

2016

The International Reach of Criminal Copyright Infringement Laws

Sara K. Morgan

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vjtl>



Part of the [Criminal Law Commons](#), [Intellectual Property Law Commons](#), and the [International Trade Law Commons](#)

Recommended Citation

Sara K. Morgan, *The International Reach of Criminal Copyright Infringement Laws*, 49 *Vanderbilt Law Review* 553 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol49/iss2/8>

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in *Vanderbilt Journal of Transnational Law* by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

The International Reach of Criminal Copyright Infringement Laws—Can the Founders of The Pirate Bay Be Held Criminally Responsible in the United States For Copyright Infringement Abroad?

ABSTRACT

Piracy and illegal downloading in the Internet age have been on the forefront of the intellectual property community's mind since the early 2000s. Websites such as The Pirate Bay are often labeled as being leaders in copyright infringement, giving users the ability to illegally download thousands of files. However, there are both jurisdictional and extradition issues with prosecuting the founders of these websites, because The Pirate Bay and many others like it are often based in other countries. Recently, the Stop Online Piracy Act and PROTECT IP Act have stirred up controversy, with many alleging that their international reach went too far. This Note looks at how (and if) the United States can hold the founders of The Pirate Bay personally and criminally liable in the United States for their actions in facilitating the copyright infringement of others.

TABLE OF CONTENTS

I.	INTRODUCTION	555
	A. <i>The Proliferation of Piracy and Illegal Downloading</i>	557
	B. <i>How This Affects American Companies and the American Economy</i>	558
II.	THE PIRATE BAY	559
	A. <i>Issues with Prosecuting the Founders of The Pirate Bay in the United States</i>	559
	B. <i>Attempts to Prosecute the Founders of The Pirate Bay</i>	561
	C. <i>The Influence of The Pirate Bay</i>	563
III.	THE CRIMINALIZATION OF COPYRIGHT INFRINGEMENT	563
	A. <i>The Copyright Act</i>	565

	B.	<i>The Digital Millennium Copyright Act of 1998</i>	566
IV.		TURNING THE FOCUS TO <i>INTERNATIONAL</i> COPYRIGHT INFRINGEMENT.....	567
	A.	<i>The PRO IP Act</i>	567
	B.	<i>International Treaties and Instruments That Discuss Criminal Copyright Infringement</i>	569
	1.	The Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement)	569
	2.	The North American Free Trade Agreement (NAFTA)	570
	3.	Proposed Treaties Not Yet in Force	571
V.		THE STOP ONLINE PIRACY ACT AND THE PROTECT IP ACT.....	574
	A.	<i>The Stop Online Piracy Act</i>	574
	B.	<i>The PROTECT IP ACT (PIPA)</i>	576
	C.	<i>Media and Political Reactions to SOPA and PIPA</i>	577
VI.		LEGAL ANALYSIS: DOES CONGRESS HAVE THE AUTHORITY TO PASS THESE INTERNATIONAL SPECIFIC BILLS?	581
VII.		SOLUTION	583
	A.	<i>Fixing the Stop Online Piracy Act and the PROTECT IP Act</i>	583
	1.	Venue and Jurisdiction Issues	583
	2.	Extradition Issues	587
	B.	<i>Returning to the Arguments Against Criminalization</i>	589
	1.	Reasons for Not Criminalizing Copyright Infringement	589
	a.	Copyrights Are Not Real Property and Do Not Provide the Author with the Same Rights.....	589
	b.	The Rationale for Criminalization of Other Crimes Does Not Fit into the Context of Copyright.....	590
	c.	The Punishment Does Not Fit the Crime	591
	d.	Civil Remedies Are Adequate	592
	2.	Forgoing Prosecution of International Infringers Does	

	Not Violate International Treaties and Agreements.....	593
VIII.	CONCLUSION.....	594

I. INTRODUCTION

Every day, nearly 100 million different Internet Protocol (IP) addresses throughout the world are involved with illegal downloads of movies, music, and television shows.¹ To put this number in perspective, that would be roughly the equivalent of every single person in the top four most populated states—California, Texas, New York, and Florida—engaging in at least one instance of illegal downloading on his or her computer every single day.² The prolific nature of the illegal download culture was also evidenced by the much anticipated and dramatized release of Seth Rogen and James Franco’s movie, *The Interview*, which resulted in over 750,000 illegal downloads within a twenty hour period alone when it was released on December 25, 2014.³ Yet another prime example occurred in February 2016, when Kanye West released his album *The Life of Pablo*. Kanye stated that his album “will never never never be on Apple. And it will never be for sale You can only get it on Tidal.”⁴ Internet users were outraged that Kanye only made his album available on Tidal—a music streaming service of questionable

1. Todd Spangler, *Pirate Bay Shutdown Has Had Virtually No effect on Digital Piracy Levels*, VARIETY (Dec. 13, 2014, 11:11 AM), <http://variety.com/2014/digital/news/pirate-bay-shutdown-has-had-virtually-no-effect-on-digital-piracy-levels-1201378756/> [<http://perma.cc/G936-AEWL>] (archived Jan. 23, 2016) (listing the movies and shows most often illegally downloaded and showing that the brief hiatus of *The Pirate Bay* did not sway downloaders from engaging in illegal downloading).

2. See United States Census Bureau, Resident Population Data (2010), <http://www.census.gov/2010census/data/apportionment-dens-text.php> [<https://perma.cc/WMZ2-LWLP>] (archived Feb. 25, 2016) (tabulating 2010 census results which show the combined population of California, Texas, New York, and Florida as 100.5 million); Spangler, *supra* note 1 (noting that despite a brief dip, the total number of peer-to-peer downloads on Dec. 12, 2014 was 100.2 million).

3. Ernesto, *The Interview Is a Pirate Hit with 200k Downloads (Updated)*, TORRENT FREAK (Dec. 25, 2014), <https://torrentfreak.com/the-interview-is-a-pirate-hit-with-200k-downloads-141225/> [<http://perma.cc/XGV9-JYNJ>] (archived Jan. 23, 2016).

4. Kanye West, TWITTER (Feb. 15, 2016, 3:34 PM), <https://twitter.com/kanyewest/status/699376240709402624> [<https://perma.cc/85DF-YGD4>] (archived Mar. 2, 2016) (“My album will never never never be on Apple. And it will never be for sale You can only get it on Tidal.”).

success⁵—and they reacted by illegally downloading *The Life of Pablo* over 500,000 times within twenty-four hours of the album's release.⁶

While the United States has created civil remedies to allow copyright holders to sue those who illegally download or share their copyrighted material, the trickier issue is the criminalization of copyright infringement.⁷ Additionally, the criminal prosecution of copyright infringers becomes more difficult when much of the illegal downloading and sharing occurs overseas on websites that do not have servers located within the United States; the best example of this is the popular torrent indexing and tracking site *The Pirate Bay*.⁸ When the website is based in another country, as *The Pirate Bay* is based in Sweden, conferring jurisdiction becomes tricky because usually the crime is prosecuted where it occurred⁹—but where did this crime occur? America has long been wanting to prosecute the founders and registrants of these international websites personally. In order to do so, two bills were introduced in 2011 that caused an uproar: the Stop Online Piracy Act and the PROTECT Intellectual Property Act.¹⁰ Both the American people as well as American-based websites expressed both outrage and support for these bills;¹¹ ultimately, they did not pass.¹²

5. Devin Leonard, *That's Business, Man: Why Jay Z's Tidal Is a Complete Disaster*, BLOOMBERGBUSINESS (May 28, 2015), <http://www.bloomberg.com/news/features/2015-05-28/why-jay-z-s-tidal-streaming-music-service-has-been-a-disaster> [<https://perma.cc/B5FV-PYL2>] (archived Mar. 2, 2016).

6. Ernesto, *Kanye West's The Life of Pablo Sparks Piracy Craze*, TORRENTFREAK (Feb. 16, 2016), <https://torrentfreak.com/kanye-wests-the-life-of-pablo-piracy-160216/> [<https://perma.cc/TM2H-WGUK>] (archived Mar. 2, 2016) (“TorrentFreak has been keeping a close eye on the popularity of the album on BitTorrent and after the first day an estimated 500,000 people have already grabbed a copy. The album is currently leading *The Pirate Bay*'s list of most shared music torrents by a landslide.”).

7. 17 U.S.C. §§ 501, 506 (2006); see also *MGM Studios Inc. v. Grokster Ltd.*, 545 U.S. 913, 919 (2005) (“We hold that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”); *Fonovisa v. Cherry Auction, Inc.*, 76 F.3d 259, 261 (9th Cir. 1996) (citing *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 435 (1984)) (“Although the Copyright Act does not expressly impose liability on anyone other than direct infringers, courts have long recognized that in certain circumstances, vicarious or contributory liability will be imposed.”).

8. THE PIRATE BAY, <http://www.thepiratebay.se> [<https://perma.cc/SH4R-2VN2>] (archived Feb. 25, 2016).

9. FED. R. CRIM. P. 18 (“Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed.”).

10. Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011); The PROTECT IP Act, S. 968, 112th Cong. (2011).

11. See Letter from AOL, eBay, Facebook, Google, LinkedIn Corporation, Mozilla, Twitter, Yahoo!, and Zynga Game Network, to Pat Leahy, Chuck Grassley, Lamar Smith, John Conyers, Members of Congress (Nov. 15, 2011), <http://www.protectinnovation.com/downloads/letter.pdf> [<http://perma.cc/YK7P-H42J>] (archived Jan. 23, 2016) (expressing support for the goals of the bills generally, but hesitation about aspects of the versions proposed); Joint Letter to the United States Senate in Support

Part I of this Note will discuss the widespread problem of online piracy, illegal downloading, and copyright infringement. It will also discuss how this problem affects Americans and the United States' economy, along with the trouble of prosecuting these owners of these international infringing websites. Part II will give an overview of The Pirate Bay. Part III will discuss the criminalization of copyright infringement, while Part IV will turn the discussion toward the international realm. Part V details SOPA, PIPA, and the outrage with which they were met. Part VI will analyze these two bills from a legal perspective. Finally, Part VII will propose that the United States decriminalize copyright infringement and will also explain why this solution does not violate U.S. international treaty obligations.

A. *The Proliferation of Piracy and Illegal Downloading*

The group of people who engage in the piracy of movies, music, and television shows is by no means a small group.¹³ The American Assembly at Columbia University found that nearly one half of all Americans have copied, shared, or downloaded online files for free.¹⁴ Within the age group of 18–29, this percentage jumps to about 70 percent.¹⁵ While not all of this copying and sharing occurs online (e.g., the copying of a friend's CD),¹⁶ illegal downloading does not seem to be slowing down.¹⁷ In 2013, illegal downloads of television shows increased by 10 percent from 2012.¹⁸ Perhaps most shockingly, the numbers of illegal downloads of some of the most pirated television shows exceeded the estimated U.S. viewership of these

of PIPA (May 25, 2011), <http://www.nam.org/Issues/Intellectual-Property/ProtectIPActSenate.pdf> [<http://perma.cc/5XN7-VP6R>] (archived Jan. 23, 2016) (expressing support for PIPA on behalf of businesses, trade associations and professional and labor organizations); Amy Goodman, *The Sopa Blackout Protest Makes History*, GUARDIAN (Jan. 18, 2012, 6:51 PM), <http://www.theguardian.com/commentisfree/cifamerica/2012/jan/18/sopa-blackout-protest-makes-history> [<http://perma.cc/M47H-MTPV>] (archived Jan. 23, 2016) (describing widespread protest in response to the proposals of SOPA and PIPA).

12. See H.R. 3261; S. 968.

13. See JOE KARAGANIS & LENNART RENKEMA, *THE AM. ASSEMBLY AT COLUMBIA UNIV., COPY CULTURE IN THE US & GERMANY 5* (2013), http://americanassembly.org/sites/default/files/download/publication/copy_culture.pdf [<http://perma.cc/9AED-9D7N>] (archived Jan. 23, 2016).

14. *Id.* at 5.

15. *Id.*

16. See *id.* (noting that in both the United States and Germany private copying occurs at a similar scale to online file sharing).

17. See Casey Johnston, *Game of Thrones Illegal Downloads Exceed TV Viewers for Second Year*, ARSTECHNICA (Dec. 27, 2013, 1:15 PM), <http://arstechnica.com/business/2013/12/game-of-thrones-illegal-downloads-exceed-tv-viewers-for-second-year/> [<http://perma.cc/P7JN-DYZX>] (archived Jan. 23, 2016) (finding that illegal downloads of several of the year's top ten shows exceeded regular viewers in the United States).

18. *Id.*

shows.¹⁹ For example, in 2013, *Game of Thrones*, a popular American television show, was downloaded 5.9 million times; this exceeds the estimated U.S. viewership of 5.5 million people by nearly half a million.²⁰ This is a 37 percent increase in downloads of *Game of Thrones* since 2012.²¹

B. *How This Affects American Companies and the American Economy*

The majority of illegally downloaded content belongs to American artists and producers, which means that sales, distribution, and potential income related to these copyrights are being affected.²² Since the once wildly popular Napster came onto the scene in 1999, music sales in the United States have dropped by over 7 billion dollars, from 14.6 billion before 1999, to 6.97 billion in 2014.²³ This effect on the music industry in the United States existed even after copyright holders sued Napster in 2001, when Napster was found liable for copyright infringement and ultimately forced into a subscription model instead of allowing free, illegal downloading.²⁴

Furthermore, because the total number of illegal downloads of some files, such as the television show *Game of Thrones*, actually exceeds the number of estimated viewers in the United States,²⁵ it is safe to assume that many of these illegal downloads are completed by people overseas.²⁶ While this trend's actual effect on American copyright holders may be debatable, since these foreign users may not have access to a legal or legitimate means of accessing these files—and therefore are not pirating in lieu of watching legally—American copyright holders' rights are still being affected by having their products being made available online for free.

19. *See id.*

20. *Id.*

21. *Id.*

22. *See* Glenn Peoples, *Bruno Mars, Rihanna Top List of Most-Pirated Artists in 2013*, BILLBOARD (Dec. 31, 2013, 1:38 PM), <http://www.billboard.com/biz/articles/news/digital-and-mobile/5855105/bruno-mars-rihanna-top-list-of-most-pirated-artists-in> [<http://perma.cc/UW92-WJ35>] (archived Jan. 23, 2016).

23. David Goldman, *Music's Lost Decade: Sales Cut in Half*, CNN MONEY (Feb. 3, 2010, 9:52 AM), http://money.cnn.com/2010/02/02/news/companies/napster_music_industry/ [<https://perma.cc/4QDK-NMH6>] (archived Mar. 2, 2016) (“Total revenue from U.S. music sales and licensing plunged to \$6.3 billion in 2009, according to Forrester Research. In 1999, that revenue figure topped \$14.6 billion.”); RIAA, NEWS AND NOTES ON 2014 RIAA MUSIC INDUSTRY SHIPMENT AND REVENUE STATISTICS 1 (2014), https://www.riaa.com/wp-content/uploads/2015/09/2013-2014_RIAA_YearEndShipmentData.pdf [<https://perma.cc/C45L-MW5F>] (archived Mar. 2, 2016) (recording 2014 U.S. recorded retail music revenues at \$6.97 billion).

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

25. *See supra* Part I.A.; *see also* KARAGANIS & RENKEMA, *supra* note 13.

26. *See* Johnston, *supra* note 17 (aggregating data on all illegal downloads for comparison to U.S. viewership).

II. THE PIRATE BAY

While there are numerous websites dedicated to helping Internet users find and access free files, The Pirate Bay is one of the largest and most well-known. It is a peer-to-peer sharing platform launched in 2003 by four Swedish men, Gottfrid Svartholm Warg, Peter Sunde, Fredrik Neij, and Carl Lundstrom, and is used by people from all over the world.²⁷ The Pirate Bay exists under the URL www.thepiratebay.se because it is a Swedish website, and its servers are also in Sweden.

The Pirate Bay is a BitTorrent indexing and tracking website.²⁸ BitTorrent is a protocol that allows for easy sharing of large files online, which means that none of the information downloaded by users is directly located on The Pirate Bay—The Pirate Bay simply tells users where to find the files to download.²⁹ To download the BitTorrent, users must have a torrent downloader such as uTorrent.³⁰ The torrent contains the audio or video file; the torrent itself is not what is copyrighted. What *is* copyrighted is the information the torrent transmits—the audio files, movies, and television shows.³¹

A. *Issues with Prosecuting the Founders of The Pirate Bay in the United States*

In a typical criminal case in the United States, the defendant is prosecuted in the district in which the crime was committed.³² When this crime occurs over the Internet, however, this district determination gets more difficult. Furthermore, when this crime occurs on a foreign website not located within the United States, this determination is arguably infinitely more difficult.

For example, if the government wanted to prosecute the registrants or founders of a website with a “.com” domain name for facilitating copyright infringement or for being contributorily liable, they must first determine the appropriate venue. This is, for example, the situation with the Megaupload.com trial currently in progress.³³

27. See *id.* (estimating the total number of downloads for the top ten most torrented shows of 2013).

28. See Gustavo Cardoso, et al., *P2P in the Networked Future of European Cinema*, 6 INT'L J. COMM. 795, 801 (2012).

29. See *id.* at 800 (explaining that trackers like The Pirate Bay are only needed to begin a download, after which communication between peers can take place without an intermediary).

30. *Id.* at 797 n. 4.

31. *Id.* at 800.

32. FED. R. CRIM. P. 18.

33. See *United States v. Dotcom*, No. 1:12-cr-3 (E.D. Va. Oct. 5, 2012) (order granting defendant's motion for leave to file supplemental memorandum and denying

Megaupload.com was a website that allowed storage and sharing of copyrighted material.³⁴ Its founder, Kim DotCom,³⁵ has been indicted, along with other people who worked for the website.³⁶ Kim DotCom has been charged with numerous crimes associated with the website, including criminal copyright infringement, racketeering, and money laundering.³⁷

Because all “.com” websites are registered with a company called Verisign—a company contracted by the Department of Commerce to handle the registry³⁸—and because Verisign is headquartered in the Eastern District of Virginia, any *in rem* case brought against a “.com” website has proper jurisdiction in the Eastern District of Virginia.³⁹ For *in personam* jurisdiction over the registrants of the “.com” website (instead of the website as a whole), the Eastern District of Virginia has allowed for a “veil piercing” and “alter ego” argument—that the website is the “alter ego” of the registrant, and therefore the registrant is subjected to the jurisdiction of where the registry or servers of the website are located because the corporate veil can be pierced.⁴⁰ This is the analysis for a “.com” website (the location of which is in the United States), and it is the analysis that the court has undertaken in the Megaupload trial.⁴¹

The situation is more difficult, however, when the website is foreign. The Pirate Bay is a Swedish website, bearing the URL www.thepiratebay.se.⁴² The “.se” is the top-level domain name for Swedish websites, indicating that both the servers of the website and

defendant’s motion to dismiss) (denying defendant’s motion to dismiss because Congress could not have contemplated allowing a foreign corporate defendant to avoid prosecution by intentionally failing to establish an address in the United States).

34. Superseding Indictment at 2, *United States v. Dotcom*, No. 1:12-cr-3, 2012 U.S. Dist. LEXIS 148114 (E.D. Va. Feb. 16, 2012).

35. Geoffrey A. Fowler, et al., *Inside the Lavish Life of Web’s Mr. Dotcom*, WALL STREET JOURNAL (January 21, 2012), <http://www.wsj.com/articles/SB10001424052970203750404577173243494465660> (subscription required) [<http://perma.cc/ZX6Y-W6EV>] (archived Jan. 23, 2016) (“Kim Schmitz legally changed his surname to Dotcom at some point over the last decade, a homage to the technology that made him a millionaire . . .”).

36. Superseding Indictment at 1, *United States v. Dotcom*, No. 1:12-cr-3, 2012 U.S. Dist. LEXIS 148114 (E.D. Va. Feb. 16, 2012).

37. *Id.*

38. United States Department of Commerce, Cooperative Agreement No. NCR 92-18742 (Nov. 29, 2012) (on file with author).

39. *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 222–25 (4th Cir. 2002); see also Cyrus Farivar, *Megaupload Programmer Pleads Guilty, Sentenced to a Year in Prison*, ARSTECHNICA (Feb. 13, 2015, 1:21 PM), <http://arstechnica.com/tech-policy/2015/02/megaupload-programmer-pleads-guilty-sentenced-to-a-year-in-prison/> [<http://perma.cc/T963-LB46>] (archived Jan. 23, 2016).

40. *Dotcom*, No. 1:12-cr-3, 2012 U.S. Dist. LEXIS 148114, at *9 (E.D. Va. Oct. 5, 2012).

41. *Id.*

42. THE PIRATE BAY, *supra* note 8.

the registry through which the website is registered are in Sweden.⁴³ Unlike the “.com” websites, the United States cannot claim *in rem* jurisdiction over the website due to its location outside of the country. Personal jurisdiction is also, therefore, presumably nonexistent because of this.⁴⁴ Even in the Megaupload case, registry of the website within the United States was insufficient to make the Eastern District of Virginia the proper venue for the *in personam* criminal trials of the registrants of the website.⁴⁵ If it had been, there would have been no need for the judge to use a “veil piercing” argument about the website perhaps being the “alter ego” of the defendants.⁴⁶ Therefore, if the registry of the website within the United States is not enough to give a domestic court proper venue in an *in personam* criminal action, it suggests that there may be no proper venue for *foreign* registrants within the United States at all. After all, their website is registered in Sweden, and both they and their servers are located in Sweden.⁴⁷

B. Attempts to Prosecute the Founders of The Pirate Bay

Although the United States may not currently be able to prosecute the founders of The Pirate Bay, this does not mean that other countries have not prosecuted them for copyright infringement. All four original founders of The Pirate Bay were charged with inducing copyright infringement and subsequently convicted by a Swedish trial court in 2009.⁴⁸ Gottfrid Svartholm Warg, Peter Sunde, Fredrik Neij, and Carl Lundstrom were each sentenced to one year in prison as well as a total amount of fines of roughly \$3.6 million USD.⁴⁹ Although their sentences were reduced upon appeal, their

43. .SE Domain Registration—Sweden, EURODNS, <https://www.euodns.com/international-domain-names/se-domain-registration/> [<https://perma.cc/SDP2-PWUA>] (archived Feb. 25, 2016).

44. See *Dotcom*, No. 1:12-cr-3, 2012 U.S. Dist. LEXIS 148114 at *9 (discussing the use of *in rem* jurisdiction to subsequently find *in personam* jurisdiction).

45. See *id.* (using a veil piercing argument to find jurisdiction).

46. See *id.*

47. See THE PIRATE BAY, *supra* note 8; Ernesto, *Pirate Bay Domain Back Online, Waving a Pirate Flag*, TORRENT FREAK (Dec. 21, 2014), <http://torrentfreak.com/pirate-bay-domain-back-online-waving-a-pirate-flag-141221> [<http://perma.cc/9STT-KM5Y>] (archived Jan. 23, 2016) (describing The Pirate Bay’s location at Nacka station, a “nuclear-proof data center built into a mountain complex near Stockholm”).

48. GERALD FERRERA ET AL., *CYBERLAW: TEXTS AND CASES* 247 (2012); Karl Ritter, *4 Convicted in Pirate Bay File-Sharing Trial*, USA TODAY (Apr. 17, 2009 10:36 AM), http://usatoday30.usatoday.com/tech/news/2009-04-17-pirate-bay_N.htm [<http://perma.cc/LC65-BWHN>] (archived Jan. 24, 2016).

49. See Ritter, *supra* note 48.

convictions were affirmed, and their fines were increased to nearly \$6.5 million USD.⁵⁰

One of the more recent developments in The Pirate Bay's legal issues caused The Pirate Bay to shut down for seven weeks.⁵¹ On December 9, 2014, Swedish police raided The Pirate Bay's data center—which was both nuclear proof and built into the side of a mountain in Sweden.⁵² Swedish police raided the data center because of copyright infringement issues continuing even after the group's previous 2009 convictions.⁵³ The website came back online on December 21, 2014, although it did not resume its normal tracking and indexing functions until January 31, 2015.⁵⁴ In the meantime, the website featured a picture of Kim Jong Un (likely in reference to the recent international issues surrounding the release of the movie *The Interview*) against a background of a waving pirate flag and a counter, counting the days until The Pirate Bay's return.⁵⁵



The Pirate Bay's website on 27 Dec 2014

Throughout 2015, The Pirate Bay experienced further outages as a result of a Swedish court requiring the website (www.thepiratebay.se) be transferred to the state.⁵⁶ However, these

50. Josh Halliday, *Pirate Bay Co-founders Lose Appeal*, *GUARDIAN* (Nov. 26, 2010, 9:05 AM), <http://www.theguardian.com/technology/2010/nov/26/pirate-bay-founders-appeal> [<https://perma.cc/9AVA-N9JL>] (archived Jan. 21, 2016).

51. See Ernesto, *supra* note 47; Ernesto, *Pirate Bay Goes down Again (Updated)*, *TORRENT FREAK* (Feb. 13, 2015), <https://torrentfreak.com/pirate-bay-down-again-150213/> [<https://perma.cc/B4JT-QK2R>] (archived Jan. 21, 2016).

52. Ernesto, *supra* note 47.

53. See *id.* (recounting the raid of Pirate Bay's servers at Nacka station).

54. See *id.* (describing the return of Pirate Bay after the raids). As of February 2016, The Pirate Bay is still operational at www.thepiratebay.se.

55. THE PIRATE BAY, *supra* note 8.

56. Ernesto, *Registrar Shuts Down Pirate Bay Domain Names*, *TORRENT FREAK* (Dec. 28, 2015), <https://torrentfreak.com/registrar-shuts-down-pirate-bay-domain-names-151228/> [<https://perma.cc/LDJ6-DC28>] (archived Jan. 21, 2016) (describing Pirate Bay's battle to win back its domain names). When The Pirate Bay lost the initial court ruling in May 2015, and was ordered to transfer the .se domain

outages were relatively short in nature.⁵⁷ The Pirate Bay is appealing the May 2015 ruling that its domain name be transferred over to the Swedish government and is currently operating from www.thepiratebay.se.⁵⁸ Interestingly, the “About” section on The Pirate Bay’s current website has a disclaimer that says, “No torrent files are saved at [The Pirate Bay]. That means no copyrighted and/or illegal material are stored by us. It is therefore not possible to hold the people behind The Pirate Bay responsible for the material that is being spread using the site.”⁵⁹

C. *The Influence of The Pirate Bay*

During the time that The Pirate Bay was shut down, Internet users not associated with the official Pirate Bay created a number of Pirate Bay imitators.⁶⁰ Fellow torrent tracking website isohunt.to launched theoldpiratebay.org as well as a project they called Open Bay.⁶¹ The Open Bay provided the source code to any user who wanted to create their own torrent website—a Pirate Bay clone.⁶² In a statement issued on December 26, 2014, by the isohunt.to team, the group stated there were already nearly 400 clones of The Pirate Bay in existence.⁶³ Given these internet users’ goal of creating a torrent website that does not have an owner and will “be impossible to shut . . . down,” it is unlikely that illegal downloading and file sharing will cease any time soon.⁶⁴

III. THE CRIMINALIZATION OF COPYRIGHT INFRINGEMENT

The criminalization of copyright infringement is an often debated topic, even disregarding the international side of the issue. Some

name over to the Swedish government, The Pirate Bay created a “Hydra,” which means that they created six new domain names that someone would be transferred to from www.thepiratebay.se if the .se domain name was shut down. The Hydra included .gs, .la, .vg, .am, .mn, and .gd domain names. All six of those domain names have subsequently been removed and The Pirate Bay is still operating out of its .se domain name. *See id.* (describing same).

57. *See id.*

58. *See id.*

59. *About*, THE PIRATE BAY, *supra* note 8.

60. Ernesto, *Hundreds of Pirate Bay Copies Emerge, Is the Hydra Alive?*, TORRENT FREAK (Dec. 27, 2014), <https://torrentfreak.com/hundreds-of-pirate-bay-copies-emerge-is-the-hydra-alive-141227/> [<https://perma.cc/QNH7-R6FK>] (archived Jan. 21, 2016).

61. *Open Bay is Open!*, ISOHUNT BLOG (Dec. 26, 2014), <http://blog.isohunt.to/412/> [<https://perma.cc/WB39-WPFJ>] (archived Jan. 21, 2016).

62. *See id.* (describing the purpose of Open Bay as allowing users to create their own torrent site).

63. *Id.*

64. *Id.*

commentators who oppose the criminalization of copyright infringement argue that the moral and social reasons for criminalizing other actions, such as burglary or murder, do not exist when the action is downloading copyrighted files from the Internet.⁶⁵ Others suggest that the resulting harm that necessitates criminalizing the former is not the same resulting harm that necessitates criminalizing the latter.⁶⁶ Still others believe that the criminal copyright infringement statutes as they exist now—which criminalize unauthorized receipt of even a single copyrighted work⁶⁷—deter fair use and communication that is beneficial to the public.⁶⁸ Proponents of copyright criminalization, however, view it as economic or property harm; a copyright is someone's property, and therefore the theft of that property should be criminalized.⁶⁹ Although the exact benefits of criminalizing copyright infringement may be debatable,⁷⁰ Congress has, nevertheless, passed various bills through the years criminalizing copyright infringement.⁷¹

Copyright infringement did not become a crime until more than one hundred years after the first copyright act was passed.⁷² This first law that criminalized copyright was enacted in 1897, when Congress amended the original Copyright Act to allow criminal prosecution of certain types of copyright infringement when there was "a specific criminal intent to infringe" and the infringer had a goal of "commercial exploitation."⁷³ Throughout the next one hundred years, Congress continued to amend the Copyright Act, expanding both the

65. See Geraldine Szott Moohr, *The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory*, 83 B.U. L. REV. 731, 733 (2003) ("The moral consensus that would condemn personal use is far from robust and the harm rationale provides only an equivocal basis for criminalization.")

66. See *id.* at 754 (discussing viewpoints on the criminalization of copyright infringement for personal use).

67. 17 U.S.C. § 506 (2008).

68. Moohr, *supra* note 65, at 779 ("The NET and especially the DMCA are likely to inhibit fair use of copyrighted material and to undermine that purpose by reducing public use.")

69. Iringa D. Manta, *The Puzzle of Criminal Sanctions for Intellectual Property Infringement*, 24 HARV. J.L. & TECH. 469, 473 (2011) ("[A]s a matter of historical record, policymakers have largely relied upon analogies to property law in their decisions to introduce and legitimize criminal sanctions for violations of IP laws.") (emphasis in original).

70. See *infra* Part VII.B.

71. See, e.g., The Copyright Act of 1976, 17 U.S.C. § 101 (2010); The Digital Millennium Copyright Act, 17 U.S.C. § 512 (2010).

72. See Note, *The Criminalization of CR Infringement in the Digital Era*, 112 HARV. L. REV. 1705, 1706 (1999) (summarizing the history of copyright infringement dating back to the first law in 1790, and noting that criminal penalties were not added until 1897).

73. *Id.* at 1706–07 (quoting Mary Jane Saunders, *Criminal Copyright Infringement and the Copyright Felony Act*, 71 DENV. U.L. REV. 671, 687 (1994)).

types of copyrights covered as well as the fines and terms of imprisonment upon conviction.⁷⁴

A. *The Copyright Act*

The Copyright Act is the basic statute under which the majority of defendants are charged domestically for infringing copyright.⁷⁵ The current version of the Copyright Act criminalizes infringement ranging from the distribution of thousands of copies of copyrighted works to the mere expectation of receipt of a single copyrighted work.⁷⁶ It allows prosecution for infringement of digital works, such as the unauthorized transmission of a Britney Spears song, as well as infringement of physical works, such as purposefully copying a copyrighted human figurine.⁷⁷

Conviction under 17 U.S.C. § 506(a) includes imprisonment for up to five years and can also include a fine up to \$250,000 if the offense is the offender's first.⁷⁸ If the offense is a second or subsequent offense, imprisonment can be up to ten years, and the fine can again be up to \$250,000.⁷⁹ Infringement is a felony if the offense "consists of the reproduction or distribution, including by electronic means, during any 180-day period, of at least 10 copies or phonorecords, of 1 or more copyrighted works, which have a total retail value of more than \$2,500."⁸⁰ A crime is only classified as a felony if the crime meets the required monetary and numerical thresholds and also involves infringement of the victim's reproduction or distribution right.⁸¹ All other infringements are classified as misdemeanors.⁸²

When proving criminal infringement of a copyright, the prosecutor must prove that the defendant acted *willfully*.⁸³ This

74. See *The Criminalization of CR Infringement in the Digital Era*, *supra* note 72, at 1714–16 (1999).

75. See The Copyright Act of 1976, 17 U.S.C. § 101 (2010).

76. See 17 U.S.C. §§ 101, 506 (2010); LYDIA PALLAS LOREN & JOSEPH SCOTT MILLER, *INTELLECTUAL PROPERTY LAW: CASES & MATERIALS* 746–47 (2014); Eric Goldman, *A Road to No Warez: The No Electronic Theft Act and Criminal Copyright Infringement*, 82 OR. L. REV. 369, 373–74 (2003).

77. See 17 U.S.C. §§ 101, 506 (2010); *United States v. Backer*, 134 F.2d 533 (2d Cir. 1943) (upholding the conviction of a defendant charged with infringing the copyright of a human figurine).

78. 18 U.S.C. § 2319 (2008) (detailing criminal penalties for violating 17 U.S.C. § 506); U.S. DEPARTMENT OF JUSTICE, *CRIMINAL RESOURCE MANUAL* tit. 9 § 1852 *Copyright Infringement—Penalties* (2015) [hereinafter DOJ Copyright] (describing the U.S. Department of Justice's position on copyright infringement penalties).

79. 18 U.S.C. § 2319 (2008); DOJ Copyright, *supra* note 78.

80. 18 U.S.C. § 2319(b)(1) (2008).

81. See DOJ Copyright, *supra* note 78; see also 18 U.S.C. § 2319 (2008).

82. See DOJ Copyright, *supra* note 78.

83. 17 U.S.C. § 506(a)(1) (2008).

requires a “voluntary, intentional violation of a known legal duty.”⁸⁴ The prosecutor has the burden of showing proof that the defendant was aware of the legal duty and also that the defendant did not believe he or she was acting in good faith.⁸⁵

B. *The Digital Millennium Copyright Act of 1998*

Although the Digital Millennium Copyright Act (DMCA) provided a number of changes to the copyright regime, the most important benefit related to the discussion of SOPA and PIPA is the safe harbor provision.⁸⁶ Congress enacted the DMCA specifically with the Internet in mind, for websites such as YouTube, Etsy, or Facebook, which host other users’ content, as well as for Internet service providers such as Comcast and Time Warner.⁸⁷ The safe harbor provision, 17 U.S.C. § 512(c)(1), states that these types of websites and service providers cannot be held liable for copyright infringement on their websites if the provider:

Does not have actual knowledge that the material . . . on the system or network is infringing;

In the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

Upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) Does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) Upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.⁸⁸

Section 512(c)(1)(A) requires “knowledge or awareness of *specific* infringing activity.”⁸⁹ General knowledge that infringing material may exist is not enough for a website to lose its safe-harbor status.⁹⁰ Additionally, the determination of whether material hosted on the

84. LOREN & MILLER, *supra* note 76, at 746 (quoting *United States v. Moran*, 757 F. Supp. 1046 (D. Neb. 1991)).

85. *Id.* at 746–47.

86. See 17 U.S.C. § 512 (2010); LOREN & MILLER, *supra* note 76, at 449–52 (discussing DMCA’s safe harbors).

87. See 17 U.S.C. § 512 (2010).

88. 17 U.S.C. § 512(c)(1) (2010).

89. *Viacom Intern, Inc. v. YouTube, Inc.*, 676 F.3d 19, 26 (2d Cir. 2012) (emphasis added); see also 17 U.S.C. § 512(c)(1) (2010).

90. See *Viacom*, 676 F.3d at 35.

website is “actually illegal” is not placed on the website.⁹¹ The type of activity that satisfies the control provision of 512(c)(2)(B) is not entirely settled but may be found when the service provider or website controls the types of content it displays as well as which users it allows to display that content.⁹²

IV. TURNING THE FOCUS TO *INTERNATIONAL* COPYRIGHT INFRINGEMENT

In addition to criminalizing infringement of copyright in the United States, Congress has also passed bills and ratified treaties and agreements that criminalize copyright infringement abroad. Although the Stop Online Piracy Act and PROTECT IP Act were perhaps the most controversial bills and proposed greater enforcement copyright infringement abroad,⁹³ they were certainly not the United States’ first attempt.⁹⁴

A. *The PRO IP Act*

In 1998, Congress passed the Prioritizing Resources and Organization for Intellectual Property Act of 2008 (the PRO IP Act), which specifically stated that intellectual property crimes cost the United States billions of dollars each year in lost revenue, and that “willful violations of . . . criminal laws involving . . . infringement by actors in the United States and, increasingly, by foreign-based individuals and entities is a serious threat to the long-term vitality of the United States economy and the future competitiveness of United States industry.”⁹⁵

91. *Id.* at 32 (quoting *UMG Recordings, Inc. v. Shelter Capital Partners, LLC*, 667 F.3d 1022, 1038 (9th Cir. 2011)).

92. *See id.* at 38 (“To date, only one court has found that a service provider had the right and ability to control infringing activity under § 512(c)(1)(B). In *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146 (C.D. Cal. 2002), the court found control where the service provider instituted a monitoring program by which user websites received detailed instructions regard[ing] issues of layout, appearance, and content. The service provider also forbade certain types of content and refused access to users who failed to comply with its instructions.”) (internal citations and quotations removed).

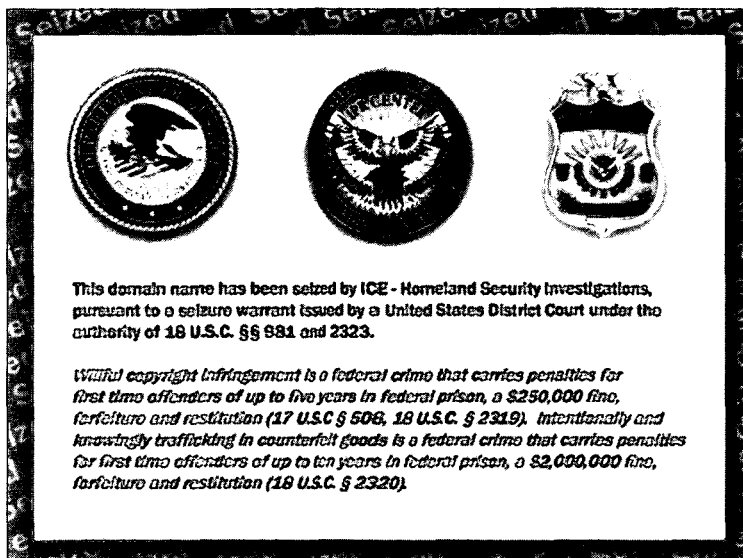
93. *See infra* Part V.A–B.

94. *See generally* Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011); The PROTECT IP Act, S. 968, 112th Cong. (2011); Prioritizing Resources and Organization for Intellectual Property Act of 2008, H.R. 4270, 110th Cong. (2007); TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement]; North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

95. H.R. 4270 § 503(4).

In addition to enacting harsher penalties for certain types of intellectual property crimes and allocating greater resources to investigate alleged intellectual property crimes, the PRO IP Act also created the position of the Intellectual Enforcement Coordinator (IPEC), whose job it is to chair “the interagency intellectual property enforcement advisory committee.”⁹⁶ The creation of this position addressed the previous issue that there was no centralized effort to coordinate intellectual property infringement prosecutions.⁹⁷ The duties of the IPEC are to help prosecute international copyright infringement by guiding overseas enforcement agencies, assisting foreign governments, and promulgating guidelines.⁹⁸

In addition to creating the IPEC position and allocating greater resources to teaching foreign enforcement agencies about our copyright laws, the PRO IP Act also gave the government the ability to seize domestic domain names for allegedly selling, facilitating the sale of, or even intending to possibly facilitate a sale of goods that infringe upon intellectual property rights.⁹⁹ Consequently, during the two years after the PRO IP Act’s enactment, nearly eighty domain names were seized by the Department of Homeland Security and replaced with the following notice.¹⁰⁰



96. *Id.* § 302(b)(1)(A).

97. See H.R. 4270; 5-15 MELVILLE B. NIMMER & DAVID NIMMER, 5-15 NIMMER ON COPYRIGHT §15.07 (Matthew Bender, Rev. Ed.).

98. H.R. 4270 § 301.

99. See *id.* §303.

100. Ben Sisario, *US Shuts down Web Sites in Piracy Crackdown*, N.Y. TIMES (Nov. 26, 2010), http://www.nytimes.com/2010/11/27/technology/27torrent.html?_r=0 [<https://perma.cc/6G9Z-UEQ9>] (archived Feb. 25, 2016).

The Government's website seizure program, titled Operation in Our Sites, continued to seize websites into 2014 and will presumably continue to do so in the future as well.¹⁰¹

The response to this granting of increased seizure abilities to the U.S. Government did not meet quiet reaction, nor did the actual seizure. Representative Zoe Lofgren from California stated that "virtually anything through which Internet traffic passes is subject to seizure, no matter how incidental the connection to the offense or how innocent the owner."¹⁰² Even the authors of *Nimmer on Copyright*, the leading copyright treatise, argue that "the effect of the PRO IP Act is to grant free-ranging seizure authority to the United States Government, without the antecedent need to take into account such matters as the proportionality of the use of the equipment in the offense."¹⁰³

B. *International Treaties and Instruments That Discuss Criminal Copyright Infringement*

Besides national legislation focusing on criminal enforcement of international piracy, the United States is also subject to international treaties and instruments that require parties to provide for criminal procedures regarding copyright infringement. These include the Agreement on Trade-Related Aspects of Intellectual Property, the North American Free Trade Agreement, the Trans-Pacific Partnership, and the Transatlantic Trade and Investment Partnership.

1. The Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement)

The Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement) is an agreement among all World Trade Organization members setting out a multi-national framework for intellectual property regulation.¹⁰⁴ It states that "[m]embers shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale."¹⁰⁵ "Commercial" is defined as "engaged in buying

101. U.S. Immigration and Customs Enforcement, *Operation in Our Sites*, DEPT. OF HOMELAND SECURITY (May 22, 2014) <http://www.ice.gov/factsheets/ipr-in-our-sites> [perma.cc/HEQ3-69EV] (archived Jan. 19, 2016).

102. NIMMER, *supra* note 97 (quoting 154 Cong. Rec. H10237 (daily ed. Sept. 27, 2008) (statement of Rep. Lofgren)).

103. *Id.*

104. TRIPS Agreement, *supra* note 94.

105. *Id.* art. 61 ("Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful (sic.) trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or

and selling, or pertaining to, or bearing on, buying and selling,” according to a World Trade Organization case between the United States and China.¹⁰⁶ “Counterfeiting or piracy ‘on a commercial scale’ refers to counterfeiting or piracy carried on at the magnitude or extent of typical or usual commercial activity with respect to a given product in a given market.”¹⁰⁷ Since the founders of The Pirate Bay neither buy nor sell any of the copyrighted material their website links to, “commercial scale” would likely not reach their activity.¹⁰⁸

2. The North American Free Trade Agreement (NAFTA)

The North American Free Trade Agreement is an agreement among the United States, Canada, and Mexico, designed to unify trade regulations among the countries. Article 1717 of the North American Free Trade Agreement requires that “[e]ach Party shall provide criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale.”¹⁰⁹ These penalties are to include imprisonment, monetary fines, or both.¹¹⁰ “Commercial scale” is not defined within NAFTA, and, unlike the TRIPS Agreement, there is no case law directly on point. However, it is likely safe to assume that the phrase should be construed similarly to how it is construed in the World Trade Organization’s (WTO) panel report discussed in the immediately preceding section; the wording of the two instruments

monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence.”)

106. See Daniel Gervais, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, 103 AM. J. INT’L L. 549, 552 (“Using the ‘dictionary approach’ now common in WTO panel reports, the panel concluded that ‘commercial’ means ‘basically, engaged in buying and selling, or pertaining to, or bearing on, buying and selling.’”); Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, ¶ 7.535, WTO Doc. WT/DS362/R (Jan. 26, 2009) (adopted Mar. 20, 2009) [hereinafter Panel Report], https://www.wto.org/english/tratop_e/dispu_e/362r_e.pdf [<https://perma.cc/4Q53-VVL5>] (archived Jan. 19, 2016). Materials on specific WTO disputes are available online at http://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm.

107. Gervais, *supra* note 106, at 552–53.

108. See *id.* (emphasizing that The Pirate Bay does not involve buying or selling).

109. NAFTA, *supra* note 94, art. 1717, ¶ 1 (“Each Party shall provide criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale. Each Party shall provide that penalties available include imprisonment or monetary fines, or both, sufficient to provide a deterrent, consistent with the level of penalties applied for crimes of a corresponding gravity.”)

110. *Id.*

(TRIPS and NAFTA) is extremely similar, and they were both negotiated according to the WTO framework.¹¹¹

3. Proposed Treaties Not Yet in Force

The Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) are two proposed treaties that would similarly require the United States to enact statutes criminalizing copyright infringement.¹¹² The TPP states that “[e]ach Party shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright or related rights piracy on a commercial scale.”¹¹³ The TTIP and TPP are considered companion treaties and would likely include similar requirements.¹¹⁴

The TPP is significantly different from the TRIPS Agreement or NAFTA, however, due to its definition of commercial scale. The TPP defines commercial scale as “acts carried out for commercial advantage or financial gain; and significant acts not carried out for commercial advantage or financial gain, that have a substantial prejudicial impact on the interests of the copyright or related rights owner in relation to the marketplace.”¹¹⁵ It also differs from previous treaties and agreements in that it requires criminalization for the aiding and abetting of copyright infringement.¹¹⁶ The full version of the draft TPP was released on November 5, 2015.¹¹⁷ This version represents the final draft negotiated among twelve countries: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam.¹¹⁸ The TPP still needs to be approved by Congress; some

111. See generally TRIPS Agreement, *supra* note 94; NAFTA, *supra* note 94; Panel Report, *supra* note 106.

112. Trans-Pacific Partnership Agreement, Chapter 18, Jan. 26, 2016 [hereinafter TPP], <https://www.mfat.govt.nz/en/about-us/who-we-are/treaty-making-process/trans-pacific-partnership-tpp/text-of-the-trans-pacific-partnership> [https://perma.cc/Q8WK-6EKE] (archived Feb. 25, 2016); Transatlantic Trade and Investment Partnership [hereinafter TTIP], <https://ustr.gov/ttip> [https://perma.cc/9YYS-ZCFU] (archived Feb. 25, 2016).

113. TPP, *supra* note 112, art. 18.77, ¶ 1.

114. Daniel R. Russel, *Transatlantic Interests In Asia*, U.S. DEP’T ST. (Jan. 13, 2014) <http://www.state.gov/eap/rls/rm/2014/01/219881.htm> [https://perma.cc/TC44-EZWH] (archived Jan. 19, 2016).

115. TPP, *supra* note 112, art. 18.77, ¶ 1.

116. *Id.* art. 18.77, ¶ 5 (“With respect to the offences for which this Article requires a Party to provide for criminal procedures and penalties, each Party shall ensure that criminal liability for aiding and abetting is available under its law.”).

117. TPP, *supra* note 112.

118. *Summary of the Trans-Pacific Partnership Agreement*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership> [https://perma.cc/P7XD-CEN7] (archived Jan 19, 2016).

commentators believe that this can be accomplished by April 2016, but it will take a “hard sell” to Congress by President Obama.¹¹⁹ Others believe it could be years until the United States ratifies the TPP, if at all.¹²⁰

Even if the TPP is approved by Congress and becomes a binding treaty, the TPP may still not directly apply to The Pirate Bay or its users for two reasons. The first type of infringement that the TPP requires criminalization of is the first half of the commercial scale definition: “acts carried out for commercial advantage or financial gain.”¹²¹ Like NAFTA and the TRIPS Agreement, these words are not clearly defined in the TPP either.¹²² If these are determined to be similar to the commercial scale words used in NAFTA and the TRIPS Agreement, then the same argument applies as to why The Pirate Bay is not commercial scale: The Pirate Bay neither buys nor sells any of its copyrighted material.¹²³ Furthermore, the founders of the site have often repeated that their intention is not to make money but to provide an open internet atmosphere.¹²⁴

The second and third situations in which the TPP requires criminalization of copyright infringement—“significant acts, not carried out for commercial advantage or financial gain, that have a

119. Jackie Calmes, *Trans-Pacific Partnership Is Reached, but Faces Scrutiny in Congress*, N.Y. TIMES (Oct. 5, 2015), <http://www.nytimes.com/2015/10/06/business/trans-pacific-partnership-trade-deal-is-reached.html> [https://perma.cc/6P5X-XQ7V] (archived Jan. 19, 2016) (reporting on the completion of the draft and discussing the different opinions that American parties and people have in regards to the TPP).

120. Rebecca Howard, *Trans-Pacific Partnership Trade Deal Signed, but Years of Negotiations Still to Come*, REUTERS (Feb. 4, 2016, 2:49 AM), <http://www.reuters.com/article/us-trade-tpp-idUSKCN0VD08S> [https://perma.cc/846J-VK26] (archived Mar. 3, 2016) (“Opposition from many U.S. Democrats and some Republicans could mean a vote on the TPP is unlikely before President Barack Obama, a supporter of the TPP, leaves office early in 2017.”); Rebecca Kaplan, *Speaker Ryan: Not Enough Votes for TPP Trade Deal*, CBS NEWS (Feb. 11, 2016 3:54 PM), <http://www.cbsnews.com/news/speaker-ryan-not-enough-votes-for-tpp-trade-deal/> [https://perma.cc/2XX6-54UJ] (archived Mar. 3, 2016) (quoting House Speaker Paul Ryan as saying “I think the president and the administration has a lot more work to do to get support for [the TPP] because there are some legitimate concerns about it.”).

121. TPP, *supra* note 112, art. 18.77, ¶ 1.

122. *See id.*

123. Gervais, *supra* note 106, at 552.

124. *See* Ryan Paul, *Pirate Bay: Big Revenue Claims Fabricated by Prosecutors*, ARSTECHNICA (Feb. 1, 2008), <http://arstechnica.com/tech-policy/2008/02/pirate-bay-big-revenue-claims-fabricated-by-prosecutors/> [https://perma.cc/QP36-Z88R] (archived Jan. 19, 2016) (“Although Sunde did not provide Ars with specific financial details regarding The Pirate Bay’s operational expenses, he did argue that the site’s high bandwidth, power, and hardware costs eliminate the potential for profit. The Pirate Bay, he says, may ultimately be operating at a loss.”); Steven Daly, *Pirates of the Multiplex*, VANITY FAIR (Feb. 28, 2007), <http://www.vanityfair.com/news/2007/03/piratebay200703?currentPage=4> [https://perma.cc/DBA8-TMCA] (archived Jan. 19, 2016) (“[Svartholm] continues to maintain that the site yields only enough profit to cover operating costs. ‘If we were making lots of money I wouldn’t be working late at the office tonight,’ says the pallid Swede. ‘I’d be sitting on a beach somewhere, working on my tan.’”).

substantial prejudicial impact on the interests of the copyright or related rights holder in relation to the marketplace” and aiding and abetting—both require that countries have a certain amount of leeway in how they criminalize these actions. In April 2007, the United States filed a complaint against China with the World Trade Organization, claiming that China violated its requirements to criminalize copyright infringement under the TRIPS Agreement because China only prosecuted copyright infringement of more than 500 copies.¹²⁵ The United States claimed that allowing people in China to pirate 499 copies or fewer without being prosecuted was China effectively forgoing its prosecution requirements.¹²⁶ Allowing for leeway and discretion in legislation, the WTO refused to find that China was violating its obligation under the TRIPS Agreement.¹²⁷ Therefore, states have some discretion in criminal copyright infringement laws. Additionally, the WTO also found that states have discretion in the application and *prosecution* of copyright infringement laws.¹²⁸ So, even if the final draft of the TPP requires criminalization of copyright infringement in a noncommercial atmosphere, the United States has discretion as to what amount of infringement rises to the level of commercial and also when it wants to prosecute an infringer who has met that level.¹²⁹

This argument that the United States has discretion in both the level at which to set the criminalization procedures as well as when to apply them is bolstered by a footnote within the TPP itself; footnote 126 in Article 18 of the TPP states that “[a] Party may provide that the volume and value of any infringing items may be taken into account in determining whether the act has a substantial prejudicial impact on the interests of the copyright or related rights holder in relation to the marketplace.”¹³⁰

Furthermore, it is important to remember that the TPP still must undergo serious scrutiny in Congress before it is passed, and the United States is also facing an upcoming presidential election. U.S. presidential candidates have taken sides on the debate as to whether Congress should approve the TPP.¹³¹ Although President

125. See Gervais, *supra* note 106, at 552; Panel Report, *supra* note 106, ¶ 7.610.

126. See Gervais, *supra* note 106, at 552; Panel Report, *supra* note 106, ¶ 7.611.

127. See Gervais, *supra* note 106, at 552–53 (explaining that the allegations failed to show violations on a commercial scale); Panel Report, *supra* note 106, ¶ 7.611 (explaining that thresholds are more like factors tests than finite numbers).

128. See Gervais, *supra* note 106, at 553; Panel Report, *supra* note 106, ¶ 7.487 (noting that not every case mandates prosecution).

129. See Gervais, *supra* note 106, at 552–53; Panel Report, *supra* note 106, ¶ 7.487 (noting the discretion countries have).

130. TPP, *supra* note 112, art. 18.77 n.126.

131. Both Democratic presidential candidates Hillary Clinton and Bernie Sanders have stated their opposition to the Trans-Pacific Partnership. See Lauren Carroll, *What Hillary Clinton Really Said About TPP and the ‘Gold Standard,’*

Obama negotiated the treaty and therefore wants to see its pass through Congress, if the TPP is not passed within President Obama's time in office, it may undergo a different fate in the hands of a new president.

V. THE STOP ONLINE PIRACY ACT AND THE PROTECT IP ACT

The most recent push by Congress to further enhance international criminal enforcement of copyright was in 2011, when the Stop Online Piracy Act (SOPA) and the Protect IP Act (PIPA) were introduced.¹³² Because these two bills introduced rather significant changes to the current Copyright Act, they were received with incredible criticism.¹³³

A. *The Stop Online Piracy Act*

The Stop Online Piracy Act, perhaps the more well known of the two, was introduced in the House of Representatives on October 26, 2011, by Representative Lamar Smith.¹³⁴ Its goal was “[t]o promote prosperity, creativity, entrepreneurship, and innovation by combating the theft of U.S. property and for other purposes.”¹³⁵ It proposed massive overhauls to the current Sections 17 and 18 of the United States Code, where the Copyright Act is located.¹³⁶

The Act specifically focused on “foreign infringing sites.”¹³⁷ Any website that does not have a domestic domain name (.com) or a domestic IP address is considered a foreign Internet site.¹³⁸ Further, a foreign Internet site is a “foreign *infringing* site” if (1) it is directed at the United States and used by users in the United States; (2) the owners or operators commit or facilitate criminal violations under 18 U.S.C §§ 2318, 2319, 2319(A), 2320, or chapter 90; and (3) it is a site that would be subject to seizure by the United States if it were a

POLITIFACT (Oct. 13, 2015), <http://www.politifact.com/truth-o-meter/statements/2015/oct/13/hillary-clinton/what-hillary-clinton-really-said-about-tpa-and-gol/> [<https://perma.cc/43LQ-8HLM>] (archived Jan. 19, 2016); Daniel Strauss, *Bernie Sanders Bashes Trade Agreement as 'Disastrous,'* POLITICO (Oct. 5, 2015, 09:25 am), <http://www.politico.com/story/2015/10/trade-deal-bernie-sanders-reacts-214426> [<https://perma.cc/M2KF-58AD>] (archived Jan. 19, 2016).

132. See Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011); The PROTECT IP Act, S. 968, 112th Cong. (2011).

133. Jenna Wortham, *Public Outcry over Antipiracy Bills Began as Grass-Roots Grumbling*, N.Y. TIMES (Jan. 19, 2012), http://www.nytimes.com/2012/01/20/technology/public-outcry-over-antipiracy-bills-began-as-grass-roots-grumbling.html?pagewanted=1&_r=1&ref=technology& [<https://perma.cc/7TYA-KB6F>] (archived Jan. 19, 2016).

134. H.R. 3261.

135. *Id.*

136. *Id.*

137. *Id.* § 102.

138. *Id.* § 101, ¶ 6.

domestic instead of foreign site.¹³⁹ A U.S.-directed website is defined as one used to conduct business directed at residents of the United States or one that has sufficient minimum contacts within the United State for exercise of personal jurisdiction.¹⁴⁰ Sufficient minimum contacts includes something as simple as displaying any prices in U.S. dollars.¹⁴¹

To aid criminal infringement, SOPA allowed the Attorney General to bring two different types of cases.¹⁴² The first is an in personam case against the registrant of a domain name used by the foreign infringing site or the operator of the foreign infringing site.¹⁴³ The second type of case is an in rem case; this could be brought if the Attorney General is unable, after due diligence, to find a person who meets the in personam requirements.¹⁴⁴ An in rem case could be brought against either the foreign infringing site or the domain name used by that site.¹⁴⁵

Once a case was brought by the Attorney General, the Attorney General could then request certain entities to help block access to the infringing site.¹⁴⁶ These entities include Internet service providers, search engines, payment network providers, and Internet advertising services.¹⁴⁷ Once the Attorney General served one of these entities with paperwork requesting its help with blocking access, advertising, or payments to the foreign infringing site, the entity had five days to comply.¹⁴⁸ If it did not comply within the five days, the Attorney General could request injunctive relief requiring it to comply.¹⁴⁹

While it is doubtless that some of the previously stated proposals within SOPA are interesting in their own rights, perhaps the most interesting and most explicitly international aspect of the Stop Online Piracy Act is Section 205, "Defending Intellectual Property Rights Abroad."¹⁵⁰ First and foremost, the section begins by stating SOPA's goal of "ensur[ing] that the protection in foreign countries of the intellectual property rights of United States persons is a significant component of United States foreign and commercial policy in general, and in relations with individual countries in particular."¹⁵¹

139. *Id.* § 102, ¶ a (emphasis added).

140. *Id.* § 101, ¶ 23.

141. *Id.*

142. *Id.* § 102, ¶ b.

143. *Id.*

144. *Id.*

145. *Id.*

146. *See id.* § 102(c)(2).

147. *See id.*

148. *Id.*

149. *Id.*

150. *Id.* § 205.

151. *Id.* § 205(a)(1).

Next, the Act proposed that it will ensure adequate resources are available in the United States embassy of any country identified in the Trade Act of 1974 as priority foreign countries, or countries that deny adequate intellectual property rights.¹⁵² In addition to providing additional and adequate resources, the Act rebranded the position within the Department of State previously known as an “intellectual property attaché.”¹⁵³ This position was assigned to an embassy in any geographic region covered by the State Department and was tasked with working within that region to advance the intellectual property goals of the United States and address intellectual property rights violations within those areas.¹⁵⁴

B. *The PROTECT IP ACT (PIPA)*

The Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 (PROTECT IP Act or PIPA) was the Senate’s version of the bill and proposed many changes similar to SOPA.¹⁵⁵ It was introduced by Senator Patrick Leahy on May 31, 2011.¹⁵⁶ This bill was a rewrite of a previous bill, Combating Online Infringement and Counterfeits Act (COICA), which was introduced in the Senate in 2010 to combat foreign “rogue” websites.¹⁵⁷ The COICA contained similar provisions to the PROTECT IP Act and passed a vote in the Senate Judiciary Committee; however, this bill never made it to a full vote on the Senate floor and was later rewritten as the PROTECT IP ACT.¹⁵⁸

While PIPA did not use the phrase “foreign infringing site,” it did focus on “rogue websites operated and registered overseas.”¹⁵⁹ Like SOPA, there were two types of cases authorized by PIPA.¹⁶⁰ The first was an in personam case directed at the registrant of a foreign domain that was used by a site dedicated to infringing U.S. copyright or enabling others to infringe U.S. copyright as well as the owner or operator of the actual site.¹⁶¹ Second, PIPA authorized in rem cases against the foreign domain name if the Attorney General could not find the appropriate person to charge in an in personam action.¹⁶²

152. *Id.*

153. *Id.* § 205(b).

154. *See id.*

155. *See* Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011); The PROTECT IP Act, S. 968, 112th Cong. (2011).

156. *See* S. 968.

157. *See* Combating Online Infringement and Counterfeits Act, S. 3804, 111th Cong. (2010).

158. *See* S. 968; S. 3804.

159. *See* H.R. 3261; S. 968, § 3.

160. *See* H.R. 3261, §§ 102–103; S. 968, §§ 3–4.

161. S. 968, § 3.

162. *Id.* §§ 3–4.

The Attorney General could request injunctive relief to stop any further criminal activity if the foreign domain name was used within the United States to access a foreign infringing site and the infringing site's activities were directed at users within the United States and harmed holders of U.S. intellectual property rights.¹⁶³ Like SOPA, a website qualified as being directed at residents in the United States if any prices were displayed in U.S. dollars or any services offered by the infringing site were obtained the United States.¹⁶⁴

Additionally, like SOPA, PIPA authorized the Attorney General to serve various entities and Internet companies with orders requiring them to comply with the Government's request to block access to the infringing site in question.¹⁶⁵ Unlike SOPA, however, the list of entities the Attorney General was able to serve is more limited.¹⁶⁶ The PROTECT IP Act only allowed the Attorney General to request compliance from operators of rogue websites, financial transaction providers, Internet advertising services, and information location tools.¹⁶⁷ Although PIPA did not give a specific time limit like SOPA did, the Attorney General could still bring an action against any entity that failed to comply with the order to stop all access to the rogue website.¹⁶⁸

C. Media and Political Reactions to SOPA and PIPA

The public reaction to these two proposed bills was immediate and drastic. On January 18, 2012, over 115,000 websites—including Google, Reddit, Wikipedia, Mozilla, and Tumblr—participated in what was called an “internet blackout,” to protest the pending legislation as well as bring awareness of the bills to the general public.¹⁶⁹ Some websites, such as Wikipedia, completely shut down for twenty-four hours, while others, like Google, changed their design or layout to notify users of the two bills.¹⁷⁰ This reaction was so unprecedented that news outlets around the world reported on the

163. S. 968, § 3(b)(1).

164. See Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011); The PROTECT IP Act, S. 968, 112th Cong., §§ 3–4 (2011).

165. See H.R. 3261, § 102; S. 968, § 3.

166. See S. 968, § 3.

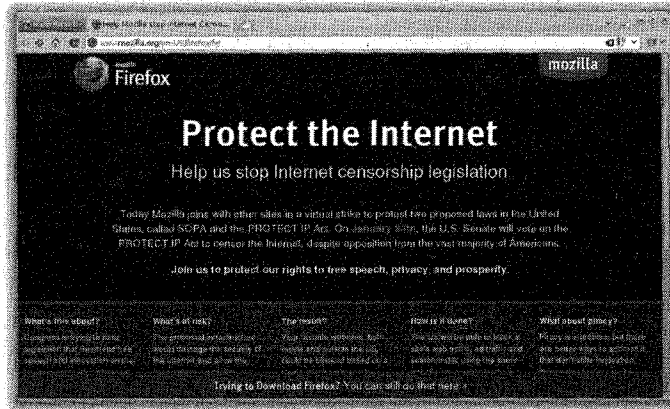
167. *Id.*

168. See H.R. 3261, § 102; S. 968, § 3.

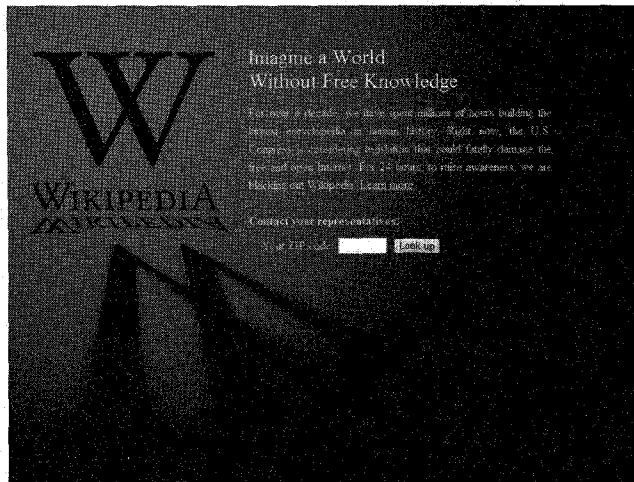
169. See Wortham, *supra* note 133; News Desk, *SOPA Blackouts: Reaction and Resources*, PBS (Jan. 18, 2012, 2:26 PM), <http://www.pbs.org/newshour/runtdown/sopa-protests-blackout-major-sites-resources-to-follow/> [https://perma.cc/D8YK-LQ5V] (archived Jan. 22, 2016).

170. See Wortham, *supra* note 133; News Desk, *supra* note 169.

proposed American legislation and the public outcry.¹⁷¹ People as far as Taiwan and Australia learned about it.¹⁷²



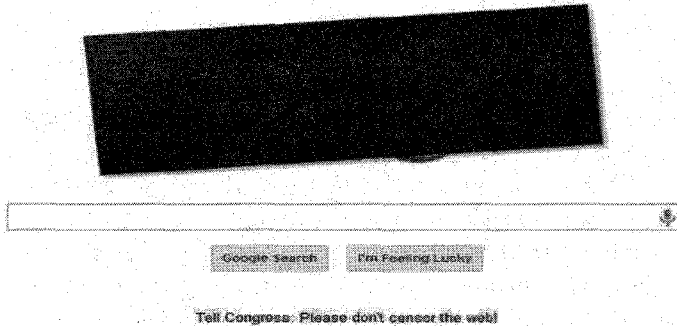
Mozilla's website on Jan. 18 2012



Wikipedia's website on Jan. 18 2012

171. See, e.g., *Wikipedia to Be Blacked out in Anti-Piracy Bill Protest*, *TAIPEI TIMES* (Jan. 18, 2012), <http://www.taipeitimes.com/News/front/archives/2012/01/18/2003523489> [<https://perma.cc/29D4-T2NV>] (archived Jan. 23, 2016); *Loi Antipiratage: Wikipédia va Fermer Pendant 24 Heures*, *LE MONDE* (Jan. 17, 2013, 10:43 AM), http://www.lemonde.fr/technologies/article/2012/01/17/loi-antipiratage-wikipedia-va-fermer-pendant-24-heures_1630565_651865.html [<https://perma.cc/V6LZ-HZYF>] (archived Jan. 21, 2016); Suzanne Hill, *Wikipedia to Go Dark in Piracy Protest*, *ABC NEWS* (Jan. 17, 2012, 5:13 PM), <http://www.abc.net.au/news/2012-01-17/wiki-to-go-dark-in-piracy-protest/3778452> [<https://perma.cc/BL9R-D47K>] (archived Jan. 21, 2016).

172. See *Wikipedia to Be Blacked out in Anti-Piracy Bill Protest*, *supra* note 171; *Loi Antipiratage: Wikipédia va Fermer Pendant 24 Heures*, *supra* note 171; Hill, *supra* note 171.



Google's website on Jan 18 2012

Numerous groups opposing the two bills issued statements condemning the proposed legislation.¹⁷³ The American Civil Liberties Union called SOPA “severely flawed” and “in contravention of the First Amendment of the U.S. Constitution.”¹⁷⁴ The group stated that access to even disfavored information must be protected.¹⁷⁵ An open letter signed by over one hundred law professors whose focuses are on intellectual property, the First Amendment, Internet law, and innovation suggested that PIPA “represent[ed] the biggest threat to the Internet in its history.”¹⁷⁶ They wrote that there were not only First Amendment concerns but also U.S. foreign policy concerns and potential damages to the entire Internet’s addressing system.¹⁷⁷ Even the White House jumped in on the debate.¹⁷⁸ Although the Obama administration’s response was not explicitly against SOPA and PIPA, the administration did say that it would not support any legislation

173. *SOPA/PIPA: Internet Blacklist Legislation*, ELECTRONIC FRONTIER FOUNDATION, <https://www.eff.org/issues/coica-internet-censorship-and-copyright-bill> [<https://perma.cc/83KH-MCTU>] (archived Jan. 23, 2016).

174. LAURA W. MURPHY & MICHAEL W. MACLEOD-BALL, AMERICAN CIVIL LIBERTIES UNION, WRITTEN STATEMENT OF THE AMERICAN CIVIL LIBERTIES UNION TO HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY “STOP ONLINE PIRACY ACT” (Nov. 15, 2011), <https://www.eff.org/document/aclu-letter-sopa> [<https://perma.cc/6TER-MEYY>] (archived Jan. 21, 2016).

175. *Id.*

176. Mark A. Lemley, David S. Levine & David Post, *Open Letter to the House of Representatives from Law School Professors*, EFF (Nov. 15, 2011), <https://www.eff.org/document/law-professors-letter-sopa> [<https://perma.cc/4QGZ-KGZR>] (archived Jan. 21, 2016).

177. *Id.*

178. Macon Phillips et al., *Obama Administration Responds to We the People Petitions on SOPA and Online Piracy*, WHITE HOUSE BLOG (Jan. 14, 2012 8:09 AM), <http://www.whitehouse.gov/blog/2012/01/14/obama-administration-responds-we-people-petitions-sopa-and-online-piracy> [<https://perma.cc/KFM6-8YTX>] (archived Jan. 22, 2016).

“that reduces freedom of expression, increases cybersecurity risk, or undermines the dynamic, innovative global Internet.”¹⁷⁹ Additionally, it emphasized that it would not support legislation that disrupted the current architecture of the Internet.¹⁸⁰

One of the major concerns Internet giants such as YouTube and Google had was that SOPA and PIPA would undermine the vital safe-harbor provisions guaranteed in the Digital Millennium Copyright Act.¹⁸¹ The Stop Online Piracy Act’s threshold for allowing the Attorney General to take action against a website it deemed to be a foreign infringing website was that the site was either committing or *facilitating* the commission of criminal infringement violations.¹⁸² However, the act never actually defined “facilitating.”¹⁸³ For an example of how a website might lose its safe-harbor protection, one can look at Google. Google operates a domestic website (www.google.com) but also operates Google domain names in other countries (i.e., google.al, google.sg). Consequently, these domain names in other countries may be considered foreign under SOPA.¹⁸⁴ Therefore, if a person uses www.google.sg to search for The Pirate Bay and subsequently downloads copyright infringing material from The Pirate Bay, Google could be found to have “facilitat[ed] the commission of criminal violations,” punishable under the United States Code.¹⁸⁵ Although this was an issue under SOPA, PIPA did seem to avoid this issue; PIPA allowed for prosecution only of websites that are “dedicated to infringing activities.”¹⁸⁶ Since search engines such as Google are generally used for many different purposes, it is unlikely that a court would find that Google is dedicated to infringing services.¹⁸⁷ Another major concern regarding SOPA and PIPA was simply the pure amount of censorship of websites and documents by so many different entities. Not only could

179. *See id.*

180. *See id.*

181. Letter from AOL, eBay, Facebook, Google, LinkedIn Corporation, Mozilla, Twitter, Yahoo!, and Zynga Game Network, to Pat Leahy, Chuck Grassley, Lamar Smith, John Conyers, Members of Congress (Nov. 15, 2011), <http://www.protectinnovation.com/downloads/letter.pdf> [<http://perma.cc/YK7P-H42J>] (archived Jan. 23, 2016) (“We are very concerned that the bills as written would seriously undermine the effective mechanism Congress enacted in the Digital Millennium Copyright Act (DMCA) to provide a safe harbor for Internet companies that act in good faith to remove infringing content from their sites.”). *See also* Malathi Nayak & Sarah McBride, *Key Facts About U.S. Online Piracy Bills SOPA and PIPA*, REUTERS (Jan. 18, 2012, 6:43 PM), <http://www.reuters.com/article/us-sopa-idUSTRE80H2EA20120118> [<https://perma.cc/8AB9-F4MW>] (archived Mar. 2, 2016).

182. *See* Stop Online Piracy Act, H.R. 3261, 112th Cong., § 102(a)(2) (2011).

183. *See* H.R. 3261.

184. *See id.* § 102.

185. *Id.* § 102(a)(2).

186. *See id.*; The PROTECT IP Act, S. 968, 112th Cong., § 3(a) (2011).

187. *See* S. 968, § 3(a).

Google face criminal charges for linking to infringing content, but domestic websites and domain names could also be censored from linking to or suggesting any infringing material as well.

Related to this concern was the lack of a proper counter-notification process or rebuttal process for service providers and search engines to utilize if they were served with a court order ordering them to restrict access to a specific website to which they believe access should not be limited.¹⁸⁸ This is in stark contrast to the currently in place DMCA, which provides for ways the website can rebut the request to take down the allegedly infringing material.¹⁸⁹

Still, supporters of the two bills proclaimed the bills' necessity and condemned the swift Internet blackout response.¹⁹⁰ Michael Wu, General Counsel of Rosetta Stone, stated that SOPA and PIPA were necessary measures "against theft and piracy so that the Internet will not be a haven for foreign counterfeiters to steal American jobs."¹⁹¹ Michael O'Leary, an executive of the Motion Picture Association of America, stated that the protests and blackouts were simply part "of a campaign to distract from the real issue here and to draw people away from trying to resolve what is a real problem, which is that foreigners continue to steal the hard work of Americans."¹⁹²

VI. LEGAL ANALYSIS: DOES CONGRESS HAVE THE AUTHORITY TO PASS THESE INTERNATIONAL SPECIFIC BILLS?

Before discussing whether SOPA and PIPA are fixable, the first question should be: Are these two bills legal to begin with? Unquestionably, they test the United States' limits of jurisdiction. To arrive at the proper solution, one should first look to see whether these two bills would withstand scrutiny.

The two questions present in an extraterritorial analysis of a federal question are (1) whether the statute explicitly or implicitly allows for extraterritorial prosecution, and (2) whether international law allows the United States to prosecute the crime in question.¹⁹³

188. *See id.*

189. *See* 17 U.S.C. § 512 (2015); LOREN & MILLER, *supra* note 76 at 495, 517–20.

190. *See, e.g.*, Global Intellectual Property Center, *Voices of Support for Rogue Sites Legislation Need No Translation*, U.S. CHAMBER OF COMMERCE (Oct. 31, 2011) [hereinafter *Voices of Support*], <http://www.theglobalipcenter.com/voices-support-rogue-sites-legislation-need-no-translation/> [<https://perma.cc/Z7RU-G3CM>] (archived Jan. 23, 2106); James Rainey, *Wikipedia to Go Offline to Protest Anti-Piracy Legislation*, LOS ANGELES TIMES (Jan. 17, 2012), <http://articles.latimes.com/2012/jan/17/business/la-fi-ct-wikipedia-20120117> [<https://perma.cc/LN2D-UXH9>] (archived Jan. 22, 2016).

191. *See* *Voices of Support*, *supra* note 190.

192. *See* Rainey, *supra* note 190.

193. ELLEN S. PODGOR, PETER J. HENNING, JEROLD H. ISRAEL & NANCY J. KING, *WHITE COLLAR CRIME* 13–15 (2013).

The first question is simple to answer as both SOPA and PIPA specifically focus on foreign infringing websites; extraterritoriality was indeed the entire concern sparking the creation of both bills.¹⁹⁴

The second question is a bit more difficult to answer but is nevertheless answered affirmatively. Of the five international forms of jurisdiction (territoriality, passive personality, nationality, protective, and universal), at least two allow prosecution of those who infringe American copyrights.¹⁹⁵ Not only does the territoriality principle allow a nation to prosecute crimes that take place on that nation's soil, but U.S. courts have also interpreted this principle as allowing prosecution when the conduct has a "substantial effect" within the territory of the United States.¹⁹⁶ In addition to the territoriality principle, the passive personality principle may also allow this statute to reach extraterritorially.¹⁹⁷ Passive personality jurisdiction is the idea that a country has jurisdiction over crimes committed against its nationals.¹⁹⁸ Since it is fair to assume that many American copyright holders are American, this principle would apply as well.¹⁹⁹

Although the United States might have the power and the ability to pass a law focusing on the extraterritorial copyright infringement, the second major issue is that the United States cannot prosecute a person whom it does not have lawfully within its territory.²⁰⁰ In order to effectuate the criminal prosecution of any of the four founders of The Pirate Bay or over the entity that is the website, for example, the United States would need to invoke the extradition treaty between the United States and Sweden. However, the extradition treaty between the United States and Sweden does not include crimes of intellectual property theft as a crime for which either country will

194. See Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011); The PROTECT IP Act, S. 968, 112th Cong. (2011).

195. See PODGOR ET AL., *supra* note 193, at 13–15; ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE §§ 3.4.1, 3.4.3 (2d ed. 2010).

196. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 402(1)(C) (AM. LAW INST. 1987); see also MURPHY & MACLEOD-BALL, *supra* note 174.

197. MURPHY & MACLEOD-BALL, *supra* note 174.

198. *Id.*

199. *But cf.* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(1) (AM. LAW INST. 1987) (cautioning that "[e]ven when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."); Christopher L. Blakesley, *A Conceptual Framework for Extradition and Jurisdiction over Extraterritorial Crime*, 1984 UTAH L. REV. 685, 715 (1984) (arguing that "passive personality theory of jurisdiction is generally considered to be anathematic to United States Law.").

200. *Supra* note 193.

extradite its citizens to the other.²⁰¹ These issues are explored more in depth below.²⁰²

VII. SOLUTION

If the United States wishes to pursue criminal charges against overseas infringers, there are a few fixes that must be made to SOPA and PIPA. First, Congress must fix SOPA and PIPA's venue and jurisdictional issues to narrow the scope of infringers that these bills can hold liable in order to properly comply with international law.²⁰³ Second, Congress must fix the extradition issues if it wishes to bring culpable parties to the United States to prosecute.²⁰⁴ Although these fixes to SOPA and PIPA may be possible, they are not likely to completely solve the problem. Even if Congress requires that some portion of the infringing act occur within the United States—to bring SOPA and PIPA into compliance within jurisdiction under international law—the United States will face problems when asking foreign countries to extradite their own citizens to the United States for prosecution.²⁰⁵

Therefore, this Note ultimately argues that the best solution is not to fix SOPA or PIPA in an attempt to pass them through Congress; the best solution to the issues surrounding criminalization of copyright infringement is to: (1) only criminalize large copyright infringements above a large threshold, and (2) decriminalize secondary liability for copyright infringement completely.²⁰⁶

A. Fixing the Stop Online Piracy Act and the PROTECT IP Act

1. Venue and Jurisdiction Issues

Although there are a number of issues and concerns surrounding Congress's ability (or inability) to pass a bill like SOPA or PIPA, perhaps the most important are the statutes' far-reaching capabilities and issues with jurisdiction and venue. First and foremost, if Congress wants to pass a law criminalizing the international infringement of copyright, there must be a solid foundation to determine "where" the crime took place. Generally, the crime is

201. See Treaty of Extradition, art. II, U.S.-Swed., Oct. 24, 1961, 14 U.S.T. 1845 [hereinafter Extradition Treaty], <https://internationalextraditionblog.files.wordpress.com/2010/12/us-sweden-extradition-treaty-14-ust-1845.pdf>. [<http://perma.cc/DN67-5W8W>] (archived Jan. 24, 2016); see also *infra* note 240 and accompanying text.

202. See *infra* Section VII.A.

203. See *infra* Section VII.A.1.

204. See *infra* Section VII.A.2.

205. See *infra* Section VII.A.

206. See *infra* Section VII.B.

prosecuted in the location at which it took place,²⁰⁷ but how does this work in the computer age?

The founders of The Pirate Bay are located in Sweden along with their servers, the direct infringers (i.e., downloaders) are located all over the world working on their own personal computers, the copyrighted material is stored on servers all over the world as well, and there is no copyrighted material stored on the servers The Pirate Bay works on. Where, then, does this crime occur? A more vivid example may be a French citizen, working from a computer in France, illegally downloading a copy of *American Sniper* (an American movie) stored on an illegal British website, after finding the website and the *American Sniper* torrent by searching The Pirate Bay (based in Sweden). Once again, where does this crime occur? The only thing American in this example is the copyrighted material.

Congress should adopt the requirement that some part of the act of infringement occur within the United States' jurisdiction. It should adopt this requirement because SOPA currently does not require that any part of the infringement occur in the United States before SOPA tries to confer jurisdiction over the owner of the infringing website.²⁰⁸ It merely requires that the website be used in the United States and that the owner commit some criminal activity.²⁰⁹ Likewise, PIPA does not require that the infringing activity occur within the United States' jurisdiction.²¹⁰ It allows an in personam suit against the registrant of a foreign website that is used primarily to infringe copyright.²¹¹ These two bills, as they currently stand run the risk of attempting to use universal jurisdiction as a means of obtaining the proper venue over the defendants.²¹²

Where a crime consists of many different parts, venue is proper wherever any one part occurred.²¹³ Courts have been applying this test of venue in regards to domestic cases for years;²¹⁴ it should subsequently be applied in the international sphere. In *United States v. Auernheimer*, the Third Circuit discussed the requirements in determining domestic jurisdiction:

Congress may prescribe specific venue requirements for particular crimes. Where it has not, as is the case here, we must determine the crime's locus

207. See PODGOR, ET AL., *supra* note 193, at 13; see also FED. R. CRIM. P. 18.

208. See Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011); *supra* Section V.A.

209. See H.R. 3261; *supra* Section V.A.

210. See The PROTECT IP Act, S. 968, 112th Cong. (2011); *supra* Section V.B.

211. See S. 968; *supra* Section V.B.

212. See MURPHY & MACLEOD-BALL, *supra* note 174.

213. See *United States v. Lombardo*, 241 U.S. 73, 77 (1916).

214. See *United States v. Rodriguez-Moreno*, 526 U.S. 275, 281 (1999); *Lombardo*, 241 U.S. at 77; *United States v. Auernheimer*, 748 F.3d 525, 532 (3d Cir. 2014).

delicti . . . the place where an offense was committed. The locus delicti must be determined from the nature of the crime alleged and the location of the acts or acts constituting it. To perform this inquiry, we must [1] initially identify the conduct constituting the offense . . . and then [2] discern the location of the commission of the criminal acts. Venue should be narrowly construed.²¹⁵

In that case, the Third Circuit determined that the offensive conduct was “accessing [a protected computer] without authorization and obtaining information,”²¹⁶ “disclosing data or personal identifying information,”²¹⁷ and “transfer[ing], possess[ing], or us[ing] and doing so in connection with a federal crime or state felony.”²¹⁸ The defendants in that case had illegally accessed AT&T servers located in Dallas and Atlanta in order to obtain email addresses of AT&T customers; they were doing so from California and Arkansas.²¹⁹ Because the defendants did not commit any of these criminalized activities in New Jersey, where the government brought the original action, the Third Circuit ruled that the District Court’s granting of venue in New Jersey was improper.²²⁰

The Third Circuit even disregarded the Government’s argument that because the effects of the defendants’ crimes were felt in New

215. *Auernheimer*, 748 F.3d at 532–33 (internal citations omitted) (internal quotations omitted) (citing the two-prong test found in *Rodriguez-Moreno*, 526 U.S. at 279); see also *United States v. Cabrales*, 524 U.S. 1, 6–7 (1998) (“[T]he locus delicti must be determined from the nature of the crime alleged and the location of the act or acts constituting it.”) (quoting *United States v. Anderson*, 328 U.S. 699, 703 (1946)).

216. *Auernheimer*, 748 F.3d at 533 (construing 18 U.S.C. § 1030 (a)(2)(C) which criminalized “intentionally access[ing] a computer without authorization or exceed[ing] authorized access, and thereby obtain[ing] . . . information from any protected computer”).

217. *Id.* at 534 (construing N.J. Stat. Ann. § 2C:20–31(a) which criminalizes any person “purposely or knowingly and without authorization, or in excess of authorization, access[ing] any . . . computer [or] computer system and knowingly or recklessly disclos[ing], or caus[ing] to be disclosed any data . . . or personal identifying information”).

218. *Id.* at 535 (construing 18 U.S.C. § 1028(a)(7), which criminalizes “knowingly transfer[ing], possess[ing], or us[ing], without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, or in connection with, any [federal crime, or state or local felony]”); cf. *Rodriguez-Moreno*, 526 U.S. at 280 (chastising the Third Circuit for focusing on the verbs of the conduct elements and not including requirements found in prepositional phrases, such as “during and in relation to”—a change that is now reflected in the Third Circuit’s current test and its inclusion of “in connection with” as a necessary conduct element in *Auernheimer*).

219. *Auernheimer*, 748 F.3d at 534 (“New Jersey was not the site of either essential conduct element. The evidence at trial demonstrated that the accessed AT&T servers were located in Dallas, Texas, and Atlanta, Georgia. In addition, during the time that the conspiracy began, continued, and ended, Spitler was obtaining information in San Francisco, California and Auernheimer was assisting him from Fayetteville, Arkansas. No protected computer was accessed and no data was obtained in New Jersey.”).

220. *Id.* at 540–41.

Jersey, venue in New Jersey was proper.²²¹ The court stated that the cases that allow venue based on where the effects of the crime are felt are cases in which it is the effect itself that is criminalized.²²² Here, where the actions are the conduct proscribed, venue must focus on where the actions took place.²²³

Additionally, in cases of conspiracy, the Court has stated that it is the location of the overt act that controls where the proper venue is located.²²⁴ In *United States v. Cabrales*, the defendant was charged with money laundering proceeds gained from illegal drug sales.²²⁵ All monetary deposits and withdrawals occurred in Florida, but the money was gained from drug sales in Missouri, where the government brought suit.²²⁶ The Court held that venue in Missouri was improper; because the nature of the crime alleged was only the financial transactions, only the location of those acts mattered.²²⁷ The Court did not care where the money came from.²²⁸

Consequently, the United States should only attempt to prosecute the founders of infringing websites when a transaction from their website occurs in the United States. Then, proper venue should sit where that transaction occurred. The proper venue of criminal trials is so imperative in obtaining justice for the defendant that it was even discussed in the Declaration of Independence, as well as twice in the Constitution.²²⁹ The Supreme Court has stated that "[t]he provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place."²³⁰ The Court has repeatedly stated its

221. *Id.* at 537.

222. *Id.* (citing the example of the Hobbs Act, which forbids theft affecting commerce, and would make venue proper anywhere the effects are felt).

223. *See id.*

224. *Brown v. Elliott*, 225 U.S. 392, 402 (1912) ("[W]here the criminal purpose is executed, the criminal purpose be punished."); *Whitfield v. United States*, 543 U.S. 209, 218 (2005) ("[T]his Court has long held that venue is proper in any district in which an overt act in furtherance of the conspiracy was committed, even where an overt act is not a required element of the conspiracy offense.") (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 252 (1940) and *United States v. Trenton Potteries Co.*, 273 U.S. 392, 402-04 (1927)).

225. *United States v. Cabrales*, 524 U.S. 1, 3-4 (1998).

226. *Id.* at 5.

227. *Id.* at 7.

228. *Id.*

229. *See* U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI; THE DECLARATION OF INDEPENDENCE ¶21 (U.S. 1776) (containing language against "transporting us beyond seas to be tried for pretended offences"); *see also Auernheimer*, 748 F.3d at 532 (finding that the "proper place of colonial trials was so important to the founding generation that it was listed as a grievance in the Declaration of Independence.").

230. *United States v. Cores*, 356 U.S. 405, 407 (1958).

importance in practically every case involving venue of criminal prosecution that has come before it.²³¹

Applying this suggestion to SOPA and PIPA would fix the problems discussed previously²³² regarding Congress attempting to criminalize and prosecute acts that do not occur within the United States.²³³ Indeed, even the Alien Tort Statute, which is a purely jurisdictional statute,²³⁴ was interpreted as requiring the action being legislated to “touch and concern the territory of the United States.”²³⁵ Even when the action does so, the Alien Tort Statute requires that the action must touch and concern to a degree sufficient to overcome the presumption against extraterritorial application.²³⁶ Likewise, some degree of criminal action should be required to occur in the United States.

2. Extradition Issues

Another major issue that needs to be fixed is extradition. If Congress were to take the above suggestion and make a territorial requirement, there would still be an issue with obtaining the four men behind The Pirate Bay as they are all in Europe. The previously mentioned Megaupload case serves as a good learning lesson.²³⁷ Currently, Kim Dotcom is a permanent resident of and living in New Zealand.²³⁸ The United States has been trying to have him extradited to the United States since 2012,²³⁹ and, finally, in December 2015, an

231. See generally *Cabralles*, 524 U.S. at 1; *Travis v. United States*, 364 U.S. 631 (1961); *Johnston v. United States*, 351 U.S. 215 (1956); *United States v. Anderson*, 328 U.S. 699 (1946); *United States v. Johnson*, 323 U.S. 273 (1944).

232. See *supra* Section VII.A.1.

233. See Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011); The PROTECT IP Act, S. 968, 112th Cong. (2011); *supra* Section V.A–B.

234. 28 U.S.C.A. § 1350 (West 2015); *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013).

235. *Kiobel*, 133 S. Ct. at 1669 (holding that the ATS did not allow Nigerian nationals to sue Dutch, British, and Nigerian corporations in the Southern District of New York for crimes that allegedly happened in Nigeria).

236. *Id.*

237. *United States v. Dotcom*, No. 1:12-CR-3, 2012 U.S. Dist. LEXIS 148114, at *9 (E.D. Va. Oct. 5, 2012).

238. Cyrus Farivar, *Why Kim Dotcom Hasn't Been Extradited 3 Years After the US Smashed Megaupload*, ARSTECHNICA (Jan. 18, 2015, 4:30 PM), <http://ars.technica.com/tech-policy/2015/01/why-kim-dotcom-hasnt-been-extradited-3-years-after-the-us-smashed-megaupload/> [<http://perma.cc/3GD6-EUFN>] (archived Jan. 24, 2016) (“Today, however, Dotcom still lives large. He remains free on bail and only has to check in with local police twice per week. In fact, the mogul has been quite active since the raid. He started two companies, released an entire album of music, separated from his wife, and founded a political party for good measure. In short, Dotcom doesn't appear to be going anywhere soon.”).

239. See *id.*; Alyssa Newcomb, *Kim Dotcom Extradition Hearing: What's at Stake for Internet Entrepreneur*, ABC NEWS (Sep. 21, 2015, 3:21 PM), <http://abcnews.go.com/Technology/kim-dotcom-extradition-hearing-stake-internet-entrepreneur/>

Australia court ruled that Kim DotCom can be extradited to the United States to face his U.S. criminal charges.²⁴⁰ However, no date has been set for his extradition, and Kit DotCom has stated that he is appealing the Australian court's ruling.²⁴¹

There are two overarching reasons why extraditions take an extended period of time. One is that extradition hearings necessarily entail numerous pre-trial motions and hearings before the actual extradition hearing can be scheduled, and the other is that many extradition treaties between countries have not been updated in recent years to reflect intellectual property crimes.²⁴² Currently, the extradition treaty between the United States and Sweden, where The Pirate Bay is located, does not include any intellectual property crimes as a basis for extradition.²⁴³

The United States should therefore update its extradition treaty with Sweden (and arguably with other countries) to reflect the importance of intellectual property crimes. However, even if Congress adopts this suggestion, it may only help in situations involving prosecuting other international perpetrators of criminal copyright infringement and not the founders of The Pirate Bay. This is because the biggest issue standing in the way of Sweden extraditing the four Pirate Bay founders to the United States is that Sweden has a presumption against extraditing Swedish nationals to other countries when they have already been convicted of the same crime in Sweden.²⁴⁴ This is a serious problem because all four founders of The Pirate Bay have already been tried and convicted of copyright infringement charges by the Stockholm District Court.²⁴⁵ Consequently, even if the United States can fix the portions of SOPA and PIPA to exercise proper jurisdiction of these men, they would likely never be extradited to the United States.

story?id=33922662 [https://perma.cc/2H4D-H8LB] (archived Feb. 26, 2016) ("Dotcom and his supporters believe his case could have a greater impact on Internet freedom and the relationship between content creators and Internet sites. Regardless of the outcome, both sides will be able to appeal, meaning the drama that has surrounded Dotcom is far from over.")

240. See Kim Zetter, *Judge Rules Kim DotCom Can Be Extradited to US to Face Charges*, WIRED (Dec. 11, 2015), <http://www.wired.com/2015/12/kim-dotcom-extradition-ruling/> [https://perma.cc/P2PS-JLSL] (archived Feb. 26, 2016) (reporting that the judge allowed Kim DotCom to remain on bail in Australia even though he is a high flight risk because he has abided by the terms of his bail since he was arrested).

241. See *id.*

242. See Newcomb, *supra* note 239.

243. See Extradition Treaty, *supra* note 201.

244. *Extradition for Criminal Offenses*, GOVERNMENT OFFICES OF SWEDEN (April 13, 2015), <http://www.government.se/government-of-sweden/ministry-of-justice/international-judicial-co-operation/extradition-for-criminal-offences/> [https://perma.cc/35MN-3MH8] (archived Feb. 26, 2016).

245. See FERRERA, ET AL., *supra* note 48, at 247; Jenny Stiernstedt et al., *The Pirate Bay Sentenced to One Year in Prison*, DN.KULTUR (Apr. 17, 2009), <http://www.dn.se/kultur-noje/musik/the-pirate-bay-sentenced-to-one-year-in-prison/> [https://perma.cc/D9 5H-BDVJ] (archived Feb. 26, 2016); *supra* Part II.B.

B. Returning to the Arguments Against Criminalization

Each side of the debate will always have concerns about different proposed bills, but in light of the personal jurisdiction and extradition concerns, perhaps the argument should return to the idea that criminalization of copyright infringement deserves a massive overhaul—specifically, the United States should heighten the threshold above which infringement becomes a crime and decriminalize secondary liability of copyright infringement.

1. Reasons for Not Criminalizing Copyright Infringement

a. Copyrights Are Not Real Property and Do Not Provide the Author with the Same Rights

Copyright infringement should not be criminalized because copyrights are not “property” in the traditional sense and therefore do not give the owner the same rights that real property does. The Supreme Court expressed this idea nearly thirty years ago. In *Dowling v. United States*, the defendant was charged under the National Stolen Property Act, which proscribes “transport[ing] in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud.”²⁴⁶ The defendant, Dowling, had been making illegal copies of Elvis Presley recordings and selling them to the public; the question before the court was whether the copyright was akin to a “good[], ware[], merchandise, securit[y] or money,” as required by the statute for conviction.²⁴⁷ The Supreme Court found that “[t]he copyright owner . . . holds no ordinary chattel. A copyright, like other intellectual property, comprises a series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protections.”²⁴⁸ Because the rights afforded to copyright owners had always been carefully thought out, this was not equivalent to the normal property rights afforded to the real property owner.²⁴⁹ Additionally, the fact that the Court specifically compared copyrights to patents and stated that it did not want real property rights to be conferred onto patents (whose sole right is to exclude) is also

246. *Dowling v. United States*, 473 U.S. 207, 208 (1985).

247. *Id.* at 208–09.

248. *Id.* at 216.

249. The real property rights being the rights to exclude, use, possess, and transfer. *See id.* at 216–17.

telling.²⁵⁰ The Court clearly wanted to keep intellectual property rights and real property rights separate.²⁵¹

b. The Rationale for Criminalization of Other Crimes Does Not Fit into the Context of Copyright

Because intellectual property is not the same as real property, the rationales for criminalizing crimes against real property should not hold true when applied to intellectual property. First, the moral and social harms are not the same.²⁵² Although some commentators argue this is not true,²⁵³ the actions of our society perhaps best demonstrate that most people do not view intellectual property and real property as having the same harms.²⁵⁴ At least one study estimates that nearly half of all Americans have downloaded, shared, or received files online for free.²⁵⁵ According to the current Copyright Act, this means that nearly half of all Americans can be convicted of at least a misdemeanor.²⁵⁶ Of that one-half, some undoubtedly meet the threshold for being charged with felonies.²⁵⁷ Is copying music from others really a crime that Congress wants nearly one half of all Americans able to be convicted of?

250. See *id.* at 226–27.

251. See *id.* (“If the intangible idea protected by the copyright is effectively made tangible by its embodiment upon the tapes, phonorecords, or films shipped in interstate commerce as to render those items stolen goods for purposes of [the National Stolen Property Act], so too would the intangible idea protected by a patent be made tangible Thus, . . . its view of the statute would readily permit its application to interstate shipments of patent-infringing goods [H]owever, Congress has not provided criminal penalties for distribution of goods infringing valid patents. Thus, the rationale supporting application of the statute under the circumstances of this case would equally justify its use in wide expanses of the law which Congress has evidenced no intention to enter by way of criminal sanction.”) (internal citations omitted).

252. Cf. Moohr, *supra* note 65.

253. See *id.* at 765 (“Personal use infringement deprives the copyright holder of legal rights, and, even when the injury is minimal, it operates as a cheat on the holder. Those who act with knowledge that the work is protected are culpable and thus blameworthy.”).

254. See KARAGANIS & RENKEMA, *supra* note 13 (describing overall the ease with which individuals in the U.S. and Germany download music for free and share with their friends and family).

255. See *id.* at 5.

256. See 17 U.S.C. § 101 (2006).

257. These numbers are taken from the Department of Justice’s Offense Guidelines and Sentencing Guidelines. See Guidelines Manual, DEPARTMENT OF JUSTICE, chapters 2, 5 (2013) (on file with author).

c. The Punishment Does Not Fit the Crime

The number of Americans who have admitted to downloading copyrighted material illegally²⁵⁸ does not balance with the absurd punishments for this crime.²⁵⁹ For example, compare the punishment for the copyright infringement of a single song under 17 U.S.C. § 506 to the punishments for other crimes. As the United States Code currently punishes criminal copyright infringement, a first time offender faces a maximum jail sentence of up to five years (sixty months) and a maximum fine of up to \$250,000.²⁶⁰ A defendant convicted of stealing the entire physical CD from a store, however, only receives a maximum of six months in prison and a \$5,000 fine.²⁶¹ The defendant in the second scenario literally steals the entire album for less of a price than illegally downloading one song.

Violent crimes are not any less disparate either. A first time offender convicted of aggravated assault leaving permanent or life-threatening bodily injuries only faces a maximum of forty-six months in jail and a fine of up to \$75,000.²⁶² Using the Internet to lure, persuade, and then rape a fifteen-year-old child will land someone with a maximum of forty-one months in jail and a fine of up to \$75,000; both are again well under the maximum punishments for criminal copyright infringement.²⁶³

Perhaps one's crime of choice, however, is a bit less violent, and a bit more white collar in nature; in that case, a person could join the likes of celebrities such as Martha Stewart, Nicholas Cage, and Willie Nelson by committing tax evasion and only owing a maximum of \$100,000 in fines.²⁶⁴ Admittedly, simply because copyright infringement has punishments more severe than other crimes that society deems "worse" does not definitively demonstrate that copyright infringement should not be criminalized. However, it does (at the very least) demonstrate that the severity of these punishments warrants a review and that societal norms suggest copyright infringement should not be criminalized. Criminalizing theft of an electronic copy of a file more harshly than physically walking out of a store with the entire CD in hand is plainly nonsensical.

258. See KARAGANIS & RENKEMA, *supra* note 13, at 5.

259. Compare *id.* with 5 MELVILLE B. NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT § 15.07(A) (Matthew Bender, Rev. Ed.) (the effect of the PRO IP Act is to grant free-ranging seizure authority to the United States Government, without the antecedent need to take into account such matters as the proportionality of the use of the equipment in the offense).

260. See 18 U.S.C. § 2319 (2006); *supra* note 258.

261. See *supra* note 258.

262. See *supra* note 258.

263. See *supra* note 258.

264. See 26 U.S.C. § 7201 (2006).

d. Civil Remedies Are Adequate

Because the same theories and reasons for punishment do not hold when applied to copyright infringement, the civil remedies already in place should be sufficient. Under 17 U.S.C. § 501, the owner of any valid copyright can sue the alleged infringer for the unauthorized exercise of a right granted exclusively to the copyright owner.²⁶⁵ Moreover, civil copyright infringement is a strict-liability offense; no scienter is required, unlike criminal infringement which requires the infringement be done willfully.²⁶⁶

Companies such as MGM, Warner Brothers, and Sony not only have the funds and the ability to bring civil cases against those who help facilitate copyright infringement, but also may more easily be able to make personal jurisdiction arguments. Plaintiffs can argue that illegal copying of American copyrighted works is enough to both purposefully avail oneself to the United States and meet the fairness factors needed for personal jurisdiction in a civil case.²⁶⁷ Consequently, the venue and jurisdictional issues with international criminal enforcement of copyright infringement may be mitigated when using civil remedies instead.

Not only are large companies that hold the rights to copyrights able to sue the alleged infringers, but some have already been compensated in the suit against The Pirate Bay founders back in 2009.²⁶⁸ Universal Music was awarded 814,339 SEK as reparations, which is roughly \$94,554.26 USD.²⁶⁹ Warner Brothers Entertainment was awarded 2.9 million SEK, which is \$336,703.70 USD.²⁷⁰ The other companies awarded reparations were Sony Music Entertainment (Sweden), Playground Music Scandinavia, Bonnier Amigo Music Group, EMI Music Sweden, Warner Music Sweden, Yellow Bird Films, Valby Nordisk Film A/S, Columbia Pictures

265. 17 U.S.C. §§ 106, 501 (2006).

266. 18 U.S.C. § 2319 (2006).

267. See *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 103 (1987) (discussing the fairness factors of burden on defendants, interests of forum state, plaintiff's interest in obtaining relief, interstate judicial system's most efficient resolution, and furthering fundamental substantive social policies); *World-Wide Volkswagen Corp v. Woodson*, 444 U.S. 286, 297 (1980) (declining personal jurisdiction because there was no purposeful availment).

268. See *Så mycket ska de betala*, AFTONBLADET (April 17, 2009), <http://www.aftonbladet.se/nyheter/article11769147.ab> [<https://perma.cc/VH47-CCJB>] (archived Feb. 26, 2016) (listing the amounts paid to each company as reparations).

269. See *id.*; XE Currency Converter, <http://www.xe.com/currencyconverter/convert/?Amount=814339&From=SEK&To=USD> [<https://perma.cc/X3WJ-5WWR>] (archived Mar. 2, 2016) (currency exchange rate current at time of publication)

270. See *Så mycket ska de betala*, *supra* note 268; XE CURRENCY CONVERTER, <http://www.xe.com/currencyconverter/convert/?Amount=2900000&From=SEK&To=USD> [<https://perma.cc/N398-E39X>] (archived Mar. 2, 2016) (currency exchange rate current at time of publication).

Industries, Metro-Goldwyn-Mayer Pictures, March Media Beteiligungs GmbH & Co Film Productions, and Twentieth Century Fox Film Corporation.²⁷¹ This serves as an example of how large companies can sue registrants of other websites that facilitate copyright infringement and be compensated for those as well. Additionally, because this was a criminal case, the companies will likely be entitled to much larger sums in a civil suit when they can receive punitive damages as well.

Any argument that civil suits do not deter as well as criminal suits should fail; the four men behind The Pirate Bay are still doing the same activities (if not more) than they were in 2009 during their first trial.²⁷² Clearly, even jail time and large fines are not enough to deter them from their activities.²⁷³

2. Forgoing Prosecution of International Infringers Does Not Violate International Treaties and Agreements.

Although the TRIPS Agreement as well as international treaties require the United States to have criminal procedures in place for copyright infringement, the specific requirements of these international instruments are very flexible. Parties to these instruments are only required to criminalize *commercial scale* copyright infringement.²⁷⁴ As commercial scale is defined above, (“engaged in buying and selling, or pertaining to, or bearing on, buying and selling”),²⁷⁵ the founders of The Pirate Bay do not meet the commercial requirement; they neither buy nor sell. In fact, the entire premise of downloading copyrighted works illegally rests on the idea that *no one* is either buying or selling.

Furthermore, as discussed above, the World Trade Organization has allowed countries to have discretion when both enacting and applying their criminal copyright infringement laws. This discretion is what would allow the United States to essentially “decriminalize” certain copyright infringing actions if the TPP were enacted in the near future. The United States could either provide criminal procedures and penalties only for very high levels of culpability (one that would not encompass websites such as The Pirate Bay and its users) or, alternatively, choose to forgo *prosecution* of these criminal acts. The second option is essentially what has been done in the United States regarding immigration and marijuana. The

271. See *Så mycket ska de betala*, *supra* note 268.

272. See Peter Sunde, *Pirate Bay Still Has the Right to Defend Itself*, TORRENT FREAK (Feb. 10, 2015), <http://torrentfreak.com/peter-sunde-pirate-bay-still-has-the-right-to-defend-itself-150210/> [<https://perma.cc/AWR7-AKFP>] (archived Feb. 26, 2016).

273. See FERRERA, ET AL., *supra* note 48, at 297.

274. See *supra* notes 104–09.

275. See Gervais, *supra* note 106; Panel Report, *supra* note 106, § 7.534.

Department of Justice has taken a relaxed approach to the prosecution of both of these issues, unless the crimes are large scale.²⁷⁶

Finally, besides the not-yet-enacted TPP, none of the other treaties or agreements discussed require the United States to criminalize secondary liability.²⁷⁷ By creating The Pirate Bay, the founders did not directly infringe copyright. They created a system through which other people could infringe copyright. While some argue that this is equally blameworthy, the fact is that it is not treated the same legally. The United States could decriminalize secondary liability for criminal copyright infringement and still be completely within their international law obligations.

VIII. CONCLUSION

Copyright infringement is an important issue, not only in the United States but internationally as well.²⁷⁸ While the current versions of the Stop Online Piracy Act and the PROTECT Intellectual Property Act have serious flaws in their transnational reaches and limits,²⁷⁹ fixing the venue and jurisdictional issues as well as the extradition treaties in place should solve these problems.²⁸⁰ However, because the rationales for criminalization of other crimes and punishment do not apply with equal force to copyright infringement, perhaps the better argument is that secondary liability of copyright infringement should not be criminalized at all and that direct copyright infringement should only be criminalized if it is a large-scale operation.²⁸¹ Not only are there civil sanctions in place that can adequately compensate copyright holders if their rights are violated,²⁸² but the Supreme Court has also directly stated that copyrights are not chattel.²⁸³ The same rights of real property do not apply with equal force to intellectual property.²⁸⁴ Additionally, cases

276. See Memorandum from Brian M. O'Leary, Chief Immigration Judge, U.S. Department of Justice (April 6, 2015), <http://www.justice.gov/eoir/pages/attachments/2015/04/07/15-01.pdf> [<https://perma.cc/97CE-YELW>] (archived Feb. 26, 2016); Memorandum from James M. Cole, Deputy Attorney General, U.S. Department of Justice to all U.S. Attorneys (August 28, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/YAV7-EUEX>] (archived Feb. 26, 2016).

277. See *supra* notes 104, 109.

278. *Supra* note 1.

279. *Supra* Part V.A-B.

280. *Supra* Part VII.B.2.

281. *Supra* Part VII.B.

282. *Supra* Part VII.B.1.

283. *Supra* Part VII.B.1.

284. *Supra* Part VII.B.1.

like The Pirate Bay demonstrate that other countries are just as capable of prosecuting the alleged infringers as the United States is.²⁸⁵ These are American copyrights being infringed, and the normal gut reaction is that American copyrights should be protected in American courts; however, the reality is that our world is growing more global by the minute. The United States should trust other countries to litigate these international copyright infringement cases as they see fit, choose to decriminalize secondary liability of copyright infringement, and choose to only criminalize large violations of direct copyright infringement. Otherwise, the United States runs the risk of overstepping jurisdictional bounds and stepping onto other countries' territory.

Sara K. Morgan*

285. *Supra* Part VII.A.2.

* Candidate for Doctor of Jurisprudence, 2016, Vanderbilt University Law School; B.A. 2010, Purdue University. I would like to thank Professor Daniel Gervais and Professor Nancy King for their insightful guidance and feedback on this Note. I would also like to thank my fiancé Ryan for always supporting and encouraging me.
