NOTES

THE STOP ONLINE PIRACY ACT: THE LATEST MANIFESTATION OF A CONFLICT RIPE FOR ALTERNATIVE DISPUTE RESOLUTION

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I. INTRODUCTION

On January 18, 2012, a series of online protests shut down many of the Internet's most popular websites.[1] The global outage of sites like Wikipedia, Craigslist and Wired.com was not caused by hackers or regulators, but by the websites themselves.[2] These seemingly quizzical wounds were self inflicted, designed to raise awareness of, and opposition to, two proposed sets of legislation: the Stop Online Piracy Act ("SOPA") and the Protect IP Act ("PIPA").[3] The bills were introduced in the United States Senate and House of Representatives, respectively, to combat the rise in online piracy originating outside the United States.[4] The legislation is the most recent battleground for the conflict between media producers, who seek tougher copyright laws to protect their intellectual property, and online content hosts, including websites that facilitate online piracy of copyrighted material.[5] In its short exis-

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1 Hayley Tsukayama & Sarah Halzack, *Web Sites Go Dark in SOPA Protest Against Plans to Ban Online Piracy*, WASH. POST (Jan. 18, 2012), *available at* http://www.washingtonpost.com/business/technology/web-sites-go-dark-in-sopa-protest-against-plans-to-ban-online-piracy/2012/01/18/gIQAmWfD8P_story.html.

2 *SOPA Blackout: Who's Gone Dark to Protest Anti-Piracy Bills? [Updated]*, L.A. TIMES BLOG (Jan. 18, 2012), http://latimesblogs.latimes.com/technology/2012/01/sopa-blackout-who-is-joining-the-protest.html.

3 Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011); Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act, S. 968, 112th Cong. (2011). These bills are referred to in this note as SOPA and PIPA, respectively.

4 While SOPA and PIPA are similar in scope and content, this Note primarily focuses on SOPA, the more publicized of the two. This Note uses "SOPA" to refer to the goals, motivations and substance of both bills.

5 Other interested parties include politicians, the ACLU and the White House. *See SOPA debate: Who's involved and what are the stakes?* (Jan. 17, 2012), http://www.washingtonpost.com/

tence, online piracy has been primarily disputed in court.[6] However, litigation has tried and failed to address the primary concerns of Internet privacy.

A new forum is needed to properly handle these kinds of disputes. Alternative dispute resolution ("ADR") mechanisms provide a viable alternative to the costly and often counterproductive international efforts to curb online piracy.[7] Specifically, because contradictory international copyright laws govern online piracy, a new international arbitration authority, in addition to that of the Arbitration and Mediation Panel of the World Intellectual Property Organization ("WIPO"), could provide an appropriate forum in which copyright owners could seek protection against online piracy.[8]

This Note examines how arbitration and mediation can be injected into the online copyright debate to better serve the interests of all parties. First, this Note addresses past litigation models to compare the benefits and costs of using the courts to resolve piracy issues. The history of litigation against mass peer-to-peer file sharers and individual downloaders is an important aspect to this story. Next, this Note describes the current state of copyright laws and how SOPA and PIPA would alter copyright protection against foreign piracy. Copyright holders, predominately represented by the Recording Industry Association of America, and content hosts, such as Google, Facebook and Wikipedia, have valid arguments; each are addressed in this section. This Note then analyzes how arbitration has been utilized in past intellectual property disputes.[9] ADR mechanisms in other intellectual property areas serve as a model for alleviating the SOPA debate.[10] In examining these

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business/economy/sopa-debate-whos-involved-and-what-are-the-stakes/2012/01/17/gIQAZAVq5P_gallery.html#photo=1.

6 *See, e.g.*, The First Amendment Center, http://www.firstamendmentcenter.org/tag/online-piracy (Feb. 2, 2013, 13:34 EST). The blog provides a comprehensive, up-to-date list of recent court decisions involving online piracy. Both individual downloaders and mass peer-to-peer file sharers are included among the cases' defendants.

7 *See* Kristina Groennings, *Costs and Benefits of the Recording Industry's Litigation against Individuals*, 20 BERKELEY TECH. L.J. 571 (2005); *see also*, RIAA v. The People: Five Years Later, ELECTRONIC FRONTIER FOUNDATION, https://www.eff.org/wp/riaa-v-people-five-years-later#3.

8 WORLD INTELLECTUAL PROPERTY ORGANIZATION ARBITRATION AND MEDIATION CENTER, http://www.wipo.int/amc/en/index.html.

9 *See, e.g.*, Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL L. REV. 1293, 1311 (1996).

10 *See* Kyle-Beth Hilfer, *Arbitration Gains Acceptance as a Means of Resolving IP Disputes*, LAW JOURNAL NEWSLETTER (Apr. 2004), http://www.lawjournalnewsletters.com/issues/ljn_intproperty/10_7/news/142296-1.html?twitter=1.

mechanisms, the current litigation model is compared to international arbitration. In doing so, this Note proposes adopting an online piracy arbitration panel housed in the WIPO Arbitration and Mediation Center. This Note outlines the advantages of using the Center to resolve online piracy disputes.[11] Finally, this Note addresses the concerns of SOPA and PIPA by proposing an arbitration mechanism that could aid in resolving future copyright infringement disputes. This system could also be utilized to handle infringement notifications, which have been at the center of controversy regarding SOPA.[12] By requiring parties to dispute notifications before a third party arbitrator—with financial incentives to dissuade frivolous claims—the proposed system could reduce litigation and help ease the heated debate over online piracy.

II. BACKGROUND OF FILE SHARING: LITIGATION AND LEGISLATION

A. *The History of File Sharing in the United States*

File sharing, and the phrase "online piracy," first reached the public ear in the late 1990s.[13] Before then, music could only be stolen in its physical form, which was of little concern to large record companies.[14] Moreover, stealing an album was akin to any other type of physical theft.[15] The paradigm shifted with the birth of the Internet. Igniting the online piracy debate was Napster, an online peer-to-peer file sharing service that began operating in

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11 *See* WORLD INTELLECTUAL PROPERTY ORGANIZATION ARBITRATION AND MEDIATION CENTER, *supra* note 8. The WIPO Arbitration and Mediation Center's mission is to provide "Alternative Dispute Resolution (ADR) options, in particular arbitration and mediation, for the resolution of international commercial disputes between private parties. Developed by leading experts in cross-border dispute settlement, the procedures offered by the Center are widely recognized as particularly appropriate for technology, entertainment and other disputes involving intellectual property." *Id*.

12 *See* Hilfer, *supra* note 10; *see also* Camille A. Laturno, *International Arbitration of the Creative: A Look at the World Intellectual Property Organization's New Arbitration Rules*, 9 TRANSNAT'L LAW 357 (1996).

13 A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 901 (N.D. Cal. 2000*), aff'd in part and rev'd in part*, 239 F.3d 1004 (9th Cir. 2001). *See generally* Jeremy U. Blackowicz, *RIAA v. Napster: Defining Copyright for the Twenty-First Century*, 7 B. U. J. SCI. & TECH. L. 182, 182–83 (2001) ("Napster is a file-sharing program that lets users freely trade music files over the Internet. It has been hailed as revolutionary by some and as unfettered piracy by others.").

14 *See, e.g.*, Michael Arrington, *Stealing Music: Is it Wrong or Isn't It?*, TECH CRUNCH (March 2009), http://techcrunch.com/2009/03/31/stealing-music-is-it-wrong-or-isnt-it/.

15 *Id.*

June 1999.[16] Napster allowed a user to locate other "sharing" users, who permitted the first user to copy a given song[17] to his or her local computer.[18] The first user would contact the "sharing" user directly and copy the music file over the Internet.[19] While Napster's servers compiled all files available for download, no files actually passed through Napster's servers.[20] In this way, Napster avoided directly hosting any copyrighted materials transferred through its system.[21] The strategy also gave validity to the argument that Napster's service could be used to transfer non-pirated material.[22]

Music producers responded to Napster and its distribution of copyrighted materials. The Recording Industry Association of American ("RIAA") filed suit against Napster, claiming the file sharing website was both contributorily and vicariously liable for its users' direct copyright infringement.[23] As discussed below, the court eventually ordered Napster to shut down operations in 2001.[24] From the ashes of Napster arose hundreds of other file-sharing programs. Today, it is estimated that 28% of Internet users access these unauthorized services on a monthly basis.[25] Accordingly, pirated material has expanded to include movies, computer software, and mobile programs.[26] As online theft has increased, so has the response by the music and movie industry. Notable among these are the trade organizations, the RIAA and the Motion Picture Association of America ("MPAA"). These groups, which represent record industry distributors and motion picture studios,

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16 *A&M Records, Inc*., 114 F. Supp. at 901.

17 Blackowicz, *supra* note 13, at 184. MP3 typically refers to a song preserved as a compressed digital music file.

18 *A&M Records, Inc*., 114 F. Supp. at 906.

19 *Id.* at 907.

20 *Id*. Because users transferred files without routing through its servers, Napster claimed it was not liable for user infringement under the Digital Millennium Copyright Act's "Safe Harbor" provision, discussed *infra*.

21 *Id*.

22 *See* Blackowicz, *supra* note 13, at 183.

23 *See A&M Records, Inc*., 114 F. Supp. at 911.

24 Christopher Jones, *Open-Source 'Napster' Shut Down*, WIRED MAGAZINE (Mar. 3, 2000), *available at* http://www.wired.com/science/discoveries/news/2000/03/34978.

25 International Federation of the Phonographic Industry, *Digital Music Report*, 16 (2012), http://www.ifpi.org/content/library/DMR2012.pdf. Half of these users operate on peer-to-peer networks. Non-peer-to-peer networks account for the other half, including "blogs, cyberlockers, forums, websites, streaming sites, smartphone based applications and stream ripping applications." *Id*.

26 RECORDING INDUSTRY ASSOCIATION OF AMERICAN, *RIAA Frequently Asked Questions*, http://www.riaa.com/faq.php.

respectively, have been at the forefront of litigation against Napster and subsequent online file-sharers. While exploring several measures to combat online piracy, the RIAA and MPAA's preferred response has been impact litigation against peer-to-peer file sharing hosts.

B. *The History of the RIAA and MPAA's Litigation Strategy Against Peer-to-peer File Sharing*

The first major victory for the RIAA, whose members included every plaintiff to the lawsuit, was *A&M Records, Inc. v. Napster, Inc*.[27] The case was the first to address the application of copyright law to peer-to-peer file sharing.[28] The plaintiffs, including major record labels and music producing companies, claimed Napster committed vicarious and contributory copyright infringement by having knowledge of, and contributing to, users' direct copyright infringement.[29] The record companies also claimed that the peddling of music accomplished through Napster had led to irreparable harm to their revenue.[30] In defense, Napster asserted the fair use doctrine[31] and substantial non-infringing use doctrine[32]

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27 *See A&M Records, Inc*., 114 F. Supp. at 896.

28 *Id*. at 899.

29 *Id*. at 918.

30 *Id.* at 915 ("Plaintiffs' economic expert opined that the availability of free MP3 files will reduce the market for authorized, commercial downloading.").

31 The fair use doctrine is codified in 17 USC § 107:

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

32 The staple article of commerce doctrine stands for the proposition that a "manufacturer is not liable for selling a 'staple article of commerce' that is "capable of commercially significant non-infringing uses." Sony Corp. of America v. Universal City Studios, Inc., 104 S. Ct. 774, 778 (1984). Here, Napster claimed its service was immune from liability because the substantial use of its website is to transfer files which do not infringe on copyright laws.

(also known as the staple article of commerce doctrine). Most importantly, Napster claimed it was not responsible for any direct copyright infringement that could be committed through its service, which they pointed to as serving a legitimate, non-infringing purpose.[33]

Rejecting these arguments, the district court found "that any potential non-infringing use of the Napster service is minimal or connected to the infringing activity, or both. The substantial or commercially significant use of the service was, and continues to be, the unauthorized downloading and uploading of popular music, most of which is copyrighted."[34] Siding with the RIAA, the Ninth Circuit affirmed the district court, holding that Napster had constructive knowledge that its program was the conduit through which users infringed on copyright.[35] The court also held Napster vicariously and contributorily liable for the direct copyright infringement of its software's users.[36] The decision led to the pioneer file sharing website's demise.[37]

The RIAA and MPAA won successive victories against Grokster, KaZaA, and Megaupload.[38] Many surviving sites, as well as new sites created in the vacuum left by Napster, transitioned into legal entities or moved their operations overseas.[39] They have

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33 *A&M Records, Inc.*, 114 F. Supp. at 922. In rejecting this argument, the District Court stated, "defendant's representations about the primacy of its legitimate uses thus appear disingenuous. The ability to download myriad popular music files without payment seems to constitute the glittering object that attracts Napster's financially-valuable user base." *Id.*

34 *Id*. The court addresses and dismisses each factor listed in 17 USC § 107.

35 *See id*. *See also* J. Cam Barker, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 TEXAS L. REV. 525 (2004).

36 *See* A&M Records, Inc., 114 F. Supp. at 912. Judge Posner concluded, "If the music is copyrighted, such [Internet file] swapping, which involves making and transmitting a digital copy of the music, infringes copyright." *Id.* at 645.

37 *Napster is Told to Remain Shut*, NY TIMES (Jul. 12, 2001), http://www.nytimes.com/2001/07/12/technology/ebusiness/12NAPS.html?pagewanted=all. The court in *Napster* granted preliminary injunctive relief until Napster could prove that it can more effectively filter copyrighted material.

38 *See id. See also* FEDERAL BUREAU OF INVESTIGATION, *Justice Department Charges Leaders of Megaupload with Widespread Online Copyright Infringement* (Jan. 19, 2012), http://www.fbi.gov/news/pressrel/press-releases/justice-department-charges-leaders-of-megaupload-with-widespread-online-copyright-infringement.

39 *Kazaa Site Becomes Legal Service*, BBC NEWS, (Jul. 27, 2004) *available at* http://news.bbc.co.uk/2/hi/science/nature/5220406.stm. Even Napster, the seminal peer-to-peer file sharing website, transferred to a subscription-based model and was eventually acquired by Rhapsody in 2011. Juan Carlos Perez,

Rhapsody Buys Napster as It Battles Spotify, PC WORLD (Oct. 4, 2011), http://www.pcworld.com/article/241114/rhapsody_buys_napster_as_it_battles_spotify.html.

adapted to the new legal landscape and undermined the court decisions that had quieted their peers.[40] As a result, conflicts of international law became the focus of subsequent legal actions against peer-to-peer file sharing websites charged with copyright infringement. The January 2012 shutdown of Megaupload was particularly demonstrative.[41] Seven individuals and two corporations were indicted on charges of "engaging in a racketeering conspiracy, conspiring to commit copyright infringement, conspiring to commit money laundering and two substantive counts of criminal copyright infringement."[42] Law enforcement authorities executed more than twenty search warrants in the U.S. and eight countries, seized approximately $50 million in assets, and arrested four Megaupload employees in New Zealand.[43] U.S. efforts to take down Megaupload were in concert with international authorities from at least eight countries.[44] The web domain has been seized by the U.S. Department of Justice, and is now shut down.[45]

Litigating against mass peer-to-peer websites has been largely beneficial to copyright holders. Proponents call it a positive step towards hampering creative destruction and protecting copyrights, which promote creativity and economic growth.[46] Proponents also

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40 *See* Ryan H. Choi, *The Grokster Dead-End*, 19 HARV. J. L. & TECH. 393, 394 (2005).

41 Ben Sisario, *7 Charged as F.B.I. Closes a Top File-Sharing Site*, N.Y. TIMES (Jan. 19, 2012), http://www.nytimes.com/2012/01/20/technology/indictment-charges-megaupload-site-with-piracy.html?_r=0. Megaupload is an online Hong Kong–based internet file sharing service providing various media hosting services, notably streaming video. *Id.*

42 *Justice Department Charges Leaders of Megaupload with Widespread Online Copyright Infringement*, U.S. DEP'T OF JUSTICE, (Jan. 19, 2012), *available at* http://www.justice.gov/opa/pr/2012/January/12-crm-074.html.

43 *Id*.

44 *Id.* International law enforcement authorities included: the New Zealand Police, the Organised and Financial Crime Agency of New Zealand (OFCANZ), the Crown Law Office of New Zealand and the Office of the Solicitor General for New Zealand; Hong Kong Customs and the Hong Kong Department of Justice; the Netherlands Police Agency and the Public Prosecutor's Office for Serious Fraud and Environmental Crime in Rotterdam; London's Metropolitan Police Service; Germany's Bundeskriminalamt and the German Public Prosecutors; and the Royal Canadian Mounted Police – Greater Toronto Area (GTA) Federal Enforcement Section and the Integrated Technological Crime Unit and the Canadian Department of Justice's International Assistance Group, as well as assistance from United Kingdom, Australia and the Philippines authorities. *Id*.

45 *See* MEGAUPLOAD http://megaupload.com/ (last visited Feb. 7, 2013 15:20 EST).

46 *Justice Department Charges Megaupload with Widespread Online Copyright Infringement*, MOTION PICTURE ASSOCIATION OF AMERICA, (Jan. 19, 2012), http://mpaa.org/resources/e2fc0145-f17b-4df7-98b8-ed136f65ea51.pdf. The MPAA claims Megupload alone has cost U.S. copyright holders $500,000,000. Accordingly, shutting down peer-to-peer sites is a move toward replacing lost revenue. Advocates from the MPAA and RIAA also point to piracy as dissuading creative growth, a driving force in the economy. *Id*.

seek to distinguish peer-to-peer file sharing from other technological advancements previously faced by the media industry. The advancements from radio to cassette and from videotape to DVD were initially resisted, but the new technologies eventually benefitted the media industry.[47] However, peer-to-peer file sharing is different. Empirical evidence has shown a decrease in sales as a direct result of file sharing, with no foreseeable benefit.[48] The effect of shutting down these sites through litigation has been measurable. Illegal downloading was confirmed to have decreased as a direct result of the RIAA's lawsuits in 2003.[49] Experts point to this event as causing an increase in revenue among RIAA/MPAA's members.[50] Accordingly, peer-to-peer lawsuits likely have a discernable benefit, at least financially, to record companies and movie studios seeking to protect their content.[51]

Opponents of the litigation strategy include peer-to-peer file sharers who claim their programs are used for legitimate, legal purposes. Google, Wikipedia and other predominate web services have voiced their disagreement with the litigation.[52] They argue that for each network shut down, dozens more replace it. While lawsuits may win a few battles, the war against peer-to-peer downloaders as a whole is arguably unwinnable.[53] Moreover, those critical of the RIAA's litigation strategy argue that the mindset of

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47 *See, e.g.*, Stan J. Liebowitz, *File Sharing: Creative Destruction or Just Plain Destruction?*, 49 J.L. & ECON. 1 (2006) ("Twenty years after [video cassette's] arrival[,] the movie industry is observed to derive more revenues from selling prerecorded videotapes than from theatrical exhibitions.").

48 *Id.*

49 *Id.* at 13.

50 *Id*.

51 *But see* Christian Peukert & Jörg Claussen, *Piracy and Movie Revenues: Evidence from Megaupload* (Oct. 22, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2176246 (finding the Megaupload shutdown "had a negative, yet in some cases insignificant effect on box office revenues").

52 *See also An Open Letter From Internet Engineers to the United States Congress* (Dec. 15, 2011), *available at* https://www.eff.org/sites/default/files/Internet-Engineers-Letter.pdf (letter to Congress from eighty-three web engineers and internet architects arguing against SOPA and PIPA). The letter states,

> If enacted, either of these bills will create an environment of tremendous fear and uncertainty for technological innovation, and seriously harm the credibility of the United States in its role as a steward of key Internet infrastructure. Regardless of recent amendments to SOPA, both bills will risk fragmenting the Internet's global domain name system (DNS) and have other capricious technical consequences. In exchange for this, such legislation would engender censorship that will simultaneously be circumvented by deliberate infringers while hampering innocent parties' right and ability to communicate and express themselves online.

53 *See id*.

illegal downloaders is the real problem.[54] One notable critic, professor David W. Opderbeck, argues that the deeper issue inherent in online piracy is that users internalize sharing norms, which transcend any particular use of an application or network, and lead users to migrate from one peer-to-peer file sharer to the next without any allegiance to a particular site.[55] Thus, shutting down one file-sharing website does not mitigate the broader problem, as its former users merely transfer to another platform.

The movie industry's efforts against them were hindered by adverse legal rulings, along with the time and expense associated with even successful litigation.[56] Moreover, pro-piracy advocates argue that the boon of online file transfers, like DVDs and videocassettes before it, will inevitably increase the RIAA and MPAA's member organizations' revenue.[57] Most importantly, these new companies shifted their operations abroad, causing often-favorable intellectual property laws to apply.[58] While the response to large-scale lawsuits against peer-to-peer file sharers has been somewhat favorable, if not sympathetic, the RIAA and MPAA's alternative practice—litigating against individual downloaders—has been met by widespread criticism.

C. *The Micro-level Problem: Litigation Against Individual Users of Peer-to-Peer File Sharing Programs*

When copyright owners sue facilitators of online peer-to-peer downloading, the usual result is a shutdown of the violating website. When copyright owners sue individual users of peer-to-peer programs, the result has almost always garnered negative criticism.[59] Indeed, the RIAA and MPAA were hit with a publicity

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54 *See, e.g.*, David W. Opderbeck, *Peer-to-Peer Networks, Technological Evolution, and Intellectual Property Reverse Private Attorney General Litigation*, 20 BERKELEY TECH. L.J. 1685 (2005). Professor Opderbeck compares lawsuits against Napster, Grokster and similar online peer-to-peer file shares to mass tort litigation, which has similarly positive and negative attributes.

55 *Id*. at 1700–01.

56 *See* Alice Kao, RIAA v. Verizon*: Applying the Subpoena Provision of the DMCA*, 19 BERKELEY TECH. L.J. 405 (2004).

57 *But see* Liebowitz, *supra* note 47, at 24 (arguing that video cassettes are an improper medium with which to compare file sharing's effect on revenue).

58 *See* BBC NEWS, *supra* note 39. *See also* Janko Roettgers, *Sorry, Hollywood: Piracy May Have A Comeback*, (Aug. 11, 2011), *available at* http://gigaom.com/video/file-sharing-is-back/.

59 *See* Press Release, RIAA, Recording Industry Begins Suing File Sharers Who Illegally Offer Copyrighted Music Online (Sept. 8, 2003), *available at* http://riaa.com/newsitem.php

nightmare when they sued individual downloaders, including a twelve year-old girl,[60] a deceased grandmother[61] and a defendant who did not even own a computer.[62] Shocking were not only the targets of the RIAA's individual suits, but also the damages won, which were often excessive.[63] Moreover, individual users were charged with several counts of copyright infringement for each violation. ,Often, the RIAA sought damages up to $1 million for an individual user.[64] However, the average settlement with individual users was around $3,000.[65] Admittedly, the purpose of individual litigation was to discourage online downloading, not to recoup lost revenue.[66] Grossly excessive penalties and moderately large settlement agreements are often an undue burden on individuals who, because of unsecure Internet access, receive punishing judgments for violations only tenuously of their own volition.[67] Even after legal threats and lowered levels of file sharing, the availability of music files on these networks remains substantial.[68]

Litigating against individual downloaders has done little to help the media industry reach its goals and has hurt its reputation deeply.[69] Because of the negative publicity surrounding suits against individual users, the MPAA and RIAA have stopped pursuing individual downloaders. Instead, they have shifted their focus to impact litigation against mass peer-to-peer file sharing sites,

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?id=85183A9C-28F4-19CE-BDE6-F48E206CE8A1. The RIAA onslaught against individual downloaders was part of a larger public relations campaign attempting to communicate the wrongs of illegal downloading. The result of the campaign was not effective. Many consider it to have backfired.

60 John Borland, *RIAA Settles with 12-year-old Girl*, CNET (Sept. 9, 2003), http://news.cnet.com/RIAA-settles-with-12-year-old-girl/2100-1027_3-5073717.html.

61 Eric Bangeman, *I Sue Dead People*, ARS TECHNICA (Feb. 4, 2005), http://arstechnica.com/uncategorized/2005/02/4587-2/.

62 Anders Bylund, *RIAA Sues Computer-less Family, 234 Others, for File Sharing*, ARS TECHNICA (Apr. 24, 2006), http://arstechnica.com/uncategorized/2006/04/6662-2/.

63 *See, e.g.*, Complaint for Copyright Infringement at 6, Capitol Records, Inc. v. Doe, No. CV03-6378 ER (RNBx) (C.D. Cal. filed Sept. 8, 2003), *available at* http://w2.eff.org/IP/P2P/sample_riaa_complaint.pdf.

64 *See* Barker, *supra* note 35.

65 *Q&A With RIAA President Cary Sherman*, DAILY TEXAN, (Mar. 25, 2004), *available at* http://http://arstechnica.com/uncategorized/2008/12/riaa-graduated-response-plan-qa-with-cary-sherman/.

66 *Id*.

67 *See* Bylund, *supra* note 62.

68 *See* Sudip Bhattacharjee, Ram D. Gopal, Kaveepan Lertwachara, & James R. Marsden, *Impact of Legal Threats on Online Music Sharing Activity: An Analysis of Music Industry Legal Actions*, 49 J.L. & ECON. 91 (2006).

69 *Id.*

like Megaupload.[70] The courts have also responded to mass litigation against individual downloaders. In December 2003, the District of Columbia Court of Appeals dealt a significant blow to the recording industry by holding that RIAA could not utilize the Digital Millennium Copyright Act's subpoena provision to compel Internet Service Providers ("ISPs") to disclose alleged infringers' identities.[71] Prior to the court's decision, a copyright holder could subpoena an infringing website by providing only $35, a copy of notification, the proposed subpoena, and a declaration that the information would only be used to protect their copyrighted material.[72] The decision eradicated the subpoena provision, making it much more difficult and costly to determine the identities of individual downloaders. Now, a copyright holder attempting to bring action must file a claim against "John Doe" in districts where the targeted ISP's servers are located.[73] The current individual user suits are instead filed as "John Doe" actions in districts in which servers controlled by the users' ISPs are located. While suing individuals for copyright infringement has fallen out of vogue, the effects of this contentious strategy remain. Proponents are exploring new ways to protect their copyrights: legislation.

D. *The Current State of Copyrights Law in the United States: The Digital Millennium Copyright Act*

Before delving into SOPA's mechanics, a brief overview of the current state of the law applicable to file sharing is necessary. The rise of digital media and technology led Congress to enact the Digi-

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70 Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL STREET JOURNAL (Dec. 19, 2008). *See also* U.S. Department of Justice, *supra* note 42. *Cf. Q&A With RIAA President Cary Sherman*, *supra* note 65. The RIAA and MPAA once championed its campaign against individual downloaders, while later regretting it quietly as opposed to its previous remarks. As discussed *infra*, the RIAA and MPAA's focus has now returned to impact litigation against peer-to-peer file sharing websites.

71 *See* Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., 351 F.3d 1229, 1236 (D.C. Cir. 2003). The DMCA will be discussed in detail *infra*.

72 *See* Groennings, *supra* note 7, at 574. *See also* Opderbeck, *supra* note 54, at 1702 ("The DMCA subpoena provisions were intended to require service providers to disclose subscriber information only when the subscriber allegedly is storing infringing materials on the provider's servers, not when the service provider merely acts as a conduit for P2P file sharing."). *Id.*

73 *See* Opderbeck, *supra* note 54, at 1702. Opderbeck's article contains a list detailing all "John Doe" actions reported by the RIAA.

tal Millennium Copyright Act ("DMCA") in 1998.[74] The legislation largely incorporates treaties of the WIPO.[75] Signed into law by President Clinton, the DMCA enables any person who purports to be the owner of copyrighted material to demand its removal from the Internet without having to go to a judge to obtain an injunction.[76] All that is necessary is a formal notification demanding the ISP[77] remove the offending page.[78] The ISP risks a contributory copyright infringement suit if it fails to quickly act on the copyright holder's legitimate demand to remove the infringing content.[79] If the ISP fails to promptly remove third-party infringement, the ISP automatically becomes a co-infringer.[80] The Act further states that if the accused infringer believes the material is not protected by copyright, the infringer can put it back on the site after a fifteen day hiatus, which commentators note as an incentive to litigate.[81]

However, the DMCA provides safe harbor for sites that are either unaware of infringement, or promptly take down infringing content to avoid liability.[82] Codified in 17 U.S.C. § 512, the safe

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74 The Digital Millennium Copyright Act, 17 U.S.C. § 512 (1998). The DMCA is a complex bill compelling a detailed analysis, which is beyond the scope and pertinence of this Note. For a more detailed examination of DMCA and its implication, *see* Edward Lee, *Decoding the DMCA Safe Harbor Provision*, 32 COLUM. J.L. & ARTS 233 (2009).

75 Carolyn Andrepont, *Digital Millennium Copyright Act: Copyright Protections for the Digital Age*, 9 DEPAUL-LCA J. ART & ENT. L. 397, 398 (1999). For a detailed description of WIPO, see *infra*.

76 *Id.* (to limit its liability, an ISP must "first (a) implement a policy terminating the accounts of users who repeatedly infringe, and (b) cooperate with copyright holders that implement anti-piracy technology").

77 ISPs are defined as "provider[s] of online services or network access, or the operator[s] of facilities therefor." The Digital Millennium Copyright Act, *supra* note 74.

78 *See* Andrepont, *supra* note 75, at 398.

79 The Digital Millennium Copyright Act, *supra* note 74.

80 *Id*.

81 *See* Digital Millennium Copyright Act, *supra* note 74. *See also* Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 346 (S.D.N.Y. 2000) (interpreting the DMCA to allow courts to grant temporary and permanent injunctions on terms that the court deems reasonable to prevent infringement).

82 *See* Digital Millennium Copyright Act, *supra* note 74. To qualify for the safe harbor provision, a website:

> (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing; (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material). 17 USC § 512(c)(1)(A).

Additionally, § 512 sets forth four safe harbors in subsections (a) through (d). *Id.*

harbor provision[83] states:

> A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections.[84]

The burden is placed on copyright owners—not host websites—to request removal of infringing content, with detailed instruction on how and when to notify.[85] In order to avoid placing an undue burden on host ISPs to police the user content on their websites, the DMCA "protects qualifying service providers from liability for all monetary relief for all direct, vicarious and contributory infringement."[86] Service providers are only eligible for the protection of this safe harbor provision if they act to expeditiously remove infringing materials upon notification.[87]

Many commentators note that limiting ISPs liability for user infringement is essential to the function of the Internet.[88] SOPA and PIPA, described below, seek to amend the DMCA to provide more expansive protection offered by current copyright laws. Notably, the safe harbor provision would shift much of the burden for detecting infringing content to the ISPs.

E. *SOPA and PIPA: An Overview*

Cries to amend copyright protection to reflect advancements in the Internet began shortly after the DMCA was signed into law.[89] On October 26, 2011, the House of Representatives re-

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83 Other less applicable "safe harbors" are incorporated into the DMCA. This note will only focus on § 512 and its significance to online piracy.

84 Digital Millennium Copyright Act, *supra* note 74, at § 512.

85 For a detailed list of the procedure and substance of the notification system, *see id.* at § 512(c)(2)(A).

86 *See* Lee, *supra* note 74, at 235.

87 *Id*.

88 *See, e.g.*, Ryan Radio, *Why SOPA Threatens the DMCA Safe Harbor*, THE TECHNOLOGY LIBERATION FRONT (Nov. 18, 2011), *available at* http://techliberation.com/2011/11/18/why-sopa-threatens-the-dmca-safe-harbor/.

89 The DMCA has been amended several times, although the scope of its enforcement has remained the same since its inception.

sponded by introducing the Stop Online Piracy Act ("SOPA"). With its counterpart in the Senate, the PROTECT IP Act ("PIPA"),[90] SOPA has the stated mission of "promot[ing] prosperity, creativity, entrepreneurship, and innovation by combating the theft of U.S. property, and other uses."[91] The "other uses" are what concerns many opponents.

First—and perhaps most important to this Note's proposal—the bills are aimed at overseeing "rogue" websites that side-step U.S. law.[92] In the time since Napster, file-sharing sites have uprooted to operate overseas. If enacted, SOPA would give greater power to the U.S. Department of Justice to reach these overseas infringers by preventing companies from funding, advertising, linking to, or in any other way assisting foreign sites hosting pirated material.[93] Thus, "rogue websites" would be blocked from U.S. funding and visitors. Additionally, the "rogue websites" could be shut down by the Department of Justice, without a trial or even a court hearing.[94] SOPA defines a "rogue" website as one that would be "otherwise subject to seizure if it were a U.S. site;" that is designed or operated for the purpose of copyright infringement; that deliberately turns a blind eye to violations of U.S. law; or, that takes "affirmative steps" to "foster infringement" like creating reward programs for uploading stolen content.[95] Federal law enforcement has the authority to shut down U.S.-based websites that offer pirated content, but they cannot directly do the same to foreign sites hosting this content. As Adam Schatz of the *Wall Street Journal* explains, the Justice Department could obtain a "court order requiring U.S. Internet providers to block access to foreign pirate websites . . . by making it impossible for users to type a simple

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[90] This note focuses on SOPA, although the commentary and proposal are directed at both bills.

[91] Stop Online Piracy Act, *supra* note 3.

[92] *See* Stop Online Piracy Act, *supra* note 3. *See Hearing Regarding H.R. 3261, The "Stop Online Piracy Act"*, 112th Cong. (2011) (Statement of Michael P. O'Leary, Senior Executive Vice President, Global Policy and External Affairs, on Behalf of the Motion Picture Association of America, Inc.), *available at* http://judiciary.house.gov/hearings/pdf/O'Leary%2011162011.pdf.

[93] Amy Schatz, *What Is SOPA Anyway? A Guide to Understanding the Online Piracy Bill*, WALL STREET JOURNAL (Jan. 18, 2012), *available at* http://online.wsj.com/article/SB10001424052970203735304577167261853938938.html.

[94] Like much of the bill, this provision has various interpretations. For an objective analysis, *see* Luke Johnson, *What Is SOPA? Anti-Piracy Bill Explained*, HUFFINGTON POST (Jan. 19, 2012), http://www.huffingtonpost.com/2012/01/19/what-is-sopa_n_1216725.html.

[95] *Hearing Regarding H.R. 3261, The "Stop Online Piracy Act," supra* note 92.

web address into an Internet browser . . . or by requiring search engines like Google to disable links to the sites."[96]

Moreover, the bill was motivated by the seemingly lax restrictions set out in the DMCA, which gave peer-to-peer litigants—many of which are based overseas—an advantage in the aforementioned lawsuits.[97] SOPA and PIPA thus address international law concerns by positioning infringers as violating United States' copyright law. If an overseas web service violates U.S. copyright law, then SOPA enables the Attorney General to:

> Seek a court order against a U.S.-directed foreign Internet site . . . to cease and desist further activities constituting specified intellectual property offenses under the federal criminal code including criminal copyright infringement, unauthorized fixation and trafficking of sound recordings or videos of live musical performances, the recording of exhibited motion pictures, or trafficking in counterfeit labels, goods, or services.[98]

If enacted, SOPA would alter the online copyright landscape. While the bill is famously associated with media piracy, it also applies to counterfeit consumer goods and prescription medication.[99] Amending the DMCA's safe harbor provision and notification system, SOPA sets forth a two-step process.[100] The law would allow intellectual property rights holders harmed by a U.S.-directed site dedicated to infringement, or a site promoted or used for infringement, under certain circumstances, to first notify any related payment facilitators and ad networks in writing that their rights are being infringed.[101] The sites then have an opportunity to counter-notify, if they believe there is no infringement.[102] Second, the

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96 *See* Schatz, *supra* note 93.

97 *See Hearings Regarding H.R. 3261*, supra note 92.

98 Official Summary of H.R. 3261 - Stop Online Piracy Act (Oct. 25, 2011), *available at* http://www.opencongress.org/bill/112-h3261/show.

99 Jared Newman, *SOPA and PIPA: Just the Facts*, PCWORLD, (Jan 17, 2012, 6:00 PM), http://www.pcworld.com/article/248298/sopa_and_pipa_just_the_facts.html.

100 The bill's official summary describes this process as,

> An additional two-step process that allows an intellectual property right holder harmed by a U.S.-directed site dedicated to infringement, or a site promoted or used for infringement under certain circumstances, to first provide a written notification identifying the site to related payment network providers and Internet advertising services requiring such entities to forward the notification and suspend their services to such an identified site unless the site's owner, operator, or domain name registrant, upon receiving the forwarded notification, provides a counter notification explaining that it is not dedicated to engaging in specified violations.

Official Summary of H.R.3261 - Stop Online Piracy Act, *supra* note 98.

101 *See id*. *See generally* Stop Online Piracy Act *supra* note 3.

102 *Id.*

right-holder can then commence legal action for limited injunctive relief against the owner, operator, or domain name registrant, or against the site or domain name itself if such persons are unable to be found, provided a counter-notification is provided, or a payment facilitator or ad network fails to suspend its services in the absence of such a counter-notification.[103] Punitively, the laws would also increase penalties against copyright infringers.[104] Finally, the bills would shift the burden of proof and weaken the DMCA's "safe-harbor provision" by placing the responsibility for detecting and policing infringement onto the site itself and allowing judges to block access to websites "dedicated to theft of U.S. property."[105]

Opponents of the bill include Microsoft, Google and Facebook. These sites voiced their concerns through large-scale protests opposing SOPA.[106] They argue that the bills are tantamount to censorship without due process, infringing on constitutionally protected free speech rights and stifling, rather than promoting, innovation.[107] Moreover, opponents argue that provisions in the bill grant immunity to copyright holders that cut off sites based on a reasonable belief of infringement. Thus, even if claims are false, only the site suffers.[108] The Electronic Frontier Foundation has said, "The standard for immunity is incredibly low and the potential for abuse is off the charts."[109] Further, there is an

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103 *Id.*

104 *See* Stop Online Piracy Act, *supra* note 3. Regarding law enforcement's new powers, the Justice Department could seek a court order requiring U.S. Internet providers to block access to foreign pirate websites. Access could be blocked either by making it impossible for users to type a simple web address into an Internet browser to reach the site or by requiring search engines like Google to disable links to the sites. The attorney general could also seek a court order requiring credit-card processors to stop processing payments to the sites and requiring advertising networks to stop placing ads on the sites or taking ads from the pirated websites for display elsewhere. In addition, both bills would allow Hollywood studios and other content owners to take private legal action against websites that are alleged to be hosting pirated material. Schatz, *supra* note 93.

105 *Id.*

106 For a complete list of organizations who support and oppose the bill, *see* Official Summary of H.R.3261 - Stop Online Piracy Act, *supra* note 98.

107 *See, e.g.*, David Drummond, *Don't Censor the Web*, GOOGLE OFFICIAL BLOG (Jan. 18, 2012), http://googleblog.blogspot.com/2012/01/dont-censor-web.html. *See also* Julian Sanchez, *SOPA, Internet Regulation and the Economics of Piracy*, WIRED MAGAZINE (Jan. 18, 2012), *available at* http://www.cato.org/publications/commentary/sopa-internet-regulation-economics-piracy.

108 Trevor Timm, *How PIPA and SOPA Violate White House Principles Supporting Free Speech and Innovation*, ELECTRONIC FRONTIER FOUNDATION, (Jan. 6, 2012), https://www.eff.org/deeplinks/2012/01/how-pipa-and-sopa-violate-white-house-principles-supporting-free-speech.

109 *Id.*

unreasonable burden on search engines and ad companies to police their own sites to avoid liability.[110] Moreover, many arguments against SOPA are made by experts unable to properly communicate their concerns. According to Professor Annemarie Bridy, "[t]he exclusion of disinterested technical experts from the SOPA hearing is symptomatic of a myopic but increasingly entrenched view of intellectual property policymaking as a process of bargaining between different sets of corporate 'stakeholders' with competing business interests—e.g., copyright owners and Internet intermediaries."[111] Failure to account for the intricate technological implications will be discussed later in this Note.

Proponents of SOPA have been the driving force behind the legislation. RIAA president Cary Sherman claims that the bill argues for "more legal safeguards to overseas-based sites, . . . places considerable burdens on potential enforcement, and includes specific parameters to determine whether a site qualifies as one 'dedicated to the theft of U.S. property' and stipulates necessary steps to be undertaken before taking any action to block access or funding."[112] Further, the law would create stricter copyright protection and tougher enforcement, which supporters believe will help gain back the over $7 billion decline in revenues during the last decade that have resulted in fifteen thousand layoffs and fewer resources to invest in innovative new technologies.[113]

III. Analysis: The Downfall of Litigation and the Prospect of ADR

A. *How Litigation Has Failed*

In 2008, Andrew Cuomo, then New York Attorney General, brokered a deal with the RIAA to end its litigation strategy against individual downloaders.[114] The RIAA reached an agreement with

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110 *Id.*

111 Annemarie Bridy, *Copyright Policymaking as Procedural Democratic Process: A Discourse-Theoretic Perspective on ACTA, SOPA, and PIPA*, 30 Cardozo Arts & Ent. L.J. 153, 162–63 (2012).

112 Cary Sherman, *RIAA chief: Copyright Bills Won't Kill the Internet*, CNET News (Nov. 8, 2011 6:13 AM PST), http://news.cnet.com/8301-1023_3-57320417-93/riaa-chief-copyright-bills-wont-kill-the-internet/?tag=cnetRiver.

113 *Id.*

114 *See* McBride & Smith, *supra* note 70. Mr. Cuomo's Chief of Staff, Steven Cohen claimed, "We want to end the litigation. It's not helpful." *Id*.

major ISPs in which the ISP, not the RIAA, would contact its customers demanding an immediate end to downloading the RIAA's copyrighted material.[115] If the customers continue the file-sharing, the ISP could slow its service to the infringer or cut off access altogether.[116] The RIAA could still sue an individual downloader, but only in extreme cases.[117]

Litigation—both against content hosts and individual users—has done little to stem the tide of online piracy.[118] Indeed, downloading has increased even in the wake of the media industry legal campaign.[119] Moreover, excessive damage awards, similar to those previously charged in RIAA lawsuits, have been held unconstitutional under the Due Process clause of the 14th Amendment.[120] The arbitrary nature in which damages were levied was certainly a deterrent for continuing to pursue individuals engaged in file sharing.[121] Fear of public backlash can also explain much of the RIAA and MPAA's disfavor towards individual lawsuits.[122] In addition to being ineffective and, at times, arguably unconstitutional, litigating piracy has been extremely costly.[123] According to the RIAA's website, the "legal digital market today exceeds $3 billion annually and boasts more than 400 licensed music services worldwide."[124] And as evidenced by the most recent SOPA and PIPA debate, little has been accomplished towards resolving the conflict between media pirates and the media content industry. As

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115 *Id*.

116 *Id*.

117 *See id*.

118 *See* Sanchez, *supra* note 107 (citing a report from Felix Oberholzer-Gee of the Harvard Business School to contend that "data on the supply of new works are consistent with the argument that file sharing did not discourage authors and publishers" from producing more works, at least in the US market); *accord* RIAA v. The People: Five Years Later, *supra* note 7 ("Virtually all surveys and studies agree that P2P usage has grown steadily since the RIAA's litigation campaign began . . . Six months after the RIAA lawsuits began, more than 20 million Americans continued to use P2P file sharing software—a number amounting to 1 in 6 Americans with Internet access.").

119 Bhattacharjee, *supra* note 68.

120 *See* Barker, *supra* note 35, at 537. *See also* TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993) (opining that excessive damages are in violation of substantive due process).

121 For an empirical analysis of the RIAA lawsuits against peer-to-peer file sharers and individual downloaders, *see generally* Opderbeck, *supra* note 54, at 1709.

122 RIAA v. The People: Five Years Later, *supra* note 6 ("There is no question that the RIAA's lawsuit campaign is unfairly singling out a few people for a disproportionate amount of punishment.").

123 *Id.*

124 Recording Industry Association of America, http://www.riaa.com/toolsforparents.php?content_selector=resources-for-students.

discussed below, this Note proposes ADR as viable forum in which to stem the tides of the ever-increasing debate over online piracy.

B. *How ADR Could be Used to Resolve the SOPA Debate*

Alternative dispute resolution methods and principles could play a large and effective role in the online piracy debate. One of the fundamental problems in international intellectual property law disputes is the disparity in how different nations conceptualize intellectual property.[125] To address this concern, the United Nations established WIPO to regulate international intellectual property law. Founded on July 14, 1967, WIPO has two main objectives: (1) to promote the protection of intellectual property worldwide, and (2) to ensure administrative cooperation among the United Nations' intellectual property treaties.[126] In fact, the DMCA incorporates one of these treaties—WIPO Copyright Treaty of 1996—into law.[127] The WIPO Copyright Treaty was designed to "[deal] with protection for authors of literary and artistic works" in order to adequately protect their copyrights internationally "when their works are disseminated through new technologies

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125 Jennifer Mills, *Alternative Dispute Resolution in Intellectual Property Disputes*, 11 OHIO ST. J. ON DISP. RESOL. 227 (1996).

126 Summary of the Convention Establishing the World Intellectual Property Organization, WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/treaties/en/convention/summary_wipo_convention.html. WIPO functions via activities in furtherance of the above stated objective:

> (i) normative activities, involving the setting of norms and standards for the protection and enforcement of intellectual property rights through the conclusion of international treaties;
>
> (ii) program activities, involving legal technical assistance to States in the field of intellectual property;
>
> (iii) international classification and standardization activities, involving cooperation among industrial property offices concerning patents, trademarks and industrial design documentation; and
>
> (iv) registration activities, involving services related to international applications for patents for inventions and for the registration of international marks and industrial designs. *Id.*

127 In pertinent parts, the Treaty requires the United States to implement legal remedies against the circumvention of technological measures (e.g., encryption) used by authors in connection with the exercise of their rights and against the removal or altering of information, such as certain data that identify works or their authors, necessary for the management (e.g., licensing, collecting and distribution of royalties) of their rights ("rights management information"). Summary of the WIPO Copyright Treaty (WCT) (1996), WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/treaties/en/ip/wct/summary_wct.html.

and communications systems such as the Internet."[128] While the DMCA-incorporated treaty makes it illegal to distribute technology to circumvent existing copyright protection (including copying VHS cassettes), the treaty is ill-equipped to deal with emerging technologies such as peer-to-peer file sharing.[129] Indeed, there is much ambiguity as to how the WIPO Copyright Treaty will be applied to Internet piracy.[130]

A promising way to manage online piracy's rise in international copyright law is to address disputes in the WIPO Arbitration and Mediation Center. Added to WIPO in 1994, the Geneva-based Center offers dispute settlement services for private, international intellectual property disputes.[131] The Center was established to solve varying jurisdictional problems inherent in complicated applications of international law.[132] Thus, the WIPO Arbitration and Mediation Center offers a flexible tribunal to accommodate various international concepts of property. Currently, the applicable subject matter is primarily "contractual disputes (e.g. patent and software licenses, trademark coexistence agreements, distribution agreements for pharmaceutical products and research and development agreements) and non-contractual disputes (e.g. patent infringement)."[133]

Yet online copyright infringement enforcement has limited the potential utility of the WIPO and its ADR Center.[134] U.S. actions regarding sites like Megaupload and Pirate Bay have brought attention to the international evasion of online pirates. Indeed, the Department of Justice takedown was accomplished with the help of eight other countries, notably New Zealand.[135] WIPO could play an important role in properly coordinating and resolving future dis-

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128 The Advantages of Adherence to the WIPO Copyright Treaty, WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/copyright/en/activities/wct_wppt/pdf/advantages_wct_wppt.pdf.

129 *See id*. *See also* Unintended Consequences: Seven Years under the DMCA, ELECTRONIC FRONTIER FOUNDATION (Apr. 10, 2006), https://www.eff.org/wp/unintended-consequences-seven-years-under-the-dmca#Section7.

130 *See id*.

131 E. Casey Lide, *ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation*, 12 OHIO ST. J. ON DISP. RESOL. 193 (1996). *See generally* WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/amc/en/index.html.

132 WIPO Arbitration and Mediation Center, WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/amc/en/center/background.html.

133 *Id*.

134 *See, e.g.*, FEDERAL BUREAU OF INVESTIGATION, *supra* note 38.

135 *Id*.

putes over online copyright infringement. And, arguably, the most effective forum for such resolution could be the Mediation and Arbitration Center.

It is apparent that the Mediation and Arbitration Center is capable of effectively settling international copyright disputes. To date, the Center's subject matter is primarily concentrated on trademark agreements and patent infringement.[136] Mediation is carried out using neutral intermediaries knowledgeable about international law.[137] The mediation is non-binding.[138] However, if the parties[139] fail to reach a settlement, arbitration is offered at the Center that calls for a combination of mediation and arbitration. Under this method, when a dispute is not settled through mediation within a prearranged time frame, the dispute goes directly to arbitration.

To illustrate, suppose a publishing house enters into a contract with a software company for a project to be completed within one year. The contract includes a clause submitting disputes to WIPO mediation and, if settlement could not be reached within sixty days, to WIPO expedited arbitration. After eighteen months of unsatisfactory service, the publishing house refuses to pay, threatening to rescind the contract. Pursuant to the contract, the publishing house files a request for mediation with WIPO. While the parties failed to reach a settlement, the mediation enabled them to focus on the issues that were addressed in the ensuing expedited arbitration proceeding.[140]

A similar process could be applied to online copyright infringement, though the WIPO Arbitration and Mediation Center has yet to update its practices to the piracy issues. As discussed below, the Center could broaden its services to address copyright

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136 The subject matter of the mediation and arbitration cases so far administered by the WIPO Center includes artistic production finance agreements, art marketing agreements, consultancy and engineering disputes, copyright issues, distribution agreements for pharmaceutical products, information technology agreements including software licenses, joint venture agreements, patent infringements, patent licenses, research and development agreements, technology transfer agreements, telecommunications related agreements, trademark issues (including trademark coexistence agreements), TV distribution rights, as well as cases arising out of agreements in settlement of prior court litigation. WIPO Arbitration and Mediation Center, *supra* note 132.

137 WIPO ADR Procedures, WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/amc/en/center/wipo-adr.html.

138 *Id*.

139 Parties include: collecting societies, individuals, companies, producers, and universities. *Id*. However, the parties included in piracy disputes could easily be included in this list.

140 Mediation Case Examples, WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/amc/en/mediation/case-example.html.

infringement cases between RIAA members and overseas online services used to transmit pirated material.

Arbitration is already commonplace in some intellectual property disputes dealing with trademark and patent disputes. For example, a three-person, mutually agreed-upon arbitral panel is utilized to resolve conflicting uses of an Internet domain addresses.[141] In another example, foreign companies entering into a copyright license include a WIPO clause requiring mediation before an intellectual property specialist.[142]

The advantages for arbitration in patent disputes include speedy resolution and mutually agreed-upon experts to preside over complex technology issues.[143] The complexity of integrating SOPA into existing copyright laws has been a point of contention among opponents.[144] By having experts serve as mediators to piracy disputes, the conflicting concerns of corporate interests and technological insights can be better balanced.[145] And unlike traditional litigation, the WIPO Arbitration and Mediation Center provides speedy results.[146]

These advantages would translate directly to piracy claims. U.S. copyright holders could bring claims against large-scale offenders, as well as individual downloaders, through a modified version of the Arbitration and Mediation Center services. Because of the unique blend of concerns, including balancing American law with foreign intellectual property laws, the intricacies of the technologies involved, as well as the problems in litigating this controversy, ADR provides a novel solution to the online piracy conflict.

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141 *See* Lide, *supra* note 131, at 208.

142 *See id*.

143 Karl P. Kilb, *Arbitration of Patent Disputes: An Important Option in the Age of Information Technology*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 599, 599 (1993).

144 *See* Bridy, *supra* note 111, at 162 ("Reaching political compromise is necessary, in other words, but democratically legitimate compromises cannot be reached in an epistemic vacuum, where corporate interests are the primary drivers of policy formation, and other concerns, such as technical ones, are viewed as irrelevant or incidental.").

145 *Id*.

146 *See* WIPO ADR Procedures, *supra* note 137.

IV. PROPOSAL

A. *WIPO's Arbitration and Mediation Center Should Address Piracy Issues*

First, the international and technical concerns of SOPA should persuade the WIPO to update its programs to include piracy as an issue covered by the Arbitration and Mediation Center. Prior enforcement of U.S. copyright law entails reaching into foreign jurisdictions to obstruct online downloading. However, commentators note that SOPA could allow the U.S. Department of Justice to reach too far.[147] As the DMCA demonstrates, the U.S. Congress is willing to incorporate WIPO treaties into U.S. intellectual property law. While negotiating a comprehensive legislative solution to online piracy, adding a WIPO-driven ADR center should be considered. Arbitration through the WIPO Arbitration and Mediation Center would be a valuable resource for countries coordinating copyright enforcement. Already employing experts properly equipped to examine the adequacy of damages resulting from copyright infringement,[148] the Arbitration and Mediation center could modify its procedures to hear certain piracy claims. While large-scale cases may still need to be litigated,[149] and other enforcement options are viable, ADR should certainly be considered moving forward.

ADR is not new to the realm of movie studio disputes. WIPO has already experimented with movie industry copyright issues. Launched in 2009, the WIPO Arbitration and Mediation's 'Film and Media Panel' handles disputes ranging from distribution agreements to artist and talent contract disputes.[150] However, because of the pending litigation against peer-to-peer file sharing organizations—many of which are based abroad—the organization has yet to address piracy concerns.[151] In light of its existing structure,

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147 Timm, *supra* note 108.

148 For a list of neutrals assigned to WIPO arbitration, *see* WORLD INTELLECTUAL PROPERTY ORGANIZATION, *Neutrals*, http://www.wipo.int/amc/en/neutrals/.

149 *See, e.g.*, MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).

150 *See generally*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/amc/en/film/.

151 WIPO has commented on online piracy generally. In reference to possible solutions WIPO notes:

> Strong measures are needed at local, national and international level to counter these dangerous trends. For instance, the Computer Program Deliberation and Mediation Committee of Korea has embarked upon the creation of a "fair-use environment" for

WIPO should provide Arbitration and Mediation Panels, which can be used in conjunction or independently,[152] at the parties' discretion.[153] RIAA copyright holders could privately contract with distributors and online advertisers (a main focus in SOPA) to compel arbitration via the Arbitration and Mediation Panel; and the process could be completed in less than one month.[154] This can help effectively accomplish the twin goals of ADR: speedy resolution and proper analysis by expert panelist familiar with the novel IP issues.[155] The mechanism could conceivably be similar to those used to resolve conflicts over an Internet address: a three-person arbitral panel knowledgeable about intellectual property and online copyright infringement. By having arbitrators who have detailed knowledge of the technicalities of online piracy, both parties would be better served.[156]

As the litigation against Pirate Bay[157] demonstrates, courts are ill-equipped to handle the confluence of international and intellectual property law. The WIPO Arbitration and Mediation Panel can resolve the copyright infringement issues addressed by SOPA more readily than the proposed legislations. Additionally, the WIPO Arbitration and Mediation Center can better account for each party's interests, as it applies not only to U.S. property law, but also international concepts of intellectual property.[158] As it stands, SOPA expressly forbids violation of U.S. copyright laws. An international arbitration panel, housed in the WIPO, stands as

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> software through a number of anti-piracy measures, including consultation on legitimate software management, free software to detect illegal copies, monitoring of suspicious websites, and an awareness campaign to change public attitudes toward legitimate software in Korea.

WIPO Paper on Internet Piracy, *available at* http://www.wipo.int/edocs/mdocs/copyright/en/wipo_ip_cm_07/wipo_ip_cm_07_www_82573.doc.

152 S*ee generally WIPO ADR Procedures*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/amc/en/center/wipo-adr.html.

153 WORLD INTELLECTUAL PROPERTY ORGANIZATION, *supra* note 150.

154 *Id.*

155 Qualifications of WIPO Arbitrators are listed at *Neutral*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/amc/en/neutrals/.

156 Juxtaposed with the SOPA initiative, which was driven by corporate interests at the behest of Internet advocates, including the engineers responsible for the Internet's formation. *See* An Open Letter From Internet Engineers to the United States Congress, *supra* note 52. These people too should have a say in the laws regarding online piracy in respect to its effect on the Internet's operations. An ADR solution would respond to this by placing technical experts at the heart of piracy disputes.

157 Summons against Pirate Bay, Internationella åklagarkammaren Stockholm [International Public Prosecution Office Stockholm], 01/31/2012, *available at* http://www.idg.se/polopoly_fs/1.143041!stamningsansokanpb.pdf.

158 *See* WORLD INTELLECTION PROPERTY ORGANIZATION, *supra* note 8.

a feasible alternative to litigating against violators who are governed by a multitude of international Intellectual Property laws. Admittedly, some copyright violations present complications outside the scope of arbitration.[159] Yet other minor disputes, particularly with individual downloaders, could benefit equitably from WIPO-based arbitration. Mandatory arbitration would provide a sound, equitable forum in which to address the escalating copyright infringement online. A well-developed forum at WIPO's Arbitration and Mediation Center would likely be beneficial to both online downloaders and media producers.

B. *SOPA Should Alter Its Notification System to Include A Third Party Arbitration System*

In addition to suggesting an addition to the WIPO Arbitration and Mediation Center, this Note suggests that any new law controlling online piracy should do away with the SOPA notification system and implement an ADR-influenced arbitration system. SOPA's proposed notification system, which places the burden of policing copyright infringement on host websites, should be replaced with a third party arbitration system. Under this system, awards would be capped at a reasonable amount,[160] and the arbitrator's fees paid by the losing party (thereby discouraging frivolous claims).[161] Current law requires a copyright holder to notify the ISP that a user of his service is potentially infringing on his content.[162] Commentators consider this costly and inefficient.[163]

As compared to the litigation against individual downloaders, this updated notification system governed by a third-party arbitrator would prevent excessive damages and promote efficient use of resolving infringing disputes. A copyright holder bringing the claim would be discouraged from sending mass notifications and

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159 *Cf.* FEDERAL BUREAU OF INVESTIGATION, *supra* note 38.

160 Because damages sought by the RIAA were not to recoup lost revenue, a reasonable amount should be under $500.

161 While mandatory arbitration is a creature of contract law, any new legislation amending the Digital Millennium Copyright Act should include a non-judicial mechanism for addressing copyright violation notifications. The WIPO Mediation and Arbitration Center can also amend its procedure to properly handle mandated arbitration, which is not new in U.S. Federal law. *See, e.g.*, N.J. Stat. Ann. § 12A:1-101 (West 2013), where automobile insurance claims are required to go through arbitration before a court will hear the dispute.

162 *See* Digital Millennium Copyright Act, *supra* note 74.

163 *See, e,g.*, Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 346 (S.D.N.Y. 2000).

requesting meritless injunctive relief from the court, as has occurred in the past. The losing party would pay for the cost of an independent arbitrator, which would encourage meritorious infringement claims while discouraging ISPs from acquiescing to users pirating copyrighted songs and movies. If an arbitration decision could not be resolved, then court proceedings could be necessary. But requiring parties to exhaust their options with an arbitrator would surely lead to speedier, more equitable results. The third-party system could also mandate penalties to losing parties. This system would discourage frivolous claims and ensure that actions taken would have a high rate of resolution. The advantages of having a knowledgeable arbitrator are important to this proposal's consideration.

This proposal is subject to compromise. Notably, court action should not be ruled out. A claimant should, however, be required to show that arbitration has been exhausted before proceeding with court action.[164] The advantages of injecting this updated notification into the SOPA law ought to be recognized going forward. By requiring arbitration before court access, injunctive relief should only be available in specific circumstances. Coupled with the WIPO Arbitration panel described above, this novel approach demonstrates ADR's utility in online piracy. Overall, the issues addressed by copyright law are ever changing and increasingly involve international players. Legislation should adapt to this changing environment by recognizing the value of ADR in pertinent online piracy disputes.

V. Conclusion

The SOPA/PIPA debate is the most recent, though certainly not the last, manifestation of an ongoing intellectual property dispute over online piracy. Litigation has tried and failed to resolve this problem. Against peer-to-peer websites, it has been ineffective. Against individuals, it has been distasteful. A novel mechanism is needed to effectively enforce copyright in and out of the United States. By injecting arbitration and mediation into the conflict, a new means of resolving piracy disputes can be achieved. The framework already exists: WIPO's Arbitration and Mediation Center. Additionally, considering a third-party arbitration system

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164 *See, e.g.*, N.J. Stat. Ann. § 12A:1-101, *supra* note 161.

for infringement notifications could appease the concerns of copyright holders and ISPs affected by SOPA. To effectively handle the rise in online piracy, the WIPO Arbitration and Mediation Center should house an arbitration panel equipped to resolve online piracy disputes. Any legislation going forward should require parties to arbitrate their dispute. The SOPA debate is far from over. In SOPA's next iteration, this Note proposes introducing ADR via WIPO and a novel notification system. In doing so, media producers and content host websites would have an effective venue to resolve their online copyright disputes.