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Keep America Exceptional! Against Adopting Japanese and European-Style Criminalization of Contributory Copyright Infringement

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Keep America Exceptional! Against Adopting Japanese and European-Style Criminalization of Contributory Copyright Infringement

*Salil K. Mehra**

ABSTRACT

This brief Article, written in connection with a Symposium hosted by the Vanderbilt Journal of Entertainment and Technology Law, addresses nascent criminal enforcement against contributory copyright infringement in connection with P2P file sharing. Using Judge Posner's analysis in the Aimster *case as a lens, it discusses recent cases in Japan and Sweden. This Article contends that criminalization involves an inherent uncertainty involving an innovator's knowledge of, and intent for, the future uses of the platform by others. Despite the difficulty of this task, since Japan and the E.U. have seen criminal prosecutions brought against contributory infringers, it should not evoke much surprise that the U.S. music industry is seeking similar sanctions. However, criminalizing contributory infringement to sanction P2P may bring criminal punishment to bear on innovators with unclear overall effects.*

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More than a decade after *A&M Records, Inc. v. Napster*,[1] it seems fair to ask whether battles over peer-to-peer (P2P) file sharing will ever end. At times, the entertainment industry seems embroiled in a game of Whac-A-Mole: Each time the industry uses litigation to shutter a new "-ster"—Napster, Aimster, Grokster—a new P2P platforms seems to pop up.[2] In addition to litigating against the users themselves,[3] industry representatives increasingly call for criminal sanctions against the innovators of P2P platforms.[4] Indeed, such calls came from music industry representatives at the symposium where the author presented this paper.[5]

Given the nascent stage of criminal copyright law enforcement against P2P sharing, this Article is necessarily brief. Criminalizing contributory infringement to sanction P2P may bring criminal punishment to bear on innovators with unclear overall effects. This Article contends that criminalization involves an inherent uncertainty involving an innovator's knowledge of, and intent for, the future uses of the platform by others. Despite the difficulty of this task, since Japan and the E.U. have seen criminal prosecutions brought against contributory infringers, the U.S. music industry seeking similar sanctions should not evoke much surprise.

Understandable frustration at seemingly endless civil litigation no doubt drives those whose livelihoods are threatened by P2P sharing to seek Draconian legal sanctions. However, fear and frustration should not drive legal policy choices, particularly when important competing interests are at stake. Others have admirably described and debated in detail the complex dynamics of IP rights holders, rent-seeking politicians and innovators — as well as the public.[6] Instead,

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1. 239 F.3d 1004 (9th Cir. 2001).

2. *See* Carlos Ruiz de la Torre, *Towards the Digital Music Distribution Age: Business Model Adjustments and Legislative Proposals to Improve Legal Downloading Services and Counter Piracy*, 8 VAND. J. ENT. & TECH. L. 503, 504 (2006) ("[N]ew illegal P2Psites will inevitably emerge, domestically or abroad, to replace the latest dismantled [site] and provide consumers access to illegal downloads.").

3. *E.g.*, Sony BMG Music Entm't v. Tenenbaum, 721 F. Supp. 2d 85 (D. Mass. 2010); Capitol Records Inc. v. Thomas-Rasset, 680 F. Supp. 2d 1045 (D. Minn. 2010).

4. *See, e.g.*, *Prosecutor, Hollywood Demand Prison for Pirate Bay Crew*, WIRED, Mar. 2, 2009, *available at* http://www.wired.com/threatlevel/tag/pirate-bay-trial (last visited Apr. 17, 2011).

5. Symposium, *Where Do We Go From Here? The Evolution of Entertainment Law and Industry in the New World*, 13 VAND. J. ENT. & TECH. L. 695 (2011). The symposium was graciously co-hosted by the VANDERBILT JOURNAL OF ENTERTAINMENT AND TECHNOLOGY LAW and the music industry organization Leadership Music. *See id.*

6. *See, e.g.*, JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 205–06 (2008) (discussing industry pressure on lawmaking and calling for use of empirical evidence as an alternative); LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES

this Article focuses on *Japan v. Kaneko* ("the Winny case")[7], in which Japanese judges struggled with precisely this problem, and explains why imposing criminal sanctions on P2P architects is unlikely to solve the problem.[8] Given the difficult questions about intent and knowledge of others' use, criminalization seems a poor fit for dealing with P2P file sharing, regardless of the increasing frustration of content industries.

This Article proceeds in three Parts. Part I discusses the inherent problem of determining intent and knowledge in the context of contributory infringement. Part II examines the Japanese prosecution of the creator of the Winny P2P software; Part III analyzes the Swedish prosecution of the Pirate Bay.

I. OF JUDGE POSNER, SLINKY DRESSES, AND "MASSAGE PARLORS"

From the demise of Napster, the architecture of each new iteration of P2P program has reflected an attempt to skirt the legal concerns that brought down its predecessor. The demise of Napster's anonymous P2P file sharing, with a centralized index server, begat AIMster's decentralized P2P model, by piggybacking on AOL Instant Messenger (hence "AIMster") to make P2P mirror the "traditional" method of sharing music among a circle of semi-anonymous friends.[9] AIMster's demise begat software like Grokster and Kazaa, which did not rely on centralized servers or another service.[10] In fact, Kazaa's

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TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004) (examining the tension between piracy and intellectual property rights and the effects of multinational corporations on the lawmaking process); Jessica Litman, *The Politics of Intellectual Property*, 27 CARDOZO ARTS & ENT. L.J. 313, 314–15 (2009) (discussing various influences in drafting of copyright legislation). *But see* Julia D. Mahoney, *Lawrence Lessig's Dystopian Vision*, 90 VA. L. REV. 2305 (2004) (questioning whether the interplay between copyright industries, lobbyists and politicians really has the "potential to extinguish the promise of early twenty-first-century advances").

7. Kyōtō Chihō Saibansho [Kyōtō Dist. Ct.] Dec. 13, 2006, Hei 16 (wa) no. 726, 1229 HANREI TIMES 105 (Japan) [hereinafter *Kaneko I*] (translation on file with author), *rev'd*, Osaka Kōtō Saibansho [Osaka High Ct.] Oct. 8, 2009, Hei 19 (wa) no. 461 (Japan) [hereinafter *Kaneko II*] (translation on file with author).

8. Indeed, this problem remains unresolved in the United States. *See* MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) (three opinions, including two three-justice concurrences, leaving unclear to what degree the opinion of the Court regarding reliance on inducement represented a departure from the standard in *Sony*); *see also infra* notes 26–27, 30–32 & accompanying text (discussing *Grokster* and *Sony* in the context of the *Winny* case).

9. Peter Menell & David Nimmer, *Legal Realism in Action: Indirect Copyright Liability's Continuing Tort Framework and Sony's De Facto Demise*, 55 UCLA L. REV. 143, 181 (2007) (describing, how in the wake "of Napster's rise, a clever programmer developed software to combine AOL Instant Messenger's technology with file sharing"). Use required registration, though the user name chosen could be a pseudonym. *Id.*

10. *See* Kristina Groennings, *Costs and Benefits of the Recording Industry's Litigation Against Individuals*, 20 BERKELEY TECH. L.J. 571, 573 (2005) ("The [recording] industry's victory

architecture, based on a series of nodes and supernodes to direct traffic, resembles that of Skype, the popular Internet telephone application, with which it shares some of its origins.[11] Interestingly, like AIMster, Skype allows encrypted file sharing among the "contacts" users welcome to their list of callers.[12]

From the copyright industry's point of view, this cycle may look less like creative destruction and more like constant guerilla warfare. After all, any innovative gains are hard to see, while file sharing software may seem to resemble the Hydra, with the industry cutting off one head, only to see two more spring up. Further, the Supreme Court's decision in *Sony Corp. of America v. Universal City Studios, Inc.*[13] complicates matters. Various copyright owners challenged Sony, maker of the Betamax video cassette recorder on the grounds that it contributed to copyright infringement by consumers who could record television programs and movies.[14] The Court ruled that contributory infringement cases could not proceed so long as the technology was capable of "substantial non-infringing uses."[15] The rule creates a safe harbor for innovators whose technology might be misused by others for infringing purposes.[16] The rule emphasized the mere *possibility* of non-infringing uses, though, leaving industry representatives with less efficient means to pursue punishment of actual infringers.[17]

While the Court has since revisited the *Sony* rule in *MGM Studios Inc.* v. *Grokster, Ltd.*,[18] an earlier challenge to the rule in *Sony*

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in Napster was fleeting as publicity over the issue increased awareness of P2P technology and users flocked to decentralized networks like Grokster and Kazaa, making the tracking of P2P use more difficult.").

11. Jonathan Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1974, 2027 n.203 (2006) (observing that "Skype was founded by the makers of the Kazaa file sharing program in August 2003").

12. *How Do I Send Files Using Skype?*, SKYPE, https://support.skype.com/en-us/faq/FA3091/How-do-I-send-files-using-Skype (last visited Apr. 3, 2011) ("You can send files to your contacts using Skype for free. You can send any size or type of file . . . . All files sent using Skype are encrypted end-to-end just like Skype-to-Skype calls.").

13. 464 U.S. 417 (1984).

14. *Id.*

15. *Id.* at 442.

16. *Id.*

17. *See* Douglas Lichtman & William Landes, *Indirect Liability for Copyright Infringement: An Economic Perspective*, 16 HARV. J.L. & TECH. 395, 400–01 (2003) (criticizing *Sony*, stating, "its ruling implies that VCR manufacturers can facilitate any copyright violation they wish so long as they can prove that VCRs also facilitate some non-trivial amount of legitimate behavior").

18. 545 U.S. 913 (2005); *see also* Jane C. Ginsburg, *Separating the Sony Sheep from the Grokster Goats: Reckoning the Future Business Plans of Copyright-Dependent Technology Entrepreneurs*, 50 ARIZ. L. REV. 577, 584 (2008) (observing that "the Court declined to analyze what the standard for contributory infringement would be when intent to foster infringement

is instructive with respect to the problem of punishing contributory infringement, either civilly or criminally. In *In re Aimster Copyright Litigation*, copyright holders, based on the infringement of Aimster's users, sought to enjoin the distributor of software that essentially created a file-swapping platform by allowing the sending of music as attachments to instant messages.[19] Judge Posner considered the difficult question inherent in this kind of punishment in his own inimitable style:

> A retailer of slinky dresses is not guilty of aiding and abetting prostitution even if he *knows* that some of his customers are prostitutes—he may even know which ones are. The extent to which his activities and those of similar sellers actually promote prostitution is likely to be slight relative to the social costs of imposing a risk of prosecution on him. But the owner of a massage parlor who employs women who are capable of giving massages, but in fact as he knows sell *only sex* and *never massages* to their customers, is an aider and abettor of prostitution (as well as being guilty of pimping and operating a brothel). The slinky-dress case corresponds to *Sony* . . . .[20]

Posner's analogy, however, is somewhat flawed. File sharing potentially has social benefits, as the *Grokster* Court later recognized; but it seems unlikely the Court will soon affirm faux massage parlors.[21] A slinky dress does not a prostitute make. In the context of P2P, the line between faux-massage parlors and dressmakers is not as well-defined, no matter how slinky the merchandise.

Behind Judge Posner's salacious analogy lies a compelling legal argument: Punishment for contributory infringement will likely turn on the knowledge of the alleged contributory infringer. For Judge Posner, knowledge and financial interest are intertwined. This makes sense in a business setting; after all, "know your customer" is familiar business advice.[22] Commercial motive suggests a commonality of interest between seller and buyer—their transaction leaves both better off. The judge can thus move from the subjective to the objective by turning from the actual knowledge of the defendant to the degree of his or her benefit relative to that of society.

But Judge Posner's insight carries within it an inherent problem. For the *noncommercial* contributory infringer, the relative

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cannot be shown" and avoided "further guidance on the meaning of [*Sony's*] 'substantial non-infringing use'" standard).

19. 334 F.3d 643 (7th Cir. 2003).

20. *Id.* at 651 (emphasis added) (citations omitted).

21. *Grokster*, 545 U.S. at 937 (describing P2P as "innovation having lawful promise"). To be fair to Judge Posner, *Aimster* predated the Court's opinions in *Grokster*. *Compare Aimster*, 343 F.3d 643, *with Grokster*, 545 U.S. 913.

22. *See, e.g.*, SAM CALAGIONE, BREWING UP A BUSINESS 170 (2005) (exhorting entrepreneurs to "know your customer"); FREEDMAN-SPIZMAN & RICK FRISHMAN, WHERE'S YOUR WOW? 49 (2008) (quoting Alice MacDougall: "In business, you get what you want by giving other people what they want.").

degrees of individual and social financial benefit are difficult to measure. What if a dressmaker were to donate her slinkiest numbers or a parlor owner were to provide space rent-free, not for financial gain, but because they believed that, even if they aided prostitution, the "nonprostitution" they abetted would be socially beneficial? The exhortation to "know your customer" assumes a profit motive this example lacks. While this hypothetical may sound far-fetched, it closely tracks a situation that confronted Japanese courts.

II. THE WINNY CASE: ISAMU KANEKO AND "VALUE NEUTRALITY"

The Winny Case started simply enough. Isamu Kaneko, a Tokyo University computer science department researcher, developed a decentralized P2P anonymous file-sharing program based in part on prior art, including WinMX.[23] He followed an "open development" model, in which he would, at no charge, release successive versions of the product to users, asking them for input on improvements.[24] In this telling, the story resembles the sort of mass collaboration that has become a familiar pattern online.[25]

But there is a darker version of this story. Kaneko did not merely direct a collaborative network of programmers working in their spare time.[26] Instead, he distributed Winny through his own website, announcing new versions and collecting feedback via the anonymous, and notorious, Internet forum 2Channel (*nichanneru*).[27] In particular, he made these announcements in a sub-forum dedicated to file swapping, where many of the participating likely transmitted

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23. *See* Salil K. Mehra, *Software as Crime: Japan, the United States, and Contributory Copyright Infringement*, 79 TULANE L. REV. 265, 270–72 (2004) (describing the technology at issue and the initial arrest).

24. *Id.*

25. *See, e.g.*, Eric Raymond, *The Cathedral and the Bazaar*, ERIC S. RAYMOND'S HOME PAGE (Feb. 18, 2010), http://www.catb.org/~esr/writings/cathedral-bazaar (providing the evolving contents of what is probably the most influential account of mass collaboration in software development).

26. *Id.*; *see also* YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006) (generally describing collaborative nature of the Internet). *But see* Jonathan Barnett, *The Host's Dilemma: Strategic Forfeiture in Platform Markets for Informational Goods*, HARV. L. REV. (forthcoming 2011), *available at* http://ssrn.com/abstract=1687351 (critiquing this account).

27. For a description of 2Channel's mixed reputation during this period, see Salil K. Mehra, *Post a Message and Go to Jail*, 78 U. COLO. L. REV. 767, 796–97 (2007) (describing the Japanese view that 2Channel's anonymous posters say unsavory things, but that their anonymity provides a ring of truth in their opinions). Despite its somewhat unsavory reputation, 2Channel continues to be one of the most visited destinations on the Japanese-language web. *See* Minoru Matsutani, *2channel's Success Rests on Anonymity*, THE JAPAN TIMES, Apr. 6, 2010, http://search.japantimes.co.jp/cgi-bin/nn20100406i1.html (describing the site as Japan's "largest online forum" with 12 to 16 million users monthly).

copyrighted works without permission.[28] Indeed, some Winny users faced charges for direct infringement—and were convicted.[29]

After the initial prosecutions of some direct infringers, the focus shifted to the creator and distributor of Winny itself. In May 2004, the police arrested Kaneko,[30] and in December 2006, the Kyoto District Court convicted him of criminal copyright infringement.[31] The Osaka High Court reversed the conviction in October 2009.[32] Since Japanese appellate courts can review not only legal, but also factual, questions,[33] the high court explained its reversal in terms of the standard applicable to contributory infringement, as well as the district court's mistaken application of this standard.

A close reading of the Winny decisions' treatment of Kaneko's knowledge helps illustrate the dilemma posed by a noncommercial contributory infringer. Denied the usual analysis of Kaneko's financial interest and then imputing to him the knowledge of paying customers, the court had to rely on far more subjective factors:

> [I]n a case where this kind of technology is made available externally, the question of whether the acts of making it available are illegal acts of aiding and abetting [copyright infringement] must be answered according to such factors as *the social context* of the reality of *actual use* of the technology and the *knowledge of that context,* as well as the *question of the subjective intent* at the time [the technology] was made available.[34]

Without a profit motive, tying the contributory infringer's intent to that of the direct infringer requires speculation. All else being equal, a profit motive tends to sharpen the link between cause and effect. In its absence, the determination turns on subjective intent and knowledge of other individuals' likely acts, as well as the possibility that they may otherwise share aligned interests. The district court concluded that Kaneko's own expectation of creating a new business model, notwithstanding any commercial gain, coupled with knowledge of the wide use of file-sharing software to infringe copyrighted works sufficed to find sanctionable contributory infringement.[35]

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28. *See Kaneko I, supra* note 7.

29. Mehra, *supra* note 23, at 270 (noting that Kaneko continued to develop the software after the arrest of several users in Fall 2003 for direct copyright infringement).

30. *Id.* at 267.

31. *Kaneko I, supra* note 7; *see also* John Leitner, *A Legal and Cultural Comparison of File-Sharing Disputes in Japan and the Republic of Korea and Implications for Future Cyber-Regulation,* 22 COLUM. J. ASIAN L. 1, 19 (2008) (describing news and academic reactions to Kaneko's 2006 conviction).

32. *Kaneko II, supra* note 7.

33. *See* J. MARK RAMSEYER & MINORU NAKAZATO, JAPANESE LAW: AN ECONOMIC APPROACH 145 (1999) ("Because they do not reserve factual issues for the jury, Japanese judges on appeal review questions of fact as well as those of law.").

34. *See Kaneko I, supra* note 7.

35. The district court specifically concluded that:

On appeal, the Osaka High Court adopted a standard that resembles the *Sony* rule of "substantial non-infringing use." The adoption of this rule is rather interesting given that, in the United States, *Grokster* had already reinterpreted *Sony*.[36] Instead, the Osaka High Court described the Winny software as "value-neutral"—similar to "dual use," a post-*Sony* term, in meaning, but with overtones of the familiar, but distinct, U.S. terms "content neutral" and "net neutrality."[37]

In addition to echoing *Sony*, the high court also adopted a more defendant-friendly standard for treating evidence of knowledge and intent. In particular, the court concluded that knowledge without intentional inducement would not suffice to incur liability:

> [T]he defendant, at the time he placed and disseminated the value-neutral Winny software on the Internet, knew of the possibility and the probability that copyright infringers would come forth, and we find that he understood that, but, since we cannot find that Winny was offered solely or chiefly to promote online copyright infringement, we hold that we cannot conclude that defendant['s conduct] meets the standard for the crime of contributory copyright infringement.[38]

Upon reconsideration of the district court's legal *and* factual conclusions, the high court declined to infer the requisite bad intent and reversed the conviction.[39] In particular, the Court pointed to evidence that Kaneko warned users of their legal obligation not to

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> [I]n this case, where a considerable portion of the files caused to be exchanged using Winny, etc. placed on the Internet were the subject of copyright, as file sharing [sic] software including Winny was widely used to infringe copyrights, where it was public knowledge that Winny provided secure software for filesharing [sic], and under the situation where actual use was made of the efficient and convenient functionality provided widely to users, and where the defendant, with knowledge of the state of actual use of Winny especially and with the expectation of birthing a new business model, to disseminate on his own web page these types of filesharing software . . . knowing that an unknown large number of people would be able to obtain [them] . . . the defendant's acts in making available these software programs to an unknown large number of people, can be found to rise to the level of aiding and abetting [criminal copyright infringement].

Id.

36. MGM Studios, Inc. v. Grokster, 545 U.S. 914, 919, 939 n.12 (2005). It is yet unclear whether *Grokster* represents an alteration or a further interpretation of the rule in *Sony*. *See id.* *Grokster* holds 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," *id.* at 919, but further states that "in the absence of other evidence of intent, a court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement, if the device otherwise was capable of substantial non-infringing uses" since "[s]uch a holding would tread too close to the *Sony* safe harbor," *id.* at 939 n.12.

37. *See Kaneko II*, *supra* note 7.

38. *Id.*

39. *Id.* (pointing to warnings from Kaneko that "due to the current situation in which rightsholders' copyrighted works are illegally circulating without permission, to all those participating in the beta test [of Winny], please avoid missteps in the context of your participation").

infringe copyrighted works, and that he stated his intention to develop further versions of Winny that would allow for tracking downloads and making royalty payments.[40] The high court ultimately acquitted Kaneko, thereby allowing him to avoid both a $15,000 fine and the one-year imprisonment that prosecutors had requested.[41]

The tension between the district and high court opinions highlights important problems. First, they raise the issue of "value neutral" or "dual use" technology. The threshold task of classifying P2P technology naturally drives the subsequent analysis. Posner avoided this characterization problem with a hypothetical that cleanly divides the underlying subject matter into the relatively innocuous "slinky dress" and the suspicious "faux massage parlor."[42] But online platforms—whether P2P or otherwise—are not so clearly labeled. Given the potential chilling of future technology with threats of imprisonment, criminalizing contributory infringement is ill-advised.

In another context, commentators worry about the threat of civil antitrust cases dampening innovation and dynamic efficiency, even when the targets of such cases are established corporations with ample ability to protect themselves through rent-seeking.[43] If *civil* antitrust suits against large corporations are worrisome, *criminal* suits against nascent companies should cause even greater concern. Imagine if the founder of Facebook had been thrown in jail for a short stint before his idea had taken root.[44] You cannot, because the Internet, as it exists in America, ensures that public and private barriers to disruptive innovation remain low.[45] By contrast, an established corporate defendant can access the press, lobbyists, and even the political process to push back against the *civil* litigation they face.

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40. *Id.* (stating that, with further development of Winny, "we will move towards having a system capable of charging copyright fees").

41. *Kaneko I*, *supra* note 7. The District Court ordered the fine but not the imprisonment; while Kaneko appealed his conviction and fine to the Osaka High Court, the prosecutors also appealed the District Court's failure to order his imprisonment. *Kaneko II*, *supra* note 7.

42. 334 F.3d 643, 651 (7th Cir. 2003).

43. *See, e.g.*, Daniel F. Spulber, *Unlocking Technology: Antitrust and Innovation*, 4 J. COMP. L. & ECON. 915, 919 (2008).

44. Indeed, it is hard to imagine the film *The Social Network* if the authorities had hauled off the young antihero for a short jail stint thirty minutes into the movie. *See* THE SOCIAL NETWORK (Columbia Pictures 2010).

45. *Cf.* Lawrence Lessig, *Sorkin vs. Zuckerberg*, THE NEW REPUBLIC, Oct. 1, 2010, http://www.tnr.com/article/books-and-arts/78081/sorkin-zuckerberg-the-social-network ("Because the platform of the Internet is open and free, or in the language of the day, because it is a 'neutral network,' a billion Mark Zuckerbergs have the opportunity to invent for the platform.").

On the other hand, a rights holder might not believe Kaneko's warnings and plans for building a royalties functionality into Winny.[46] Were these merely attempts to cover himself? The Osaka High Court's citation of these facts dovetails nicely with *Grokster*, in which Justice Stevens held that, absence affirmative evidence of an intent to induce infringement, "a court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement, if the device otherwise was capable of substantial non-infringing uses. . . . Such a holding would tread too close to the *Sony* safe harbor."[47] This passage suggests that *Grokster* merely demarcates the line between two types of indirect liability—contributory infringement (where no substantial non-infringing use exists) and induced infringement (aiding and abetting). This line may be clear in theory—but not in practice. Evidence that Winny might later include methods to prevent infringement, as well as warnings not to infringe, track this twenty-first century reinterpretation of *Sony*. Of course, rights holders could reasonably worry that this safe harbor effectively immunizes any contributory infringer who is not so foolish as to exhort users to infringe.

III. THE PIRATE BAY AND BEYOND

Could any contributory infringer be so foolhardy? The very existence of The Pirate Bay would seem to answer the question with a resounding "yes."[48] The sensational Swedish case, with both civil and criminal charges pending, has not yet reached a final result, but it has already impacted how P2P is perceived.[49] The defendants operated a BitTorrent index and tracker that helped users to find torrent files, often directing downloaders to peers who possess infringing copies of popular television programs and movies.[50] Four defendants (three site operators and their former ISP's CEO) received one-year prison terms for contributory copyright infringement, though three had their sentences reduced on appeal, with that of the fourth still pending.[51]

46. *See Kaneko II*, *supra* note 7.

47. MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 939 n.12 (2005).

48. *See* THE RESEARCH BAY, http://thepiratebay.org (last visited Apr. 18, 2011) (website now calling itself "The Research Bay").

49. *See, e.g.*, Michael Carrier, *The Pirate Bay, Grokster and Google*, 15 J. INTELL. PROP. RTS. 7, 7 (2010) (observing that the Pirate Bay case provokes "strong reactions," with '[p]roponents point[ing] to a vibrant forum for distributing files" and "[c]ritics lamenting the massive pirating of copyrighted works").

50. *Id.*

51. *Pirate Bay Executives' Prison Terms Shortened*, THE SWEDISH WIRE (Nov. 27, 2010), http://www.swedishwire.com/science/7373-pirate-bay-executives-prison-terms-shortened.

Whatever the resolution of the Pirate Bay case, it differs from *Kaneko* in important ways. First, while the Pirate Bay does not sell its service directly, the site does host advertising, at least to defray its costs.[52] Second, the site gained notoriety for its famously flippant attitude towards rights holders.[53] Finally, the trial court found the defendants to have intentionally created the opportunity for others to infringe;[54] unlike *Kaneko*, there was no ambiguity on this point, nor any need to connect dots involving subjective intent, actual knowledge, and social context.

The Pirate Bay case thus provides an example of a more commercial and more clearly intentional contributory infringer. The attitude of its members, coupled with its adoption of piracy as a metaphor, may make it an attractive target for rights holders seeking to further leverage U.S. criminal law. Is criminal copyright enforcement against contributory infringers a realistic possibility in the United States? After all, the United States has a different history and legal and social institutions than countries such as Japan and Sweden; these differences make criminal penalties for contributory infringement unlikely. Most notably, to the extent that non-infringing uses of P2P software include citizen expression, criminal penalties for contributory infringement implicate similar "chilling" concerns that have led U.S. courts to closely scrutinize state restraints on freedom of speech.[55] Some commentators believe that the Internet may require a rebalancing of expression versus state restraint,[56] but the dangers of chilling speech, online association, and innovation should be weighed. In particular, the United States has a highly developed system of civil

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52. [Stockholm District Court] 2009-04-17 p.51 B13301-6 (Swed.) [hereinafter *Pirate Bay*], *translation available at* http://www.wired.com/images_blogs/threatlevel/2009/04/piratebayverdicts.pdf (stating that "defendants intentionally brought about the actual circumstances which constituted aiding and abetting").

53. The site repeatedly would publish online letters from rights holder counsel, followed by the site operators' taunts, including requests for more correspondence due to a lack of toilet paper and to be sued in Japan so as to provide the opportunity to visit there. *E.g.*, Email from Gottfrid Svartholm Warg, Co-Owner, Pirate Bay, to Willoughby & Partners (Nov. 1, 2004), *available at* http://static.thepiratebay.org/sega_response2.txt. Additional letters and responses are available at *Legal Threats Against the Pirate Bay*, THE RESEARCH BAY, http://thepiratebay.org/legal (last visited Apr. 3, 2011).

54. *Pirate Bay*, *supra* note 52, at 53.

55. *See, e.g.*, N.Y. Times v. United States, 403 U.S. 713 (1971) (striking down prior restraint injunctions based on asserted national security grounds in Pentagon Papers case); Garrison v. Louisiana, 379 U.S. 64 (1964) (striking down Louisiana criminal defamation statute). *But see* Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001) (upholding injunction of website's posting of software code that circumvented DVD encryption system based on code's functional, non-speech aspect in addition to reflecting the programmers' thoughts).

56. *See, e.g.*, THE OFFENSIVE INTERNET: SPEECH, PRIVACY, AND REPUTATION 6 (Saul X. Levmore & Martha Nussbaum eds., 2010) (discussing free-speech in the online context).

litigation with a discovery system already adapted to the Internet context—so it need rarely turn to criminal enforcement.[57]

Nevertheless, several considerations suggest that criminal prosecution for contributory copyright infringement could develop in the United States. First, the Department of Justice (DOJ) has already institutionalized criminal copyright enforcement in a way that capitalizes on the information provided by rights holders and their representatives, including the Recording Industry Association of America (RIAA).[58] This enforcement relies on existing statutes and penalties and targets what DOJ has euphemistically called "the deterrent effect of prosecution."[59] It would not necessarily require new legislation, new institutions, or a new definition of purpose to extend that reach.

The pressure to internationalize and harmonize the response to P2P also increases the possibility of American criminalization of contributory infringement.[60] Such pressure stems, in part, from overseas prosecutions, such as those of Kaneko and the Pirate Bay. In addition, powerful producer interests may soon attempt to convince governments to incorporate criminal provisions in trade agreements.[61]

57. *See* Joshua Dickman, *Anonymity and the Demands of Civil Procedure in Music Downloading Lawsuits,* 82 TULANE L. REV. 1049, 1079–80 (2008) (describing U.S. courts' applications of personal jurisdiction concepts in the context of motions to quash subpoenas to ISPs seeking users' identities); Mehra, *supra* note 27, at 813–14 (pointing out lower U.S. need to apply criminal law to online libel because of its that developed civil litigation institutions and methods).

58. The DOJ now has expert IP prosecutors to implement its IP enforcement strategy; each U.S. Attorney's Office has Computer Hacking and Intellectual Property (CHIP) Coordinators and 25 CHIP units, placed in areas of geographic emphasis and consisting of a concentration of Assistant U.S. Attorneys focusing on high-tech and IP offenses. Computer Crime & Intellectual Prop. Section, *Computer Hacking and Intellectual Property (CHIP) Program,* U.S. DEP'T OF JUST., http://www.justice.gov/criminal/cybercrime/chips.html (last visited Mar. 29, 2011). In prosecutions such as Operation Remaster, the DOJ has acted in concert with private trade associations such as the Recording Industry Association of America (RIAA) and the Motion Picture Association of America (MPAA). Susan Butler, *Seizures (Legal Matters),* BILLBOARD, Oct. 29, 2005, *available at* http://www.allbusiness.com/retail-trade/miscellaneous-retail-retail-stores-not/4555134-1.html.

59. COMPUTER CRIME & INTELLECTUAL PROP. SECTION, U.S. DEP'T OF JUSTICE, PROSECUTING INTELLECTUAL PROPRERTY CRIMES 306 (3d ed. 2006), *available at* http://www.justice.gov/criminal/cybercrime/ipmanual/ipma2006.pdf,

60. *See* Nate Anderson, *ACTA Draft Leaks: Nonprofit P2PFaces Criminal Penalties,* ARS TECHNICA (Feb. 4, 2009), http://arstechnica.com/tech-policy/news/2009/02/actual-acta-draft-leaks-noncommercial-p2p-could-get-criminal-penalties.ars.

61. *See* John Tehranian, *Parchment, Pixels, & Personhood: User Rights and the IP (Identity Politics) of IP (Intellectual Property),* 82 U. COLO. L. REV. 1, 80–81 (2011) ("[The Anti-Counterfeiting Trade Agreement] also empowers customs officers at border crossings to search laptops, smart phones, and other devices with hard drives–not for detonation devices that might threaten national security, but for content that infringes copyright law . . . . With the strong support that ACTA is receiving from lobbying interests acting on behalf of the content-creation industries, the proposal also raises serious concerns that hard-drive searches will create an in

The chilling effect of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Digital Millennium Copyright Act (DMCA) had made copyright scholars and Internet activists wary[62] of proposed agreements such as the pending Anti-Counterfeiting Trade Agreement (ACTA), which includes provisions requiring signatory nations to criminally punish contributory infringement "on a commercial scale," even where done with "no motivation of financial gain."[63]

The ACTA has drawn the most fire for the secrecy of its negotiation, but some observers have been alarmed by its potential criminalization of contributory infringement for P2P activity, even without commercial gain.[64] The language in the draft that concerns such observers copies TRIPS language negotiated a generation ago.[65] However benign the origin of that text, the same words may come to mean something different in wired world. Requiring criminal punishment for contributing to "commercial scale" infringement takes on new meaning.[66] Even absent a profit motive, the reach that the Internet confers on individuals makes it easier to deem their activity to be on a "commercial scale."

IV. CONCLUSION

Given the draft form of the ACTA and the incomplete status of the Pirate Bay case, plus the unprecedented nature of *Kaneko*, firm

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terrorem effect to stifle any manner of unauthorized possession or use of copyrighted content, whether legitimately excused by law or not.").

62. *See* Letter from 75 Law Professors to President Barak Obama (Oct. 28, 2010), *available at* http://wcl.american.edu/pijip/go/academics10282010 (calling for halt of ACTA); *Sunlight for ACTA*, ELECTRONIC FRONTIER FOUND., https://secure.eff.org/site/Advocacy? cmd= display&page=UserAction&id=383 (last visited Mar. 29, 2011); *see also* Anti-Counterfeiting Trade Agreement (Proposed Final Draft Dec. 2010) [hereinafter ACTA Draft], *available at* http://trade.ec.europa.eu/doclib/docs/2010/december/tradoc_147079.pdf.

63. *See* Anderson, *supra* note 60 (observing that the drafts of the ACTA "include language that would make copyright infringement on a 'commercial scale,' even when done with 'no direct or indirect motivation of financial gain,' into a criminal matter"). The draft of the ACTA contains provisions that would require states to criminalize aiding and abetting such acts, and would thus be relevant to cases such as those of Kaneko and The Pirate Bay. *See* ACTA Draft art. 23.1, 23.4 (stating 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" and "[w]ith respect to the offences specified in this Article for which a Party provides criminal procedures and penalties, that Party shall ensure that criminal liability for aiding and abetting is available under its law").

64. *Id.*

65. *Compare* ACTA Draft art. 23, *with* Agreement on Trade Related Aspects of Intellectual Property Rights art. 61, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 183.

66. *See* Anderson, *supra* note 60.

conclusions about the impact of criminal prosecution for contributory copyright infringement would be premature. Even so, given the far-reaching effects that criminal prosecution could have on technologies with "lawful promise,"[67] it would also be premature to embark on that adventure without a first debating the potential downsides. At the very least, where no direct profit motivates the alleged contributory infringement, it is dangerous to jump to the conclusion that potential innovation deserves prosecution. As with chilled expression or lost economic efficiency, we may not fully appreciate what we lose because it has not yet crystallized—but we will lose it just the same.

67. *See* MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 937 (2005).