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Brian A. Benko

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RUSSIA AND ALLOFMP3.COM: WHY THE WTO AND WIPO MUST CREATE A NEW SYSTEM FOR RESOLVING COPYRIGHT DISPUTES IN THE DIGITAL AGE

Even when laws have been written down, they ought not always remain unaltered.

Aristotle¹

I. INTRODUCTION

The Digital Age threatens copyright protection throughout the world.² Computer file formats, such as the MP3,³ allow music owners to make an intangible copy of their music library.⁴ In the 1990s, Peer-to-Peer (“P2P”) file sharing networks exploited this new technology.⁵ These networks created a way for users to download songs without pay-

1. ARISTOTLE, *POLITICS*, bk. 2, pt. VIII (Benjamin Jowett trans., Carlton House 1965) (n.d.).

2. The World Intellectual Property Organization [WIPO], *Intellectual Property on the Internet: A Survey of Issues*, ¶¶ 65–68 (Dec. 2002) [hereinafter *IP on the Internet*] (discussing several issues raised by the proliferation of digital media); Rebecca F. Martin, Note, *The Digital Performance Right in the Sound Recordings Act of 1995: Can It Protect U.S. Sound Recording Copyright Owners in a Global Market?*, 14 *CARDOZO ARTS & ENT. L.J.* 733, 740–41 (1996) (discussing the threat digital recordings pose for copyright holders).

3. Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 *U. CHI. L. REV.* 263, 270–71 (2002). MP3 is the abbreviation for MPEG-1 Audio Layer 3. *Id.* The MP3 file format allows a five-minute song to be compressed into a five mega-byte file. *Id.* In contrast, waveform files, the precursor to the MP3, compressed the same size song into a fifty MB file. *Id.*

4. *Id.* at 263. A person can turn a compact disk into an MP3 on her home computer. Michael Mertens, *Thieves in Cyberspace: Examining Music Piracy and Copyright Law Deficiencies in Russia as it Enters the Digital Age*, 14 *U. MIAMI INT'L & COMP. L. REV.* 139, 139 n.3 (2006). New technology allows users to make near perfect digital reproductions of music. Ku, *supra* note 3, at 271. Such reproductions fit on small computer files, which makes music easily transmittable and facilitates transference to other people. *Id.* at 270–71.

5. *IP on the Internet*, *supra* note 2, ¶¶ 103–09 (discussing the growth and legal issues created by P2P filing sharing networks). Internet expansion allows even greater numbers of computer files to be moved thousands of miles in a few seconds. Jennifer Newton, Note, *Global Solutions to Prevent Copyright Infringement of Music over the Internet: The Need to Supplement the WIPO Internet Treaties with Self-Imposed Mandates*, 12 *IND. INT'L & COMP. L. REV.* 125, 125–26 (2001).

ing for it.⁶ Over time this practice made users feel entitled to free copyrighted music.⁷ As a result of P2P file-sharing networks, the music industry has suffered great financial losses.⁸ While courts still deal with the problems caused by P2P networks,⁹ an even greater problem lies on the horizon.¹⁰

This new problem is transnational digital copyright infringement.¹¹ Websites, once again, provide the means for infringing copyrights.¹² Unlike P2P websites, users pay for downloaded music. But, like P2P file-sharing networks, music companies do not receive compensation for the electronic transference of music. The lingering problem linking transnational digital download websites with P2P networks is a result of the business model used by transnational digital download websites. The business model is simple, but, at the same, time complex. It utilizes the territorial system of copyright law and relies on national boundaries. Transnational digital download companies operate in a foreign nation. They sell music to consumers residing in another nation. The transaction between the two parties seems ordinary; but, in fact, the Internet company operates in a foreign nation with loophole-ridden copyright laws. These laws neither compel the company to stop operations, nor adequately protect copyright holders who reside in other nations. The transnational digital download website business model poses a new challenge for copyright holders, threatens the survival of the music industry,

6. *IP on the Internet*, *supra* note 2, ¶¶ 103–09 (discussing the rise of P2P file sharing networks, and explaining the legal issues raised by their existence).

7. Grace J. Bergen, *Litigation as a Tool Against Digital Piracy*, 35 MCGEORGE L. REV. 181, 182–83 (2004) (discussing the effect of new technology on social norms).

8. Richard D. Rose, *Connecting the Dots: Navigating the Laws and Licensing Requirements of the Internet Music Revolution*, 42 IDEA 313, 319 (2002); Eliza Shardlow-Clark, Note, *Online Music Sharing in a Global Economy: The U.S. Effort to Command (or Survive) the Tidal Wave*, 14 MINN. J. GLOBAL TRADE 141, 141–43 (2004) (stating that P2P file sharing networks take large earnings from the recording industry). Besides losses suffered by the recording industry, musicians lose money that would otherwise be allocated to production costs. Ku, *supra* note 3, at 305–06.

9. See, e.g., *Metro-Goldwin-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (holding that one who distributes a device with the object of promoting its use to infringe copyrights, as shown by clear expression or other affirmative steps to foster infringement, is liable for the resulting acts of infringement by third parties).

10. Matthew V. Pietsch, *International Copyright Infringement and the Internet: An Analysis of the Existing Means of Enforcement*, 24 HASTINGS COMM. & ENT. L.J. 273, 278–79 (2002) (hypothesizing that even if the U.S. closes P2P file sharing networks in this country, a greater problem may arise if a similar website began operating in another country).

11. Mertens, *supra* note 4, *passim* (providing a review of various issues raised by AllofMP3.com and other transnational digital copyright infringers).

12. AllofMP3.com, <http://www.AllofMP3.com> (last visited Feb. 2, 2007); mp3search, <http://www.mp3search.nu> (last visited Feb. 2, 2007).

and treats music as if it were *ferae naturae*.¹³

These websites expose two specific defects laden within international copyright law. First, the territorial system of copyright law permits each nation to determine whether websites that sell music to consumers around the world are legal. Second, the current system of international intellectual property agreements lacks an effective dispute resolution system. As a consequence of these problems, the world needs a new system for resolving copyright disputes between parties residing in different nations.

This article uses Russian law and Russian-based AllofMP3.com to analyze the private dispute resolution system of the World Intellectual Property Organization¹⁴ (“WIPO”), and the nation-based dispute resolution system of the World Trade Organization¹⁵ (“WTO”). *Section I* provides an overview of AllofMP3.com and the current system of resolving international copyright dispute. *Section II* applies and analyzes the WIPO Center’s private party based dispute resolution system, and the WTO’s nation based dispute resolution system. *Section III* proposes a new system for resolving international copyright disputes in the Digital Age. *Section IV* concludes this article with a few thoughts on the importance of fixing international copyright dispute resolution.

II. ALLOFMP3.COM AND INTERNATIONAL COPYRIGHT DISPUTE RESOLUTION

This section reviews the legal loophole exposed by AllofMP3.com and the current system for resolving international copyright disputes. *Subsection A* discusses the expansion of Internet access, and explains the territorial system of copyright law. *Subsection B* provides an overview of AllofMP3.com, including its impact on Russia’s accession to the

13. Pietsch, *supra* note 10, at 278–79. Surveys show AllofMP3.com accounts for fourteen percent of Internet music downloads in the U.K. *Call for Illegal MP3 Site Talks*, BBC NEWS, July 14, 2006, <http://news.bbc.co.uk/2/hi/entertainment/5180188.stm> [hereinafter *Call for Site Talks*]. Beyond surveys, website rating services ranked AllofMP.com as receiving the 986th highest level of traffic on the Internet during the period between March and May of 2006. Thomas Crampton, *Russian Download Site is Popular and Possibly Illegal*, NY TIMES, June 1, 2006. In sheer numbers, 345,000 people from the U.S. visited AllofMP3.com in April of 2006. *Id.*

14. Convention Establishing the World Intellectual Property Organization, July 14, 1967, 21 U.S.T. 1749, 828 U.N.T.S. 3 [hereinafter WIPO Convention].

15. Agreement Establishing the World Trade Organization, Apr. 15, 1994, 108 Stat. 4809, 33 I.L.M. 1144 [hereinafter WTO Agreement].

WTO. Finally, *Subsection C* provides an overview of the Berne Convention for the Protection of Literary and Artistic Works¹⁶ (“Berne Convention”), the WIPO Arbitration and Mediation Center (“WIPO Center”), and the WTO’s Agreement on Trade-Related Aspects of Intellectual Property Rights¹⁷ (“TRIPS Agreement”) and the Dispute Settlement Understanding¹⁸ (“DSU”).

A. The Effect of the Internet on the Territorial System of Copyright Law

Sales over the Internet have exploded ever since the creation of the Internet because it connects people throughout the world. Today, the Internet creates legal issues of International significance because of the territorial system of copyright protection. This section discusses the affect that the expansion of the Internet has had on digital music sales, and explains the territorial system of copyright law.

1. Internet Expansion

Internet access has increased exponentially since its inception.¹⁹ From the early 1990s to the dawn of the new millennium, the number of countries with access to the Internet increased from just over ten to over 200.²⁰ The number of people using the Internet has also increased.²¹ In 2002, approximately 605 million people used the Internet.²² In 2006, the number of Internet users increased to nearly 1.1 billion.²³ The Internet will continue growing in the coming years,²⁴ impacting even those na-

16. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention].

17. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 299, 33 I.L.M. 1197 [hereinafter TRIPS Agreement].

18. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 [hereinafter DSU].

19. Internet World Stats, <http://www.internetworldstats.com/stats.htm> (last visited May 14, 2007) (providing quantitative data on the number of Internet users since the Internet’s inception); see also *IP on the Internet*, *supra* note 2, ¶ 7.

20. *IP on the Internet*, *supra* note 2, ¶ 7.

21. Internet World Stats, *supra* note 19.

22. *IP on the Internet*, *supra* note 2, ¶ 7.

23. Internet World Stats, *supra* note 19.

24. See Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT’L L. 613, 621–22 (1996) (stating the G-7 countries have developed a plan “to include the developing and Third World countries, as well as the developed countries[,]” in creating a global information infrastructure).

tions whose infrastructure currently does not permit widespread Internet access.²⁵ Eventually, the Internet will connect every person in the world.

Even though complete Internet connectivity is still but a dream, the Internet affects the lives of a great many people and the economies to which they are a part. In particular, the Internet affects the growth of the global marketplace, a marketplace that it helped create.²⁶ The Internet has impacted various sectors of the global marketplace. One market in particular affected by this new marketplace is the music industry.²⁷ As the Internet exits its infant stage, the growth of music sales remains strong. This trend will continue as more people gain access to the Internet; and, as a result, music sales over the Internet will increase.²⁸ An obvious side effect of the Internet's expansion and its commercial prowess throughout the world is the expected increase in sales between Internet companies and citizens residing in different nations.²⁹

2. The Territorial System of Copyright Law

As music sales over the Internet become more prominent, the complex issues surrounding copyrighted music are not exactly music to every nation's ears. Nations must examine what caused these issues to arise. Expanded Internet access and unauthorized Internet music sales inhibit the protection of copyrights³⁰ because there are no international laws regulating transactions between parties residing within different nations.³¹

Since the inception of copyrights,³² each nation has defined its own

25. *IP on the Internet*, *supra* note 2, ¶¶ 384, 385. For example, markets in Asia, Latin America, and Africa are expected to experience significant increases in Internet access. *Id.*

26. *Id.* ¶ 16 (stating Internet sales in the U.S. amount to approximately six trillion dollars annually); *cf.* Ruth L. Okediji, *The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System*, 7 SING. J. INT'L & COMP. L. 315, 320–23 (2003) (discussing the growth of trade between Europe and Africa in the 1500s and its effect on the market, which is analogous to the effect that increased Internet access has on the new global marketplace).

27. *IP on the Internet*, *supra* note 2, ¶¶ 19, 25. Companies use various business models in transferring copyrighted materials over the Internet. *Id.* ¶¶ 35–36.

28. *Id.* ¶ 20.

29. *Id.*

30. Eric Priest, *The Future of Music and Film Piracy in China*, 21 BERKELEY TECH. L.J. 795, 822 (2006) (stating Internet access is a contributing factor for infringement).

31. Elizabeth Chien-Hale, *Asserting U.S. Intellectual Property Rights in China: Expansion of Extraterritorial Jurisdiction?*, 44 J. COPYRIGHT SOC'Y U.S.A. 198, 200 (1997); *see also* Newton, *supra* note 5, at 130–31 (explaining the territorial system of copyright law).

32. Alexander A. Caviedes, *International Copyright Law: Should the European Union Dictate its Development?*, 16 B.U. INT'L L.J. 165, 168–70 (1998); *see also* Shardlow-Clark, *supra* note

copyright laws.³³ Adequate protection depends on each nation to promulgate its own copyright laws.³⁴ This system affects copyright holders where a company sells a digital copy of a song to a citizen of another nation. The nation where the company operates may lack adequate copyright protection.³⁵ After all, not every country has adequate copyright protection.³⁶ This is, in part, due to the fact that nations have different understandings of what constitutes adequate copyright protection.³⁷ Russia, for instance, has a licensing law that allows for the sale of the music without the permission of the copyright holder.³⁸

In light of the problem described above, copyright holders must bring suit in the courts of every nation in which their rights are infringed.³⁹ Such actions are subject to the laws of the nation where the copyright holder files the lawsuit.⁴⁰ If the laws of that nation provide insufficient protection, then the foreign copyright holder has no recourse

8, at 143. The invention of the printing press, in 1436, created the need for copyright protection. Lucinda Jones, *An Artist's Entry Into Cyberspace: Intellectual Property on the Internet*, 22 EUR. INTEL. PROP. REV. 79, 79 (2000); see also Shardlow-Clark, *supra* note 8, at 143. This invention forced printers to compete with pirates when trying to recoup costs. Caviedes, *supra* note 32, at 168–69. Nonetheless, the first Anglo-American copyright law was not adopted until 1709, in England. Seth M. Goldstein, Note, *Hitchcock's "Rear Window" & International Copyright Law: An Examination of Stewart v. Abend & Its Affect on International Copyright Renewal and Exploitation*, 14 CARDOZO INT'L & COMP. L. 247, 251 (2006).

33. Caviedes, *supra* note 32, at 168–69.

34. Shardlow-Clark, *supra* note 8, at 143–44.

35. See Mertens, *supra* note 4, at 163–66 (explaining how AllofMP3.com operates under a loophole within Title IV of the Russian Copyright Act).

36. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 2006 SPECIAL 301 REPORT, at 26 (2006), available at http://www.ustr.gov/Document_Library/Reports_Publications/2006/2006_Special_301_Review/Section_Index.html?ht=; see also UNITED STATES OFFICE OF THE TRADE REPRESENTATIVE, 2005 SPECIAL 301 REPORT, available at http://www.ustr.gov/Document_Library/Reports_Publications/2005/2005_Special_301/Section_Index.html?ht=. The adequacy of a nation's copyright law generally depends on two main factors. The first factor is whether a nation's culture promotes, without restriction, the dissemination of ideas to the masses. Chien-Hale, *supra* note 31, at 226. The second factor is whether a nation's financial interest benefit from protecting the dissemination of ideas. *IP on the Internet*, *supra* note 2, ¶ 376. For instance, strong intellectual property rights also "[stimulate] economic growth, increase the gains from international trade, promote private investment and transfer of technology, and encourage national creativity." Chien-Hale, *supra* note 31, at 226.

37. Chien-Hale, *supra* note 31, at 200; see also Elaine G. Gin, *International Copyright Law: Beyond the WIPO & TRIPS Debate*, 86 J. PAT. & TRADEMARK OFF. SOC'Y 763, 764 (2004).

38. See discussion *infra* Part I.B.1.

39. Chien-Hale, *supra* note 31, at 200; see also Gin, *supra* note 37, at 764; Newton, *supra* note 5, at 130–31.

40. *IP on the Internet*, *supra* note 2, ¶ 258. This also means the dispute is subject to the court system of the particular nation in which the dispute arises, which varies in each nation. *Id.*

against the copyright infringer. The proliferation of the Internet acts as a catalyst for this problem. As a result of these circumstances, new technology,⁴¹ and sales arising from this technology⁴² challenge whether the territorial system can adequately protect copyrights.⁴³

Various interpretations of the importance of copyrights have much to do with each nation's unique value structure. A nation's value structure determines its theoretical understanding of copyright law. Throughout the world, various theoretical understandings exist.⁴⁴ For example, western nations place particular importance on giving citizens an incentive to make additional copyrighted works.⁴⁵ In England, copyrights are primarily an economic right—a property right.⁴⁶ Conversely, in other cultures, nations, particularly communist and post-communist nations, have placed emphasis on the importance of disseminating copyrighted materials to the masses.⁴⁷ This is in part due to the historical underpinnings of these societies.⁴⁸

41. Ku, *supra* note 3, at 270–72 (discussing the new technology impacting digital media). New technology is something that copyright law has encountered in the past. Michael J. O'Sullivan, *International Copyright: Protection for Copyright Holders in the Internet Age*, 13 N.Y. INT'L L. REV. 1, 2–3 (2000). In the past, photographs, books, and movies have led to changes in copyright law. *Id.* (using U.S. copyright law to illustrate how technological advancement affects national copyright laws).

42. *IP on the Internet*, *supra* note 2, ¶¶ 17, 20.

43. See generally Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273, 279–80 (1991) (analyzing the system of international law applicable to and the unresolved problems with Internet piracy).

44. HOWARD B. ABRAMS, COPYRIGHT LAW §1:3 (2006) (discussing the underlying rationale behind copyright law in the U.S.); see, e.g., Brent T. Yonehara, *Enter the Dragon: China's WTO Accession, Film Piracy and Prospects for Enforcement of Copyright Laws*, 12 DEPAUL-LCA J. ARTS & ENT. L. & POL'Y 63, 75–78 (2002) (discussing the underlying rationale behind China's copyright law).

45. See, e.g., U.S. CONST. art. I, § 8, cl. 8 (“Congress shall have Power . . . To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings.”). The U.S. adopted copyright laws according to Utilitarian theory. Allan Segal, Comment, *TRIPS: With a Painful Birth, Uncertain Health, and a Host of Issues in China, Where Lies Its Future?* 7 SAN DIEGO INT'L L.J. 523, 524 (2006). This theory rests on the following premise: if you give authors an incentive to create works, then the nation will be better off because authors will create new works. *Id.*

46. Monica Kilian, *A Hollow Victory for the Common Law? TRIPS and the Moral Rights Exclusion*, 2 J. MARSHALL REV. INTELL. PROP. L. 321, 323 (2003).

47. Wei Shi, *Cultural Perplexity in Intellectual Property: Is Stealing a Book an Elegant Offense?*, 32 N.C. J. INT'L L. & COM. REG. 1, 26 (2006) (stating China's constitution does not mention copyrights). China's communist system is, at least in part, responsible for its inadequate intellectual property protection. Segal, *supra* note 45, at 540.

48. Shi, *supra* note 47, at 7, 24–25 (claiming Confucian philosophy and communist historical underpinnings furthered China's lack of sufficient intellectual property rights); Yonehara, *supra* note 44, at 79–80 (claiming that a nation's history and cultural beliefs, created long before the in-

B. AllofMP3.com: A Russian Company Using the Territorial System of Copyright Law for Profit

Internet companies around the world use Internet expansion and the territorial system of copyright law for financial gain.⁴⁹ This is possible because the Internet connects users to foreign companies. This connectivity allows companies to reach consumers in unprecedented numbers. The first internationally known example of this issue is AllofMP3.com.⁵⁰

1. The Loophole

AllofMP3.com, a website based in Russia, sells music over the Internet.⁵¹ No one doubts the popularity of AllofMP3.com, as it comprises fourteen percent of the Internet retail music market in the U.K.⁵² Digital music consumers flock to this website because it sells songs at a comparatively low price.⁵³ The price of each song on AllofMP3.com ranges from five to twenty cents.⁵⁴

As is usually the case, if a deal is too good to be true, then there must be a catch. Here, the catch lies in whether the website is legal.

ception of copyright law, often determines the strength of its copyright law).

49. Mertens, *supra* note 4, at 162–64.

50. *Id.* at 162–63. AllofMP3.com provides a legal disclaimer stating:

The user bears sole responsibility for any use and distribution of all materials received from ALLOFMP3.com. This responsibility is dependent on the national legislation in each user's country of residence. The Administration of ALLOFMP3.com does not possess information on the laws of each particular country and is not responsible for the actions of foreign users.

AllofMP3.com,

Is it Legal to Download Music from AllofMP3?, available at <http://music.allofmp3.com/help/help.shtml?prm=legal&rnd=709687#top> [hereinafter AllofMP3.com: Legal Disclaimer].

51. James Chapman, Note, *Russian Web Sites Jeopardize U.S. Users: The Dangers of Importing Copyrighted Material Over the Internet*, 29 HASTINGS INT'L & COMP. L. REV. 267, 269 (2006).

52. Tony Smith, *Russian MP3 Sales Site 'More Popular in UK than Napster'*, THE REGISTER, May 12, 2006, available at http://www.theregister.co.uk/2006/05/12/allofmp3_uk_download_demand/.

53. *Id.* AllofMP3.com sells music eighty percent below the price at which iTunes sells music. *Face the Music; Russia Wants to Join the WTO. It Should Prove It's Worthy by Closing a Website that Record Companies Say is a Thinly Disguised Music Bootlegger*, LA TIMES, Oct. 25, 2006, at 16 [hereinafter *Prove It's Worthy*]. The wholesale price of music, the cost of each song to the company, is sixty-five cents per song. *Id.*

54. Smith, *supra* note 52 (stating the price of each song is determined by "the length and quality of the file"). iTunes, in comparison, the worlds largest on-line music retailer, sells songs for a flat fee of ninety-nine cents per song. *Id.*

From AllofMP3.com's perspective, its business complies with Russian copyright law.⁵⁵ Their claim rests in a clause within Russian law. Title IV of the Russian Copyright Act⁵⁶ authorizes collecting societies to grant licenses to companies so that companies may sell music, which are permitted to occur even if the seller does not have the permission of the copyright holder.⁵⁷ The Russian Multimedia and Internet Society ("ROMS"), and the Federation for Collective Copyright Management of Works Used Interactively ("FAIR") are two examples of Russian collecting societies.⁵⁸

In AllofMP3.com's case, it obtained a license to sell music from both ROMS and FAIR.⁵⁹ These licenses require the website to comply with Russian copyright law.⁶⁰ The licenses, however, do not require the

55. Frank Aherns, *U.S. Joins Industry in Piracy War*, WASHINGTON POST, June 15, 2006, at A01. In February 2005, the Computer Crime Division of the Moscow Police investigated AllofMP3.com, but took no action against the website. Tony Smith, *Moscow Prosecutor Lets Low-Cost MP3 Site off the Hook*, THE REGISTER, Mar. 7, 2005, available at http://www.theregister.co.uk/2005/03/07/all_ofmp3-com_let_off/. Because of this, Vadim Mamotin, Director General of MediaServices, AllofMP3.com's parent company, can safely say that "In six years of operation we have never been convicted by a Russian court or declared illegal. . . . Under Russian law we are 100 percent legal." Thomas Crampton, *Free-for-All Over Russian Music Site*, THE INTERNATIONAL HERALD, Oct. 18, 2006, at 1.

56. Law on Copyright and Related Rights, No. 5351-I of July 9, 1993 as amended July 20, 2004, tit. IV, art. 44 (Russ.), available at http://www.fips.ru/ruptoen2/law/low_cop.htm [hereinafter Russian Copyright Law].

Article 44. Purpose of Collective Management of Property

1. In order to ensure the property rights of . . . performers, organizations may set up for . . . collective management.

3. Collecting societies shall . . . issue licenses to users. . . . [These organizations] . . . shall not be entitled to deny the issue of license to users [sic], without good grounds therefore.

4. Collecting societies shall be entitled to retain unclaimed royalties . . . upon the expiration of three years from the date of entry of the royalties on the organizations account.

Id.

57. *Id.*

58. Mertens, *supra* note 4, at 163–64.

59. *Id.* at 164; AllofMP3.com: Legal Disclaimer, *supra* note 50 ("The availability over the Internet of [AllofMP3.com] materials is authorized by the license # LS-30-05-03 of the Russian Multimedia and Internet Society ("ROMS") and license # 006/3M-05 of the Rightholder's (sic) Federation for Collective Copyright Management of Works Used Interactively ("FAIR").").

60. Mertens, *supra* note 4, at 163. AllofMP3.com's website states that the use of any music downloaded from the website is for the personal use of the buyer. AllofMP3.com: Legal Disclaimer, *supra* note 50. Furthermore, the website contends, pursuant to Russian copyright law, the website is legal because it "pays license fees for all materials downloaded from the site." AllofMP3.com, AllofMP3.com Terms of Use, available at <http://music.allofmp3.com/help/help.shtml?prm=legal#top> (follow "AllofMP3.com Services Terms of Use" hyperlink) (last visited May 14, 2007).

licensee to obtain the copyright holder's permission before selling their music.⁶¹ In lieu of receiving permission from the copyright holder, collecting societies demand that the licensee pay them a portion of the proceeds from each sale.⁶² The collecting societies supposedly forward these royalties to the copyright holder;⁶³ but, copyright holders have never received royalties.⁶⁴ Copyright holders refuse them because, in their opinion, the amounts are too small.⁶⁵

Nonetheless, ROMS stands by the legality of AllofMP3.com.⁶⁶ In response to claims that AllofMP3.com operates illegally, ROMS general director Oleg Nezus stated, "[The legality of AllofMP3.com] has to be decided by a court and no court has said [it] is illegitimate."⁶⁷ This Oleg Nezus quote indicates there is a larger problem. The territorial system of copyright law allows AllofMP3.com to operate legally because the Russian Copyright Act permits its operation. Consequently, other countries and private parties are required use other channels to effect change in Russia.

2. The Perfect Storm

The territorial system of copyright law is not the only conflict surrounding AllofMP3.com. Many nations around the world are trying to find their own loophole around this system in an effort to shut down the website. Countries are mobilizing the private sector to achieve this end. But, the real trouble for AllofMP3.com manifests because of Russia's pending WTO accession.

Legal battles in several countries have accompanied AllofMP3.com's popularity because Russia allows the website to operate.⁶⁸

61. Mertens, *supra* note 4, at 165.

62. Crampton, *supra* note 55 (stating AllofMP3.com pays collecting agencies fifteen percent of its revenues).

63. Russian Copyright Law, *supra* note 56, art. 44.

64. *AllofMP3 is Illegal, Says Music Industry*, THE REGISTER, May 30, 2006, available at http://www.theregister.co.uk/2006/05/30/allofmp3_illegal/.

65. Sabra Ayres, *Russian Web Site a Thorn in Trade Talks*, COX NEWS SERVICE, Oct. 26, 2006; see also Anna Smolchenko, *Music Web Site Blocking WTO Bid*, THE MOSCOW TIMES (RUSS.), Oct. 6, 2006 (quoting ROMS chief Oleg Nezus acknowledging the copyright holder's boycott of AllofMP3.com royalty payments).

66.

Cheap Russian MP3s Raise a Ruckus, WIRED NEWS, June 2, 2006, available at <http://www.wired.com/news/wireservice/0,71076-0.html>.

67. *Id.*

68. Smith, *supra* note 52. AllofMP3.com has approximately 5.5 million subscribers. Nick Francis, *Why We're All Russians to iTuneski*, THE SUN, Oct. 18, 2006.

Some nations have already quashed access to the website.⁶⁹ For example, an Italian court shut down an Italian version of the website.⁷⁰ Also, a German court granted a preliminary injunction against AllofMP3.com.⁷¹ And, a Danish court ordered a telecommunication's operator to block Internet subscribers from accessing the website.⁷²

While a few nations have already determined whether AllofMP3.com operates legally, other nations have yet to decide this issue.⁷³ In both the U.K. and the U.S., record companies have filed lawsuits against the website.⁷⁴ In the U.K., the High Court permitted the British Phonographic Industry ("BPI") to sue AllofMP3.com.⁷⁵ In the U.S., on December 21, 2006, numerous major record labels filed suit against MediaServices, AllofMP3.com's parent company, in the District Court of Southern New York.⁷⁶ The record companies sought a preliminary injunction and damages in the amount of \$1.65 trillion dollars for instances of infringement that occurred over a five-month period.⁷⁷ The potential merits of this suit remain questionable because MediaServices has stated, "[the] suit is unjustified as AllofMP3.com does not operate in New York. Certainly the labels are free to file any suit they wish, despite knowing [that] . . . AllofMP3.com operates legally in Russia."⁷⁸ The outcome of these suits appears to be in favor of AllofMP3.com.

69. See, e.g., *Prove It's Worthy*, *supra* note 53.

70. *Id.*

71. *Id.*

72. *Court Orders ISP to Block Web Site*, AXI INT'L FOCUS, Oct. 27, 2006.

76. Complaint, *Arista Records L.L.C. v. MediaServices, Inc.*, No. 1:06-CV15319 (S.D.N.Y. Dec. 20, 2006) ("[AllofMP3's business] amounts to nothing more than a massive infringement of Plaintiffs' exclusive rights under the Copyright Act").

74. *Call for Site Talks*, *supra* note 13 (discussing the lawsuit filed against AllofMP3.com in the U.K. High Court); *Record Labels Sue Operator of Russian Music Web Site*, CHI. TRIB., Dec. 22, 2006, at 12 (stating several major record labels filed a complaint against MediaServices, AllofMP3.com's parent company, in the District Court of Southern New York alleging copyright infringement).

75. *Call for Site Talks*, *supra* note 13.

76. Jeff Leeds, *Music Label's Lawsuit Seeks Shutdown of Russian Online Service*, NY TIMES, Dec. 22, 2006, at 3 (stating several members of the Recording Industry Association of America, including Sony, BMG, and Virgin Records, filed the suit).

77. Peter Lauria, *Music Labels: NYET to Russian Pirates*, NY POST, Dec. 21, 2006, at 44. The complaint seeks \$150,000 in damages for each instance of copyright infringement. Complaint, *Arista Records L.L.C. v. MediaServices, Inc.*, No. 1:06-CV15319 (S.D.N.Y. Dec. 20, 2006).

78. Al-lofMP3.com Blogs, Response to Complaint by Major Record Labels, available at <http://blogs.allofmp3.com/allofmp3/2006/12/26/allofmp3-response-to-complaint-by-major-record-labels/> (posted Dec. 26, 2006).

Representatives of the website have no incentive to appear before a judge, which deprives the music industry of its day in court.

In addition to private litigation against AllofMP3.com, the U.S. has utilized the private sector in an effort to shut the website down.⁷⁹ In the fall of 2006, members of the U.S. Congress placed pressure on Visa and MasterCard to stop accepting transactions from the website.⁸⁰ These efforts proved successful when both companies blacklisted AllofMP3.com.⁸¹ The efficacy of the attempt, however, is questionable; U.S. Congressman Howard Berman recognized, “‘It’s like Whack-a-Mole’ with one website popping up after another.”⁸²

Even with impending litigation and national efforts to shut down AllofMP3.com, a larger issue shrouds the website: Russia’s accession to the WTO.⁸³ Russia applied to the WTO in 1994; today, Russia is still trying to accede to the WTO.⁸⁴ Russia’s intellectual property laws, which are alleged to be inadequate, present the most recent barrier to accession,⁸⁵ and AllofMP3.com exemplifies these concerns.⁸⁶ The U.S.

79. *Credit Card Companies Stop Services for Russian Website*, 24 INSIDE U.S. TRADE 43 (2006) [hereinafter *Credit Card Companies*].

80. *Id.*

81. *Id.*

82. *Id.*

83. Martin Crutsinger, *Russia is Closing in on OK to Join WTO*, AUGUSTA CHRONICLE, July 15, 2006, at D05 (stating intellectual property protection is a primary concern in the ongoing U.S. negotiations with Russian concerning WTO accession).

84. William H. Cooper, *Russia’s Accession to the WTO*, Congressional Report Service, July 17, 2006; Interview by Ranabir Ray Choudhury with Germen Gref, Russian Minister for Economic Development and Trade, FINANCIAL TIMES (LONDON), Feb. 4, 2006. There are four stages in WTO accession: (1) preliminary disclosure of information to WTO officials; (2) bilateral accession negotiations; (3) finalizing negotiations and analysis of the countries trade regimes; and (4) presentation of a draft protocol of accession and other negotiation documents. David E. Miller, *Combating Copyright Infringement in Russia: A Comprehensive Approach for Western Plaintiffs*, 33 VAND. J. TRANSNAT’L L. 1203 (2000). Russia is the largest economy still not a member of the 149 nation WTO. See, e.g., Crutsinger, *supra* note 83, at D05.

85. See Hearing Before the Subcommittee on Courts, the Internet and Intellectual Property of the H. Comm. On the Judiciary, 109th Congress (Dec. 7, 2005), available at <http://judiciary.house.gov/media/pdfs/espinel120705.pdf> (testimony of Victoria Espinel, Assistant U.S. Trade Representative) (discussing international protection and enforcement of the intellectual property rights, specifically concerning Russia and China). Russia ranks second in the world for producing the most pirated material. E.g., Crampton, *supra* note 13.

86. *Cheap Russian MP3s Raise a Ruckus*, *supra* note 66.

‘The United States is seriously concerned about the growth of internet piracy on Russian websites such as AllofMp3.com . . . the world’s largest server-based pirate website,’ Neena Moorjania, chief spokesman for the Office of the United States Trade Representative . . . ‘Russia’s legal framework for intellectual property rights production must meet WTO Requirements . . . In that context, we continue to call on Russia to shut down websites that offer pirate music, software and films for downloading,’ she said.

Trade Representative's 2006 Special 301 Report expressed concerns with the growth of Internet piracy in Russia,⁸⁷ and specifically named AllofMP3.com as a notorious market.⁸⁸ The potentially hazardous ramifications of this statement are legion for Russia and AllofMP3.com. To put the matter more bluntly, a U.S. Representative stated that the U.S. would withhold assent to Russian accession to the WTO until Russia complies with the TRIPS Agreement.⁸⁹ Interestingly, Russian compliance concerns the U.S. even though WTO accession requires each nation to implement laws that are compliant with the TRIPS Agreement.⁹⁰ But, to put this matter more logically, the U.S. apparently implies that Russia's copyright law offends the TRIPS Agreement.⁹¹

These matters recently came to a head when Russia commenced the final stage of accession to the WTO—multilateral negotiations on a Working Party Report and Protocol of Accession.⁹² On November 19, 2006, the U.S. and Russia entered into a bilateral market access agreement.⁹³ Along with this agreement, Russia included a side letter—which was not officially part of the agreement—stating a commitment to create stronger intellectual property laws.⁹⁴ The side letter, however, does not bind Russia. Furthermore, the side letter does not necessarily mean that stronger intellectual property laws will effect a change because of the

Id. The 2006 SPECIAL 301 REPORT cites AllofMP3.com as one of five notorious markets in the world. 2006 SPECIAL 301 REPORT, *supra* note 36, at 6, 26.

87. 2006 SPECIAL 301 REPORT, *supra* note 36, at 26.

88. *See id.* at 6 (stating the U.S. views AllofMP3.com as a notorious threat to the protection of intellectual property rights).

89. Crutsinger, *supra* note 83, at D05 (stating the U.S. is the last country that must agree to Russian ascension to the WTO).

90. Susan Sell, *Intellectual Property and the Public Policy in Historical Perspective: Contestation and Settlement*, 38 LOY. L.A. L. REV. 267, 314–15 (2004).

91. Anna Smolchenko, *Music Web Site Blocking WTO Bid*, MOSCOW TIMES (Ru.), Oct. 6, 2006 (“I have a hard time imagining Russia being a member of the WTO with [AllofMP.com] operating,” [U.S. Trade Representative Susan] Schwab.”). *But see* Christina L. Broadbent & Amanda M. McMillian, *Russia and the World Trade Organization: Will TRIPS Be a Stumbling Block to Accession?*, 8 DUKE J. COMP. & INT’L L. 519, 536 (1998) (noting Russian Copyright law sufficiently meets four important portions of the TRIPS Agreement).

92. THE OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, UNITED STATES, RUSSIA SIGN BILATERAL WTO MARKET ACCESS AGREEMENT: NEGOTIATIONS ON WTO MEMBERSHIP NOW MOVE TO THE MULTILATERAL PHASE, Nov. 19, 2006, *available at* <http://www.usrb.org/PDFs/US%20Russia%20Sign%20WTO%20Bilateral%20Market%20Access%20Agreement%20USTR%20Press%20Release.pdf>.

93. *Id.*

94. *Russia Promises to Shut Down Pirating in WTO Deal with U.S.*, 24 INSIDE U.S. TRADE 47, 47 (2006) (discussing the content of the side letter to the bilateral agreement between Russia and the U.S. and noting that Russian compliance is not part of the actual agreement).

need for a better enforcement mechanism. But, stronger laws may prove insufficient in ending the threat of transnational digital copyright infringement in Russia because of Russia's overall attitude toward intellectual property protection. And stronger Russian laws will not remedy insufficient copyright laws in those nations that are not a member of the WTO or even in those nations that are a member of the WTO. Nonetheless, according to U.S. Trade Representative Susan Schwab, "Is the WTO ready to let Russia in?" And the answer is: 'Not yet'"⁹⁵

C. International Agreements and Dispute Resolution

In the past, Russia signed and ratified several international intellectual property agreements.⁹⁶ Russia is a member of the Berne Convention,⁹⁷ and the WIPO Convention; however, Russia is not a member of the WTO.⁹⁸ The U.S.'s emphasis on Russian compliance with the TRIPS Agreement before Russia accedes to the WTO indicates that the DSU, the WTO's enforcement system,⁹⁹ is at least partially ineffective.¹⁰⁰ But, the U.S. refuses to rely on nation-based dispute resolution.¹⁰¹ Instead of using the DSU's nation-based dispute resolution system, the U.S. demands that Russia change its laws before accession.¹⁰² Thus, the U.S. has decided the fate of the DSU by implicitly declaring it a failure.¹⁰³ Surprisingly, the TRIPS Agreement permits nations a period

95. *U.S. Indicates Russia Far From WTO*, MOSCOW TIMES, April 11, 2007, at 1.

96. WIPO, WIPO Guide to Country Profiles, available at <http://www.wipo.int/members/en/> (follow "Russian Federation" hyperlink) (last visited May 14, 2007) (stating Russia joined the WIPO Convention in April 1970).

97. *Id.*

98. *Id.* China is also a member of WIPO. *Id.* (follow "China" hyperlink). Yet, China has the worst record of intellectual property infringement in the world. 2006 SPECIAL 301 REPORT, *supra* note 36, at 16–25; see also 2005 SPECIAL 301 REPORT, *supra* note 36, at 16.

99. Compare DSU, *supra* note 18, app. 1 (listing the agreements to which the DSU procedures apply), with TRIPS Agreement, *supra* note 17, art. 64.1 (incorporating the DSU procedures into the TRIPS Agreement).

100. See 2006 SPECIAL 301 REPORT, *supra* note 36, at 14–25; 2005 SPECIAL 301 REPORT, *supra* note 36, at 14–16; see also Brigitte Binkert, Comment, *Why the Current Global Intellectual Property Framework Under TRIPS Is Not Working*, 10 INTEL. PROP. L. BULL. 143, 149 (2006) (noting that China has the worst intellectual property protection in the world and also noting that China is a member of the WTO).

101. See Martin Crutsinger, *Roadblock Remains in Russia-U.S. Deal*, THE ADVERTISER (AUSTL.), Sept. 9, 2006, at 87.

102. Smolchenko, *supra* note 91.

103. See generally Maria C. H. Lin, *China After the WTO: What You Need to Know*, in COMMERCIAL LAW AND PRACTICE COURSE HANDBOOK SERIES, 177 (Commercial Law and Practice, PLI Order No. A0-0095, 2001) (discussing the WTO's failure to force China to comply with the TRIPS Agreement).

before requiring compliance with its substantive provisions.¹⁰⁴

The U.S. demand to Russia seems even more peculiar after the U.S. filed two requests for consultation with China, on April 16, 2007, under the DSU, both of which concern intellectual property protection.¹⁰⁵ These disputes are the first that any member of the WTO has brought against China for its lax intellectual property protection. In response to the request for consultation, a Chinese official said, “[The WTO action was] against the consensus reached between the two countries’ leaders on developing bilateral trade relations and properly handling trade problems China expresses great regret and strong dissatisfaction at the decision of the United States to file WTO cases against China over intellectual property rights”¹⁰⁶ China’s response indicates that the WTO dispute resolution system is more appropriate in some circumstances rather than others.¹⁰⁷ A large and complex body of international law, however, is in need of explanation in order to make sense of what the events in China mean for Russian accession to the WTO.

1. The Berne Convention

On September 9, 1886, ten countries signed the Berne Convention.¹⁰⁸ This convention was the first international effort to protect copyrighted materials.¹⁰⁹ Throughout the years, the Berne Convention’s

104. TRIPS Agreement, *supra* note 17, arts. 65.1, 65.3.

105. Request for Consultation by the United States, *China – Measures Affecting the Protection of Intellectual Property Rights*, WT/DS362/1 (April 16, 2007); Request for Consultation by the United States, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/1 (April 16, 2007).

106. Richard McGregor, *China Hits Out as US Launches Trade Cases*, FINANCIAL TIMES (U.K.) (April 10, 2007); *see also* Steve McClure, *China Syndrome: WTO Action gets Cautious Welcome in Asia*, 119 BILLBOARD 9 (April 21, 2007) (noting a remark by Tian Lipu, commissioner of the Chinese Government’s Intellectual Property Office as saying, “It’s not a sensible move for the U.S. government to file [DSU] complaints [against China].”).

107. The mounting trade deficit, estimated at \$233 billion in 2006, the U.S. has with China is credited with prompting the U.S. to file a request for consultation with China over intellectual property protection in 2007. Michael Arndt and Harry Maurer, *A Trade Spat Heats Up*, BUSINESSWEEK, April 20, 2007, at 2, available at http://www.businessweek.com/magazine/content/07_17/c4031036.htm.

108. Heather Nehila, Comment, *International Copyright Law: Is It Music to American Ears?*, 16 TEMP. INT’L L.J. 199, 200 (2002) (discussing the creation of the Berne Convention and noting that the Convention currently has seventy-seven members).

109. Kevin Fayle, Note, *Sealand Ho! Music Pirates, Data Havens, and the Future of International Copyright Law*, 28 HASTINGS INT’L & COMP. L. REV. 247, 250 (2005). WIPO administers a treaty system for protecting intellectual property rights; one of the treaties is the Berne Convention. Martin, *supra* note 2, at 759.

membership has grown and the substantive provisions have changed.¹¹⁰ The most recent change to the convention took place in 1971, in Paris.¹¹¹ Widespread use of phonography, photography, and the television prompted the revisions.¹¹² Yet, even when the Berne Convention changed, its objectives remained the same: “to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works.”¹¹³

The Berne Convention furthers this objective by providing a framework for protecting copyrights.¹¹⁴ This framework embraces several important principles and obligations.¹¹⁵ The most important principle is the nationality principle,¹¹⁶ which requires members to protect foreign copyright holders in the same way that it protects its own copyright holders.¹¹⁷ The Berne Convention also contains various member obligations, which are stated in the first twenty-one articles of the convention.¹¹⁸ Even with these important and revolutionary principles and obligations, copyright protection ultimately depends on whether a nation’s laws adequately protect against copyright infringement.¹¹⁹ The Berne Convention, however, is criticized for its lack of an enforcement mechanism.¹²⁰ Although the Berne Convention does not prohibit an enforce-

110. Mertens, *supra* note 4, at 145.

111. *Id.* On five occasions the Berne Convention was amended: Berlin in 1908, Rome in 1928, Brussels in 1948, Stockholm in 1967, and, most recently, Paris in 1971. WIPO, *WIPO Intellectual Property Handbook: Policy, Law and Use*, No. 489 (E), ¶ 5.167 (2d ed. 2004) [hereinafter *WIPO IP Handbook*].

112. Mertens, *supra* note 4, at 145.

113. Berne Convention, *supra* note 16, at pmb1.

114. O’Sullivan, *supra* note 41, at 11.

115. See generally Berne Convention, *supra* note 16, arts. 1–21.

The convention rested on three principles to determine the minimum amount of protection granted to author’s works: (a) Works originating in one of the contracting States . . . must be given the same protection in each of the other contracting States as the latter grants to the works of its own nationals (principle of “national treatment”). (b) Such protection must not be conditional upon compliance with any formality (principle of “automatic” protection). (c) Such protection is independent of the existence of protection in the country of origin of the work (principle of the “independence” of protection).

Mertens, *supra* note 4, at 144–45.

116. Berne Convention, *supra* note 16, art. 3; see also Lina M. Montén, Comment, *The Inconsistency Between Section 301 and Trips: Counterproductive with Respect to the Future of International Protection of Intellectual Property Rights*, 9 MARQ. INTELL. PROP. L. REV. 387, 390–91 (2005).

117. Berne Convention, *supra* note 16, art. 3.

118. *Id.* arts. 1–21.

119. Caviedes, *supra* note 32, at 171.

120. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codifying various sections of 17 U.S.C. so the U.S. copyright law complied with the Berne

ment mechanism, it does not contain one.

2. The Enforcement Mechanisms

In an effort to compensate for the Berne Convention's lack of an enforcement mechanism, the WTO and WIPO each created their own system for resolving international copyright disputes.¹²¹ The difference between these two systems lies in the parties who may use them. The WIPO Center resolves disputes between private parties.¹²² The WTO, on the other hand, uses the DSU to resolve disputes between member nations.¹²³ Nevertheless, both of these systems work with the Berne Convention: WIPO administers the Berne Convention,¹²⁴ and the WTO's TRIPS Agreement adopts articles 1–21 of the Berne Convention.¹²⁵

a. The WIPO Arbitration and Mediation Center

On July 14, 1967, a special convention at the Stockholm Revision Conference established WIPO.¹²⁶ Even though WIPO administers the Berne Convention,¹²⁷ it lacks a mechanism for enforcing member obligations.¹²⁸ WIPO's mission "is to promote through international cooperation the creation, dissemination, use, and protection of works of the human mind."¹²⁹

In an effort to further its mission, WIPO created the Center in 1994.¹³⁰ The WIPO Center provides several ways for private parties to resolve intellectual property disputes: mediation, arbitration, and expe-

Convention and noting the Berne Convention is not self-executing); *see also* Chien-Hale, *supra* note 31, at 208–09; Jose Felgueroso, *TRIPS and the Dispute Settlement Understanding: The First Six Years*, 30 *AIPLA Q.J.* 165, 169–70 (2002); Leaffer, *supra* note 43, at 276 (critiquing the Berne Convention for lacking a system of dispute resolution).

121. Felgueroso, *supra* note 120, at 208.

122. *See generally* WIPO, *WIPO Arbitration and Mediation Rules*, No. 446 (E), *passim* (2004) (stating the WIPO rules for arbitration) [hereinafter *WIPO Rules*]

123. *See* DSU, *supra* note 18, art. 1, app. I (stating the DSU resolves disputes between member nations); WTO Agreement, *supra* note 15, art. 2.1 (illustrating how the WTO uses the DSU to resolve disputes).

124. Berne Convention, *supra* note 16, art. 4 (ii).

125. TRIPS Agreement, *supra* note 17, art. 9.1. The TRIPS Agreement does not incorporate article 6*bis* of the Berne Convention. *Id.*

126. Caviedes, *supra* note 32, at 176.

127. *WIPO IP Handbook*, *supra* note 111, ¶ 5.195.

128. *See generally* WIPO Convention, *supra* note 14 (lacking a system for resolving disputes).

129. *WIPO IP Handbook*, *supra* note 111, ¶ 1.14.

130. WIPO, *Dispute Resolution for the 21st Century*, No. 779, at 2 (2005).

dited arbitration.¹³¹ To utilize these procedures, both parties must voluntarily submit to them.¹³² Voluntary submission occurs where private parties either place a clause in a contract¹³³ or agree¹³⁴ to use WIPO's dispute resolution procedures.¹³⁵

The WIPO Center administers a two-step process to help private parties resolve disputes.¹³⁶ The first step is mediation.¹³⁷ WIPO administers this non-binding form of alternative dispute resolution.¹³⁸ During mediation, the mediator facilitates a mutually acceptable solution, and provides a non-binding assessment of the dispute.¹³⁹

In the event the dispute remains unresolved at the end of mediation the disputants may try arbitration¹⁴⁰ or expedited arbitration.¹⁴¹ For arbitration, WIPO asks private parties to choose the law to be applied to the substantive portions of the dispute.¹⁴² While the parties choose the substantive law, the WIPO arbitration rules govern the procedure of the dispute.¹⁴³ Both arbitration and expedited arbitration use similar rules with the exception of a few provisions, which facilitate a faster proceeding.¹⁴⁴ These provision cause expedited arbitration to last only three months, while arbitration lasts nine months.¹⁴⁵ Even with the slight variation in

131. *Id.* at 5.

132. *Id.* at 7.

133. WIPO, Recommended WIPO Contract Clauses and Submission Agreements, available at <http://arbiter.wipo.int/arbitration/contract-clauses/clauses.html> (listing several sample contract clauses) (last visited Sept. 9, 2006).

134. *Id.*

135. *Dispute Resolution for the 21st Century*, *supra* note 130, at 7.

136. *Id.*

137. The WIPO Rules, *supra* note 122, art. 13; *IP Handbook*, *supra* note 111, ¶ 4.165.

138. See generally WIPO Rules, *supra* note 122.

139. WIPO, What is Mediation?, available at <http://www.wipo.int/amc/en/mediation/guide/index.html> (last visited May 14, 2006).

140. WIPO Rules, Arbitration and Mediation Rules, *supra* note 122, at 9–28; Robert M. Sherwood, *The TRIPS Agreement: Implications for Developing Countries*, 37 IDEA 491, 541 (1997) (stating that WIPO provides an international arbitration center for resolving intellectual property disputes between private parties).

141. *WIPO IP Handbook*, *supra* note 111, ¶ 4.163. Private parties may decide to avail themselves of arbitration first, rather than participate in mediation. *Id.*

142. WIPO Rules, Arbitration, *supra* note 122, art. 59 (b) (stating the applicable law for the arbitration proceedings shall be the law of the place where the arbitration is taking place unless the parties agree otherwise).

143. *Id.* art. 2 (stating the WIPO arbitration rules shall govern the arbitration proceedings unless the parties agree otherwise).

144. WIPO Rules, *supra* note 122, at 1 n.1, 91–93 (displaying a table of differences between WIPO Arbitration and Expedited Arbitration).

145.

WIPO, Principal Steps in WIPO Arbitration and Expedited Arbitration, <http://www.wipo.int/amc/en>

the WIPO rules, both procedures result in binding decisions based upon the arbiter's impartial assessment of the dispute.¹⁴⁶

b. The WTO: The TRIPS Agreement and The DSU

On January 1, 1995, the WTO adopted the TRIPS Agreement.¹⁴⁷ Like WIPO, the TRIPS Agreement requires member nations to comply with Articles 1–21 of the Berne Convention.¹⁴⁸ In addition to these obligations, the TRIPS Agreement sets forth other obligations with respect to copyright law.¹⁴⁹ For example, the TRIPS Agreement requires member nations to provide a minimum set of enforcement standards for the implementation and enforcement of intellectual property protection in the laws of each member nation.¹⁵⁰ Also, the TRIPS Agreement provides something WIPO lacks: a system for resolving disputes between members, which is known as the DSU.¹⁵¹ The DSU is a separate agreement under the guise of the WTO that provides members with a vehicle for resolving disputes arising under various WTO agreements.¹⁵² Appendix 2 of the DSU allows each WTO agreement to alter the DSU's standard procedures.¹⁵³ The WTO developed the DSU, in part, because WIPO lacked a mechanism for enforcing member obligations.¹⁵⁴

The TRIPS Agreement uses the DSU's standard multi-step settlement process to force adherence to the TRIPS Agreement.¹⁵⁵ The first step is a confidential consultation between the member nations involved in the dispute.¹⁵⁶ This stage commences when a nation files a request for

/arbitration/expedited-rules/principal-steps.html (last visited May 14, 2007).

146. *Id.*

147. Binkert, *supra* note 100, at 144. The TRIPS Agreement requires member states to abide by articles 1–21 of the Berne Convention. O'Sullivan, *supra* note 41, at 13.

148. TRIPS Agreement, *supra* note 17, art. 9.1.

149. TRIPS Agreement, *supra* note 17, arts. 1, 3, 4, 9–21, 41. The TRIPS Agreement requires WTO members to promulgate enforcement procedures, establish fair and equitable enforcement procedures, decide cases on the merits, and allow for appellate review of trial court decision. *Id.* art. 41.

150. *Id.*

151. Compare TRIPS Agreement, *supra* note 17, art. 64.1 (making the DSU the system for resolving disputes between members), with WIPO Convention, *supra* note 14, *passim* (providing no system of dispute resolution).

152. DSU, *supra* note 18, app. 2.

153. *Id.*

154. Fayle, *supra* note 109, at 250; Ruth Okediji, *TRIPS Dispute Settlement and the Sources of (International) Copyright Law*, 49 J. COPYRIGHT SOC'Y U.S.A. 585, 586–87 (2001).

155. See Okediji, *supra* note 154, at 616–25 (discussing the DSU procedures); see also Pietsch, *supra* note 10, at 295–98 (2002) (discussing the DSU procedures).

156. DSU, *supra* note 18, art. 4. The DSU encourages nations to take all steps possible to set-

consultation because it believes another member is noncompliant with its TRIPS Agreement obligations.¹⁵⁷ Consultations ideally result in settlement; however, absent settlement, the dispute proceeds through the remainder of the process.¹⁵⁸

The second step commences when disputants fail to reach an agreement after sixty days of consultation.¹⁵⁹ At the end of the sixty day period, the complaining nation may request the establishment of a panel.¹⁶⁰ Individuals without an interest in the dispute comprise the panel.¹⁶¹ The panel produces a report containing a binding decision.¹⁶² After the panel produces the report, the participants may review it,¹⁶³ and submit comments to the panel.¹⁶⁴ In the event a nation submits comments, the panel must consider implementing them.¹⁶⁵ After review, the panel may either amend its prior report, or disregard the proposed comments.¹⁶⁶ At the conclusion of this process, the dispute settlement board adopts the panel's report.¹⁶⁷

The goal of the DSU proceedings is to effectuate compliance with the TRIPS Agreement.¹⁶⁸ In furtherance of this goal, the third step implements the panel's report.¹⁶⁹ Nations must comply with the panel's

tle disputes before establishing a panel. *See id.* arts. 3.3, 4.5. Regardless of whether a consultation produces a settlement, consultations are confidential and do not prejudice any future proceedings in which the member participates. *Id.* art. 4.6.

157. *Id.* art. 4. When a nation files a request for consultation, the request must stipulate the specific obligations the consulted nation violated. *Id.* art. 4.4.

158. *Id.* art. 4.5. The DSU provides other non-litigious ways of facilitating settlement between the two nations. *Id.* art. 5. These include Good Offices, Conciliation, and Mediation. *Id.*

159. *Id.* art. 4.7. The complaining party may request the formation of a panel before the 60 day period ends, if the noncompliant nation consents. *Id.*

160. *Id.* art. 6 (stating the procedures for establishing a dispute settlement board panel).

161. *Id.* art. 8 (stating the procedures for selecting panelists). Panels are composed of 3 members. *Id.* art. 8. The Secretariat General nominates panelists, and these nominations are binding unless there is a compelling reason for not allowing a nominee to sit on the panel. *Id.* art. 8.6. There are standard procedures that panelists must abide by in resolving disputes. *Id.* app. 3.

162. DSU, *supra* note 18, art. 12.7.

163. *Id.* art. 15.1. The panel sets the period of time during which participants may review the panel's report. *Id.*

164. *Id.* art. 15.2.

165. *Id.*

166. *Id.* The panel holds a meeting to discuss whether to implement any of the advisory comments. *Id.*

167. *Id.* art. 16.4. Adoption of the report is automatic upon final approval by the dispute settlement board. *Id.* There is, however, an appeals process available to nations that are displeased with any portion of the panel's report. *Id.* art. 17 (providing the procedures and rules governing the appeal process).

168. Okediji, *supra* note 154, at 618.

169. DSU, *supra* note 18, art. 21.

report within a reasonable period of time.¹⁷⁰ In the event a nation fails to comply within a reasonable period of time, that nation may be required to pay compensation or suspend concessions.¹⁷¹ Where a nation pays compensation, the nations negotiate a mutually acceptable compensation package.¹⁷² The suspension of concessions is equal to the impairment suffered as a result of the other member's non-compliance.¹⁷³ Thus, the WTO sanctions nations for not complying with the panel decision.¹⁷⁴

III. INTERNATIONAL COPYRIGHT DISPUTE RESOLUTION

This section analyzes the strengths and weaknesses of international dispute resolution, as exposed by transnational digital copyright infringement. *Subsection A* applies WIPO's private dispute resolution system to the various grievances that entities have with AllofMP3.com. *Subsection B* discusses Russia's WTO accession and the advantages of nation-based dispute resolution. *Subsection C* applies the WTO's nation-based dispute resolution system to grievances with AllofMP3.com. Finally, *Subsection D* discusses the cultural effects of forcing strict copyright laws on a sovereign nation.

A. The WIPO Center's Deficiencies

Even though Russia must comply with the Berne Convention, WIPO still lacks a mechanism for enforcing Russian compliance with the convention.¹⁷⁵ Instead, WIPO administers the WIPO Center, which

170. *Id.*; see Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Canada – Patent Protection of Pharmaceutical Products, WT/DS114/13 (Aug. 18, 2000) (providing an example of a case where the parties used arbitration to interpret what constitutes a reasonable period of time).

171. DSU, *supra* note 18, art. 22; see Yuka Fukunaga, *Securing Compliance Through the WTO Dispute Settlement System: Implementation of DSB Recommendations*, 9 J. INT'L ECON. L. 383, 386 (2006) (discussing the implementation of DSB recommendations). Neither the payment of compensation nor the suspension of concessions acts as a penalty. Wilfred J. Ethier, *Intellectual Property Rights and Dispute Settlement in the World Trade Organization*, 7 J. INT'L ECON. L. 449, 455 (2004).

172. DSU, *supra* note 18, art. 22.2.

173. *Id.* art. 22.4.

174. Pamela Samuelson, *Challenges for the World Intellectual Property Organization and the Trade-Related Aspects of Intellectual Property Rights Council in Regulating Intellectual Property Rights in the Information Age*, 21 EUR. INTELL. PROP. REV. 528, 531 (1999).

175. See generally WIPO Convention, *supra* note 14 (providing no system for resolving disputes).

allows private parties an avenue for resolving disputes.¹⁷⁶ The WIPO Center, however, has two major problems: (1) the contract requirement, and (2) the private-party-focused proceedings.¹⁷⁷ This subsection reviews both of these requirements.

1. The WIPO Center's Contract Requirement

Private parties must create a contract before they may use the WIPO Center.¹⁷⁸ In transnational digital copyright infringement, no prior contractual obligations exist between the parties. In fact, the circumstances prevent forming such obligations for several reasons. For one, no contract exists between the website and the copyright holder. The only contractual obligation is between the music consumer and the website.¹⁷⁹ As such, the WIPO Center is ineffective because there is no contract, and because there is no chance of forming a contract.¹⁸⁰ This highlights a basic reality of copyright infringement: the infringer transmits copyrighted material without the permission of the copyright holder.¹⁸¹ It is highly unlikely that an infringing website will contract to resolve the copyright holder's grievance. The contractual mandates of the WIPO Center would not work to protect the best interests of a company like AllofMP3.com and thus there is no chance that it would avail itself to the WIPO Center's proceedings.

The contract requirement is also troublesome because the infringer

176. See generally, WIPO Rules, *supra* note 122 (explaining the procedures for private party participation in the WIPO Center's proceedings).

177. See Gin, *supra* note 37, at 780–81 (reviewing problems with the WIPO Center's system for resolving disputes); see also Camille A. Laturno, Comment, *International Arbitration of the Creative: A Look at the World Intellectual Property Organizations New Arbitration Rules*, 9 TRANSNAT'L LAW. 357, 388 (1996). But see Laturno, *supra* note 177, at 389 (discussing the merits of arbitration in intellectual property disputes).

178. WIPO Rules, Mediation Rules, *supra* note 122, arts. 1, 3 (b)(ii) (conditioning use of WIPO Center mediation on the submission of a contract); WIPO Rules, Arbitration Rules, *supra* note 122, arts. 1, 9 (ii) (conditioning use of WIPO Center arbitration on the submission of a contract).

179. See Michael Mainville, *Anti-piracy Law Could Shut Russian Music Download Site*, THE GUARDIAN (U.K.), Sept., 15, 2006.

180. See generally Laturno, *supra* note 177, at 376–77 (discussing situations in which WIPO Center arbitration is most appropriate). Although Title IV of the Russian copyright requires licensed companies to pay royalties to a collective rights management agency, there is no contract between these parties. See generally Russian Copyright Law, *supra* note 56, art. 44 (providing no provision requiring the copyright holder and the licensee form a contract).

181. WIPO, *Understanding Copyright and Related Rights*, No. 895 (E), at 7 (2004). Copyright law protects an idea's expressed form. *Id.* For music, the protected expression is the music on the MP3. See *id.*

believes in the legality of its operations.¹⁸² For example, AllofMP3.com believes it complies with Russian copyright law. Because AllofMP3.com believes it follows Russian copyright law, the website would suffer negative consequences by forming a contract with the disputant.

The last problem with the contract requirement is that it puts an unnecessary duty on third parties who would otherwise not be involved in the dispute.¹⁸³ For example, VISA and MasterCard unilaterally refused charges from consumers who used their services to purchase music on AllofMP3.com.¹⁸⁴ Such an action unjustly transfers excessive power to an indirectly involved private party. Therefore, for these three reasons, the contract requirement is a major deficiency of the WIPO Center's private party dispute resolution system.¹⁸⁵

2. Private Party Focused Proceedings

The WIPO Center only applies to disputes between private parties.¹⁸⁶ Resolving a transnational digital copyright dispute requires a determination of whether a nation's laws permit the website to operate legally.¹⁸⁷ If the website operates legally, and these same laws apply at arbitration, then a private party's grievance cannot prevail. Thus, the WIPO Center supplies a system unable to remedy the underlying issue, which is inadequate copyright protection.

Nonetheless, resolving disputes between private parties encourages national sovereignty and autonomy. Because the WIPO Center applies

182.

See AllofMP3.com, AllofMP3.com Press Center, <http://www.allofmp3.com/press/centre.shtml?s=993&d=18191974> (last viewed May 14, 2006) (arguing AllofMP3.com complies with Russian copyright law).

183. *Id.*

184. *Credit Card Companies*, *supra* note 79.

185. See WIPO, *WIPO Guide to Mediation*, No. 449 (E), at 10 (updated 2004). Because of the private nature of ADR, dispute records are unavailable. *Id.* Several examples in WIPO materials, led the author to this conclusion. See *id.* (containing several examples of the WIPO Center's ADR cases). ADR is more appropriate for commercial copyright disputes within a particular nation. See, e.g., Scott H. Blackmand & Rebecca M. McNeill, *Alternative Dispute Resolution in Commercial Intellectual Property Disputes*, 47 AM. U. L. REV. 1709, 1712 (1998). The WIPO Center has had success solving domain name disputes. See, e.g., *Cases from the WIPO Arbitration and Mediation Center*, 13 WORLD ARB. & MED. REP. 307 (2002) (publishing several panel decisions from arbitration proceedings for domain name disputes).

186. See generally WIPO Guide to Mediation, *supra* note 185.

187. AllofMP3.com Press Center, *supra* note 182 (stating that so long as AllofMP3.com complies with Russian law it will continue operating).

only to private parties, each nation determines whether its laws comply with the Berne Convention.¹⁸⁸ If a private party from another country could compel alterations to a nation's copyright law, then the policies, principles, and history of a sovereign nation, with respect to copyrights, might be jeopardized. As such, one might argue that the omission of national involvement from the WIPO Center procedures promotes national sovereignty.¹⁸⁹ Furthermore, one might argue that the Berne Convention, which WIPO administers, expressly furthers national sovereignty by promoting the territoriality of copyright law.¹⁹⁰ The rationale for such arguments is founded in the basic premise of national autonomy—the right to promulgate laws without external interference or influence.

B. Using the DSU to Compel Compliance with the TRIPS Agreement

Russia, a Berne Convention member, must comply with portions of the TRIPS Agreement because the TRIPS Agreement incorporates the first twenty-one articles of the Berne Convention.¹⁹¹ But, no system exists for enforcing these obligations.¹⁹² This is because neither the Berne Convention, nor WIPO have an adequate enforcement mechanism.¹⁹³ But, Russian accession to the WTO would finally provide one, the DSU.¹⁹⁴

Eventually Russia will accede to the WTO based on its recent agreement with the U.S. concerning accession. When this occurs, Russia must comply with the TRIPS Agreement. Yet, the U.S. does not intend to wait for the DSU to force Russia to comply with the TRIPS Agree-

188. See generally Berne Convention, *supra* note 16 (stating member nations must comply with convention obligations).

189. *Contra* Joshua Meltzer, *State Sovereignty and the Legitimacy of the WTO*, 26 U. PA. J. INT'L ECON. L. 693, 699 (2005) (stating the growth of transnational economies created a need for nations to join international organizations, even with the threat of losing national autonomy).

190. Berne Convention, *supra* note 16, art. 9 (stating the author of an artistic work retains the exclusive right to authorize reproduction of the work). In certain special cases, nations may legislate where reproduction of the work neither conflicts with the normal exploitation of the work nor unreasonably prejudices the legitimate interests of the author. *Id.*

191. Compare Berne Convention, *supra* note 16, arts. 1–21 (containing the twenty-one Berne Convention articles ascribed to by the TRIPS Agreement), with TRIPS Agreement, *supra* note 17, art. 64.1 (stating the TRIPS Agreement incorporates the first twenty-one articles of the Berne Convention).

192. See generally Berne Convention, *supra* note 16, *passim* (containing no enforcement provision).

193. See generally WIPO Convention, *supra* note 14 (containing no enforcement provision); Berne Convention, *supra* note 16 (containing no enforcement provision).

194. See TRIPS Agreement, *supra* note 17, art. 64.1 (stating agreements under Articles XXII and XXIII of GATT 1994 shall apply to consultations and settlements of disputes under the DSU).

ment.¹⁹⁵ The pressure and emphasis the U.S. places on Russian conformance with the TRIPS Agreement, prior to accession, indicates the U.S. doubts whether the DSU will effect Russian compliance with the TRIPS Agreement.

This assertion warrants review of resolved TRIPS Agreement disputes to test the validity of such an assertion. Several TRIPS Agreement disputes have arisen under the DSU.¹⁹⁶ Many of these cases compelled a member nation to comply with the TRIPS Agreement.¹⁹⁷ In these cases, compliance was effected at various parts of the DSU procedure, including panel decisions,¹⁹⁸ arbitration,¹⁹⁹ and mutually agreed solutions.²⁰⁰

While the DSU has successfully resolved many disputes, it has also failed on a few occasions.²⁰¹ The dispute between the U.S. and the European Communities illustrates these failures.²⁰² In 1999, the Euro-

195. *In Bad Company*, THE WASHINGTON TIMES, Oct. 11, 2006, at A14 (stating the U.S. refuses to assent to Russia's accession to the WTO until Russia complies with the TRIPS Agreement).

196. Request for Consultation by the United States, *European Communities – Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, WT/DS124/1 (May 7, 1998); Request for Consultation by the United States, *Greece – Enforcement of Intellectual Property Rights for Motion Picture and Television Programs*, WT/DS125/1 (May 7, 1998).

197. *E.g.*, Notification of a Mutually-Agreed Solution, *Pakistan – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS36/4 (March 7, 1997) (reaching a mutually-agreed solution in a dispute alleging non-compliance with articles 27, 65, and 70 of the TRIPS Agreement).

198. Report of the Panel, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS79/R (Aug. 24, 1998) (finding India failed to comply with its obligations under article 70.8 of the TRIPS Agreement); Report of the Panel, *Complaint by the European Communities and their Member States, India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS79/R (Aug. 24, 1998) (resolving a patent dispute through the use of a panel report).

199. Recourse to Arbitration Under Article 25 of the DSU Award of the Arbitrators, *United States – Section 110(5) of the U.S. Copyright Act*, WT/DS160/ARB25/1 (Nov. 9, 2001) (reaching a satisfactory solution with an arbitration report concerning U.S. non-compliance with article 13 of the TRIPS Agreement); Arbitration Decision under Article 21.3 (c) of the DSU, *Canada – Patent Protection of Pharmaceutical Products*, WT/DS114/13 (Aug. 18, 2000) (providing an example of a case where an arbitration award succeeded the panel report).

200. Notification of a Mutually-Agreed Solution, *Japan – Measures Concerning Sound Recordings*, IP/D/4/Add.1 (Nov. 17, 1997) (announcing a mutually-agreed solution whereby Japan amended its copyright law to comply with the TRIPS Agreement); Notification of a Mutually-Agreed Solution, *Argentina – Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals*, WT/DS171 (June 20, 2002) (reaching a mutually-agreed solution concerning allegations that Argentina had failed to comply with articles 27, 28, 31, 34, 39, 50, 62, 65 and 70 of the TRIPS Agreement).

201. Notification of a Mutually Satisfactory Temporary Arrangement, *United States – Section 110(5) of the U.S. Copyright Act*, WT/DS160/23 (June 26, 2003).

202. Report of the Panel, *United States – Section 110(5) of the U.S. Copyright Act*, WT/DS160/R (June 15, 2000).

pean Communities complained that the U.S. Copyright Act disobeyed article 9.1 of the TRIPS Agreement, which incorporates articles 1-21 of the Berne Convention, because the Act permitted the playing of radio and television music in public places without the payment of a royalty fee.²⁰³ The panel report ruled in favor of the European Communities, ordering the U.S. to change its copyright law.²⁰⁴

The U.S., however, thwarted this result. This case went through a lengthy post-panel procedure taking the U.S. and the European Communities over three years to reach a satisfactory implementation arrangement.²⁰⁵ To date, this dispute has still not reached a final agreement.²⁰⁶ Consequently, facts support arguments for and against the efficacy of the DSU.

C. A Critique of The DSU and The TRIPS Agreement

Russian WTO accession may or may not close the legal loophole relied on by transnational digital copyright infringing websites. The DSU, however, may be an inappropriate means of causing awareness and drawing public opposition to transnational digital copyright infringers. This is true even though closing websites requires a system capable of forcing a nation to change its copyright law.²⁰⁷ In AllofMP3.com's case, if Russia joins the WTO, then the DSU can force Russia to comply with the TRIPS Agreement.²⁰⁸ Yet, the TRIPS Agreement and the DSU have several flaws preventing it from effectively accomplishing this goal.²⁰⁹

The TRIPS Agreement has two main flaws. Both flaws arise from

203. Request for Consultations by the European Communities and their Member States, *United States – Section 110 (5) of the U.S. Copyright Act*, WT/DS160/1 (Feb. 4, 1999) (alleging the U.S. failed to comply with articles 11bis (1) and 11.1 of the Berne Convention, as incorporated by the TRIPS Agreement).

204. Report of the Panel, *United States – Section 110(5) of the U.S. Copyright Act*, WT/DS160/R (June 15, 2000).

205. Notification of a Mutually Satisfactory Temporary Arrangement, *United States – Section 110(5) of the U.S. Copyright Act*, WT/DS160/23 (June 26, 2003).

206. Status Report by the United States Addendum, *United States – Section 110(5) of the U.S. Copyright Act*, WT/DS160/24e/Add24 (Dec. 8, 2006).

207. See AllofMP3.com Press Center, *supra* note 182 (stating AllofMP3.com will operate so long as it complies with Russian copyright law).

208. See generally DSU, *supra* note 18, art. 1.1, app. 1 (applying the DSU procedures to TRIPS Agreement disputes); TRIPS Agreement, *supra* note 17, art. 64.1 (incorporating the DSU procedures into the TRIPS Agreement).

209. Cf. 2006 SPECIAL 301 REPORT, *supra* note 36, at 24 (stating China joined the WTO but still has inadequate intellectual property protection).

the text of the agreement. One of these flaws lies in its existing substance. The other, however, rests in the insufficient breadth of the content.

The first problem with the TRIPS Agreement lies in the substance of the text. The agreement imposes general enforcement obligations instead of specific obligations on members.²¹⁰ The following hypothetical arguments illustrate the problem. A complaining party might argue Russia fails to adequately enforce intellectual property rights.²¹¹ The potential success of this argument is unpredictable because the TRIPS Agreement fails to define the word “effective”.²¹² Similarly, Russia might argue section 9.2 of the Berne Convention affords each nation the right, in special cases, to promulgate laws, laws that other nations must respect.²¹³ The potential success of this argument is also unpredictable because section 9.2 fails to define which cases are “special cases.”²¹⁴ General obligations make the DSU procedures unpredictable. This unpredictability may deter nations from requesting a consultation.

The second problem is that the TRIPS Agreement is utterly devoid of anything close to addressing digital copyright infringement.²¹⁵ In fact, the agreement never even mentions the Internet.²¹⁶ As a result, complaining nations would be required to rely on general provisions if

210. See Berne Convention, *supra* note 16, arts. 1-21 (containing the Berne Convention obligations incorporated by the TRIPS Agreement); TRIPS Agreement, *supra* note 17, art. 41 (providing the general member obligations for enforcing intellectual property rights).

211. *Id.*

212. *Id.*

213. Compare AllofMP3.com Press Center, *supra* note 182 (claiming the Berne Convention allows Russia to promulgate its own laws), with Berne Convention, *supra* note 16, art. 9.2 (“It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such . . . exploitation of the work does not unreasonably prejudice the legitimate interests of the author”).

214. Peter K. Yu, *Still Dissatisfied After All These Years: Intellectual Property, Post-WTO China, and the Avoidable Cycle of Futility*, 34 GA. J. INT’L & COMP. L. 143, 144-45 (2005).

215. See generally TRIPS Agreement, *supra* note 17 (containing no provisions for protecting digital media); cf. WIPO Convention, *supra* note 14, art. 4 (i) (stating the purpose of WIPO is to promote the harmonization of intellectual property law but WIPO lacks an appropriate dispute resolution mechanism for promoting its objectives). Even the WIPO Internet treaties lack adequate standards pertaining to digital copyright infringement. See generally WIPO Copyright Treaty, Dec. 20, 1996, S. TREATY DOC. No. 105-17, 36 I.L.M. 65 (1997), available at <http://www.wipo.int/treaties/en/ip/wct/index.html> (containing no system for enforcing signatory obligations); WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 36 I.L.M. 76 (1997), available at http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html (containing no system for enforcing signatory obligations).

216. Hamilton, *supra* note 24, at 615; see generally TRIPS Agreement, *supra* note 17 (providing no provision addressing digital infringement).

they were to fight against transnational digital copyright infringement. Therefore, the TRIPS Agreement's imprecise coverage of digital copyright infringement proves troublesome for member nations taking issue with AllofMP3.com and similar websites.²¹⁷ In addition to the TRIPS Agreement's failure to supply Internet provisions, other areas remain unaddressed by the text of either the TRIPS Agreement or the Berne Convention.²¹⁸ For instance, neither agreement addresses copyrighted materials in intangible form.²¹⁹ Also, the DSU procedures remain unaltered by the TRIPS Agreement, even though the DSU allows WTO agreements to amend its procedures.²²⁰

Like the TRIPS Agreement, the DSU also has several flaws. This section discusses four such flaws. First, the DSU relies wholly on members to complain about other member's unfulfilled obligations.²²¹ This is troublesome because some time may pass before a member discovers that another member has noncompliant copyright laws.²²² Furthermore, some nations forego consultation even where a WTO member disobeys the TRIPS Agreement.²²³ This is a problem because certain nations

217. See Meltzer, *supra* note 189, at 712–14 (stating the Appellate Body has overturned decisions because the panel decisions referenced materials other than the text and citing Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, at 115, WT/DS58/AB/R (Oct. 12, 1998)). It is unlikely any TRIPS Agreement provisions support finding article 44 of the Russian Copyright Law renders Russia noncompliant. See *id.* at 730–31 (stating the appellate body has overturned panel decisions because the decision interpreted GATT using general goals rather than expressly looking at a textual obligation or rule of interpretation).

218. See generally Berne Convention, *supra* note 16, arts. 1–21 (containing no provision addressing digital infringement); TRIPS Agreement, *supra* note 17, arts. 1, 3, 4, 9–21, 41 (containing no provisions addressing digital infringement).

219. *Id.*

220. See DSU, *supra* note 18, app. 2 (listing several agreements with provisions altering the DSU procedures, with the TRIPS Agreement being notably absent).

221. See DSU, *supra* note 18, art. 2.1 (defining members as those nations that are parties to plurilateral trade agreements).

222. See Request for Consultations by the United States, *Ireland – Measures Affecting the Grant of Copyright and Neighboring Rights*, WT/DS82/1 (May 22, 1997) (requesting consultation between the U.S. and Ireland concerning Ireland's lack of copyright protection). Ireland adopted its first copyright law in 2000. Copyright and Related Rights Act, 2000 (Act No. 28/2000)(Ir.) (amended 2004). Thus, the TRIPS Agreement and the DSU took effect in 1994, but members waited until 1997 to utilize the DSU. Compare DSU, *supra* note 18, with Request for Consultations by the United States, *Ireland – Measures Affecting the Grant of Copyright and Neighboring Rights*, WT/DS82/1 (May 22, 1997).

223.

WTO, Disputes by Country, http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (last visited May 14, 2007) (listing each time a member requested consultation with China, two of which involved issues related to China's lax intellectual property laws). Even though China infringes more intellectual property than any other nation, only the U.S. has initiated DSU proceedings against China for such issues. *Id.*; see Request for Consultation by the United States, *China –*

wield more economic power than other nations. For instance, it is unlikely a small African nation would choose to make waves with the powerful U.S. by alleging the U.S. failed to uphold its obligations under the TRIPS Agreement. Such action might create severe problems in other aspects of international diplomacy. Therefore, the long-term overall effects outweigh the short-term effect of compelling another nation to comply with its TRIPS Agreement obligations.

Second, effectuating the DSU process takes too long.²²⁴ To initiate proceedings, a nation must file a consultation request.²²⁵ Consultations last sixty days before a party may request a panel.²²⁶ If the dispute remains unsettled after consultation, a panel becomes involved.²²⁷ Panels often take eight and half months to circulate the final panel report.²²⁸ Additionally, members may wait up to fifteen additional months for the report to be implemented.²²⁹ In certain situations, implementation takes considerably longer.²³⁰ During this lengthy period, transnational digital copyright infringers can offend massive amounts of copyrights.²³¹ For

Measures Affecting the Protection of Intellectual Property Rights, WT/DS362/1 (April 16, 2007); Request for Consultation by the United States, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/1 (April 16, 2007). After China joined the WTO in 2001, intellectual property infringement increased. See 2005 SPECIAL 301 REPORT, *supra* note 36, at 16. And, it ultimately took six years before any WTO member requested a DSU consultation with China.

224. Carolyn B. Gleason & Pamela D. Walther, *PART I: Review of the Dispute Settlement Understanding (DSU): Panel 1 D: Stage IV--Operation of the Implementation Process: The WTO Dispute Settlement Implementation Procedures: A System in Need of Reform*, 31 LAW & POL'Y INT'L BUS. 709, 712 (2000) (stating the lengthy time table in several DSU cases worked as a detriment to effecting the ends for which the WTO created the DSU).

225. DSU, *supra* note 18, art. 4.

226. *Id.* art. 4.7. Members may request a panel before the sixty day period ends if they feel settlement efforts failed. *Id.*

227. *Id.* Members requesting a panel must submit a brief explanation of the legal basis for the request. *Id.* art. 6.2

228. *Id.* apps. 3, 10.12 (displaying the proposed panel timeline).

229. DSU, *supra* note 18, art. 21.4 (defining the maximum period of time between the issuance of the panel report and a determination as to what constitutes a reasonable period of time for implementing the panel's decision).

230. See Report of the Panel, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/R (Aug. 6, 2001) (reporting the U.S. must comply with the Board's decision); Report of the Appellate Body, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R (Jan. 2, 2002); Status Report by the United States, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/11/Add.47 (Oct. 16, 2006) (stating the U.S. is working with Congress to comply with the dispute settlement board's decision).

231. Lauria, *supra* note 77 (stating a large number of infringement cases took place over a five month span). There have been situations where a nation filed a consultation request, but the nation neither requested a panel nor agreed to a settlement. See Request for Consultations by Canada, *European Communities – Patent Protection for Pharmaceutical and Agricultural Products*,

example, AllofMP3.com would remain open for a long time before successful DSU proceedings could compel amendments to Russian law or impose sanctions.²³² Additionally, external factors may delay a nation's consultation request.²³³ As a result, copyright holders would suffer financial losses during the waiting period.²³⁴

Third, the DSU only allows members to request consultation.²³⁵ The effectiveness of the DSU, thus, depends on nations to allege non-compliance. Relying on nations displaces private parties, such as record companies—companies in need of immediate action.²³⁶ The DSU contrasts WIPO's private party focused system. Private parties are more likely to initiate proceedings because private parties have a financial interest at stake. Therefore, reliance on members decreases the likelihood of determining whether a nation complies with the TRIPS Agreement.

Fourth, members file very few consultation requests. Since the DSU's enactment, only four consultations concerned copyright law.²³⁷ Member-nations have refrained from filing consultation requests even though international copyright protection is a salient concern.²³⁸ A failure to file a consultation request when a problem occurs harms the

WT/DS153/1, Dec. 7, 1998 (documenting a dispute that began in 1998 and still remains unresolved in 2007).

232. See generally Timothy M. Reif & Marjorie Florestal, *Revenge of the Push-Me, Pull-You: The Implementation Process Under the WTO Dispute Settlement Understanding*, 32 INT'L LAW. 755, 757–61 (1998) (providing a thorough overview of DSU procedures following the issuance of a panel report).

233. See *supra* note 223 and accompanying text.

234. See Lauria, *supra* note 77 (stating the complaint against AllofMP3.com alleges eleven million instances of copyright infringement over a five month period).

235. See DSU, *supra* note 18, art. 3.2; Pietsch, *supra* note 10, at 298.

236. See Tony Halpin, *Why Ten Cent 'Pirate' Downloads Are Causing Discord in World Trade*, THE TIMES (LONDON), Oct. 7, 2006 (noting AllofMP3.com gains 5,000 new users each day).

237. Request for Consultations by the United States, *Ireland – Measures Affecting the Grant of Copyright and Neighboring Rights*, WT/DS82/1 (May 22, 1997); Request for Consultation by the United States, *European Communities – Measures Affecting the Grant of Copyright and Neighboring Rights*, WT/DS115/1 (Jan. 12, 1998); Request for Consultations by the European Communities, *United States – Section 110(5) of U.S. Copyright Act*, WT/DS160/1 (Feb. 4, 1999); Request for Consultations by the United States, *Japan – Measures Concerning Sound Recordings*, WT/DS28/1 (Feb. 14, 1996) [hereinafter *Japan – Sound Recordings*]. There were technically five copyright disputes, but one concerned the same issue found in *Japan – Sound Recordings*. *Id.* Request for Consultations from the European Communities, *Japan – Measures Concerning Sound Recordings*, WT/DS42/1 (June 4, 1996). Considering the total number of DSU consultations exceeds 300, copyright disputes rarely arise. Fukunaga, *supra* note 171, at 386.

238. Compare 2006 SPECIAL 301 REPORT, *supra* note 36, at 16-25 (stating that China has the worst intellectual property protection in the world), with *supra* note 237 and accompanying text (showing that the U.S. only recently filed the first request for consultation against China concerning its copyright law).

DSU's value and credibility. This issue creates problems for the long-term efficacy of the DSU.

Taken together, the TRIPS Agreement forms a symbiotic relationship with the DSU. The DSU must resolve several problems if the TRIPS Agreement hopes to protect copyright holders in the Digital Age. And, the TRIPS Agreement must resolve several problems if the DSU hopes to end copyright infringement in the Digital Age.

D. Cultural Problems with Strict Copyright Protection

Even though the DSU has deficiencies, some may argue these deficiencies preserve national sovereignty. For example, a lengthy process furthers fair conflict resolution. Also, excluding private parties ensures that every nation makes an independent final determination on whether to complain about another nation's compliance with the TRIPS Agreement.

Furthermore, under the Berne Convention's nationality principle, every nation must treat foreign copyright holders as it treats its own.²³⁹ Russia currently treats foreign copyright holders the same way it treats Russian copyright holders.²⁴⁰ Russian copyright law sanctions collective rights agencies.²⁴¹ So long as Russia applies this provision equally, it complies with the nationality principle.²⁴²

Requiring Russia to change its laws in order to appease other nations offends national autonomy. Respecting a nation's autonomy is an important concern for nations that disagree with another nation's understanding of copyright law. For the world to respect this rule, each nation must promulgate and administer its own rule of law without interference.²⁴³

239. Berne Convention, *supra* note 16, art. 2.

240. Smolchenko, *supra* note 65 (stating Russian collecting societies offered royalties to U.S. record companies).

241. Russian Copyright Law, *supra* note 56, art. 44.

242. Berne Convention, *supra* note 16, art. 9.

243. Cf. Shubhankar Dam, *Legal Systems as Cultural Rights: A Rights' Based Approach to Traditional Legal Systems Under the Indian Constitution*, 16 IND. INT'L & COMP. L. REV. 295 (discussing how the right to justice for aboriginal cultures in India should not require them to avail themselves to India's positivist rule).

III. A NEW SYSTEM FOR RESOLVING INTERNATIONAL COPYRIGHT DISPUTES

This section proposes a new system for resolving international digital copyright disputes. The new system requires amendments to the substance and procedure of the current DSU procedures. The substantive changes create new member obligations for protecting digital music, and the procedural changes supply a two-step system for resolving disputes, the effect of which permits both private party and member nation participation. *Subsection A* discusses the reorganization of international copyright law. *Subsection B* addresses how reorganization would affect the DSU. *Subsection C* explains the procedure a new system would utilize to solve international copyright disputes. Finally, *Subsection D* addresses the advantages and disadvantages of the proposed system.

A. Restructuring International Copyright Law

For several reasons, the WTO and WIPO must collaborate in convening a new meeting of the Berne Convention. There are several reasons for collaboration. First, the WTO and WIPO have similar memberships.²⁴⁴ Second, these two organizations have a history of cooperation.²⁴⁵ Third, and most important, the TRIPS Agreement incorporates part of the Berne Convention.²⁴⁶ Incorporation compels WTO members to comply with articles 1-21 of the Berne Convention.²⁴⁷

At the convention, member nations should work together in drafting new provisions for the Digital Age. Transnational digital copyright infringement threatens copyrights. New provisions must protect copy-

244. Compare WIPO, WIPO Members, available at <http://www.wipo.int/members/en/> (listing the 183 members of WIPO), with WTO, WTO Members, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (listing the 149 members of the WTO).

245. See Agreement Between the World Intellectual Property Organization and the World Trade Organization, Dec. 22, 1995, IP/C/6, available at http://www.wto.org/english/tratop_e/trips_e/wto_wip_e.htm; TRIPS Agreement, *supra* note 17, pmb1.; Press Release, WTO, WTO and WIPO Join Forces to Help Developing Countries Meet Year-2000 Commitments on Intellectual Property (June 14, 2001) (providing an example of when the WTO and WIPO worked together to solve a problem).

246. TRIPS Agreement, *supra* note 17, art. 9.1 (stating the TRIPS Agreement incorporates the first twenty-one articles of the Berne Convention).

247. *Id.* Yet, any amendments to the Berne Convention must also be incorporated into the TRIPS Agreement. See TRIPS Agreement, *supra* note 17, art. 71.1; see also Samuelson, *supra* note 174, at 533 (discussing the incorporation of the Berne Convention into the TRIPS Agreement).

rights in the Digital Age because international law currently lacks binding provisions for Digital copyright protection.²⁴⁸ New Internet obligations would further develop minimum standards for protecting copyrights internationally.²⁴⁹ The new member obligations need not be specific; a set of principles requiring members to administer laws prohibiting Internet music sales unless the seller obtained prior authorization from the copyright holder is sufficient.

B. Utilizing the DSU

Even with the DSU's deficiencies, the DSU could provide a capable enforcement mechanism for new Internet obligations. First, however, the TRIPS Agreement must incorporate the new Berne Convention provisions.²⁵⁰ Incorporation permits the DSU to resolve disputes between WTO members.²⁵¹ Even after incorporation, WTO members still must alter the DSU's standard procedures, in furtherance of the interests of member nations and private parties.

Nevertheless, the DSU's sole reliance on members to request consultation is not a fatal flaw. The DSU allows WTO agreements to modify the DSU's procedures to better fit the subject matter of each agreement.²⁵² Several other WTO Agreements have adopted rules and procedures that alter the standard DSU procedures.²⁵³ Amendments to

248. See generally Berne Convention, *supra* note 16 arts. 1–21; TRIPS Agreement, *supra* note 17 (containing no provision addressing digital infringement). This would not be the first time that nations formed a convention because of new technological advancements. See *supra* note 111 and accompanying text.

249. See TRIPS Agreement, *supra* note 17, pmb1. (listing the harmonization of copyright as one of the purpose of the TRIPS Agreements).

250. See TRIPS Agreement, *supra* note 17, art. 71.1 (stating the TRIPS Agreement Council may reconvene if there are any "relevant new developments which might warrant modification or amendment [to the TRIPS Agreement]").

251. See DSU, *supra* note 18, app. 2 (listing the TRIPS Agreement as one of the WTO agreements using the DSU to resolve disputes between members); TRIPS Agreement, *supra* note 17, art. 64 (excluding all others with the exception of member nations from DSU proceedings).

252. DSU, *supra* note 18, art. 1.2, app. 2 (stating the DSU is subject to "special or additional rules and procedures" contained in other agreements covered by the DSU, and listing the other WTO Agreements that amend the standard DSU procedure). The DSU enables other WTO agreements, including the TRIPS Agreement, to amend its standard procedures. *Id.* app. 1 (B) (listing the TRIPS Agreement as one of the multilateral trade agreements covered by the DSU).

253. See Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1, Legal Instruments—Results of the Uruguay Round, 1868 U.N.T.S. 120, arts. 14.2–14.4, annex 2 (stating that a panel may establish a technical expert group and also adding special rules for expert groups); Agreement on Implementation of Article VI of GATT 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1, Legal Instruments—Results of the Uruguay Round, 1186 U.N.T.S. 2, arts.

the DSU procedures, as applied through the TRIPS agreement, must involve member nations and private parties.

C. *The New Process*

Amendments to the TRIPS Agreement's DSU procedures shall create an optional two-step system for resolving disputes. These new procedures will incorporate a hybrid of the WIPO Center's private party focused procedures, and the DSU's existing nation-based dispute resolution procedures.

1. Step I: The Private Party Consultation

The first step involves the private sector.²⁵⁴ Instead of only allowing nations to request a consultation, private parties shall be permitted to request a consultation with another private party. This new DSU step and the existing DSU procedures commence the exact same way, with a consultation. The difference between these two rests in the potential result. Instead of alleging that a nation fails to comply with the TRIPS Agreement, the private party raises noncompliance as an issue. This is subtle but very important distinction.

After the party raises the issue, the two parties partake in proceedings similar to arbitration. A panel, identical to the current DSU panel, reviews these proceedings.²⁵⁵ Private parties present, instead of member nations, the relevant facts to the arbitrator. After reviewing the facts, the panelists distribute an opinion. The decision, however, would not state whether a nation failed to comply with its TRIPS Agreement obligations. Instead, the decision provides an advisory opinion stating whether there is reason to believe the nation where the responding party resides failed to comply with the TRIPS Agreement. If the advisory opinion finds the nation to be in compliance with its obligations, then the process ends. But, if the advisory opinion concludes that a member is non-compliant, then the second portion of the proceedings begins.

17.4–17.7 [Anti-Dumping Agreement] (amending the DSU rules for confidential proceedings, requests for consultation, and agreement interpretation); Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 164, arts. 4.2–4.12, 6.6, 7.2–7.10, 8.5, n.35, 24.4, 27.7, Annex V (altering the consultation timetable in order to quicken the DSU process and also amending specific provisions related to fact-finding).

254. See generally Geoffrey D. Antell, Book Note, 46 HARV. INT'L L.J. 527, 543–44 (2005).

255. See generally DSU, *supra* note 18, arts. 7, 8, 11, 12 (providing the current DSU procedures).

2. Step II: The Current DSU Procedures

The current DSU procedures remain unchanged. There is, however, one major exception: the nation-based portion of the DSU now has two possible ways to begin.²⁵⁶ The first way occurs where a member requests a consultation. The second way occurs where a private party successfully raises the issue of non-compliance. This determination automatically sends the proceedings to the nation-based portion of the DSU procedures.

In certain situations a nation may not wish to consult with a member nation even though private consultation resulted in an advisory opinion that found reason to believe that a member nation has failed to comply with its obligations.²⁵⁷ Among nations, various reasons may prompt such a decision, including economic and political issues.²⁵⁸ But regardless of the reason, this option preserves national autonomy. Ultimately, members retain unfettered control in determining whether to commence consultation.²⁵⁹ Again, this contingency protects national sovereignty while still allowing private parties to raise the issue of non-compliance.

D. An Evaluation of the Amended DSU Procedures

The amendments to the DSU have advantages and disadvantages. The disadvantages of this system primarily concern state autonomy. Some nations may rebel against permitting private sector participation in international law. Yet, this problem is unlikely because the private sector influences public affairs, through lobbying and other activities.²⁶⁰ Furthermore, nations retain the right to refuse to participate in a consultation. But, the territorial system of copyright law is still a rule worthy

256. Cf. U.C.C. § 2-207 (2000) (allowing parties to reach an agreement where different or additional terms are present and providing several possible routes for parties to reach agreement).

257. See Yu, *supra* note 214, at 147–48 (discussing the losses the U.S. could suffer by initiating DSU proceedings, under the TRIPS Agreement, against China, if the U.S. ultimately lost the dispute); see generally Antell, *supra* note 254, at 544.

258. Cf. Kim Newby, *The Effectiveness of Special 301 in Creating Long Term Copyright Protection for U.S. Companies Overseas*, 21 SYRACUSE J. INT'L L. & COM. 29, 56 (1995) (discussing why the imposition of sanctions on China, by the United States Trade Representative's Special 301 Report, might hurt the long term interests of the U.S.). This is one possible reason a nation might choose to refrain from bringing an action under the DSU. *Id.*

259. Cf. Chad P. Bown & Bernard M. Hoekman, *WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector*, 8 J. INT'L ECON. L. 861, 869–70 (2005) (explaining the current situation where private sector involvement in the DSU is conditioned on a member nation's decision to pursue a DSU consultation).

260. Antell, *supra* note 254, at 530.

of consideration and thus any reduction in state autonomy is disadvantageous.

The advantages of involving the private sector, however, outweigh the disadvantages. There are several advantages to the proposed two-step system. First, the two-step system facilitates the use of the DSU. Because nations retain authority to choose whether to participate in the proceedings, more entities will monitor member nations for non-compliant laws. Second, the system decreases the member's responsibility in declaring that another nation failed to comply with the TRIPS Agreement. Third, nations will produce less documentation because private entities will complete the majority of fact finding during the first step.²⁶¹ Fourth, the private sector is no longer at the mercy of national governments when trying to effectuate another nation's compliance. Fifth, private parties have a greater incentive than nations to initiate DSU proceedings. Transnational digital copyright infringement costs private parties money. Money is a necessity for the private sector. Without money, private enterprise will perish.

IV. FINAL OBSERVATIONS

International copyright law appears to be forever in flux. There is a set of agreements and organizations in place, including WIPO, the Berne Convention, the WTO, the TRIPS Agreement, and the DSU. Yet, deficiencies and inadequacies plague the current system. Accordingly, the system needs to be changed.

The change this article proposes is systematic. The change is systematic because the world is changing. Nations and private entities share responsibility for this change. Private parties created a Digital world that allows people to transfer property across thousands of miles. Nations cultivated international law, which expands, little by little, beyond the territorial system of law. But, the greatest change arises because private parties exploit a nation's laws with the help of technology. This advancement is transnational digital copyright infringement.

International copyright protection requires a systematic change. Changes to a system of law arise out of necessity.²⁶² Necessity has been

261. *Id.* at 544 (stating that nations rely heavily on the private sector for information and expertise when participating in the DSU).

262. PLATO, *THE REPUBLIC*, 55–56 (Desmond Lee trans., Penguin Books 2d ed. 2003) (n.d.).

referred to as the mother of invention.²⁶³ Here, necessity is present. International organizations must work together in creating an international system for the purpose of protecting the dissemination of expressed ideas.²⁶⁴

*Brian A. Benko**

263. *Id.*

264. Antell, *supra* note 254, at 544.

* LL.M. Candidate, December 2008, The John Marshall Law School; J.D. Candidate, May 2008, The John Marshall Law School; B.S.P.A., May 2005, Indiana University-Bloomington. Thank you Dan Larson for introducing me to AllofMP3.com. Thank you Rich Parkinson for reading my work when nobody else would. Thank you Lisa Azoory, Karen Simon, and Bradley Taub for your priceless editorial assistance. Thank you Mom and Dad for teaching me the importance of trying my best — *sine qua non*. This article is dedicated to the memory of Margie O’Keefe, my friend, and Walter and Helen Kobetz, my grandparents — “I know it’s not much, but it’s the best I can do. My [words are my gift] and this one’s for you.” ELTON JOHN, YOUR SONG (DJM Records 1970).

