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Note

Divergent Approaches to File-Sharing Enforcement in the United States and Japan

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INTRODUCTION

The amount of digital content in the world has undergone an explosion of growth in the last decade. At the same time, “file-sharing”, a popular form of Internet digital content distribution, has achieved high levels of use globally.¹ A comprehensive snapshot of global BitTorrent usage (one

1. See *IFPI Publishes Recording Industry in Numbers 2010*, INT’L FED’N PHONOGRAPHIC INDUS. (Apr. 28, 2010), <http://tinyurl.com/375qnhf> (“[File sharing] remains the most prevalent channel for illegal distribution of unauthorised content, accounting for more than 20% of internet traffic globally.”).

of the most popular means of engaging in file-sharing), taken in December 2010, reveals that approximately thirty million users are exchanging files at any given time.² Many of the shared files include popular movies, recently-released music albums, and frequently-used software titles.³ Such unauthorized file-sharing of copyrighted works is commonly referred to as “piracy.”

File-sharing is a relatively straightforward concept: Anonymous Internet users connect to one another using a peer-to-peer (P2P) network in order to share computer files. Making the connection requires special software, such as a BitTorrent client (for example, *µtorrent*) or standalone file-sharing software (for example, Kazaa in the United States or Winny in Japan). Users typically have the ability to search for the desired files, which, in many cases, are stored on another user’s computer rather than on a central server. Thus, the purpose of the P2P network is to identify on which computers different files are located, in order to enable the users interested in receiving and distributing the files to connect with one another. Different types of P2P networks may accomplish this task in different ways.⁴

Both the United States and Japan have been plagued by widespread file-sharing of copyrighted works. Each country, however, has historically attempted to deal with illegal file-sharing from different angles, and these divergent approaches to enforcing copyright persist today. Thus, the ensuing discussion will attempt to explain why the United States and Japan, though similarly situated with respect to unsuccessful copyright enforcement against file-sharers, are responding to the underlying problem in radically different ways.

This Note is organized as follows: Part I will describe the efforts to combat piracy in each country and provide a snapshot of the copyright laws in the United States and Japan that are relevant to file-sharing. Part II will then trace the emergence of new enforcement strategies in both countries: the recent resurgence of file-sharing lawsuits in the United States and aggressive criminal prosecution in Japan. Part III will provide a

2. *A Snapshot of the Public BitTorrent Landscape*, TORRENTFREAK (Dec. 14, 2010), <http://tinyurl.com/3rlon98>.

3. For example, it is estimated that over half of the shared files comprise video content (5.5 million torrents). *Id.* Movies are by far the largest ‘video’ subcategory with two million torrents, followed by television, with one million torrent files. *Id.*

4. For instance, a typical BitTorrent network enables a user to download the constituent parts of a particular file from numerous users, in parallel. Bram Cohen, *The BitTorrent Protocol Specification*, BITTORRENT.ORG (Jan. 10, 2008), http://www.bittorrent.org/beps/bep_0003.html. This is true if, in fact, multiple users are each hosting the same file, which is frequently the case when popular movies and music are being shared. In contrast, conventional file-sharing software (such as Napster, discussed in Part I.B, *infra*) allowed one user to download a file from another single user or a central server.

side-by-side comparison of the legal landscapes affecting file-sharing in the United States and Japan.

This Note will aim to provide the reader with a comparative study of copyright enforcement against file-sharers in the United States and Japan. Given the current enforcement methods used by each country, the Note will attempt to show that, even with the recent rise of new enforcement mechanisms, neither country is likely to experience a reduction in piracy using its present strategy. Therefore, the Note will conclude by examining possible alternative enforcement strategies in conjunction with the changing dynamic between copyright holders and the consumers of their works.

I. FILE-SHARING AND COPYRIGHT: LAW AND ENFORCEMENT

Copyright holders in the United States and Japan — countries whose copyright laws share more similarities than differences — have traditionally utilized different avenues towards enforcement. In response to the proliferation of P2P file-sharing software for sharing music, the Recording Industry Association of America (RIAA) initiated a widespread lawsuit campaign against end-users. In contrast, during the early part of the past decade, Japan avoided an “online file-sharing epidemic” of the same magnitude,⁵ yet the Recording Industry Association of Japan (RIAJ) has prominently targeted file-sharing software developers instead of end-users, seeking criminal charges and monetary fines.

A. Piracy Law in the United States and Japan

The United States and Japan are signatories to the major copyright treaties, namely, the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention)⁶ and Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).⁷ These

5. Ian Condry, *Cultures of Music Piracy: An Ethnographic Comparison of the U.S. and Japan*, 7 INT'L J. CULTURAL STUD. 342, 345–46 (2004).

6. Berne Convention for the Protection of Literary and Artistic Works, *adopted* Sept. 9, 1886, S. TREATY DOC. NO. 99-27, 1161 U.N.T.S. 3 [hereinafter Berne Convention]. The Berne Convention is a multinational treaty “contain[ing] a series of provisions determining the minimum protection to be granted [to protected works].” *Summary of the Berne Convention*, WORLD INTELL. PROP. ORG., <http://tinyurl.com/yapqrkx> (last visited Nov. 28, 2010). The treaty was originally accepted in Berne, Switzerland, on September 9, 1886, and has since undergone a series of amendments. *The Berne Convention*, WORLD INTELL. PROP. ORG., <http://tinyurl.com/bfjr9> (last visited Nov. 28, 2010). Japan acceded to the Berne Convention relatively early on July 15, 1899; the United States did not accede until nearly ninety years later on March 1, 1989. *Contracting Parties*, WORLD INTELL. PROP. ORG., <http://tinyurl.com/3qpglzy> (last visited Nov. 28, 2010).

7. The TRIPS Agreement is a multilateral agreement on intellectual property that, similar to the Berne Convention, “is a minimum standards agreement.” *Overview: the TRIPS Agreement*, WORLD TRADE ORG., <http://tinyurl.com/437kz2o> (last visited Nov. 28, 2010). The TRIPS Agreement came into effect on January 1, 1995, and applies to all WTO member countries, including the United States

treaties require signatory countries to grant a basic set of rights and protections to copyright holders. For example, the Berne Convention requires member countries to recognize certain exclusive rights for the author of a protected work, including the rights of reproduction, distribution, and performance.⁸ In addition, the TRIPS Agreement sets forth that member countries must “ensure that enforcement procedures as specified [in this Agreement] . . . are available . . . to permit effective action against any act of infringement of intellectual property rights.”⁹ Note that the TRIPS Agreement effectively subsumes the minimum standards for copyright protection set forth in the Berne Convention.¹⁰ Against this background, it is useful to examine specific copyright laws in the United States and Japan that bear on file-sharing and piracy.

1. *Section 17 of the United States Code*

Digital content, such as movies and music files, receive copyright protection in the United States under Section 17 of the United States Code.¹¹ In the United States, infringement of copyright occurs when someone “violates any of the exclusive rights of the copyright owner,” such as the right to reproduce and distribute copies of the original work.¹² Users uploading or downloading files over P2P networks do so in violation of the copyright owner’s exclusive right to reproduce and distribute the original work.¹³ Upon a showing of infringement, potential remedies include injunctions, damages and profits, and costs and attorneys’ fees.¹⁴

2. *The Japanese Copyright Act*

Japanese copyright law sets forth substantially the same provisions regarding infringement of copyright. Article 113 of the Japanese Copyright

and Japan. *WTO Members and Observers*, WORLD TRADE ORG., <http://tinyurl.com/2vons> (last visited Nov. 28, 2010).

8. *See, e.g.*, Berne Convention, *supra* note 6, art. 9(1) (“Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.”); *id.* art. 11(1) (“Authors of dramatic . . . and musical works shall enjoy the exclusive right of authorizing: (i) the public performance of their works . . .”).

9. Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 41(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1125, 1213–14 [hereinafter TRIPS Agreement].

10. “Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto.” TRIPS Agreement, *supra* note 9, art. 9, 33 I.L.M. at 1201.

11. 17 U.S.C. § 102(a) (2006).

12. 17 U.S.C. § 501(a) (2006); 17 U.S.C. § 106 (2006).

13. *See, e.g.*, *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001) (affirming the district court’s holding that users of file-sharing software infringe the copyright holder’s exclusive rights of reproduction and distribution by using the software to upload and download music).

14. 17 U.S.C. §§ 502–05 (2006).

Act¹⁵ specifies that copyright infringement includes “the act of distributing, or possessing for the purpose of distributing, . . . objects made by an act infringing on the [exclusive rights of the author].”¹⁶ The Article further contains a provision capturing what might be characterized as willful infringement in the United States: “the act of distributing, or importing or possessing for the purpose of distributing, [a work] . . . with knowledge of the fact that such act had occurred.”¹⁷ As far as remedies are concerned, the Japanese Copyright Act provides for the recovery of damages¹⁸ and injunctive relief.¹⁹ In cases where it is “extremely difficult” to prove damages, a special section applies which provides for the court to determine a reasonable damage award for the plaintiff.²⁰ This section, however, is distinct from, and does not seek to mimic, a statutory damages provision.²¹

B. *The History of Enforcement Activities Against File-Sharing in the United States and Japan*

1. *Responses to the American “File-Sharing Epidemic”*

Shawn Fanning, an eighteen-year-old student at Northeastern University, kicked off the file-sharing revolution in the United States when he released Napster, a pioneering P2P file-sharing service, during the summer of 1999.²² Prior to Napster’s release, individuals relied on search engines (such as Lycos) and music websites to download music, frequently encountering broken hyperlinks and outdated indices.²³ Napster changed all this by maintaining “a central, dynamic index of all available files,”

15. Chosaku-ken-hō [Copyright Act], Law No. 48 of 1970, art. 113(ii), *available at Japanese Law Translation—Copyright Act*, MINISTRY JUST., <http://tinyurl.com/6xycfrh> (last visited June 26, 2011) (Japan) [hereinafter Japanese Copyright Act].

16. *Id.*

17. *Id.* art. 113(3)(iii).

18. *Id.* art. 114(3) (“The copyright holder . . . may assert against a person who, intentionally or negligently, infringes upon said holder’s copyright . . . a claim for compensation for damages in an amount corresponding to the amount of money which would be received by such holder through the exercise of its copyright.”).

19. *Id.* art. 112(1) (“[T]he copyright holder . . . may demand that persons infringing, or presenting a risk of infringing . . . copyright . . . cease the infringement or not infringe, as the case may be.”).

20. *Id.* art. 114-5 (“Where . . . it is extremely difficult to prove the facts necessary to establish the amount of damages due to the nature of such facts, the court may determine an appropriate amount of damages on the basis of the entire import of oral proceedings and the results of the court’s examination of the evidence.”).

21. A statutory damages provision calls for the court to select the amount of damages from a predetermined range. In contrast, Article 114-5 requires the court to determine, based on the parties’ arguments, a reasonable damages award.

22. Felix Oberholzer-Gee & Koleman Strumpf, *File-Sharing and Copyright* 7 (Harvard Business School, Working Paper No. 09-132, 2009), *available at* <http://www.hbs.edu/research/pdf/09-132.pdf>.

23. *Id.*

providing users with reliable access to a seemingly endless supply of music through a user-friendly interface.²⁴ The file-sharing service soared in popularity, reaching twenty-six million users in 2001.²⁵

Several months following its release, the RIAA sued Napster for various forms of copyright infringement.²⁶ Ultimately, the Court of Appeals for the Ninth Circuit affirmed the district court's holding which found Napster liable for infringement, forcing the popular program to shut down.²⁷ The court reasoned that Napster's central directory of files gave its makers knowledge of and the ability to control user infringement.²⁸

The Ninth Circuit's decision caused users to jump to second-generation P2P services such as eDonkey and Grokster.²⁹ Convinced that P2P technology had substantial non-infringing uses, these next-generation P2P services eliminated central indices in the hopes of being protected by the precedent set by the Supreme Court's 1984 decision in *Sony Corp. of America v. Universal City Studios, Inc.*³⁰ In that decision, the Court held that companies are not liable for their customers' acts of copyright infringement if their technology is capable of substantial non-infringing uses.³¹ Nevertheless, during the next round of litigation initiated by the RIAA, the Supreme Court in *MGM Studios, Inc. v. Grokster, Ltd.*³² ruled that a company that "distribute[s] a device 'with the object of promoting its use to infringe copyright'" could be liable for the resulting illegal acts.³³ The Court found that Grokster had wanted to be the next Napster and had developed software aimed to induce copyright infringement.³⁴ Many P2P services subsequently reached settlement agreements with the RIAA.³⁵

The RIAA initiated a new strategy of targeting illegal file-sharing in 2003 when it began filing civil lawsuits against individuals alleged to have shared copyrighted music.³⁶ For the next five years, the RIAA's lawsuit

24. *Id.*

25. Devin Leonard, *Napster 2.0's Sad Song*, CNNMONEY.COM (July 28, 2008), <http://tinyurl.com/683erw>.

26. Courtney Macavinta, *Recording Industry Sues Music Start-up, Cites Black Market*, CNET NEWS (Dec. 7, 1999), <http://news.cnet.com/2100-1023-234092.html>.

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

28. *Id.* at 1021–22.

29. Oberholzer-Gee & Strumpf, *supra* note 22, at 7.

30. *Id.* at 7–8; *see also* *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (holding that companies are not liable for customers' acts of copyright infringement if their technology is capable of substantial non-infringing uses).

31. Oberholzer-Gee & Strumpf, *supra* note 22, at 8.

32. 545 U.S. 913 (2005).

33. *Id.* at 936–37.

34. *Id.* at 923–25.

35. Oberholzer-Gee & Strumpf, *supra* note 22, at 9.

36. John Borland, *RIAA Sues 261 File Swappers*, CNET NEWS (Sept. 8, 2003), <http://tinyurl.com/3k7k7au>. In its first round of lawsuits, the RIAA went after users accused of sharing over one thousand files on peer-to-peer networks, dubbing these users the most egregious file swappers. Stephanie Losi, *RIAA Sues Hundreds in 'First Wave' of War*, E-COMMERCE TIMES (Sept.

campaign would target upwards of thirty thousand accused file-sharers.³⁷ The sheer volume of lawsuits suggests that the RIAA did not intend to prosecute the cases in court, and it had little reason to do so. RIAA data revealed in a later court case show that eleven thousand of the eighteen thousand accused had settled immediately or had their cases dropped by the labels.³⁸ The remaining seven thousand accused either refused to settle or did not respond to the settlement letter until after the RIAA filed “named” lawsuits against them, at which point most of the cases settled.³⁹ Only a handful of the lawsuits actually made it to trial,⁴⁰ the first of which, the infamous case of *Capital Records, Inc. v. Thomas*,⁴¹ occurred in 2007, nearly four years after the RIAA began filing lawsuits.⁴² Some cases were still pending or on appeal as of March 2011.⁴³

Though the RIAA incurred legal expenses that vastly outweighed the damages collected,⁴⁴ the Association claims that the lawsuits were designed “to educate fans about the law, the consequences of breaking the law, and raise awareness about all the great legal sites in the music marketplace.”⁴⁵ Commentators, however, have noted that the “destructive” lawsuits did little to curb illegal file-sharing; rather, the lawsuits “created a public-

8, 2003), <http://www.ecommercetimes.com/story/31525.html?wlc=1289458866>.

37. *RIAA v. The People: Five Years Later*, ELECTRONIC FRONTIER FOUND. (Sept. 2008), <https://www.eff.org/wp/riaa-v-people-years-later>. The RIAA filed 5460 lawsuits during 2004, bringing the total number of lawsuits to 7437. *Id.* By the end of 2005, the total number of suits had swelled to 16,087. *Id.* Although the RIAA shortly thereafter ceased announcing the number of new lawsuits it was filing, news reports show the number as of October 2007 to be at least thirty thousand. *Id.*

38. Nate Anderson, *The RIAA? Amateurs. Here's How You Sue 14,000+ P2P Users*, ARS TECHNICA, <http://tinyurl.com/27n2toy> (last visited Dec. 12, 2010). During the initial waves of RIAA lawsuits, however, many defendants did not immediately settle or otherwise take action. This is demonstrated by a RIAA spokesperson's statement in 2005, which claimed that the Association had received pre-trial settlements (averaging \$3000 apiece) from approximately 20% of the accused (which by the end of 2005 approached sixteen thousand defendants). *RIAA Trivia Fun Facts!*, FILESHAREFREAK (Feb. 15, 2008), <http://tinyurl.com/y7fbbb7>.

39. Anderson, *supra* note 38.

40. *Id.*

41. 579 F. Supp. 2d 1210 (D. Minn. 2008). The jury in the 2007 trial found Thomas liable for infringing twenty-four songs, awarding plaintiffs a judgment of \$222,000. *Id.* at 1227. Judge Michael Davis, presiding over the case, vacated the judgment for being “wholly disproportionate to the damages suffered by [p]laintiffs,” and also ordered a new trial on other grounds. *Id.* at 1227–28. In subsequent trials, juries have continued to side with the plaintiffs, awarding \$1.92 million (June 2009 trial) and \$1.5 million in damages (November 2010 trial). See Jon Healey, *The RIAA's Latest Victory Over Jammie Thomas-Rasset*, L.A. TIMES (Nov. 5, 2010, 6:14 PM), <http://tinyurl.com/23cubp2>.

42. Jon Healey, *For a Few 99-cent Songs More*, L.A. TIMES (Oct. 1, 2007), <http://tinyurl.com/3gpslvz>.

43. See, e.g., *Sony BMG Music Entm't v. Tenenbaum*, 721 F. Supp. 2d 85 (D. Mass. 2010) (awaiting disposition on appeal).

44. Marcus Yam, *RIAA Paid \$16M+ in Legal Fees to Collect \$391K*, TOM'S HARDWARE US (July 15, 2010 9:00 AM), <http://tinyurl.com/33yy8nr>.

45. *For Students Doing Reports*, RIAA, <http://www.riaa.com/faq.php> (last visited Nov. 11, 2010). Interestingly, a Pew Internet & American Life Project survey conducted in 2000 revealed that 78% of Internet users who downloaded music did not think they were stealing. Oberholzer-Gee & Strumpf, *supra* note 22, at 9.

relations disaster for the industry, whose lawsuits targeted, among others, several single mothers, a dead person and a 13-year-old girl.”⁴⁶

The RIAA’s lawsuit campaign against file-sharers ended abruptly in December 2008.⁴⁷ In financial terms, estimates all but confirm that the lawsuits filed against the tens of thousands of individuals have been remarkably unsuccessful: Over a three-year period during its campaign, the RIAA paid over \$64 million in legal fees to collect just \$1.36 million in damages and settlements, recovering an abysmal 2.3% of their investment.⁴⁸ In 2008 alone, the RIAA spent \$17.6 million on legal fees while receiving only \$391,000 in settlement payments.⁴⁹

Moreover, studies analyzing P2P network activity suggest that although the RIAA’s campaign produced a short-term decline in file-sharing activity, it is difficult to conclude that the campaign ultimately achieved the desired net long-term decrease.⁵⁰ Data concerning file-sharing activity during the RIAA’s campaign support this proposition. Although surveys conducted during the initial stages of the RIAA’s campaign (the end of 2003 to the beginning of 2004) showed a decline in illegal downloads, the volume began to creep up again by 2005.⁵¹

2. *The Relative Absence of File-Sharing in Japan*

During the same time period that the RIAA was waging a war against file-sharers and file-sharing programs, the file-sharing scene in Japan was relatively quiet. While Japan boasted the second-highest share of world Internet users (behind the United States), its share of downloads was dramatically less than that of the United States.⁵² According to Professor Condry at the Massachusetts Institute of Technology, this was in spite of Japan’s copyright law being “largely harmonized with the United States,”

46. Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, at B1.

47. *Id.*

48. *RIAA Spent \$64 Million Over Three Years on Legal Fees*, TECHYE.NET (July 14, 2010), <http://tinyurl.com/3sewd4g>. In 2006, for example, three law firms retained by the RIAA accounted for nearly \$18 million of the expenses: Holmes Roberts & Owen (\$9.3 million), Jenner & Block (\$7 million), and Cravath Swaine & Moore (\$1.25 million). *Id.*

49. Yam, *supra* note 44.

50. Oberholzer-Gee & Strumpf, *supra* note 22, at 12–13.

51. Annemarie Bridy, *Why Pirates (Still) Won't Behave: Regulating P2P in the Decade After Napster*, 40 RUTGERS L.J. 565, 604 (2009). Professor Bridy remarks that the rebound “is consistent with a finding that fear among users of being prosecuted for illegally downloading content *decreased* from 2003 to 2005.” *Id.* (emphasis added).

52. Condry, *supra* note 5, at 351. According to statistics compiled in Professor Condry’s article, the U.S. shares of global Internet users and downloads from file-sharing networks in 2002 were 27.4% and 35.7%, respectively. *Id.* On the other hand, Japan comprised 9.3% of all Internet users and only 2.8% of all downloads. *Id.*

and the equal willingness of music fans in Japan to copy and share music as their American counterparts.⁵³

An exception to the relatively quiet atmosphere arose in 2001 when the RIAJ, perhaps taking a cue from the RIAA, sued Japan MMO, the operator of the popular FileRogue P2P service.⁵⁴ The RIAJ alleged that the FileRogue service violated their copyrights, “presenting evidence that, at the time of suit, the vast majority of the 70,000 files available on the service were commercial CD tracks.”⁵⁵ After issuing a preliminary injunction requiring Japan MMO to suspend operations of the FileRogue service in 2002, the Tokyo District Court ruled in the following year that Japan MMO was liable for infringement and subsequently issued damages amounting to ¥71 million (approximately \$710,000).⁵⁶ In the aftermath, however, software developers continued to write new file-sharing programs, each time with increasing technical sophistication.

A case in point is that of Isamu Kaneko, a former researcher at the University of Tokyo. In 2002, Kaneko created what would become an immensely popular file-sharing tool known as “Winny.”⁵⁷ Winny enabled users to share files without using a central server (in contrast to Napster), and its rapid acceptance and use among Internet users kicked off the P2P file-sharing movement in Japan.⁵⁸ In 2006, Kaneko was convicted by the Tokyo District Court for making Winny available online with the knowledge that it was being used for copyright infringement; he was also fined ¥1.5 million (approximately \$12,800).⁵⁹ Kaneko became the first person to face such charges for creating P2P software.⁶⁰ In an interesting twist, the Osaka High Court overturned the district court ruling and acquitted Kaneko in 2009, reasoning that the court could not conclude that Kaneko intended to promote copyright infringement based on the evidence before it.⁶¹ Some practitioners believe that the Prosecutor’s

53. *Id.* The Tokyo District Court’s opinion is available on the Japanese Courts website (Japanese language only). Tōkyō Chihō Saibansho [Tōkyō Dist. Ct.] Dec. 17, 2003, Hei 14 (wa) no. 4237, SAIKŌ SAIBANSHO SAIBANREI JŌHŌ [SAIBANREI JŌHŌ] 1, <http://www.courts.go.jp>.

54. Renny Hwang, *Digital Media Trends in Asia-Pacific: Increasing Litigation and Proliferation of Online Music Subscription Services*, DIGITAL MEDIA PROJECT, 2, <http://tinyurl.com/3vfmadl> (last visited Nov. 13, 2010).

55. *Id.*

56. *Id.*

57. Jun Hongo, *File-sharing: Handle Winny at Your Own Risk*, JAPAN TIMES (Oct. 27, 2009), <http://tinyurl.com/yldvznp>; Steve McClure, *Winny’s Kaneko Fined For Copyright Violation*, BILLBOARD.BIZ (Dec. 14, 2006), <http://tinyurl.com/42nqz13>.

58. Hongo, *supra* note 57.

59. *Id.*

60. *Id.*

61. *Id.*

Office is in the midst of appealing the case to the Supreme Court, so the battle may not be over yet.⁶²

Notwithstanding the action against Kaneko, the number of civil copyright law cases (not limited to file-sharing) filed in district courts in Japan remains small in comparison to the United States and other developed countries. Between 1999 and 2003, the number of annual cases ranged from a low of 97 to a high of 127.⁶³ Criminal copyright law cases handled by the Prosecutor's Office were greater in number during the same time period, with a low of 147 and a high of 304.⁶⁴

II. NEW TACTICS IN THE "WAR AGAINST PIRACY"

Following on the heels of the lawsuits brought by the U.S. music industry, movie industry copyright holders have initiated similar actions against those illegally sharing their content over P2P networks. Specialized law firms have emerged, accusing thousands of defendants across the United States of infringing their clients' works. On the other side of the globe, the Japanese government is criminally prosecuting alleged file-sharers with increased frequency. Police are routinely monitoring various P2P networks, investigating individual user activity and coordinating nationwide raids to make arrests.

A. *The Reemergence of John Doe Lawsuits Against File-Sharers in the United States*

Perhaps learning from the failures of the RIAA, new players have entered the legal battlefield in hopes of extracting damage awards from those illegally sharing copyrighted works. In 2010 alone, over eighty thousand lawsuits targeting hundreds and thousands of defendants, known as "Doe lawsuits,"⁶⁵ were filed against file-sharers in federal district courts

62. During an in-person interview at the law offices of Anderson Mōri & Tomotsune (one of Japan's largest law firms), several intellectual property attorneys expressed the view that the case against Kaneko is unfinished and will be brought before the Supreme Court by the Prosecutor's Office. Interview with Yasufumi Shiroyama & Takashi Nakazaki, Attorneys, Anderson Mōri & Tomotsune, in Roppongi, Tōkyō (Dec. 14, 2010).

63. Takashi B. Yamamoto, *Copyright Enforcement in Japan – Infringement and Remedies*, INFO TECH LAW OFFICES 1 (Dec. 10, 2004), <http://www.itlaw.jp/CRIC200412.pdf>. In contrast, the number of copyright cases filed in U.S. courts between 1999 and 2003 ranged from approximately 1800 to 2300 per year (these numbers were estimated from a bar graph tracking the total number of U.S. copyright cases filed per year). David Kravets, *Copyright Lawsuits Plummet in Aftermath of RIAA Campaign*, WIRED (May 18, 2010), <http://www.wired.com/threatlevel/2010/05/riaa-bump>.

64. Yamamoto, *supra* note 63, at 1.

65. A "Doe lawsuit" refers to a lawsuit where the plaintiff is suing defendants (for the purposes of this note, numerous defendants) whose identities are presently unknown. These defendants are referred to (and listed on the complaint) as "Does." Once the unknown defendants are identified, the plaintiff will amend the complaint to name the defendants and proceed with the suit against them. Paul Fletcher, *Meet John Doe*, PUBLISHER'S NOTEBOOK (Mar. 24, 2011),

across the United States.⁶⁶ The number is staggering, given that the RIAA, during its five-year crusade, “only” targeted approximately thirty thousand file-sharers.⁶⁷ The sudden appearance of thousands of lawsuits has also attracted widespread attention from media sources, including the *Wall Street Journal*⁶⁸ and Reuters.⁶⁹

The trend of litigation activity appears to be driven by a growing group of law firms dedicated to pursuing copyright claims.⁷⁰ For example, Dunlap, Grubb & Weaver, PLLC (DGW), a Virginia law firm that also operates under the name U.S. Copyright Group (USCG), began filing lawsuits against file-sharers in January 2010 on behalf of movie copyright holders.⁷¹ Over the course of the year, the firm has filed over sixteen thousand lawsuits, with the goal of collecting pretrial settlement payments in many of the cases.⁷² Some of the lawsuits centering on the illegal distribution of highly publicized films, such as *The Hurt Locker* and *Far Cry*, have attracted nationwide attention.⁷³

1. *Mechanics Behind the New Wave of Mass Infringement Lawsuits*

Firms specializing in mass copyright litigation share a common procedure in filing infringement lawsuits. A law firm first signs on copyright holders — all cases so far have involved movie producers or animation studios — as clients.⁷⁴ Clients are not charged; on the contrary, they receive a percentage of whatever revenues the firm is able to collect through lawsuits.⁷⁵ A P2P detection company is then hired to monitor online file-sharing networks, in order to find people sharing the works at issue.⁷⁶ The detection company provides the firm with a list of IP

<http://tinyurl.com/3vc43mm>. Alternatively, defendants may later be dismissed from the suit without being named.

66. See *infra* Figure 1 and Table 1. See generally Nate Anderson, *U.S. Anti-P2P Law Firms Sue More in 2010 Than RIAA Ever Did*, ARS TECHNICA, <http://tinyurl.com/2f792lp> (last visited Mar. 16, 2011) (describing the rise in number of “Doe” lawsuits filed in federal district courts).

67. ELECTRONIC FRONTIER FOUND., *supra* note 37.

68. Ethan Smith, *Thousands Are Targeted Over ‘Hurt Locker’ Downloads*, WALL ST. J. (May 31, 2010), <http://tinyurl.com/5tqudqx>.

69. Ian Paul, *Lawsuit Takes Aim at People Swapping Movies Online*, REUTERS (Mar. 31, 2010), <http://tinyurl.com/6kognx8>.

70. For example, the Adult Copyright Company, a West Virginia firm representing adult video producers, filed seven cases against 5469 file-swappers in a matter of weeks. Anderson, *supra* note 66. The Media Copyright Group, an Illinois/Minnesota-based operation also representing members of the porn industry, targeted 1200 file-swappers in four separate cases during the month of September. *Id.*

71. Anderson, *supra* note 66.

72. *Id.*

73. See, e.g., Greg Sandoval, *For ‘Hurt Locker’ Sharers, Good and Bad News*, CNET NEWS (July 7, 2010), http://news.cnet.com/8301-31001_3-20009833-261.html.

74. Anderson, *supra* note 66.

75. *Id.*

76. *Id.*

addresses representing the alleged file-sharers.⁷⁷ Finally, the firm files a Doe lawsuit against the unknown infringers and obtains a subpoena from the court, in order to force Internet Service Providers (ISPs) to provide the names and physical locations corresponding to the IP addresses.⁷⁸ As the Ars Technica blog puts it, “[o]nce the lawyers have addresses in hand, it’s just a matter of mailing out letters to the accused, asking them to pay up or risk massive statutory damages of up to \$150,000 per infringement in court.”⁷⁹ Settlement offers are believed to fall between \$1500 and \$2500 per individual.⁸⁰

The U.K.-based *Guardian* newspaper sheds some light onto the financial side of these firms’ operations. The paper reports that ACS:Law, a London-based solicitors’ firm making copyright claims using the same method as DGW, keeps 40% of the payments made by alleged file-sharers, while copyright holders receive a 20% to 30% cut.⁸¹ According to the leaked figures, the P2P detection firm (responsible for tracking the IP addresses of suspected file-sharers) earns 10% of the net revenue, leaving the ISP, which reveals the identity of the file-sharers in response to a court order, with approximately a 15% share.⁸²

How does this leaked information relate to mass infringement lawsuits being filed in the United States? Although all parties involved appear to be profiting from the settlement payments, the division of the proceeds suggests these operations largely benefit law firms rather than the copyright holders.

2. *Nationwide Occurrence of Doe Lawsuits*

As mentioned above, Doe lawsuits against file-sharers have been filed in jurisdictions all over the United States. Comprehensive statistics compiled by an anonymous reader of TorrentFreak⁸³ reveal that over one hundred distinct Doe suits were filed between January 2010 and March 2011.⁸⁴ The filings made during this time period represent the initial wave of Doe suits

77. *Id.*

78. *Id.*

79. *Id.*

80. *USCG v. The People*, ELECTRONIC FRONTIER FOUND., <https://www EFF.ORG/cases/uscg-v-people> (last visited June 17, 2011).

81. Josh Halliday, *ACS: Law Gets More of Copyright Fines Than Rights Holders*, GUARDIAN.CO.UK (Oct. 5, 2010), <http://tinyurl.com/347yr6y>.

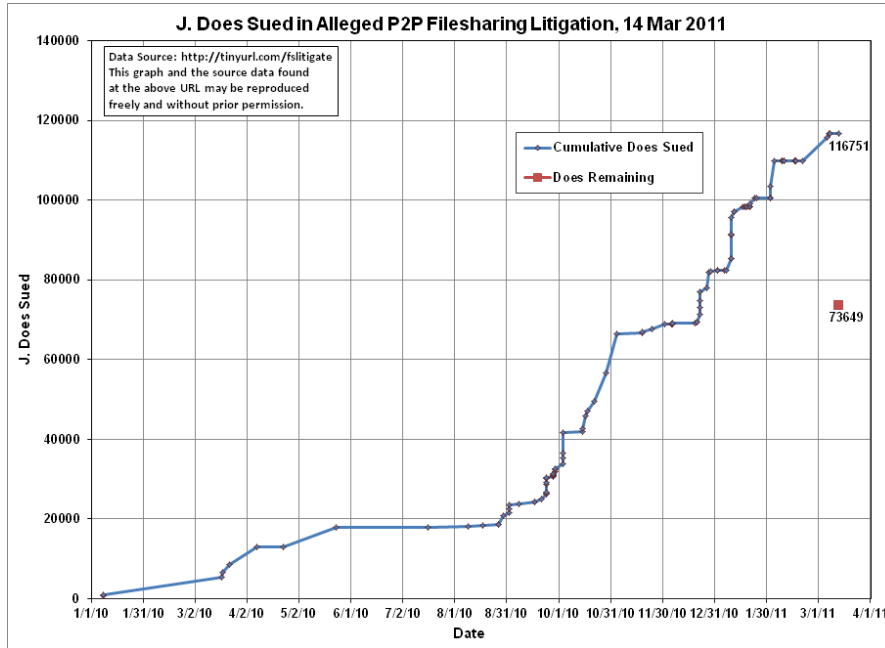
82. *Id.*

83. TorrentFreak is a popular website reporting on the latest news in P2P file-sharing and BitTorrent, the most widely used file-sharing protocol. *See* TORRENTFREAK, <http://torrentfreak.com> (last visited May 13, 2011).

84. The statistics are made available to the public for direct download in Microsoft Excel (.xls) and Portable Network Graphics (.png) formats at <http://tinyurl.com/fslitigate> (last visited June 17, 2011).

against file-sharers. Figure 1 is a graphical representation of the cumulative number of Does sued during the same period.

FIGURE 1



Although some suits list only a handful of Does, the vast majority list hundreds or thousands of Does. Table 1 lists those suits during the same time period that were filed against over one thousand Doe defendants.

TABLE 1

Date Filed	Copyright Holder	No. Defendants	Jurisdiction
3/18/2010	Achete/Neunte Boll Kino Beteiligungs GMBH & CO KG	2094	D.D.C.
3/23/2010	West Bay One, Inc.	2000	D.D.C.
4/8/2010	Maverick Entertainment Group, Inc.	1000	D.D.C.
5/24/2010	Voltage Pictures	5000	D.D.C.
8/30/2010	Cornered, Inc./Maze Films	2177	D.D.C.
9/24/2010	West Coast Productions, Inc.	2010	N.D. W. Va.
9/24/2010	Third World Media, LLC	1243	N.D. W. Va.
9/24/2010	Combat Zone, Inc.	1037	N.D. W. Va.
10/4/2010	On the Cheap, LLC	5011	N.D. Cal.

10/4/2010	Third World Media, LLC	1568	N.D. Cal.
10/4/2010	Media Products, Inc.	1257	N.D. Cal.
10/4/2010	Elegant Angel/Patrick Collins, Inc.	1219	N.D. Cal.
10/17/2010	Hustler/LFP Productions	3120	N.D. Tex.
10/18/2010	Hustler/LFP Productions	1106	N.D. Tex.
10/22/2010	Hustler/LFP Productions	2619	N.D. Tex.
10/29/2010	Axel Braun Productions	7098	N.D. W. Va.
11/4/2010	West Coast Productions, Inc.	9729	N.D. W. Va.
12/2/2010	MCGIP, LLC	1164	N.D. Ill.
12/23/2010	Diabolic Video Productions	2099	N.D. Cal.
12/23/2010	Third Degree Films, Inc.	2010	N.D. Cal.
12/23/2010	New Sensations, Inc.	1768	N.D. Cal.
12/23/2010	New Sensations, Inc.	1745	N.D. Cal.
12/27/2010	Evasive Angles, Inc.	1149	N.D. Cal.
12/28/2010	Patrick Collins	3757	N.D. Cal.
1/10/2011	West Coast Productions, Inc.	5829	D.D.C.
1/10/2011	Third World Media, LLC	4171	D.D.C.
1/10/2011	Axel Braun Productions	2823	D.D.C.
1/12/2011	West Coast Productions, Inc.	1434	D.D.C.
1/17/2011	Justin Slayer	1254	N.D. Tex.
1/24/2011	Funimation Entertainment Ltc.	1337	N.D. Tex.
2/2/2011	OpenMind Solutions, Inc.	2925	S.D. Ill.
2/4/2011	Nu Image, Inc.	6500	D.D.C.
3/7/2011	Freak Show Entertainment	5865	C.D. Cal.
3/8/2011	VPR Internationale	1017	C.D. Ill.
Total Defendants (from suits with more than 1,000 Does)		96,135	

Aside from the sheer number of Does joined in the suits, Table 1 shows that copyright holders fall primarily into two groups: independent film producers and adult entertainment industry studios. A spokesperson for the Motion Picture Association of America (MPAA) was quick to declare that the MPAA has “absolutely nothing to do with these lawsuits.”⁸⁵

It is worth further noting that a few points distinguish the current wave of Doe lawsuits from the RIAA’s campaign. First, the stigma associated with downloading porn may be significantly worse than if infringement of music files were at issue. From the defendant’s point of view, the threat of being named in a federal complaint for illegally sharing copyrighted

85. Smith, *supra* note 68.

material like porn may create extra incentive to settle early. Moreover, it is possible that on the average, if a case against a movie infringer went through trial, the damages would turn out to be higher compared to cases involving music files. As Thomas Dunlap, name partner at DGW, notes in an online Q&A, “[e]ach film contains one to two hours of video content. The quantum of damages in a copyright case is, in part, tied to the content at issue Film content is significantly more dense and expensive to make than music content”⁸⁶ If Mr. Dunlap is correct, the threat of six-figure copyright damages may induce more accused infringers to settle early.

3. *The Involvement of Public Interest Organizations*

As the lawsuits continue to multiply, certain public interest organizations have begun challenging the mass litigation firms on behalf of copyright holders. Their efforts have exposed flaws in the legal strategy pursued by many copyright law firms. For example, when DGW filed a lawsuit in the District of Columbia against five thousand Does for illegally sharing *The Hurt Locker*, the Electronic Frontier Foundation (EFF) joined forces with the Public Citizen and the American Civil Liberties Union (ACLU) to challenge DGW’s attempt to file a single lawsuit against thousands of people.⁸⁷ Representatives of the EFF and ACLU argued that there is nothing binding the Does together, making it improper to name all of them as defendants in a single lawsuit.⁸⁸ Judge Rosemary Collyer, presiding over the case, rejected these arguments by the EFF and ACLU that “[DGW] should be required to file a single lawsuit for every individual alleged to have violated copyright,” and allowed the lawsuit to proceed.⁸⁹ However, Judge Collyer instructed DGW that they must work with the EFF and ACLU on informing those accused of copyright violations about their rights.⁹⁰ Specifically, DGW must help come up with a new way of notifying individuals that they are being sued for copyright infringement.⁹¹

In a separate lawsuit filed in the District of Columbia also initiated by DGW, two (out of the thousands) of Does provided clear evidence that they do not live in the District of Columbia.⁹² The EFF and ACLU have jointly filed an amicus brief asking the judge to dismiss the two defendants

86. Greg Sandoval, *‘Hurt Locker’ Lawyer: Illegal Sharing Must End (Q&A)*, CNET NEWS (Sept. 29, 2010), http://news.cnet.com/8301-31001_3-20018004-261.html.

87. Sandoval, *supra* note 73.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Targets of Predatory Lawsuits Fight Copyright Troll in Washington, D.C.*, ELECTRONIC FRONTIER FOUND. (Oct. 18, 2010), <http://tinyurl.com/3gy7amj>.

for lack of personal jurisdiction.⁹³ In their brief, DGW's strategy is characterized as being one where defendants are faced with a dilemma that violates the basic tenets of civil procedure: Defendants must choose between exorbitant legal fees to defend themselves in a far-away jurisdiction, or they must pay a settlement fee to make the lawsuit disappear, even if they are, in fact, innocent of any wrongdoing.⁹⁴ The amici also argue that DGW speculated about the Doe defendants' connections to Washington, D.C.⁹⁵

Despite opposition from organizations such as the EFF and ACLU, the law firms have seemingly been undeterred. In fact, Figure 1 shows that an increasing number of lawsuits were filed in late 2010 and early 2011.⁹⁶ On the other hand, the opposition has managed to generate public awareness of this new wave of lawsuits. A number of news reporting agencies and Internet blogs have begun covering the lawsuits as they arise.⁹⁷

4. *The Tables Turned: File-Sharing Defendants Fight Back*

Law firms representing copyright holders have also faced resistance from defendants, as well as unfavorable action taken by several district court judges. Dmitriy Shirokov, one of the 4577 defendants accused of illegally downloading the movie *Far Cry*, recently filed a lawsuit against DGW.⁹⁸ Mr. Shirokov, who is seeking class certification, accuses DGW of engaging in extortion, copyright misuse, unjust enrichment, and fraud, among several other charges.⁹⁹ The complaint puts forth two key claims. First, that DGW lied to the Copyright Office when it registered the *Far Cry* copyright, claiming that the film was "first published" in November 2009.¹⁰⁰ The January 2010 registration date was thus within the three-month window of the first published date,¹⁰¹ which is required by statute

93. *Id.*

94. *Id.*

95. *Id.*

96. Indeed, in the first quarter of 2011, lawsuits against over thirty-three thousand Does were filed in five federal districts across the nation. *See supra* Table 1.

97. *See, e.g.*, Marcia Coyle, *LUMPED Together? Groups Say Firm 'Stacked the Deck' in Download Suit*, NAT'L L.J. (June 7, 2010), <http://tinyurl.com/3l6h5lo> (presenting arguments made by the EFF and ACLU alleging that DWG is improperly joining defendants into a single lawsuit); Greg Sandoval, *Porn Maker Sues 7,098 Alleged Film Pirates*, CBS NEWS (Nov. 2, 2010), <http://tinyurl.com/4358n6g> (reporting that an adult entertainment studio has sued seven thousand individuals for illegally sharing an adult film); *US Copyright Group Files Dismissal Opposition in Court*, MYCE (Nov. 11, 2010, 8:00 AM), <http://tinyurl.com/6ddzfnm> (covering the arguments set forth by DGW in its response opposing a motion to quash previously filed by fourteen thousand defendants alleging lack of jurisdiction).

98. Nate Anderson, *P2P Settlement Lawyers Lied, Committed Fraud Says New Lawsuit*, ARS TECHNICA, <http://tinyurl.com/5rzw79c> (last visited Dec. 3, 2010).

99. Complaint at 52, 58–59, 85, 87, *Shirokov v. Dunlap, Grubb & Weaver PLLC*, No. 10-cv-12043, 2010 WL 4926598 (D. Mass. Nov. 24, 2010).

100. *Id.* at 5.

101. *Id.*

in order for the firm to seek statutory damages for its client.¹⁰² Absent timely registration, the plaintiff may only seek actual damages. Mr. Shirokov put forth the related argument that even if the January 2010 registration were valid, statutory damages is out of reach because most of the infringement accusations predate the January 19 registration date.¹⁰³ Mr. Shirokov contends that actual damages amount to some fraction of \$26.99, the list price of a new *Far Cry* DVD, yet the settlement letters to all defendants demand at least \$1500, while threatening six-figure statutory damage penalties that defendants might face in court if they do not pay up.¹⁰⁴

As Mr. Shirokov's lawsuit is pending, the law firms have faced significant setbacks in the courts. On December 6, 2010, over 4000 of the original 4577 defendants in the *Far Cry* lawsuit were dropped from the case.¹⁰⁵ On the same day, 925 of the 1653 defendants in *The Steam Experiment* lawsuit were also dismissed.¹⁰⁶ These two "mass dismissals" marked the beginning of a line of cases involving judges dropping defendants. Judge Collyer, presiding over both cases, required DGW to name the defendants it wanted to sue (among the identified Does) by this date, after having allowed the firm several time extensions.¹⁰⁷ Since filing

102. 17 U.S.C. § 412(2) (2008) ("[N]o award of statutory damages . . . shall be made for . . . any infringement of copyright commenced after first publication of the work and before the effective date of its registration, *unless such registration is made within three months after the first publication of the work.*") (emphasis added). Because the vast majority of defendants in the *Far Cry* lawsuit are alleged to have downloaded the movie prior to the January 2010 registration date, if the registration is indeed defective due to the "first published" date being incorrect, statutory damages could not be awarded against these defendants. Complaint, *supra* note 99, at 4–5.

103. Complaint, *supra* note 99, at 86.

104. *Id.* at 41, 49–50.

105. Exactly 4437 of the original 4577 defendants (97%) were dropped from the case without prejudice. Notice of Filing Second Amended Complaint and Notice of Voluntary Dismissal of Certain Doe Defendants, *Achte/Neunte Boll Kino Beteiligungs Gmbh & Co. v. Adrienne Neal*, 736 F. Supp. 2d 212 (D.D.C. Sept. 10, 2010) (No. 10–453). See also *U.S. Copyright Group Drops Cases Against Thousands of BitTorrent Users*, TORRENTFREAK (Dec. 7, 2010), <http://tinyurl.com/3zaadow>. DGW believes that the remaining 140 defendants — whose true identities remain unknown — reside in the District of Columbia. *Id.*

106. Nate Anderson, *US Copyright Group Drops 5,000 P2P Defendants From Cases*, ARS TECHNICA, <http://tinyurl.com/26mdwq6> (last visited Dec. 12, 2010).

107. Nate Anderson, "Put Up or Shut Up" Time for US Copyright Group, ARS TECHNICA, <http://tinyurl.com/3gp6627> (last visited Dec. 8, 2010). When DGW brought cases for the films *Far Cry* and *The Steam Experiment* in March 2010, Judge Collyer set an initial deadline to name defendants in July, later extended to November 18. "When November 18 came along, USCG asked the judge to extend their time again . . . for nearly five years." *Id.*

On a related note, due to Time Warner (the ISP for many of the Does in the two cases) resisting DGW's subpoena, obtaining the Does' identities has been slow-going for DGW. In July, the ISP argued before Judge Collyer that performing the large number of new lookups in P2P cases would be impossible without a major staffing increase, while also compromising the hundreds of lookups the ISP performs for law enforcement each month. Judge Collyer ultimately granted the subpoena, also accepting Time Warner's argument that it should only be required to perform twenty-eight lookups per month. Nate Anderson, *P2P Plaintiffs to Get Just 28 Time Warner IPs Each Month*, ARS TECHNICA, <http://tinyurl.com/37hazz5> (last visited Dec. 8, 2010).

the lawsuits in March, the firm had yet to name a single defendant.¹⁰⁸ Thus, due to the lack of personal jurisdiction over the vast majority of the identified Does — many of whom live outside of Washington, D.C., and otherwise have no connection to the District — the firm was forced to drop (without prejudice) all but 868 of the Does in the two cases.¹⁰⁹ DGW has only named three of the remaining defendants so far but wants to continue proceedings against the 865 who “may [also] live in the [District].”¹¹⁰

Ten days after the Does were dismissed from the *Far Cry* and *The Steam Experiment* suits, a West Virginia district court judge dismissed all but one of the defendants in each of the seven cases filed by Ken Ford’s “Adult Copyright Company” in the Northern District of West Virginia.¹¹¹ In addition to the dismissal, Judge John Bailey demanded that the plaintiffs (1) file each case separately and (2) only submit IP addresses likely to map to West Virginia Internet users.¹¹² Judge Bailey noted that the mere allegation that the defendants used the same P2P software and infringed the same movie does not mean they can be joined into a single lawsuit.¹¹³ Similar mass dismissals have also occurred in Texas and Illinois. In February 2011, Judge Royal Ferguson dropped thousands of Does from sixteen cases filed in the Northern District of Texas and quashed numerous subpoenas made to ISPs.¹¹⁴ The court approvingly cited to the earlier West Virginia decision, while noting that that “there are no allegations . . . that the [d]efendants are in any way related to each other, or that they acted in concert or as a group in their allegedly infringing actions.”¹¹⁵ Reaching a similar result in a Doe suit filed in the Northern District of Illinois, Judge Milton Shadur asserted that “there is no

At this rate, it would take three years or more for DGW to obtain the identities of all the *Far Cry* and *The Steam Experiment* Does who are serviced by Time Warner (note that the twenty-eight per month figure is the total amount for both cases). This estimate is based on the fact that DGW submitted eight hundred lookup requests for *Far Cry* Does to Time Warner not long after filing the case. Many additional requests have likely been submitted. *Id.*

108. Anderson, “Put Up or Shut Up” *Time for US Copyright Group*, *supra* note 107.

109. Anderson, *supra* note 106.

110. *Id.* As Nate Anderson points out, many of the unnamed 865 Does are probably Time Warner customers. Because Time Warner is only required to perform twenty-eight lookups per month, it will likely be a long time before the identities of these remaining Does are known. Judge Collyer has allowed more time in these cases. *Id.*

111. Order, *Combat Zone, Inc. v. Does 1–1037*, No. 3:10-CV-95 (N.D. W. Va. Dec. 16, 2010), available at <https://www.eff.org/cases/west-virginia-copyright-troll-lawsuits>. The order severing the Doe defendants in the other six cases is identical in substance. See also Nate Anderson, *Judge Kills Massive P2P Porn Lawsuit, Kneecaps Copyright Troll*, ARS TECHNICA, <http://tinyurl.com/27cxc7j> (last visited Mar. 16, 2011).

112. Order, *supra* note 111, at 4–5. The court noted that the “physical location of any IP address can be determined from a simple Google search.” *Id.* at 5 n.2.

113. *Id.* at 2–3.

114. Nate Anderson, *Texas Chainsaw Massacre: Senior Judge “Severs” Most P2P Lawsuits*, ARS TECHNICA, <http://tinyurl.com/3cbj9xo> (last visited Mar. 16, 2011).

115. *Id.*

justification for dragging into an Illinois federal court, on a wholesale basis, a host of unnamed defendants over whom personal jurisdiction clearly does not exist and — more importantly — as to whom [plaintiff's] counsel could readily have ascertained that fact.”¹¹⁶

Several sources have characterized the mass dismissals as a blow to the viability of the mass lawsuit strategy.¹¹⁷ Indeed, filing individual suits against every Doe dismissed in the West Virginia case would result in filing fees upwards of \$1 million.¹¹⁸ Nonetheless, the plaintiffs retain the option to reinitiate proceedings against the dropped Does at a later time. Plaintiffs' attorneys may also partner with local counsel in jurisdictions across the country to keep the lawsuits going, though this could turn out to be an overly expensive outlay.¹¹⁹ In any event, plaintiffs will need to rethink their procedural strategy, as the courts thus far do not seem to share plaintiffs' enthusiasm for joining thousands of defendants into a single lawsuit.

B. *The Situation in Japan*

As noted in the discussion above, Japan has avoided large-scale lawsuits against alleged file-sharers. In fact, extensive searching shows that copyright holders have not filed any lawsuits against individuals.¹²⁰ This is in spite of the fact that file-sharing has increased significantly since the early 2000s.¹²¹ According to statistics released by the RIAJ in 2006, Japan's file-sharing population increased from 1.3 million in 2005 to 1.8 million people in 2006.¹²² A 2008 survey on the status of file-sharing software users, co-conducted by the Association of Copyright for Computer Software (ACCS) in Japan, revealed that 10.3% of all Japanese Internet users also utilized file-sharing software.¹²³

NetAgent, a Japanese firm providing P2P investigation services, recently estimated that over twenty thousand individuals are currently using the

116. Nate Anderson, *Random Defendant Outlawyers P2P Attorney, Gets Lawsuit Tossed*, ARS TECHNICA, <http://tinyurl.com/4ruskk3> (last visited Mar. 16, 2011).

117. *See, e.g.*, Anderson, *supra* note 111.

118. *Id.*

119. Ken Ford says that his firm, the Adult Copyright Company, has “assembled a network of attorneys with the ability to pursue individual claims against infringers in their own jurisdictions.” *Id.*

120. Mr. Shiroyama and Mr. Nakazaki, intellectual property attorneys at the law offices of Anderson Mōri & Tomotsune, expressed their belief that, to their knowledge, no lawsuits have been filed against individual file-sharers. Interview with Yasufumi Shiroyama & Takashi Nakazaki, *supra* note 62.

121. Thomas Mennecke, *File-Sharing Surges in Japan*, SLYCK (July 26, 2006), http://www.slyck.com/story1249_Filesharing_Surges_in_Japan.

122. *Id.*

123. Summary of Findings From User Questionnaires and Web Crawling Surveys, Japan and International Motion Picture Copyright Association (Dec. 12, 2008), <http://www.jimca.co.jp/english/survey2008.html>. The same survey conducted in 2007 yielded a 9.6% figure; 2008 was the first time the 10% mark had been breached. *Id.*

“Share P2P-network” to exchange child pornography.¹²⁴ This figure represents approximately 20% of the one hundred thousand users of the Share network, which is one of the more popular P2P networks in Japan.¹²⁵ The same firm compiled global file-sharing statistics in early 2008 tracking the number of users on Winny, Share, and Limewire at the time.¹²⁶ The statistics show that on average, 508,000 individuals in Japan shared files over the three networks at any given time; compare this figure to the 1.75 million U.S. individuals who used Limewire to share files during the same year.¹²⁷ (Winny, Share, and Limewire were the most popular P2P networks in Japan during 2008, but Winny and Share were, and still remain, relatively obscure in the United States.)¹²⁸

Aside from the data produced above, Japanese file-sharing statistics are difficult to come by, for reasons that will be discussed in Part III, *infra*. Interest groups representing the Japanese entertainment industry, in contrast to their U.S. counterparts, do not have the same incentive to collect data and show the public how bad piracy has become. In the United States, the MPAA, RIAA, and other organizations dedicated to combating piracy publicize how widespread file-sharing has become in order to support their political lobbying efforts and as justification to pursue individual file-sharers, as the case may be. In other words, there is an incentive to “play up the numbers.” On the other hand, Japanese interest groups would be unable to realize a similar benefit, as will be explained below. Being more forthcoming might actually produce an unintended consequence: If the true extent of the file-sharing problem in Japan became widely known among the public, more people might be encouraged to take up file-sharing (the “everyone is doing it, so should I” phenomenon).

1. *The Japanese Government’s Criminal Prosecution of File-Sharers*

Instead of civil lawsuits being initiated by copyright holders, the Japanese government has in recent years taken the lead in copyright enforcement. The Japanese news sources cited in this section reveal (in the aggregate) that at least fifty-four police arrests have been made since 2008. Although this number may not seem significant, a *Japan Times* news report disclosed that the police uncovered only fourteen cases of copyright infringement on P2P networks between 2001 and early 2008.¹²⁹

124. *News*, NETAGENT, http://www.netagent.co.jp/news_eng.html (last visited Dec. 3, 2010).

125. *Id.*

126. Interview with Hatsuyama Tomonori, Chief of Consulting Sales Department, NetAgent, in Sumida-ku, Tokyo (Dec. 9, 2010).

127. NetAgent used their proprietary software to monitor file-sharing traffic on the Winny, Share, and Limewire networks in order to produce the statistics. *Id.*

128. *Id.*

129. “Statistics released in March 2008 showed that the police have uncovered only 14 cases of

The targets of these enforcement actions are diverse. Police officers arrested a teenage boy for posting manga on YouTube¹³⁰ and administrators of a mobile music website offering unauthorized downloads.¹³¹ The police have even gone after a virus writer for using copyrighted images without permission in his Trojan Horse virus.¹³² Aside from these interesting examples, most of the arrests have centered on those accused of illegally sharing movies, TV shows, and animation.

One of the better publicized arrests occurred late in 2009, when police officers from all over Japan arrested ten people for using the “Share P2P” software application to illegally share copyrighted material.¹³³ Those arrested were all male, ranging in age from twenty-three to fifty-seven years old, and the copyrighted material included popular movies, TV shows, animation, and video games.¹³⁴ Another serious crackdown took place in September 2010, when police in twenty-one prefectures nationwide — from far-northern Hokkaido to subtropical Okinawa — raided fifty locations and arrested eighteen individuals for allegedly sharing child pornography online.¹³⁵ The most recent raid occurred in January 2011, when police again targeted fifty locations across Japan, arresting eighteen alleged file-sharers.¹³⁶ Following the arrests, the RIAJ published

copyright infringement on peer-to-peer networks since 2001.” Hongo, *supra* note 57.

130. *Teenage Boy Arrested for Posting Manga Content on YouTube*, JAPAN TODAY (June 15, 2010), <http://tinyurl.com/69cxe8t>. The fourteen-year-old boy posted photos of manga episodes (comics from magazines) on YouTube, prior to their official release date. *Id.* This is the first time police have taken action against someone for posting infringing content on Youtube. *Id.*

131. Nate Anderson, *Japanese Mobile Music Site Admins Arrested for Infringement*, ARS TECHNICA (last visited July 20, 2011), <http://tinyurl.com/nkueo3>. Two men operated a mobile music download website known as “Daisan Sekai” (“The Third World”) which attracted over a million unique users and was regarded by the RIAJ as “one of the most popular illegal mobile music site[s]” in the country. *Id.*

132. Police arrested three men said to have been involved in a plot to “infect users of the P2P file-sharing network Winny with a Trojan horse that displayed images of popular anime characters while wiping music and movie files.” *First Virus Writer Arrested in Japan for Breaching Copyright*, SOPHOS (Jan. 24, 2008), <http://tinyurl.com/3d8jgor>.

Curiously, one of the men, Masato Nakatsuji, was arrested again in 2010 for allegedly “writing a computer virus that replaces all the files on a person’s computer with home-made manga images of squid, octopuses and sea urchins.” Duncan Geere, *Japanese Virus Replaces Files With Pictures of Squid*, WIRED.CO.UK (Aug. 16, 2010), <http://tinyurl.com/2ecxd6b>. Police arrested him on charges of “property destruction,” marking the first time Tokyo police have arrested someone for property destruction in connection with malware. *Id.* Nakatsuji had told police, “I wanted to see how much my computer programming skills had improved since the last time I was arrested.” *Id.*

133. Jared Moya, *Japanese Cops Arrest 10 File-Sharers*, ZEROPAID (Dec. 2, 2009), <http://tinyurl.com/6gx5w2h>.

134. *Id.*

135. *Japan Nabs 18 for Child Porn*, STRAITS TIMES (Sept. 29, 2010), <http://tinyurl.com/5rd2pij>. Interestingly, while publishing and distributing child porn carries a hefty punishment under Japanese law (up to five years in prison or up to a ¥5 million fine (approximately \$80,000)), the possession of images itself is not illegal. *Id.*

136. *Police Arrest 18 Alleged Movie, Music and Software Uploaders*, TORRENTFREAK (Jan. 15, 2011), <http://tinyurl.com/69derva>.

on its website “a list of the ages, sex, locations, occupations and copyright works said to have been shared by the 18 individuals.”¹³⁷

In addition to nationwide raids, police have gone after individual file-sharers on a smaller scale. During the summer of 2010, police arrested a thirty-one-year-old man for sharing TV programs over BitTorrent; this marked the first time an arrest had been made in connection with BitTorrent use.¹³⁸ The man told investigators, “I did it for people who missed the programs. Because there is a potential for viruses on Winny and others, I used BitTorrent, which I heard police weren’t investigating.”¹³⁹ Two additional incidents in 2010 received media attention. First, a sixty-two-year-old man was arrested for uploading two major box-office hits, *Avatar* and *Percy Jackson and the Olympians*, on P2P networks.¹⁴⁰ Finally, in October 2010, police arrested a forty-two-year-old woman for illegally uploading animation to the Internet.¹⁴¹ The woman used next-generation file-sharing software known as “Perfect Dark,” which is supposedly able to mask the user’s identity.¹⁴²

In contrast to prior government enforcement efforts, the arrests made in recent years reflect what appears to be a more systematic and aggressive attempt to curb illegal file-sharing. As the news reports illustrate, police have gone after file-sharers located all over the country, from various demographics, who are sharing all kinds of digital content.

2. *Mechanics Behind the Police Investigations and Arrests*

It is difficult to ascertain the specific procedure followed by the Japanese police in its investigations and arrests.¹⁴³ What is known is that during the early stages of its investigation, police retain a P2P monitoring firm in order to identify the targets of their investigation.¹⁴⁴ However, Japan has historically had strong privacy protection measures in place when the identities of the accused were at stake.¹⁴⁵ IHAHO,¹⁴⁶ an industry

137. *Id.*; Press Release, RIAJ (Jan. 14, 2011), <http://tinyurl.com/3uha99x>.

138. Joshua Williams, *Man Arrested for BitTorrent File-sharing in Japan*, EXAMINER.COM (July 20, 2010), <http://tinyurl.com/6bbws5h>.

139. *Id.*

140. *Avatar Uploader Arrested Due to Japanese New Anti-Piracy System*, P2P ON (Apr. 6, 2010), <http://tinyurl.com/6byfet2>.

141. *Perfect Dark P2P User Arrested for Sharing Anime*, P2P ON (Oct. 9, 2010), <http://tinyurl.com/6l5u349>.

142. *Id.*

143. During the December 9 interview at NetAgent’s offices, the employees stated that they could not reveal any details of their cooperation with the police. However, the employees indirectly suggested that they are involved at multiple stages during a police investigation. Interview with Hatsuyama Tomonori, *supra* note 126.

144. *Id.*

145. See generally *Special Issue on Consumer Privacy in Japan and the New National Privacy Law*, 10 PRIVACY & AM. BUS. 8 (Nov. 2003), available at <http://www.jmra-net.or.jp/publications/01.pdf> (tracing the development of Japanese consumer privacy law from 1960 to 2003).

discussion group representing the interests of Japanese ISPs, released a set of guidelines in 2008 setting forth a recommended procedure to be followed before an ISP releases its customers' identities.¹⁴⁷ According to the guidelines, the ISP must contact the accused customer to explain the allegation and provide him with sufficient time to respond.¹⁴⁸ The user's identity should only be revealed to the P2P monitoring firm when it is clear that there exists a plausible claim that the user committed the alleged crime.¹⁴⁹ Many ISPs originally chose not to cooperate with the procedures, as they had to bear the costs of providing this "service." ISPs also had the option to seek a *karisyobun* (a preliminary injunction) to avoid having to do a look-up.¹⁵⁰ As the frequency of police investigations have increased in recent years, however, ISPs have offered their full cooperation, while simply building in the cost of performing these "look-ups" into their costs of doing business.¹⁵¹

3. *The Recent Amendment to the Japanese Copyright Law*

Apart from increased police enforcement, legislation targeting illegal downloads of copyrighted material was recently enacted. An amendment to the Japanese Copyright Law went into effect in January 2010, making it illegal to knowingly download copyrighted material without authorization.¹⁵² The Japanese parliament approved the amendment in June 2009, following two years of pressure by an umbrella organization of influential associations including the Motion Picture Producers

146. IHAHO is a counseling center that provides consultation, primarily to telecommunications companies, on illegal and harmful information encountered on the Internet. The center was established with the support of the Japanese Ministry of Internal Affairs in 2008. "IHAHO" stands for "illegal harmful hotline." *About the Center*, IHAHO, <http://www.ihaho.jp/info/aboutus.htm> (last visited June 17, 2011).

147. The guidelines are available in Japanese (no official English translation available) at http://www.telesa.or.jp/consortium/provider/pdf/provider_031111_1.pdf.

148. *Id.*

149. *Id.* The guidelines are thought to provide a "safe harbor" to ISPs concerned about violating their customers' right to privacy. By disclosing a customer's identity only when necessary (for example, to assist with a police investigation when there is a plausible claim that the customer committed a crime), ISPs believe that they are shielded from any liability. *Id.*

150. Interview with Hatsuyama Tomonori, *supra* note 126.

151. Several reasons caused ISPs to better cooperate with the P2P monitoring firm and police investigators. For one, the cost of resistance (for example, obtaining a preliminary injunction) was wrought with hassle and reputational risks. Moreover, Japanese society's opinion of a "good ISP" is one that fully cooperates with performing look-ups for police investigations. ISPs want to avoid being seen as a bad company, especially one that has the image of profiting from the illegal distribution of data (for example, refusing to disclose the identities of its customers who are distributing copyrighted works, or worse, leaked corporate documents containing sensitive data). *See* note 187, *infra*, and accompanying text.

152. Rob Schwartz, *Japan Strengthens Copyright Law*, BILLBOARD.BIZ (June 16, 2009), <http://tinyurl.com/njbeon>. The official Japanese version of the amendment is available for download on the Ministry of Education, Culture, Sports, Science and Technology (MEXT) website at <http://tinyurl.com/d7yocp>.

Association of Japan (MPPAJ) and RIAJ.¹⁵³ Japanese law previously allowed prosecution against those uploading copyrighted material without authorization, but downloading the same material for private use was perfectly legal.¹⁵⁴ Despite the appearance of a tougher stance against piracy, commentators are questioning the efficacy of the new amendment. Although unauthorized downloading of copyrighted works is now illegal, the user must be aware that the files were illegally uploaded, and the amendment fails to stipulate any fine or jail term for violations.¹⁵⁵ Sources also note that streaming is not covered in the amendment, and watching illegal videos on video-sharing websites such as YouTube and Nico Nico Douga does not appear to be illegal either.¹⁵⁶ The music industry, however, welcomed the amendment, which does leave the door open for civil suits claiming damages (though none have been filed to date).¹⁵⁷

4. *Anti-Piracy Efforts by Non-Governmental Organizations*

ISPs and the major interest groups are also playing a part in reducing illegal file-sharing. Japanese ISPs are thought to reduce the available downstream bandwidth for customers who they believe are heavily engaged in file-sharing.¹⁵⁸ Applying an automatic reduction to a user's download speed is thought to deter file-sharing behavior, and the ISPs' response appears to be designed to condition their customers' behavior in order to minimize file-sharing. This response arguably represents a compromise between an absolute three-strikes program at one end of the

153. Interestingly, many citizens chose to express their opinion concerning the proposed revisions to the copyright law back in 2007. When a subcommittee of the Agency for Cultural Affairs sought input from the public about the revisions, it received 7500 comments, "an unusually large number, and most were negative." Kazuaki Nagata, *(Near) Death of a Salesman*, JAPAN TIMES (Dec. 11, 2009), <http://search.japantimes.co.jp/cgi-bin/fm20091211a1.html>.

154. "[I]t shall be permissible for the user of a work that is the subject of a copyright . . . to reproduce the work for his personal use or family use or other equivalent uses within a limited scope (hereinafter referred to as 'private use') . . ." Japanese Copyright Act, *supra* note 15, art. 30. The same is not true under U.S. Copyright Law, where a showing of "fair use" requires the court to consider a four-factor test. 17 U.S.C. § 107 (2006).

155. Schwartz, *supra* note 152. *See also* Nagata, *supra* note 153 (stating that the amendment does not enforce any punishment for violators "since it can be hard for rookie web surfers to know whether or not the files they are about to download are legal or illegal"). Finally, although the amendment does not stipulate criminal penalties, civil actions remain available for potential plaintiffs.

156. Fumi Yamazaki, *Copyright Law Amendment*, WHAT'S HAPPENING IN JAPAN RIGHT NOW? (June 14, 2009, 8:40 PM), <http://tinyurl.com/lmf4tn>.

157. Schwartz, *supra* note 152.

158. Interview with Hatsuyama Tomonori, *supra* note 126. The threshold triggering the reduction in download speed is unknown. For sake of illustration however, it seems that larger mobile phone service companies — such as Softbank, au (KDDI), and NTT Docomo — have implemented a threshold somewhere between 1 to 2 GB/day. Users reaching the threshold reportedly experience slow download speeds, effectively preventing them from further downloading for the remainder of the day.

spectrum (which cuts off a user's Internet connection after repeated infractions), and aggressively going after file-sharers on the other.

In another attempt to modify file-sharers' behavior on illegal downloads, the RIAJ, MPAA, and other organizations have ramped up their efforts to spread the message that "file-sharing is wrong." For example, in December 2009, RIAJ Chairman Keiichi Ishizaka told a crowd of eight thousand people at a midtown Tokyo gathering that illegal downloads are financially hurting musicians and may prevent them from continuing their line of work.¹⁵⁹ The MPAA more recently encouraged the Japanese government to adopt a three-strikes policy, similar to ones implemented in France and South Korea.¹⁶⁰ As its name suggests, such a policy would allow ISPs to ban repeated file-sharing offenders. Japanese ISPs previously attempted in 2006 to ban Winny P2P users, but lawmakers refused to support the ban.¹⁶¹

III. ANALYZING THE LEGAL LANDSCAPES IN THE UNITED STATES AND JAPAN

The response to the increasing rate of piracy in the United States has been in the form of civil actions: Doe lawsuits being filed against thousands of alleged infringers. A survey of news sources shows that there are few cases involving defendants who have been criminally charged with copyright infringement with respect to file-sharing.¹⁶² As discussed above, Japan's experience has been the exact opposite: A comprehensive search supports the conclusion that no civil action has been taken against individual file-sharers in Japan. The *RIAJ v. Japan MMO*¹⁶³ case, discussed in Part I.B, *supra*, is one of the rare examples of legal action taken directly by a copyright holder (or in this case, an organization of copyright holders) in Japan. On the other hand, the Japanese police have not been shy about arresting those caught illegally sharing copyrighted material.

This section will explore possible reasons why each country has chosen to take radically different approaches to combat unauthorized file-sharing. The analysis first highlights a key difference between the U.S. and Japanese copyright damages provisions, moving on to evaluate the idea that the different enforcement methods used by each country are uniquely effective

159. See Nagata, *supra* note 153.

160. *MPAA Pressures Japan For a 3-strikes Internet Disconnect Policy*, MYCE (Oct. 22, 2010, 10:20 PM), <http://tinyurl.com/3on7alm>.

161. *Id.*

162. See, e.g., *United States v. Dove*, 585 F. Supp. 2d 865 (W.D. Va., 2008) (finding defendant guilty of criminal copyright infringement and conspiracy to commit criminal copyright infringement arising from his involvement in an Internet piracy organization).

163. Tōkyō Kōtō Saibansho [Tōkyō High Ct.] Mar. 31, 2005, Hei 16 (ne) no. 405, SAIKŌ SAIBANSHO SAIBANREI JŌHŌ [SAIBANREI JŌHŌ] 1 <http://www.courts.go.jp>.

because they are better suited to that country's individual circumstances. Finally, the section concludes by taking a step back and assessing the effectiveness of both prior and current enforcement efforts and considering whether either country would benefit from adapting its enforcement strategy in favor of that used by the other nation.

A. Why the Stark Difference in Efforts Focused on Cracking Down on Piracy?

Considering that both countries appear similarly situated with respect to the copyright laws (see discussion in Part I, *supra*) and with respect to the problem at hand (heavy file-sharing of copyrighted works), the divergent approaches to enforcement of copyright are startling. Some of the reasons for the differing approaches may be reconciled, however.

1. Different Legal Incentive Structures for Copyright Holders

In U.S. file-sharing cases, the carrot motivating plaintiffs to file lawsuits is the allure of large damage awards made possible under 17 U.S.C. § 504. Pursuant to this section, infringers are liable for *either*: “(1) the copyright owner’s actual damages and any additional profits of the infringer, as provided by subsection (b); or (2) statutory damages, as provided by subsection (c).”¹⁶⁴ As file-sharers in most cases presumably do not profit from their illegal activities, and since the magnitude of actual damages in most cases is believed to hover around a “lost sale” (or a small multiple thereof), plaintiffs overwhelmingly elect to recover statutory damages. The choice is a wise — and profitable — one: Plaintiffs are able to recover no less than \$750, and no more than \$30,000, *per work* infringed.¹⁶⁵ Moreover, if the plaintiff can show that infringement was willful, the court, in its discretion, may “increase the award of statutory damages to a sum of not more than \$150,000.”¹⁶⁶ Given the allure of such large punitive damages, it is no wonder that mass lawsuits are being filed by copyright holders against alleged file-sharers throughout the United States.

The Japanese Copyright Act includes a similar provision for actual damages and disgorgement of profits.¹⁶⁷ However, the Copyright Act does not include an analogous provision for statutory damages. This may explain in great part why Japanese copyright holders do not bother to file lawsuits like their Western counterparts. Actual damages caused by an

164. 17 U.S.C. § 504(a) (2006).

165. 17 U.S.C. § 504(c)(1) (2006).

166. 17 U.S.C. § 504(c)(2) (2006).

167. In the context of file-sharing, the formula for actual damages is the number of reproductions of the copyrighted work, multiplied by the per unit profit that the copyright holder *could have* earned but for the acts of infringement. Japanese Copyright Act, *supra* note 15, art. 114(1). However, the amount of damages is limited by the “copyright holder’s ability to sell or take other [similar] actions with respect to said objects.” *Id.*

individual infringer are likely to be low — no more than, say, the market price of the copyrighted work, assuming a “lost sale” theory is used.¹⁶⁸ Absent a sufficiently high probability of recovering a large amount of damages, a reasonable plaintiff will realize that the time and expense of going through with a lawsuit greatly overshadows the amount that he can hope to recover (for example, the retail price of a DVD). Moreover, the concept of punitive damages falls outside of the Japanese civil code. Where a U.S. court has the authority to multiply damage awards if the defendant was determined to have willfully infringed, Japanese courts are granted no such power. This is somewhat puzzling in light of the distinct provision of the Copyright Act that sets forth what appears to be willful infringement.¹⁶⁹

2. *Different Methods May be Better Suited to Each Country*

Another plausible explanation for why the United States and Japan have adopted entirely different approaches is that there is simply no “one size fits all” solution, even where both countries are experiencing essentially the same problem. Cultural factors produce different approaches to enforcement in each country.

The United States has a track record of litigiousness and a global reputation reinforcing the same.¹⁷⁰ Since copyright holders have the proper tools at their disposal¹⁷¹ and eager attorneys ready to represent them, the fact that they are actively going after file-sharers is unsurprising. In Japan, on the other hand, a long tradition of avoiding litigation means that potential plaintiffs will defer from enforcing their rights,¹⁷² especially when their ability to recover damages in excess of the legal costs is questionable. Civil inaction on the part of copyright holders thus requires

168. However, the idea that piracy of a unit of digital content represents a foregone sale of that unit has been criticized by the courts and Internet commentators. *See, e.g.*, *United States v. Dove*, 585 F. Supp. 2d 865, 872 (W.D. Va., 2008) (noting that “although it is true that someone who copies a digital version of a sound recording has little incentive to purchase the recording through legitimate means, it does not necessarily follow that the downloader would have made a legitimate purchase if the recording had not been available for free”); Fred Locklear, *IDC Says Piracy Loss Figure is Misleading*, ARS TECHNICA, <http://tinyurl.com/3m549k2> (last visited June 17, 2011) (criticizing the view that “every copyrighted music or movie download and unlicensed software install is counted as a monetary loss to piracy”). An interesting scenario arises where a defendant is accused of sharing a particular file with numerous users. Strict adherence to the lost sales theory (e.g., one lost sale for each user that the file was shared with) might yield a relatively high amount of actual damages incurred. This situation presents evidentiary challenges, however. For example, if the defendant is a BitTorrent user, then it is highly unlikely that he was the “sole distributor” of a particular movie file, based on how a BitTorrent P2P network operates.

169. Japanese Copyright Act, *supra* note 15, art. 113(3)(iii).

170. David S. Clark, *Litigiousness*, L. LIBRARY: AM. L. & LEGAL INFO., <http://tinyurl.com/3gex8ra> (last visited Dec. 13, 2010).

171. *See supra* the discussion of damages in Part III.A.1.

172. *See* Tony Cole, *Commercial Arbitration in Japan: Contributions to the Debate on “Japanese Non-Litigiousness,”* 40 N.Y.U. J. INT’L L. & POL. 29, 35 (2007).

that the government step in to combat piracy, lest nothing be done about illegal file-sharing.

With respect to statutory damages available to U.S. copyright holders under 17 U.S.C. § 504, the potential for large damage awards is arguably intended to make file-sharers fear having to pay more than they can afford, regardless of the proportion to the actual damages stemming from the illegal distribution. In other words, the threat of high damages — whether the amount reasonably approximates actual damages or is closer to being deemed “excessive” — is supposed to deter illegal file-sharing while compensating plaintiffs. Whether this was intended by Congress when it enacted, and subsequently amended, the statutory damages provision is not entirely clear.¹⁷³ In either event, the law firms and copyright holders responsible for the current wave of mass lawsuits hope to induce settlement payments to the furthest extent possible, rather than to proceed through trial.¹⁷⁴ For example, even during the RIAA’s five-year campaign, only a small handful of the thirty-thousand-plus lawsuits actually went to trial.¹⁷⁵ There is also the possibility that the judge or jury will find the defendant not guilty, or that the judge will reduce excessive damage awards.¹⁷⁶ Practically speaking, therefore, the threat of exceedingly large statutory damages (“up to \$150,000 per work infringed”) is being used to extract settlement payments from accused infringers.

The Japanese criminal justice system is an entirely different matter. Arguably, a system of sporadic, nationwide arrests offers a degree of effectiveness lacking in the statutory damages scheme used in the United States. When it comes to illegal file-sharing, police are retaining P2P detection firms to investigate those illegally uploading copyrighted works. The police then follow a specific procedure to unmask the identities behind the IP addresses obtained. This is, in essence, similar to what the U.S. law firms representing copyright holders are doing. In many of the cases brought to light so far, police then carefully make arrests around the country, coordinating as many as fifty raids during a two-day span across as many as twenty-one different prefectures.¹⁷⁷ Once players are input into the criminal justice system, Japan is notorious for producing a nearly flawless conviction rate: Defendants are found guilty of their charged crimes in a staggering 99% of cases.¹⁷⁸ The practical message to file-

173. See Pamela Samuelson & Ben Sheffner, Debate, *Unconstitutionally Excessive Statutory Damage Awards in Copyright Cases*, 158 U. PA. L. REV. PENNUMBRA 53, 67 (2009), <http://www.pennumbra.com/debates/pdfs/CopyrightDamages.pdf>.

174. See *supra* discussion and accompanying text in Part II.A.

175. Anderson, *supra* note 38.

176. See, e.g., Nate Anderson, *Judge Slashes “Monstrous” P2P Award by 97% to \$54,000*, ARS TECHNICA (last visited July 20, 2011), <http://tinyurl.com/yebgu7f>.

177. *Japan Nabs 18 for Child Porn*, *supra* note 135.

178. J. Mark Ramseyer & Eric B. Rasmusen, *Why is the Japanese Conviction Rate So High?*, 30 J. LEGAL STUD. 53, 53 (2001). The article suggests that understaffed and financially-constrained

sharers is clear: “If we catch you, you are almost certainly going to jail, paying a fine, or both.”

Additionally, Japanese copyright holders fear that suing file-sharers will lead to bad precedent. For example, were Japanese copyright law to include a fixed range of damages, the range would likely span some small multiples of actual damages.¹⁷⁹ The result would be a nightmare for copyright holders, because such damages would effectively set a low ceiling on the amount of damages that can be recovered, thus removing any deterrent effect. The current mindset of avoiding litigation exemplifies the Japanese expression “the snake in the thicket” (*yabu hebi*).¹⁸⁰ Rather than proceeding with litigation, copyright holders may be better off making file-sharers second-guess whether engaging in illegal distribution is “safe” and keeping the consequences uncertain.

Thus, the enforcement regimes one of these countries employs may actually be better suited to the country in light of its unique cultural and legal norms. The threat of being faced with a civil action resulting in high statutory damages if caught and found guilty of copyright infringement may work more effectively in the United States, whereas the near-guarantee of being faced with criminal punishment if caught may serve as a better deterrent in Japan.

B. *Is Either of the Enforcement Regimes Actually Effective?*

1. *Assessing the Net Effect of Previous Enforcement Attempts in the United States and Japan*

When the RIAA commenced with mass lawsuits against music file-sharers in 2003, it justified its actions by claiming that piracy was eroding the music industry’s bottom line, which in turn was hurting artists simply trying to make a living.¹⁸¹ The goal of the lawsuits, according to the RIAA, was two-fold: (1) to recover a percentage of the losses due to piracy, and (2) to educate the public that piracy is wrong, illegal, and must cease if the music industry is to survive.¹⁸² Fast forward five years to the end of 2008.

Prosecutor’s offices may help explain why the conviction rate in Japan is so high. Faced with these constraints, Prosecutors would tend to try only the “most obviously guilty,” leading to convictions in nearly all cases. *Id.* at 88.

179. What is envisioned by a “fixed range of damages” is a damages scheme bearing some resemblance to statutory damages under 17 U.S.C. § 504, but *not*, in fact, a form of punitive damages, which are not awarded by Japanese courts as a matter of public policy.

180. The English parallel to this Japanese expression is “let sleeping dogs lie.” DANIEL C. BUCHANAN, *JAPANESE PROVERBS AND SAYINGS* 250 (1973).

181. *Recording Industry Begins Suing P2P File-sharers Who Illegally Offer Copyrighted Music Online*, RIAA (Sept. 8, 2003), <http://tinyurl.com/69bwq58> (quoting RIAA president Cary Sherman as saying, “We simply cannot allow online piracy to continue destroying the livelihoods of artists, musicians, songwriters, retailers, and everyone in the music industry”).

182. *Frequently Asked Questions About File-Sharing Litigation*, RIAA (Sept. 8, 2003),

The RIAA managed to recoup a small fraction of the amount it paid in legal fees, and statistics reveal that the public is engaged in file-sharing more than ever.¹⁸³ Rather than educate, the lawsuits appear to have incited anger among file-sharers, instilling in them the belief that downloading music is in fact unproblematic and that the RIAA's greed is to blame. This mindset persists, even as lawsuits are initiated against thousands of file-sharers for distributing movies.

In contrast, Japan's entertainment industry avoided the public relations disaster experienced by the RIAA. This may be due to the fact that enforcement efforts by the RIAJ were not as focused and widespread as those used by the RIAA. Although the RIAJ's lawsuit against MMO Japan in 2001¹⁸⁴ and the arrest of Winny creator Isamu Kaneko in 2006 made headlines, other enforcement efforts avoided widespread public scrutiny.¹⁸⁵ Nevertheless, following several years of increasing activity, file-sharing remains at relatively high levels in Japan.¹⁸⁶ The public appears to believe that the distribution of movies, music, animation, and the like is not problematic, although society does believe that file-sharing is bad.¹⁸⁷ Indeed, thousands of citizens opposed the removal of the "download for private use" exception (formerly codified in Article 30 of the Copyright Act)¹⁸⁸ by sending written comments to the government.¹⁸⁹

2. *The Current Wave of Mass Lawsuits in the United States is Unlikely to Curb Piracy*

The RIAA campaign's net effect supports the proposition that suing file-sharers is ineffective toward reducing the rate of piracy. What it does show, however, is the potential for copyright holders (and the lawyers they

<http://tinyurl.com/6h75l9x>.

183. See *infra* discussion and accompanying text in Part III.B.2.

184. See *supra* discussion and accompanying text in Part II.B.

185. Japanese media have consistently reported on police arrests as they occurred. Much less common, however, are editorials or other forms of public scrutiny of police arrests. Compare this with the explosion of commentary on file-sharing news in the United States on popular websites such as TorrentFreak and Ars Technica.

186. See *infra* discussion and accompanying text in Part III.B.3.

187. Japanese society's negative view towards file-sharing (in general) stems from the cases where company trade secrets or other private or sensitive information were inadvertently shared over P2P networks. A data leak suffered by IBM Japan provides an illustration. IBM Japan hired a subcontractor to develop a tuition payment processing system for one of its clients, the Kanagawa Education Department. An employee of the subcontractor transferred the client's proprietary information to his personal computer, resulting in the information becoming publicly available through the Winny file-sharing software, which had been installed on his computer. *Press Release*, IBM JAPAN (Jan. 8, 2009), <http://www-06.ibm.com/jp/press/2009/01/0802.html>.

188. Japanese Copyright Act, *supra* note 15, art. 30(1) ("Except in the cases listed below, it shall be permissible for the user of a work that is the subject of a copyright . . . to reproduce the work for his personal use or family use or other equivalent uses within a limited scope (hereinafter referred to as 'private use') . . .").

189. Nagata, *supra* note 153.

retain) to earn money from the pursuit of file-sharers. As discussed in Part II, *supra*, the law firms representing the movie copyright holders are implementing the same basic strategy used by the RIAA. This “business model” is outlined and discussed in various news articles and blogs, soliciting numerous comments from Internet users (many of whom are presumed to be file-sharers).¹⁹⁰ Many Internet users appear angered by the fact that the lawsuits are primarily being used to generate money rather than for good-faith enforcement of copyright holders’ rights. That is, many seem to believe that the rules of civil procedure and the judicial system are being abused, with the sole intent of collecting money by threatening the accused with obscene statutory damages provided by U.S. copyright law.

This widespread characterization is bound to reinforce the common belief among file-sharers that “sharing is permissible, especially when law firms and copyright holders are acting out of greed.” Internet commentators also contend that if more reasonably priced, legitimate avenues of distribution were available, there would be less incentive to engage in piracy,¹⁹¹ which suggests that copyright holders should shift their attention from the pursuit of consumers to addressing the marketplace. These ideas likely paint a representative picture of how file-sharers feel about current anti-piracy efforts. Given the severe antagonistic nature of the relationship between plaintiffs (copyright holders) and defendants (file-sharers), these lawsuits alone are unlikely to succeed in curbing piracy.

An assessment of how the legal proceedings are progressing provides additional support for this analysis. Since DGW began filing lawsuits in January 2010, several events can be seen as important turning points. First, public interest groups such as the EFF and ACLU began their involvement in the months following the initial lawsuits, supporting accused file-sharers by arguing in court that plaintiffs are abusing civil process by joining thousands of unrelated defendants in a single lawsuit.¹⁹² Although the EFF and ACLU did not address the defendants’ innocence or guilt, the support of public interest groups alone may incorrectly lead file-sharers to conclude that their actions are unproblematic. Also, more recently, a Florida attorney named Graham Syfert began making available a “self-help” bundle of electronic documents (for example, motion to dismiss and motion to quash) intended to provide pro se defendants with basic legal guidance.¹⁹³ The bundle is available for a mere \$20.¹⁹⁴ Mr.

190. *See supra* discussion and accompanying text in Part II.A.

191. *See, e.g., Pirates Are the Music Industry’s Most Valuable Players*, TORRENTFREAK (Jan. 22, 2010), <http://torrentfreak.com/pirates-are-the-music-industrys-most-valuable-customers-100122> (arguing that if more unlimited and unrestricted music services were offered, piracy would “go into a free-fall”).

192. *See supra* discussion and accompanying text in Part II.A.3.

193. Thom Holwerda, *U.S. Copyright Group Sues Lawyer for Aiding BitTorrent Defendants*,

Syfert soon caught the attention of DGW, who has requested the court to sanction Syfert for “increasing DGW’s cost of continuing with the lawsuit.”¹⁹⁵ Mr. Syfert has countered by requesting sanctions against DGW.¹⁹⁶ This quarrel may further undermine any appearance of good-faith copyright enforcement efforts, while increasing file-sharers’ resentment of copyright holders and their attorneys.¹⁹⁷

Further, the fact that courts in at least four jurisdictions have dismissed a significant number of defendants in the Doe suits before them suggests that the viability of the mass infringement lawsuits has been thrown into question.¹⁹⁸ Indeed, at last count, upwards of forty-eight thousand Does were dismissed from thirty-seven cases filed around the country.¹⁹⁹ File-sharers are undoubtedly viewing these incidents as serious challenges to copyright holders’ attempts of enforcement. At the very least, file-sharers are likely to believe their activity is not as threatened as it was during the outset of the mass lawsuits. Thus, given how the current wave of mass lawsuits have progressed and begun to unfold — without forgetting the RIAA’s previous failure — it is doubtful that any significant reduction in file-sharing will occur.

3. *The Effect of the Japanese Police Arrests is Uncertain*

The series of police arrests discussed in Part II, *supra*, has largely avoided any controversy or public backlash. Indeed, there is a dearth of actual published opinion regarding the arrests; news reports have for the most part recited the facts and left it at that. Against this backdrop, one wonders whether the arrests have even affected file-sharing activity in Japan at all. Commentators have observed that file-sharing activity decreased in response to the initial arrests in 2008, and then inexplicably plateaued as police made arrests with greater frequency.²⁰⁰ While it is unlikely that file-sharing activity has increased since the recent arrests began, it is also difficult to conclude that continued criminal enforcement has caused a reduction in file-sharing, given that the data only show a

OSNEWS.COM (Nov. 28, 2010), <http://tinyurl.com/3yb8dvw>.

194. *Id.*

195. *Id.*

196. *Id.*

197. See Thomas Mennecke, *U.S. Copyright Group Attacks Defense ‘Money-making Scheme,’* SLYCK (Nov. 23, 2010), <http://www.slyck.com/news.php?story=2135>.

198. See *supra* discussion and accompanying text in Part II.A.4.

199. Alleged File-sharing and Other Mass Litigation, <http://tinyurl.com/fslitigate> (last visited June 17, 2011). The forty-eight thousand figure is the aggregate total taken from the “Does Dismissed” column found in the “By District” worksheet. Viewing the “Data Only” worksheet and selecting “dismissed” for the “status” column yields a total of thirty-seven cases in which Does have been dismissed.

200. Interview with Hatsuyama Tomonori, *supra* note 126.

decrease in response to the initial arrests. It is tempting to conclude that people are simply acting irrationally and not making logical decisions.

It would seem logical that the police will continue to make arrests for illegal file-sharing with greater frequency. Police departments across Japan have in recent years reinforced their cybercrime divisions, both in terms of the number of personnel and in terms of technical expertise. Even smaller areas such as Nagakute, a town in the Aichi prefecture with a population of about fifty thousand, have created specific cybercrime divisions.²⁰¹ As the police become better equipped to tackle file-sharing cases, the number of arrests will naturally continue to increase.

C. *Going Forward: Will Either Country Change Its Enforcement Methods?*

At this point, it is natural to ask whether the United States or Japan will modify their current enforcement methods against file-sharers. After all, neither country can claim an overall reduction in file-sharing through its respective enforcement methods.

1. *Will the United States Adopt Criminal Prosecution?*

Is there a reasonable possibility that the United States will adopt criminal prosecution, as has been done in Japan throughout much of the last decade? This seems unlikely. U.S. copyright laws have historically tipped in favor of the entertainment industry, as exemplified by repeated copyright-term extensions and increases in statutory damages.²⁰² Although U.S. copyright laws provide for criminal penalties against infringers,²⁰³ criminal prosecution would probably not be in the best interests of the entertainment industry. Criminal prosecution of file-sharers could bring with it increased public scrutiny of the copyright laws in connection with criminal matters. For example, such scrutiny could ultimately result in constitutional challenges (for example, excessive statutory damage awards in violation of the Eighth Amendment), leading to potential copyright reform calling for lower damage awards.²⁰⁴ It is also unclear whether, and

201. *Child Porn, ID Theft Drive Record Cyber Crime in Japan*, PHYSORG.COM (Mar. 4, 2010), <http://www.physorg.com/news186931900.html>.

202. The Copyright Act of 1909 allowed for works to be copyrighted for a period of twenty-eight years from the date of publication, renewable once for a second twenty-eight-year term, for a total maximum term of fifty-six years. Copyright Act of 1909, ch. 320, sec. 23, Pub. L. No. 60-349, 35 Stat. 1075. The next major revision, the Copyright Act of 1976, substantially increased the copyright duration to “a term consisting of the life of the author and 50 years after the author’s death.” Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541. Statutory damages under 17 U.S.C. § 504 have experienced similar repeated increases over time.

203. *See* 17 U.S.C. § 506 (2006) (outlining criminal infringement of copyright laws); *see also* 18 U.S.C. § 2319 (2006) (providing punishments for criminal infringement of a copyright).

204. Indeed, there is already plenty of debate on whether the six- and seven-figure damage awards in several P2P file-sharing cases are unconstitutional. *See, e.g.*, Samuelson & Sheffner, *supra* note 173, at 53 (discussing whether “whopping” statutory damage awards are constitutional in a

to what extent, the threat of criminal prosecution will serve to deter illegal file-sharing. In either event, there is a non-trivial risk that criminal prosecution would upset the status quo, leaving the entertainment industry better off without government involvement.

2. *Conversely, Will Japan Adopt Civil Actions?*

On the other hand, is there a reasonable possibility that Japan will adopt civil actions, as has been done in the United States throughout much of the last decade? This scenario presents a more realistic possibility. The Japanese entertainment industry currently seems to be downplaying the true extent of piracy. At some point, however, the industry might come around, realizing that it is free to pursue civil actions against individuals, independent of government enforcement. Conditions appear ripe for this to happen: Increasing numbers of Japanese lawyers are entering the market, which means greater availability of manpower to pursue civil actions.²⁰⁵ Further, the widely-publicized failure of civil actions to curb piracy in different jurisdictions (including the United States) provides valuable lessons from which to base a civil lawsuit strategy. The main obstacle to the viability of civil actions in Japan, as discussed, is the accepted notion that as a practical matter, damage award amounts are insufficient. This obstacle may not be impossible to overcome, however.

A potentially viable strategy may be one where plaintiffs file lawsuits against numerous defendants involved in the same file-sharing swarm.²⁰⁶ Plaintiffs should argue that the extent of damages caused by the file-sharing swarm is impossible to prove, directing the court to determine an “appropriate amount of damages” pursuant to Article 114-5 of the Japanese Copyright Act.²⁰⁷ To support this theory, plaintiffs should dispute the notion that each single unauthorized distribution results in one “lost sale.”²⁰⁸ In the case most favorable to plaintiffs, the court would, in determining an appropriate damage award, aggregate the economic harm

debate between a University of California, Berkeley, law professor and a copyright attorney employed by NBC Universal).

205. This trend is largely due to Japan’s adoption of a U.S.-style legal education system in 2004. Because the Ministry of Justice previously kept the number of licensed lawyers in Japan artificially low, legal talent commanded a premium. For the sake of illustration, 23,119 Japanese lawyers were registered with the Japanese Federation of Bar Associations in March 2007. Setsuko Kamiya, *Scales of Justice: Legal System Looks for Right Balance of Lawyers*, JAPAN TIMES (Mar. 18, 2008), <http://search.japantimes.co.jp/cgi-bin/nn20080318i1.html>. Therefore, at the time, Japan maintained 5518 people per lawyer. *Id.* In contrast, there are 285 people per lawyer in the United States. *Id.*

206. What is meant by a “swarm” is a group of users involved in the distribution of a particular file.

207. “Where . . . it is extremely difficult to prove the facts necessary to establish the amount of damages due to the nature of such facts, the court may determine an appropriate amount of damages on the basis of the entire import of oral proceedings and the results of the court's examination of the evidence.” Japanese Copyright Act, *supra* note 15, art. 114-5.

208. Locklear, *supra* note 168.

caused by each individual's actions in the file-sharing swarm. This aggregate amount may be large (proportional to the number of defendants), and defendants would be jointly and severally liable for the total amount. Were this strategy to fail (for example, where even the aggregate amount is insufficient to make civil actions viable), the entertainment industry would have occasion to exercise its political muscle before the Japanese Parliament and lobby for copyright damages reform. In such a scenario, the proof is in the pudding: Even where multiple defendants are sued, low damage awards are preventing plaintiffs from being made whole.

D. The Battle May Not Be as One-Sided as it Once Was

Aside from the method of enforcement, the dynamic between copyright holders and consumers of copyrighted works seems to be changing. This is especially true with respect to copyrighted digital content available online and the associated Internet freedoms. In recent times, the public has more actively voiced its concerns and resisted policies that would encroach on its unhindered Internet access.

Historically, “Big Content” — the major record labels, movie producers, and other prominent members of the entertainment industry — was extremely influential over copyright issues.²⁰⁹ Big Content proved to be politically powerful by exercising its human capital and financial muscle. The Copyright Term Extension Act of 1998 (CTEA)²¹⁰ is an infamous example. The CTEA, which tacked on an additional twenty years to the copyright term, effectively “froze” the advancement date of the public domain in the United States for works covered by the older fixed-term copyright rules. The Walt Disney Company was among the supporters of the CTEA and lobbied heavily for the Act's passage.²¹¹

Big Content remains influential today, despite the consistent negative press generated by the RIAA and MPAA. Nonetheless, times appear to be changing. More and more, people are beginning to see the Internet as an essential liberty. For example, according to a BBC News article, a global survey conducted in 2010 showed that “[a]lmost four in five people around the world believe that access to the [I]nternet is a fundamental right.”²¹² Indeed, people have not remained idle as Big Content continues its reckless crackdown on piracy. Those filing lawsuits against file-sharers find themselves challenged by public interest groups such as the EFF and

209. *See, e.g.*, Samuelson & Sheffner, *supra* note 173, at 53.

210. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

211. Chris Sprigman, *The Mouse that Ate the Public Domain: Disney, the Copyright Term Extension Act, and Eldred v. Ashcroft*, FINDLAW (Mar. 5, 2002), <http://tinyurl.com/rpk4k>.

212. *Internet Access is 'A Fundamental Right'*, BBC NEWS (Mar. 8, 2010), <http://tinyurl.com/ygdz6jq>.

ACLU, who are actively coming to the aid of defendants.²¹³ Where the RIAA and MPAA have pushed for the adoption of strict “three-strikes” policies to be enforced by ISPs, governments and ISPs have refused to yield.²¹⁴ The MPAA’s calling for censorship of alleged file-sharing websites has been met with public outrage and disbelief.²¹⁵ Interestingly, the MPAA and RIAA recently admitted in a document filed with U.S. Department of Commerce that filing lawsuits against infringers “is not by itself a solution in the long run [because they are an enormous resource drain].”²¹⁶

Resistance against Big Content has existed in the past. The difference in the current environment is that the public is as expressive as ever about its views concerning the Internet and any attempts to limit individuals’ online freedom. This dynamic implies a shift in the political landscape. Bureaucrats may be faced with increasing pressure to answer not only to Big Content, but also to the public and its more or less united views on Internet freedoms and unacceptable policies.

CONCLUSION

In any event, the crackdown on piracy — both in the United States and in Japan — will continue for the foreseeable future. In the United States, despite the legal challenges against the law firms behind the mass lawsuits, the majority of the Doe suits remain pending as the firms focus on obtaining the Does’ identities and mailing out settlement letters. Whether this “business model” continues to be viable remains to be seen.

Similarly, Japanese law enforcement has been gaining momentum in recent years, resulting in arrests nationwide. Police have strategically broadened their targets, pursuing file-sharers from various demographics

213. See, e.g., Sandoval, *supra* note 86.

214. See, e.g., John W. Daly, *Germany Says No to Three Strikes*, TECHEYE.NET (Mar. 3, 2010, 9:21 AM), <http://www.techeye.net/internet/germany-says-no-to-three-strikes> (quoting German Justice Minister Sabine Leutheusser-Schnarrenberger as stating, “Cutting citizens off from the internet [is] not the right way to counter online [sic] piracy”). Significantly, a three-strikes provision that appeared in an early draft for the Anti-Counterfeiting Trade Agreement (ACTA) has since been removed. Nate Anderson, *ACTA Arrives (Still Bad, But a Tiny Bit Better)*, ARS TECHNICA, <http://tinyurl.com/y5xoxfz> (last visited Dec. 14, 2010). The removal suggests that government negotiators from the countries involved were opposed to such a measure. Currently, only a few jurisdictions, such as France, the United Kingdom, and the Republic of Korea (South Korea), have some form of a three-strikes policy in place. See Digital Economy Act, 2010, c. 24, §§ 9–10 (Eng.), available at http://www.legislation.gov.uk/ukpga/2010/24/pdfs/ukpga_20100024_en.pdf; Eric Pfanner, *France’s Three-Strikes Law for Internet Piracy Hasn’t Brought Any Penalties*, N.Y. TIMES, July 18, 2010, <http://www.nytimes.com/2010/07/19/technology/internet/19iht-CACHE.html>; *Facts and Figures on Copyright Three-Strike Rule in Korea*, HEESOB’S IP BLOG (Oct. 24, 2010), <http://tinyurl.com/2flchqg>.

215. Steven J. Vaughan-Nichols, *The Rise of Web Censorship*, ZDNET.COM (Nov. 28, 2010, 1:33 PM), <http://tinyurl.com/2bfk5xe>.

216. Greg Sandoval, *MPAA, RIAA: Lawsuits Won’t Protect Content*, CNET NEWS (Dec. 10, 2010, 1:24 PM), http://news.cnet.com/8301-31001_3-20025357-261.html.

and sharing a variety of files. Although Japan recently amended its Copyright Act to make downloading for private use illegal, it seems unlikely that this will change anything in the immediate future.

As predicted in Part III, *supra*, current enforcement efforts in both countries are unlikely to produce the desired net decrease in file-sharing. The RIAA's failed campaign illustrates this proposition in the case of the United States. Similarly, current Japanese enforcement efforts have thus far failed to produce a verifiable decrease in the rate of file-sharing. How changes in law enforcement methods will impact file-sharing in Japan is more difficult to answer, but the results, at least from the available data, are not encouraging.