 2008, <http://blog.wired.com/business/2008/08/pirate-bay-bloc.html>. In addition, as of August 21, 2008, the Bay is also appealing the Italian court’s order. Jason Gregory, *The Pirate Bay Files Appeal Against Italian Government ISP Blockade*, GIGWISE.COM, Aug. 21, 2008, <http://www.gigwise.com/news/45532/the-pirate-bay-files-appeal-against-italian-government-isp-blockade>.

110. See 3 NIMMER & NIMMER, *supra* note 39.

monitor their users' activities raises obvious privacy concerns.<sup>111</sup> Most people surf the Internet with at least a modicum of anonymity; enabling service providers to supervise their subscribers' actions removes the cloak and exposes that person's communications and personal files. Although this monitoring would be by private entities and not the government itself, such surveillance goes against a long, deeply ingrained tradition of privacy and could have a chilling effect on free speech. If Americans are hesitant to condone surveillance in the interest of national security,<sup>112</sup> it is highly doubtful that surveillance for copyright protection will be considered acceptable.

Congress has proposed a variety of other novel solutions to the piracy problem, and most focus on what is viewed as the largest group of infringers: college students.<sup>113</sup> One proposed bill would require U.S. universities to aggressively combat piracy in order to stay off a "blacklist"<sup>114</sup> of the top 25 piracy schools. Schools on the blacklist would be placed on probation, pending a review of the U.S. Secretary of Education, until they adopted mandatory technological measures designed to block piracy.<sup>115</sup> The schools would be unable to obtain federal funds until they complied.<sup>116</sup> The University lobbyists caused the bill to be withdrawn,<sup>117</sup> but such a proposal raises significant questions about the extent of control the entertainment industry lobby has over Congress

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111. See Katyal, *supra* note 77, at 340 (arguing that monitoring services implemented by internet service providers have exacerbated privacy concerns).

112. See, e.g., Dan Eggen, *Bush Authorized Domestic Spying: Post-9/11 Order Bypassed Special Court*, THE WASH. POST, Dec. 16, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/16/AR2005121600021.html>.

113. See Emily Cohn, *RIAA Targets College Students*, THE CORNELL DAILY SUN, Feb. 28, 2008, available at <http://cornellsun.com/node/28168> (citing research indicating "over half of college students illegally download music and movie files" and quoting Cary Sherman, president of RIAA as stating, "All the research we've seen indicates college kids as the most prolific illegal downloaders.").

114. The blacklist would be created based on Motion Picture Association of America and Recording Industry Association of America allegations of infringement. See Ken Fisher, *Bill would force "top 25 piracy schools" to adopt anti-P2P technology*, ARS TECHNICA, July 23, 2007, <http://arstechnica.com/news.ars/post/20070723-bill-would-force-top-25-piracy-schools-to-adopt-anti-p2p-technology.html>.

115. *Id.*

116. *Id.*

117. See Declan McCullagh, *Universities win Senate fight over anti-P2P proposal*, CNET NEWS BLOG, July 24, 2007, [http://www.news.com/8301-10784\\_3-9749071-7.html](http://www.news.com/8301-10784_3-9749071-7.html).

and the federal government; the proposal would make government action contingent upon the receipt of written complaints from copyright holders (mainly the Motion Picture Association of America and the Recording Industry Association of America).<sup>118</sup>

The investigatory practices of the entertainment industry are already questionable, and the lack of governmental control over the process raises privacy and entrapment issues.<sup>119</sup> In addition, universities are already arguably underfunded; the wisest use of their resources is probably not to track the every digital move of their students. Even more important, there is a conflict with the core value of dissemination of knowledge and its restriction by these practices. These anti-piracy practices would restrict not only movies such as Spiderman, but also documentaries and other valuable media. Finally, this proposal has one glaring flaw: it targets only a small group of infringers, and then for only a limited period of time. Once she graduates, the student is free to resume infringement activities, as she is now out of the law's jurisdiction. Therefore, besides the potential for a witch-hunt based solely on the entertainment industry's allegations of infringement, the bill's limited scope hinders its potential as a lasting solution in the war against piracy.

In essence, United States legal reform to prevent copyright infringement is plagued by privacy issues and further deterred by a culture that does not regard file sharing as an evil deserving of strict punishment. In addition, due to the fluidity of media, infringement is an international issue that transcends national boundaries; it simply cannot be completely solved by United States legislation alone. Therefore, an international solution that tackles piracy from all corners of the world is necessary.

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118. In the wake of the bill proposal, at least one university on the "Top 25" list has completely banned peer-to-peer software from its networks. See Eric Bangeman, *Schools take wait-and-see approach after Ohio U bans P2P traffic*, ARS TECHNICA, April 26, 2007, <http://arstechnica.com/news.ars/post/20070426-schools-take-wait-and-see-approach-after-ohio-u-bans-p2p-traffic.html>.

119. The RIAA has been sued for using illegal investigatory practices. See Ken Fisher, *RIAA sued for using illegal investigatory practices*, ARS TECHNICA, July 4, 2007, <http://arstechnica.com/news.ars/post/20070704-riaa-sued-for-using-illegal-investigatory-practices.html>. In its overzealous efforts, the RIAA has even sued a dead person! Andrew Orlowski, *RIAA Sues the Dead*, THE REGISTER, Feb. 5, 2005, <http://arstechnica.com/news.ars/post/20070704-riaa-sued-for-using-illegal-investigatory-practices.html>.

### C. Consumer Education

Rather than treat file sharers as criminals, the entertainment industry, the government, and even universities<sup>120</sup> could attempt to educate the consumer about the ramifications of illegal downloads. The average consumer is not fully informed about copyright laws and what constitutes a violation. In addition, most people fail to realize the staggering costs associated with stealing music. Instead of expending thousands of dollars on lawsuits, the entertainment industry could instead refocus its efforts into infomercials, advertisements, and other means of spreading the message.

However, some, such as the Bay operators, are fundamentally opposed to intellectual property laws. To these people, the message will most likely fall on deaf ears. Likewise, neither the media giant nor the multimillionaire artist is a very sympathetic figure. Therefore, consumer education may change the behavior of some individuals but will prove ineffective on a larger scale.

### D. International Legal Reform

Since the piracy problem transcends national lines, international legal reform appears to be the only viable solution. One of the first international treaties to address intellectual property rights was the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS")<sup>121</sup> in

120. At least one university is integrating infringement education with its freshman orientation program. See Benny Evangelista, *Download Warning 101: Freshman Orientation this Fall to Include Record Industry Warnings Against File Sharing*, SAN FRANCISCO CHRONICLE, Aug. 11, 2003, <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2003/08/11/BU221002.DTL>.

Most universities have anti-infringement policies that could result in discipline through the university judicial system for a violator. See UC Commitment to Copyright Law, <http://www.ucop.edu/irc/policy/copycommit.html> (last visited Nov. 3, 2008) (University of California); Rutgers Copyright Information, <http://ruweb.rutgers.edu/copyright.shtml> (last visited Nov. 3, 2008) (Rutgers University). Some universities take a more educational approach to their user policies and include relevant information about the law. See, e.g., URHNet Copyright Policy, <http://www.housing.uiuc.edu/technology/URHnetsecurity/Filessharing/copyright.htm> (last visited Nov. 3, 2008) (University of Illinois).

121. Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments -- Results of the Uruguay Round, Apr. 15, 1994, 1869 U.N.T.S. 299 (1994), available at

1994. TRIPS was an effort by the World Trade Organization to establish a minimum threshold of protection that each government must afford to the intellectual property of fellow WTO members.<sup>122</sup> However, because much of it focused on bootleg recordings and public performances, the emergence of the Internet presented new issues that TRIPS was unequipped to deal with. In order to enhance the TRIPS agreement, the World Intellectual Property Organization (“WIPO”) introduced the Copyright Treaty<sup>123</sup> and Performances and Recordings Treaty,<sup>124</sup> which were adopted by the WIPO Diplomatic Conference in Geneva in 1996; they attempted to sweep computer programs and databases under the umbrella of copyright protection.

Despite these treaties, international enforcement continues to be a challenge,<sup>125</sup> especially in a nation such as Sweden where file sharing is embraced as a cultural norm. Likewise, even if international enforcement could be strengthened, the Bay has expressed its willingness to relocate at a moment’s notice<sup>126</sup> and has even considered buying its own island so it could operate comfortably in its own jurisdiction.<sup>127</sup> Finally, the wording and doctrines utilized by international treaties are subject to the same weaknesses as U.S. law: as they strengthen their protection, technology will continue to develop around the legal contours in order to outmaneuver the law. Therefore, an international

[http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm).

122. See WTO.org, Understanding the WTO - Intellectual Property: Protection and Enforcement,

[http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm7\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm) (last visited Nov. 3, 2008).

123. WIPO Copyright Treaty, Dec. 20, 1996, S. TREATY DOC. No. 105-17, 36 LL.M. 65 (1997), available at

<http://www.wipo.int/treaties/en/ip/wct/index.html>.

124. WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. TREATY DOC. No. 105-17, 36 LL.M. 76 (1997), available at

[http://www.wipo.int/treaties/en/ip/wppt/trtdocs\\_wo034.html](http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html).

125. See Greg Piper, *Neutrality Rules Would Cripple Media Industry, Says Viacom CEO*, WASH. INTERNET DAILY, Oct. 3, 2007, LexisNexis (discussing the challenges associated with international enforcement).

126. See *supra* note 16. See also David Kravets, *Pirate Bay Says It Can’t Be Sunk, Servers Scattered Worldwide*, WIRED, February 1, 2008, <http://blog.wired.com/27bstroke6/2008/02/the-pirate-bay.html>. (“[T]he site has set up a clandestine, double-blind operation with its servers spread throughout the world -- and out of reach of the Swedish authorities.”).

127. See *Pirate Bay Ditches Bid for Own Nation*, THE LOCAL, Feb. 22, 2007, <http://www.thelocal.se/6496/20070222/>.



agreement is not the most viable solution because of enforcement issues and the Bay's ability to relocate in a country that is not a signatory.

### *E. Piracy as a Business Model*

Perhaps in recognition of the inevitability of piracy, some entertainment companies have integrated piracy into their business models. A business model that accepts and adapts to recognize piracy, while also targeting the market with innovative new products that offer inexpensive, legitimate alternatives, is an international solution that neither discourages technological development nor invades privacy interests. Therefore, piracy as a business model is the most promising weapon in the war against the Bay.

One of the best examples of a legitimate alternative to illegal downloads is iTunes, which revolutionized music sales by selling albums completely online, usually at a discounted price. Not only do iTunes albums often include "extras" available exclusively from iTunes, such as short films that feature an interview with the artist, but most also come with a "digital booklet"—a PDF version of the customary CD insert, containing photographs and lyrics.<sup>128</sup> In addition, iTunes has employed several other strategies to make it one of the most popular sources of downloads:<sup>129</sup> it paired with Ticketmaster to offer pre-sale deals on ticket prices;<sup>130</sup> it teamed up with Starbucks to allow coffee enthusiasts that enjoy the store's background music to instantly download it

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128. See, e.g., Jim Welte, *Digital Digest: Sony, Dylan & iTunes, Yahoo Music, DMG: iTunes, Bob Dylan Link up for Album-Concert Promotion*, MP3.com, Aug. 8, 2006, <http://www.mp3.com/news/stories/5748.html> (describing the exclusive digital booklet accompanying the purchase of Bob Dylan's *Modern Times* album on iTunes).

129. iTunes ranks third behind Wal-Mart and Best Buy for top music retailer in the U.S. Peter Cohen and Jason Snell, *Apple Event - Live Coverage*, MACWORLD, Sept. 5, 2007, <http://www.macworld.com/news/2007/09/04/livecoverage/index.php>.

130. Fans that pre-order albums are provided a secret code by Ticketmaster that enables them to participate in pre-sales of tickets on Ticketmaster.com. See Jim Dalrymple, *Apple Sells Red Hot Chili Peppers Concert Tickets on iTunes*, MACWORLD, April 4, 2006, <http://www.macworld.com/news/2006/04/04/redhot/index.php>. Ticketmaster will also offer fans a free music download with every concert ticket purchased. See Steven Schwankert, *Ticketmaster Offers Ticket Buyers Free iTunes Songs*, NETWORK WORLD, Feb. 7, 2007, <http://www.networkworld.com/news/2007/020707-ticketmaster-itunes.html>.

onto their iTunes-supported devices with the push of a button;<sup>131</sup> it offers exclusive movie premieres;<sup>132</sup> and of course, there is the iPod<sup>133</sup>, iPhone,<sup>134</sup> and Apple TV,<sup>135</sup> all popular devices designed to work exclusively with iTunes. Finally, iTunes has moved beyond the music realm and expanded its downloads to include television shows<sup>136</sup> and movies.<sup>137</sup> Therefore, by catering to the demand for online distribution and making its product desirable, unique, and affordable, Apple has provided a legitimate, high quality alternative to illegal downloads through iTunes.<sup>138</sup>

Other companies are following Apple's lead and providing legitimate alternatives to piracy.<sup>139</sup> ABC launched a streaming video player<sup>140</sup> on its website allowing users to

131. See Glenn Fleishman, *First Look: iTunes Wi-Fi Music Store at Starbucks*, *MacWorld*, Oct. 2, 2007, <http://www.macworld.com/2007/10/firstlooks/starbucks/index.php>.

132. Ed Burns released his film *Purple Violets* via iTunes instead of a traditional theatrical release, stating, "My style of filmmaking is dying on the vine. These small, talky movies have a hard time finding an audience theatrically, so you need to adapt . . . There are still people who want to see this non-traditional type of film, and now there are non-traditional ways to get them out there." CBS News, *Ed Burns Picks iTunes Over Cinemas for New Film's Debut*, available at <http://www.cbc.ca/arts/film/story/2007/10/26/burns-movie-itunes.html> (last visited Nov. 3, 2008).

133. 110 million iPods have been sold worldwide, as of September 2007. Cohen Snell, *supra* note 101.

134. iPhone, <http://www.apple.com/iphone/> (last visited Nov. 3, 2008).

135. Apple TV, <http://www.apple.com/appletv/> (last visited Nov. 3, 2008).

136. ABC, CBS, MTV, ESPN, Sci Fi Channel, Comedy Central, Disney Channel, Nickelodeon and Showtime all offer episodes through iTunes for \$1.99 each. Season passes are offered, as are multi-passes (for shows that air daily, a user can purchase a month's worth). It is also interesting to note that these episodes are available only after they have aired. See *Stay Tuned to iTunes: Overview of iTunes 8*, <http://www.apple.com/itunes/store/tvshows.html> (last visited Nov. 3, 2008).

137. Disney, Paramount, MGM, and Lionsgate films are all available on iTunes. See *Pass the Popcorn: Overview of iTunes 8*, <http://www.apple.com/itunes/store/movies.html> (last visited Nov. 3, 2008).

138. *But see* Carlos Ruiz de la Torre, Comment, *Towards the Digital Music Distribution Age: Business Model Adjustments and Legislative Proposals to Improve Legal Downloading Services and Counter Piracy*, 3 VAND. J. ENT. & TECH. L. 503 (2006) (arguing legal downloading services can still be improved to further prevent piracy).

139. Other networks are branching out from iTunes and experimenting with their own media distribution devices. For example, Fox and NBC have teamed up to launch Hulu.com, which will be free to users and offer paid downloads of movies and television shows. It will operate on an ad-supported format. It will also allow users to load their own videos, similar to YouTube. See Jonathan Zipper, *NBC and Fox Team-Up to Face Online Competition*, *HOLLYWOOD TODAY*, Oct. 29, 2007, <http://www.hollywoodtoday.net/?p=2695>.

140. ABC, <http://abc.go.com/index> (last visited Nov. 3, 2008).

watch episodes of their favorite shows only minutes after they have aired.<sup>141</sup> After the player debuted, over 6 million people requested episodes, demonstrating its popularity.<sup>142</sup> In addition, ABC released episodes of its popular shows on iTunes for \$1.99 each, and over 8 million have been sold.<sup>143</sup> These alternative distribution channels have not affected ratings for the shows,<sup>144</sup> and therefore, like iTunes, ABC proves that if consumers are offered a legitimate, high quality alternative that does not come with a potential prison sentence, they will respond.<sup>145</sup>

Even Sweden has harnessed the latest technology to develop a legitimate alternative. Headweb, a Swedish company, combined watermarking technology with peer-to-peer file sharing methods to develop a product that will allow users to legally download a movie, using BitTorrent technology, and then watch it on a regular DVD player.<sup>146</sup> Because the product will offer legitimate, fully functional, high-quality movies in a variety of formats, it is expected to

141. Nate Anderson, *Disney-ABC: "We understand piracy now as a business model"*, ARS TECHNICA, Oct. 10, 2006, <http://arstechnica.com/news.ars/post/20061010-7946.html>.

142. *Id.*

143. *Id.*

144. *Id.*

145. Artists are also responding to the changes in the music industry and seeking alternative business models and new methods of distribution. For example, the Spice Girls chose not to sell their greatest hits album in traditional retail outlets and instead the album will only be available through online distribution channels, such as iTunes, and at Victoria's Secret Stores. See Marisa Laudadio and Kristen Mascia, *Bra Power! Spice Girls Selling New Album at Victoria's Secret*, PEOPLE MAGAZINE, Oct. 16, 2007, <http://www.people.com/people/article/0,,20152560,00.html>.

In addition, Radiohead has allowed fans to pay only what they can afford to when purchasing the new album, and Prince is giving away his album for free with copies of UK's Daily Mail. Kristen Le Mesurier, *Can You Leave Price to the Customer?*, The Sydney Morning Herald Innovator Blog, [http://blogs.smh.com.au/innovator/archives/2007/10/can\\_you\\_leave\\_price\\_to\\_the\\_cus.html](http://blogs.smh.com.au/innovator/archives/2007/10/can_you_leave_price_to_the_cus.html) (Nov. 3, 2008 9:00 EST).

Finally, Madonna has also departed from her major record label and signed an unprecedented deal with concert promoter Live Nation, Inc. Madonna described her motivation for leaving her record label: "The paradigm in the music business has shifted and as an artist and a business woman, I have to move with that shift. For the first time in my career, the way that my music can reach my fans is unlimited. I've never wanted to think in a limited way and with this new partnership, the possibilities are endless." Alex Veiga, *Madonna, Live Nation Link Up on Deal*, Oct. 16, 2007, [http://news.yahoo.com/s/ap/20071016/ap\\_en\\_mu/madonna\\_live\\_nation](http://news.yahoo.com/s/ap/20071016/ap_en_mu/madonna_live_nation).

146. Paul O'Mahony, *Swedish Firm Offers Legal Alternative to Internet Piracy*, THE LOCAL, Sept. 12, 2007, <http://www.thelocal.se/8472/20070912/>.

be popular in Sweden with consumers who have been waiting for a reliable, legal alternative.<sup>147</sup>

Embracing piracy as a business model encourages the development of new technologies, such as the watermarking downloads in Sweden or the streaming video player on ABC's website. It does not threaten to violate privacy laws, nor does it waste judicial resources by spawning endless litigation. Piracy as a business model is an international solution that capitalizes on the market to beat pirates at their own game, and therefore it is the most viable weapon in the war against piracy.<sup>148</sup>

## CONCLUSION

This Comment has examined the phenomena behind The Pirate Bay, a file sharing website that utilizes BitTorrent technology. The baffling immunity of the Bay, especially in the wake of the destruction of so many other file sharing websites, is best explained by the combination of relaxed copyright laws in Sweden, the cultural support of the Swedish for the anti-copyright ideological movement, and the current legality of BitTorrent trackers. The Bay is more than just a place to download the latest music and movies: it represents a forum for the free exchange of ideas and media content without legal interference. The administrators behind the Bay are dedicated, sophisticated, computer-savvy, and have demonstrated they are willing to go to great lengths to protect their forum.

Because the Bay represents an ideological movement and transcends national borders, an international solution is necessary. Legal reform in the United States is not a long-term solution, as new file sharing technologies continue to develop. In addition, international legal reform has been plagued with enforcement issues, and the Bay has demonstrated it is willing to relocate in order to sidestep treaty jurisdiction. Private counter-piracy efforts have spawned questionable tactics and demonstrate the potential for privacy invasion. The issues presented by the Bay

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147. *Id.*

148. For more arguments in favor of integrating piracy into a business model, see Piper, *supra* note 119; John Healey, *Looking for Napster 2.0*, L.A. TIMES, Oct. 15, 2007, <http://www.latimes.com/news/opinion/la-ow-healey15oct15,0,1679894.story?coll=la-opinion-center>.

represent the complicated balance between promoting technological development while protecting intellectual property rights and protecting individual privacy. Adopting piracy as a business model accomplishes this balance by recognizing the changing tide of the entertainment industry and developing technology that provides consumers with an affordable but legitimate alternative.