

# THE BORDERLESS TORRENTS: INFRINGING THE COPYRIGHT LAWS AROUND THE WORLD

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## ABSTRACT

*The problem of copyright infringement has always been one of the most difficult issues to solve in our society. Recent years have seen an increase in the number of copyright infringement occurring through the medium of internet. Software, such as BitTorrent, have routed the ways for infringers to download copyrighted content through them without the fear of being caught. Courts of nations, such as the United States and the European Union, have no unified laws for determining whether providers of such software are liable for secondary copyright infringement. While the providers of the BitTorrent software claim it is a simple file sharing medium, authors around the world have criticized it as “a technology responsible for doing more harm than good.” Lawmakers, therefore, have started considering the legitimacy of the BitTorrent software and the continuing role of its providers in contributing to the mass copyright anarchy.*

*This article intends to propose a theory that clarifies the liability of the providers of the BitTorrent software for copyright infringement. This article argues that the providers of BitTorrent software should be made liable for infringing copyrights of people under certain specific*

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*conditions. This article proposes the insertion of a separate clause in the TRIPs Agreement defining the minimum liability standards for the BitTorrent software providers. The proposed clause in the article focuses on the element of “knowledge” and goes on to provide five conditions under which the providers of the BitTorrent software shall be held liable for copyright infringement. Because copyright infringement is not one tort, the article mutates doctrinally and theoretically to provide a unique legal test for each of the copy-torts. The insertion of a new clause in the TRIPs Agreement will not only harmonize the laws around the world but will also help authors combat the mass violations of copyright around the globe. To make the proposal more practicable, this article also discusses the potential criticisms that may arise to the proposal and the remedies to those criticisms thus clarifying the position of such providers in cases of mass copyright dilemmas.*

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## INTRODUCTION

*Why don't you just download it using the BitTorrent?*<sup>1</sup>

This question is one which every person using the Internet must have stumbled upon once in his life. So, what exactly is the topic about? A general notion of BitTorrent could be the purple colored software icon one sees on his desktop screen. With owners of entities such as the Kickass Torrents<sup>2</sup> charged with copyright infringement and money laundering, a number of organizations and lawmakers have now challenged the BitTorrent software provider's role in cases of online copyright infringements for its free file sharing nature. But, how can somebody hold the providers of a software liable for any kind of infringement?

To answer this question, it is important to understand how the BitTorrent technology works and why the creators of the BitTorrent software should become liable for infringing copyrights of people around the world. The BitTorrent technology was developed to allow users across the world to share any type of file, irrespective of its size or type and without incurring any costs. The BitTorrent protocol dictates the technology and the BitTorrent software implements that protocol. The protocol allows users to download content using different torrent sites which transmit files to different torrent software such as the BitTorrent, Vuze,<sup>3</sup> qtorrent, etc. through which the downloading happens. The issue, therefore, is: *Can providers of such software who allow the downloading to happen through*

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<sup>1</sup> Here BitTorrent refers to the BitTorrent software.

<sup>2</sup> Todd Haselton, *Ironic: KickassTorrents owner arrested after using iTunes*, TECHNOBUFFALO (July 21, 2016), <http://www.technobuffalo.com/2016/07/21/kickasstorrents-owner-arrested/> [<http://perma.cc/QL3K-T6AS>].

<sup>3</sup> All these are freeware, ad-supported, and proprietary BitTorrent clients owned and developed by BitTorrent, Inc.

them, be made liable for copyright infringement, apart from the users and the sites that share such content? Since the BitTorrent software is the most used, this paper only talks about the liability of its providers. Finding them would make providers of similar software<sup>4</sup> liable too. The primary complication relates to the technology itself and the fact that “Law has often lagged behind the technology.”<sup>5</sup> The initial years after launching the BitTorrent software have been smooth enough to go unnoticed in the eyes of the Law. But recently, the legitimacy of the content transmitted through them has come into dispute as copyright holders complain that providers of BitTorrent possess actual knowledge of the fact that the specific infringing material is available on its system and that they fail to take necessary measures to prevent it.<sup>6</sup> Over the past two-hundred years, countries have evolved their copyright regimes passing a number of bills and legislation in an attempt to modernize the copyright law. However, these modern statutes lack specific provisions which can make the providers of the BitTorrent software accountable for their role in infringing the copyrights of others.

“Staggering statistics show that the BitTorrent traffic volume increased from 26% to 52% in the first half of 2004.”<sup>7</sup> As of 2012, the BitTorrent software is utilized by

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<sup>4</sup> Software’s such as qtorrent, Vuze use the same BitTorrent protocol to transmit files. The takedown of BitTorrent shall lead to similar software’s being found guilty of secondary copyright infringement.

<sup>5</sup> Lyria Bennett Mosses, *Recurring Dilemmas: The Law’s Race To Keep Up With Technological Change*, J. L. TECH. & POL’Y, 239 (2007).

<sup>6</sup> Rebecca Giblin, *A Bit Liable? A Guide To Navigating The U.S. Secondary Liability Patchwork*, 25 SANTA CLARA COMP. & HIGH TECH. L. J. 7, 28 (2012).

<sup>7</sup> David Erman, Dragos Ilie & Adrian Popescu, *BitTorrent Traffic Characteristics*, DEPT. TELECOMM. SYS., BLEKINGE INSTITUTE OF TECHNOLOGY, (2006), <https://pdfs.semanticscholar.org/e48a/a628f0f4021e991b5ccc848e7fba429ad20f.pdf> [<https://perma.cc/SL2U-JKJX>].

more than 150,000,000 active users (according to BitTorrent, Inc.).<sup>8</sup> Based on this figure, the total number of monthly BitTorrent users can be estimated at more than a quarter of a billion.<sup>9</sup> An example of extreme downloading that happened through BitTorrent was the pirated version of the show, *Game of Thrones*, in 2013.<sup>10</sup> It is also reported that the advent of peer-to-peer (P2P) networks, the global music sales have limped from \$40,000,000,000 annually to \$15,000,000,000 causing significant losses.<sup>11</sup>

The present article briefly discusses the problems faced by countries in holding providers of BitTorrent liable and further explains how the ongoing issue may be resolved with the inscription of a new provision into the TRIPs Agreement. Part I of the paper begins with an introduction to the file sharing concept. It displays the working of the protocol and the reason it has achieved superiority over other P2P networks. Part I also explains the problems that arise in holding the providers of BitTorrent software liable and further shows how the existing laws of various countries have proved insufficient to address this issue. Part II proposes a separate provision (Article 9bis) in the TRIPs

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<sup>8</sup> Michael T. Heaton, *BitTorrent*, BITTORRENT (June 6, 2013, 10:51 AM) <http://bittorrenttx.blogspot.com/> [<https://perma.cc/9R72-URQC>].

<sup>9</sup> *BitTorrent*, WIKIPEDIA, <https://en.wikipedia.org/wiki/BitTorrent> [<https://perma.cc/Q9PZ-8EZX>] (last visited Nov. 25, 2016); Ernesto, *uTorrent & BitTorrent Surge to 150 Million Monthly Users*, TORRENTFREAK, (Jan. 9, 2012) <https://torrentfreak.com/bittorrent-surges-to-150-million-monthly-users-120109/> [<https://perma.cc/U2UY-UTGV>].

<sup>10</sup> *Game of Thrones* was the most downloaded pirated TV show with 5.9 million downloads via BitTorrent. Ernesto, *'Game of Thrones' Most Pirated TV-Show of 2013*, TORRENTFREAK (Dec. 25, 2013) <https://torrentfreak.com/game-of-thrones-most-pirated-tv-show-of-2013-131225/> [<https://perma.cc/4M9J-PLQJ>].

<sup>11</sup> Stephen Carlisle, *Copyright Piracy and the Entertainment Industries: Is The Effect Massive or Negligible*, NOVA SOUTHEASTERN UNIVERSITY (Aug. 13, 2014), <http://copyright.nova.edu/copyright-piracy-entertainment-industries/> [<https://perma.cc/ECA6-SS3M>].

Agreement that discusses the specific liabilities for the providers of the BitTorrent software along with an explanation of the different elements of the draft proposal. Part III discusses the potential criticisms of the proposed remedies and gives a response to the possible criticisms that may arise for the proposal.

I. THE ADVENT OF BITTORRENT AND THE BOTCHED  
LEGAL STRUCTURE

Online transmission of copyrighted content has become a serious issue since the past decade and a number of national and international courts have tried to address them in their own ways. Speculations have developed regarding the extent of liability the providers of the BitTorrent software share. Part I analyzes how the BitTorrent Software providers escape copyright liability, even though the software facilitates massive infringement.

A. *The BitTorrent Chronicles (Nature and Process)*

Starting with a brief introduction and overview of the evolution of the BitTorrent technology, this part explains why BitTorrent gained superiority over other P2P networks.

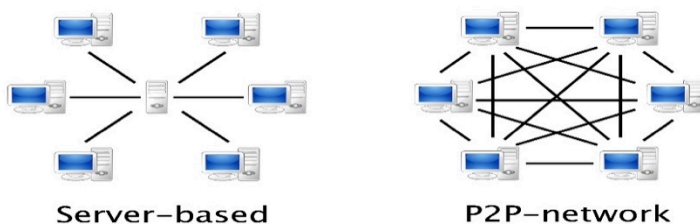
**1. Introduction and Evolution of the File Sharing Concept**

In order to understand the concept of BitTorrent and the liability of its providers, it is necessary for one to understand what the basics of file sharing are. “File sharing means sharing of files through computers forming networks to allow the transfer of data.<sup>12</sup> When a user wants to download a file, each computer (or node) agrees to share some files, and the software allows users to find and

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<sup>12</sup> Felix Oberholzer-Gee & Koleman Strumpf, *File Sharing and Copyright*, 10 INNOV. POL’Y & THE ECON., 19, 24 (2010).

download files from other computers in the network.<sup>13</sup> Individual nodes are called ‘clients’ if they request information, ‘servers’ if they fulfill requests, and ‘peers’ if they do both.’<sup>14</sup> The present day scenario consists of the client–server model versus the P2P model. In the former type, a person sends a request to a bigger computer that holds a selection of files which in return, sends the files to the person, the client; whereas in the latter P2P model, there is no such centralized server.<sup>15</sup> The following diagram<sup>16</sup> illustrates the difference:



In the case of a client-server model, all the computers are connected to one central server, whereas in P2P model, all computers are inter-related and therefore if one wants to stop the flow of information, one has to shut down all the computers, which is virtually impossible.<sup>17</sup>

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Allen Mendelsohn, *A Torrent of Copyright Infringement? Liability for BitTorrent File-Sharers And File-Sharing Facilitators Under Current and Proposed Canadian Copyright Law*, FACULTY OF LAW MCGILL UNIV. MONTREAL, (Aug. 15, 2010), <https://www.scribd.com/document/54602923/Allen-Mendelsohn-LLM-Thesis-A-Torrent-of-Copyright-Infringement-Liability-for-BitTorrent-File-Sharers-and-File-Sharing-Facilitators-Under-Current> [https://perma.cc/25U5-NZN2].

<sup>16</sup> *Building a P2P Peer-Client with Node.js-Part I: Introduction*, TERNDRUP.NET, (Oct. 27, 2015) <http://www.terndrup.net/2015/10/27/Building-a-P2P-Peer-Client-with-Node-js/> [https://perma.cc/PLS4-WXSC].

<sup>17</sup> The impossibility of shutting down arises because in the case of a P2P model, more than a million computers might be connected all over the world at one time making it impossible to shut them.



A number of other softwares such as Napster arose using the P2P network system for file sharing, and “[i]t quickly amassed over eighty million registered users in just eighteen months of launch.”<sup>18</sup> But similar to the previous client–server model, Napster too, was eventually shut down under the various counts of copyright infringement.<sup>19</sup> The only file sharing network to remain untouched by any legal claws was BitTorrent making its manifestation responsible for taking the file sharing concept to its new levels.

## **2. Superiority over other P2P Technologies**

As seen above, where major of the network operators could not continue on the internet because of their contribution to copyright infringement, BitTorrent alone has been able to escape major jurisdictions in the world, making it the sole contender using the P2P protocol. BitTorrent thus is superior to other P2P technologies for the following reasons: “First, the improved technology has significantly reduces download times . . . . Second, the technology forces users to share the parts of files that they already own while they download the remaining bits . . . . [M]ore efficient file distribution systems such as BitTorrent have now also succeeded in reducing the negative externalities that users impose on one another when they transfer files.”<sup>20</sup> The inventor of BitTorrent, Bram Cohen also wrote a paper about how BitTorrent uses the tit-for-tat algorithm as a method for

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<sup>18</sup> Navalgund, *BitTorrent*, NALSAR UNIVERSITY OF LAW, INTERNET CRIMES - LAW, POLICY AND REGULATION, 6 (2014), <http://thegiga.in/LinkClick.aspx?fileticket=sWu4-DXL-4E%3D&tabid> [<https://perma.cc/4JSY-PSUJ>].

<sup>19</sup> *A & M Records, Inc. v. Napster, Inc.*, 239 F. 3d 1004, 1014 (9th Cir. 2001) (holding Napster liable for contributory copyright infringement).

<sup>20</sup> See Oberholzer-Gee & Strumpf, *supra* note 12, at 27–28.

achieving pareto efficiency.<sup>21</sup> The feature has greatly helped the providers of the BitTorrent software to monopolize the file sharing system and thereby outcast the other competitors.

### 3. Modus Operandi of the BitTorrent Protocol and the Software

“The BitTorrent’s network has the concept of a jigsaw puzzle.”<sup>22</sup> BitTorrent is designed in such a way that to encourage users to share files with others simultaneously as they download the file. “The idea was to ‘break’ the file being transferred containing in to smaller segments called pieces,” (A piece is a part of file being shared. The file is logically split in to pieces that are of the same length)<sup>23</sup> A torrent client<sup>24</sup> usually allows users to retrieve the contents found in torrents and <sup>25</sup> once the torrent file has been downloaded from the web server, a user can open it in the BitTorrent software and selects the location where he'd like the torrent contents to be saved.<sup>26</sup> “The [software] connects to the tracker by the announce[d] URL, contained in the

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<sup>21</sup> Bram Cohen, *Incentives Build Robustness in BitTorrent*, 1(MAY 22, 2003), <http://www.bittorrent.org/bittorrentecon.pdf> [<https://perma.cc/XGF3-JFCZ>].

<sup>22</sup> Rebecca Giblin, *Physical World Assumptions And Software World Realities (And Why There Are More P2P Software Providers Than Ever Before)*, 35 COLUM. J.L. & ARTS 57, 105 (2011).

<sup>23</sup> *The Basics of BitTorrent*, BITTORRENT, <http://help.bittorrent.com/customer/en/portal/articles/178790-the-basics-of-bittorrent> [<https://perma.cc/JD4D-WTLV>].

<sup>24</sup> Here clients refer to different BitTorrent software (e.g., µtorrent).

<sup>25</sup> *How to Download Torrent Files*, TECH-FAQ, (Mar. 11, 2016), <http://www.tech-faq.com/how-to-download-torrent-files.html> [<https://perma.cc/7BJU-UAXY>].

<sup>26</sup> *How do I migrate torrents from another client to this one?*, BITTORRENT <http://help.bittorrent.com/customer/en/portal/articles/1826055-how-do-i-migrate-torrents-from-another-client-to-this-one> [<https://perma.cc/2SBK-399K>].

torrent file,<sup>27</sup> and receives a list of peers,<sup>28</sup> who share the pieces of this file.”<sup>29</sup> On receiving a list of peers<sup>30</sup> and seeds<sup>31</sup> the software establishes connections to them and starts downloading the pieces.<sup>32</sup> “Users transferring content via BitTorrent are categorized as either ‘seeds’ or ‘leechers.’”<sup>33</sup> “Collectively a group of seeds and leechers is known as a ‘swarm.’”<sup>34</sup> Finishing the download, one can view or store the files downloaded or remove them if one so wishes.

Therefore, the term, BitTorrent, can be referred to three entities: a company, a protocol, and a software. In this paper, we particularly discuss the BitTorrent software and the liability of its providers. The BitTorrent software is notably the one through which the downloading happens. When a user wants to download any particular torrent file, the user uses the BitTorrent software for the downloading to happen.

Hence, the main argument of this paper is: *Can the providers of the BitTorrent software who help to download a torrent file be made liable for secondary copyright infringement?* The discussion below discusses this issue with respect to different laws and approaches.

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<sup>27</sup> *Id.*

<sup>28</sup> A peer is an entity that uploads and downloads files using BitTorrent protocol.

<sup>29</sup> Aigul Khabdulina, *Deterring Free Ride Behavior In BitTorrent Peer-To-Peer Networks* 6 (Dec. 2010) (unpublished M.S. thesis, University of Arkansas) (on file with the University of Arkansas Library).

<sup>30</sup> *BitTorrent*, *supra* note 9.

<sup>31</sup> Seeds are peers that have a complete copy of a file and upload it to the swarm.

<sup>32</sup> Khabdulina, *supra* note 29, at 8.

<sup>33</sup> Giblin, *supra* note 22, at 106.

<sup>34</sup> *Id.*

## **B. *BitTorrent and Warding off the Liability Regime***

This part discusses the concept of secondary liability and further presents the incompetency of laws in the United States, the European Union, and India to hold providers of the BitTorrent software secondarily liable for any copyright infringement.

### **I. American Jurisprudence Fails to Prove Liability**

While American copyright law tries to define all possible acts of infringement, the advent of digital technology has clearly threatened the copyright of authors as it prevents the copyright laws from accomplishing its purpose.<sup>35</sup> The concept of secondary liability has been well established in the US copyright law.<sup>36</sup> Under the American Jurisprudence, a copyright infringer is “anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 121.”<sup>37</sup> Since, the makers of BitTorrent software come under secondary copyright infringement, they can be subject to the following theories of liability.

#### *a. Software Providers Often Do Not Have a Financial Interest for Vicarious liability*

While a sizeable number of people have assumed that the BitTorrent software like other intermediaries may be subjected to vicarious liability, it would be worth noting that

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<sup>35</sup> Raymond Shih Ray Ku, *The Creative Design Of Copyright: Napster And The New Economics Of Digital Technology*, 69 U. CHI. L. REV. 263, 300 (2002).

<sup>36</sup> See Robert A. Gilmore, *Peer-To-Peer: Copyright Jurisprudence In The New-File Sharing World, The Post Grokster Landscape Of Indirect Copyright Infringement And The Digital Millennium Copyright Act*, 5 FLA. L. REV. 85, 88–90 (2004).

<sup>37</sup> 17 U.S.C §501(a) (2012).

the BitTorrent software easily defeats the count of vicarious liability. Vicarious liability in the copyright context can be related to the common law doctrine of respondeat superior under tort laws<sup>38</sup> The Second Circuit, in the case of *Shapiro v. H. L. Green Co.*, held that vicarious liability in copyright law requires that an alleged infringer have, (1) “an obvious and direct financial interest in the exploitation of copyrighted materials” and (2) ‘the right and ability to supervise’ the conduct of the direct infringer.<sup>39</sup> Applying the above, two principles to BitTorrent software, it can be seen that the BitTorrent client software is a mere tool that facilitates the distribution of files and has no internal search functionality which shows that it has no ability to control the choice of file by the infringer.<sup>40</sup> The element of direct financial interest is coherent to the knowledge of the providers of the BitTorrent software. “In case of a P2P file-sharing system, the vendor of the file-sharing tool has no direct involvement in the copying or transmission of the files being shared. These activities are handled directly between end-users.”<sup>41</sup> It can thus be safely concluded that the providers of BitTorrent software have no direct financial interest in the copyrighted material. Also, the providers of BitTorrent software have released it for free unlike its other P2P predecessors. Since both the elements are missing, the providers of the BitTorrent Software cannot be held vicariously liable for a copyright infringement.

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<sup>38</sup> Bartholomew & Tehranian, *The Secret Life of Legal Doctrine: The Divergent Evolution of Secondary Liability in Trademark and Copyright Law*, 21 BERKELEY TECHNOLOGY LAW JOURNAL, at 48 (2006)

<sup>39</sup> *Shapiro v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963).

<sup>40</sup> Giblin, *supra* note 22, at 105.

<sup>41</sup> Fred von Lohmann, *IAAL: What Peer-to-Peer Developers Need to Know about Copyright Law*, 3, ELECTRONIC FRONTIER FOUNDATION (2006), [https://www.eff.org/files/p2p\\_copyright\\_wp\\_v5\\_0.pdf](https://www.eff.org/files/p2p_copyright_wp_v5_0.pdf) [<https://perma.cc/E3NW-NDX3>].

*b. Software Providers Often Do Not Have Knowledge of Infringement for Contributory Infringement*

In a similar relation to the count of vicarious liability, American legislators that attempted to hold the providers of BitTorrent liable for contributory infringement failed largely in subjecting them to the law. The concept of contributory infringement originated in the tort law on the notion that, “one who directly contributes to another’s infringing conduct should be held accountable.”<sup>42</sup> In 2004, Marybeth Peters, The Register of Copyrights distilled guidance from the Second Circuit Court of Appeals to explain that contributory infringement generally requires “(1) knowledge of the infringing activity, and (2) material contribution to the activity”.<sup>43</sup> The makers of the BitTorrent software have designed the software in such way that, it neither has knowledge of direct infringement nor does it materially contribute to infringement. The BitTorrent Software merely acts as a platform to upload and download the files without the knowledge of what is contained in the file. In the case of *Sony Corp. of America v. Universal City Studios*, the Supreme Court added a gloss to the prior standard: one who distributes an infringement-enabling device will not be liable for the ensuing infringements if the device is widely used for non-infringing purposes.<sup>44</sup> Indeed, it need merely be capable of substantial non-infringing use.<sup>45</sup> This is so even though the distributor was aware that at least some of the use to

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<sup>42</sup> *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996).

<sup>43</sup> See Statement Of Marybeth Peters, The Register of Copyrights before the Committee on Judiciary: U.S. Senate 108<sup>th</sup> Congress 2d Session, (July 22, 2004), <https://copyright.gov/docs/regstat072204.html> [<https://perma.cc/A9LL-27JA>].

<sup>44</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S 417, 442 (1984).

<sup>45</sup> *Id.*

which the device would be put would be infringing. The Supreme Court, through its decisions in *Sony Corp of America v. Universal City Studios*<sup>46</sup> and *Metro-Goldwyn-Mayer Studios v. Grokster*,<sup>47</sup> maintained what is really a common sense distinction between technology and uses of that technology. Simply put, you can't be liable simply for making something that *can* be used for copyright infringement. But, you can be liable if you intend or encourage infringing uses.<sup>48</sup> Ambiguously, when BitTorrent software is downloaded, it can be used to create a potentially limitless number of peer networks without any further interference from its original provider.<sup>49</sup> BitTorrent, the company, like the Grokster defendants, does not provide access nor does it have its own search functionality making the BitTorrent company. further removed from its predecessors.<sup>50</sup> Therefore, the BitTorrent software cannot be charged with the doctrine of contributory liability under the U.S. copyright law.

*c. Active Inducement Is Difficult to Prove*

Where it has been difficult for the jurists to prove vicarious or contributory liability for BitTorrent, the charge of inducement would be well beyond the scope. Merriam–Webster defines inducement as “a motive or consideration that leads one to action or to additional or more

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<sup>46</sup> *Id.* at 456.

<sup>47</sup> *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 941 (2005).

<sup>48</sup> See Center for Democracy & Technology, *Interpreting Grokster: Limits on the Scope of Secondary Liability for Copyright Infringement*, 2006 STAN. TECH. L. REV. 3, (2006).

<sup>49</sup> John Borland, *BitTorrent File-Swapping Networks Face Crisis*, ZDNET NEWS, Dec. 20, 2004, [www.zdnet.com/article/bittorrent-file-swapping-networks-face-crisis/](http://www.zdnet.com/article/bittorrent-file-swapping-networks-face-crisis/) [<https://perma.cc/HR86-FRV7>].

<sup>50</sup> Rebecca Giblin, *supra* note 6, at 31.

effective actions.”<sup>51</sup> The U.S. Supreme Court in the *MGM* case, held that in order to be held liable for inducing copyright infringement, a defendant must have taken “affirmative steps to foster infringement . . . by third parties.”<sup>52</sup> Applying the above, stated principle, the BitTorrent software simply allows the users to download and upload a file through their software without having the power to control the transmission. Hence, there is no way BitTorrent encourages the users to infringe the copyrights of others making it free from the liability of inducement.

In the United States, the RIAA,<sup>53</sup> failed miserably to bring the makers of BitTorrent to the courts of the United States. The RIAA used the DMCA<sup>54</sup> as a tool to require internet service providers (ISPs) to provide it with the identities of illegal file sharers.<sup>55</sup> In 2008, the RIAA announced its new approach called the “three strikes” agreement or the graduated response plan<sup>56</sup> with the ISPs<sup>57</sup> requiring ISPs to give three chances to the infringers to stop their infringing activity after giving notice of infringement, which would result in the loss of the internet service to the infringer.<sup>58</sup> In July 2011, it was announced that the RIAA had reached an agreement with major ISPs to implement a graduated response regime in six steps also known as the

<sup>51</sup> *Inducement*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/inducement> [<https://perma.cc/5DSV-NNU7>].

<sup>52</sup> 545 U.S. 913, 936–37(2005).

<sup>53</sup> Recording Industry Association of America.

<sup>54</sup> Digital Millennium Copyright Act.

<sup>55</sup> 17 U.S.C § 512(a)–(c) (2012).

<sup>56</sup> Nate Anderson, *RIAA Graduated Response Plan: Q&A with Cary Sherman*, ARS

TECHNICA (2008), <https://arstechnica.com/uncategorized/2008/12/riaa-graduated-response-plan-qa-with-cary-sherman/> [<https://perma.cc/VB2J-AX6K>].

<sup>57</sup> Internet Service providers are companys, organizations or groups that provide an online service.

<sup>58</sup> Genan Zilkha, *The RIAA’s Troubling Solution to File-Sharing*, 20 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 688 (2009).



“six-strikes policy.”<sup>59</sup> Under this policy, the first two stages included notifying ISP users that their account was used for infringing purposes with the next two stages requiring subscriber acknowledgment of receipt. The final stage involving sanctions such as referral to copyright education program, reductions in transmission speed, etc.<sup>60</sup> In addition to these, the DMCA also enacted four “safe harbors,”<sup>61</sup> which provided immunity from infringement liability to online service providers.<sup>62</sup> However, “[a] few scholars have argued for liability for Internet intermediaries, contending that imposing liability on those intermediaries will give them efficient incentives to identify and block infringing or other offensive material.”<sup>63</sup>

Thus, even though the United States has implemented laws to deal with the rising copyright infringement issues by BitTorrent, it lacks explicit provisions in making them completely liable for the infringement.

## **2. The EU Jurisprudence – The Three Strikes System**

Directives 2000/31/EC (E-Commerce Directive) and 2001/29/EC (Copyright Harmonization Directive) passed by the European Parliament prescribes provisions relating to

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<sup>59</sup> Rebecca Giblin, *Evaluating Graduated Response*, 37 COLUM. J.L. & ARTS 147, 176 (2014).

<sup>60</sup> Salil K. Mehra & Marketa Trimble, *Secondary Liability, ISP Immunity, and Incumbent Entrenchment*, 62 AM. J. COMP. L. 685, 703–04 (2014).

<sup>61</sup> The DMCA enacted the following four safe harbors for online service providers:

1. Transitory digital network communications, 2. System caching, 3. Storing information on its system at the direction of users, and 4. Providing information location tools like text hyperlinks.

<sup>62</sup> 17 U.S.C. § 512 (2012).

<sup>63</sup> Mark Lemley, *Rationalizing Internet Safe Harbors*, 6 J. OF TELECOMM. & HIGH TECH. L. REV. 101, 110 & n.43 (2007).

copyrights and related rights in the information society.<sup>64</sup> Liability of the makers of the BitTorrent under the EU law can be studied under two headings.

a. *Direct Liability: No Explicit Provision of Liability for P2P Software*

Where the EU law has been acclaimed to be one of the strictest laws in terms of copyright infringement, it has astonishingly failed to make providers of software such as BitTorrent liable for secondary infringement. Article 13 and 14 of the E-Commerce Directive provide that any online service provider engaging in caching and hosting activities are liable if they have actual knowledge of transmission of unlawful information over their networks and they fail to remove expeditiously or disable access to unlawful information.<sup>65</sup> Article 5(1) of the Copyright Harmonisation Directive further exempts temporary acts of reproduction by an intermediary whose sole purpose is to enable mere transmission of copyrighted materials between third parties from copyright liability.<sup>66</sup> Therefore, since BitTorrent software merely provides transmission of materials without the knowledge of copyrightability, its providers cannot be held directly liable under the European Directives.

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<sup>64</sup> Council Directive 2001/29, 2001 O.J. (L 167) 1 (EC) [hereinafter Copyright Harmonisation Directive]; Council Directive 2000/31, 2000 O.J. (L 178) 1 [hereinafter E-Commerce Directive].

<sup>65</sup> Kolubahzizi T. Howard, Remedies of the e-Commerce Directive (Directive 2000/31/EC), 7 (2014), [http://www.academia.edu/7440378/Remedies\\_of\\_the\\_e-Commerce\\_Directive\\_Directive\\_2000\\_31\\_EC](http://www.academia.edu/7440378/Remedies_of_the_e-Commerce_Directive_Directive_2000_31_EC) [<https://perma.cc/XL2X-WE8L>].

<sup>66</sup> Copyright Harmonisation Directive, *supra* note 64.

b. *Indirect Liability: BitTorrent Software's Easy Escape to Indirect Infringement*

To make an entity indirectly liable for any crime, it is necessary to prove direct liability first. Where the EU laws fail to prove direct liability of BitTorrent, it automatically escapes the reign of indirect liability too. Article 8(3) of the Directive provides that all the EU member states “shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.”<sup>67</sup> This means that copyright owners have the right to obtain an injunction against a file sharing service that infringes their copyrights. However, Article 8(3) does not apply to BitTorrent software since these software simply act as middlemen and are purely unaware of the users who share such unauthorized files.<sup>68</sup>

In order to deal with copyright violations occurring through BitTorrent, the EU adopted the US format of graduated response or the three strikes system. The three strikes required the OSPs to provide subscriber information to copyright holders who engaged in copyright violations and to stop granting them access to the internet.<sup>69</sup> Unlike the U.S., the EU does not expressly set forth a notice and takedown process; instead the EU allows “agreements between all the parties concerned” and the discretion of the member states.<sup>70</sup>

However, the EU also enacted some safe harbors in its Directives which are almost similar to the U.S. safe

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<sup>67</sup> *Id.*

<sup>68</sup> GIUSEPPE MAZZIOTTI, EU DIGITAL COPYRIGHT LAW AND THE END USER 165 n.561 (2007).

<sup>69</sup> Mehra & Trimble, *supra* note 60, at 703–04.

<sup>70</sup> E-Commerce Directive, *supra* note 64.

harbors.<sup>71</sup> The E-Commerce Directive provides safe harbors to OSPs for 3 activities: (1) providing access to the internet (conduit), (2) caching, and (3) hosting of material.<sup>72</sup> In addition, some EU countries, such as France<sup>73</sup> and the UK,<sup>74</sup> have also adopted three strikes law<sup>75</sup> to prevent copyright infringement.

Accordingly, although the EU has enacted provisions against BitTorrent networks and their intermediaries, they have been impuissant in holding them liable for copyright infringement. Therefore, the issue of whether providers of the BitTorrent software can be held liable for copyright infringements remains unaddressed by the Copyright Harmonisation Directive.

### 3. The Indian Jurisprudence- Lacks Legal Provisions

With the most liberal copyright laws, entities, like BitTorrent software, could easily escape liability under the Copyright Act of India. With more than a billion internet users, India remains amongst the top countries in the utilization of the internet.<sup>76</sup> Unlike in the United States, intermediary liability has not been developed further into a doctrine of contributory infringement, leaving makers of

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<sup>71</sup> DANIEL C.K. CHOW & EDWARD LEE, *INTERNATIONAL INTELLECTUAL PROPERTY*, 243 (2nd ed. 2012).

<sup>72</sup> E-Commerce Directive, *supra* note 64.

<sup>73</sup> Arnold, Darmon, Dejean & Penard, *Graduated Response Policy and the Behavior of Digital Pirates: Evidence from the French Three-strike (Hadopi) Law*, 1 (2014)

<sup>74</sup> The Digital Economy Bill which incorporated a graduated response policy despite the alleged file sharer not convicted of copyright offences. *See also* Emma Barnet, *Digital Economy Act: What Happens Next?*, THE DAILY TELEGRAPH, (Apr. 9, 2010), <http://www.telegraph.co.uk/technology/news/7571532/Digital-Economy-Act-what-happens-next.html> [<https://perma.cc/8NXH-QCAJ>].

<sup>75</sup> Zilkha, *See supra* note 58.

<sup>76</sup> Navalgund, *supra* note 18, at 24.

BitTorrent software in the same category as other search and service providers. The Indian Copyright Act, 1957<sup>77</sup> deals with the provisions relating to copyright infringement. Section 51 of the Act deals with cases where any person does practices the exclusive rights, which are reserved for the owner of the copyright.<sup>78</sup> Section 14 of the Act states that making copies of any work by any medium, communicating the work to the public or issue copies of the work to public fall within the domain of exclusive rights of a copyright owner.<sup>79</sup> So, if a network like Napster was running in India, it would be liable for encroaching upon the exclusive rights of the copyright owner for facilitating the communication of the work to the public.<sup>80</sup> On the other hand, networks such as BitTorrent consist no central server for storing the information of the people making it difficult to stop the system in one go.<sup>81</sup> There is no single entity that is managing the infringing activity: The entire process is managed by software, which is being used by hundreds of thousands of people to make copies of a work. However, anybody who has used such software for downloading and sharing copyrighted work would be held guilty under the Copyright Act.<sup>82</sup> It is important to note that the Indian Act is far behind the BitTorrent technology and lacks the resources to accommodate claims of third generation networks like BitTorrent.

Nonetheless, even though India has begun to develop legal and enforcement infrastructure, there are complications that might not be effective and expeditious. In 2011, several

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<sup>77</sup> The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India) [hereinafter The Act].

<sup>78</sup> *Id.* at § 51.

<sup>79</sup> *Id.* at § 14.

<sup>80</sup> Raman Mittal, *P2P Networks: Online Music Piracy of Music, Films and Computer Software*, 9 J INTELL. PROP. RTS. 440, 457 (2004).

<sup>81</sup> *Id.*, at 445.

<sup>82</sup> Navalgund, *supra* note 18, at 22.

John Doe orders were issued against individual sellers and cable TV operators to have ISPs disable access to infringing materials.<sup>83</sup> In *Super Cassettes, Indus. v. Myspace, Inc.*,<sup>84</sup> decided in July 2011, the plaintiff was granted an interim injunction against the defendant whose social network was found to be secondarily infringing through allowing its “webpace” or “place” to be used for sharing infringing materials. However, no suit against an Indian P2P site has ever been filed. Sites such as DesiTorrent, DCTorrent and other sites serving primarily Indian content are hosted outside India, conferring some protection from the relatively disorganized international enforcement efforts of Indian rightsholders.<sup>85</sup> The failure to take action relates to uncertainty regarding the liability of intermediaries for copyright infringement.<sup>86</sup> Domestically, the Indian Information Technology Act of 2000, confers immunity on ISPs if they prove that they followed standards of due diligence to prevent infringement,<sup>87</sup> thereby providing a safe harbor for intermediary liability.

Unlike, U.S., EU and international Law, “Indian Law does not provide for ‘counter-notification’ in the event of a takedown, leaving no remedy if the request is unwarranted or frivolous.”<sup>88</sup> However, the present day has witnessed an increase in cases against P2P networks. The adjudication of these cases is likely to determine the scope of immunity of

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<sup>83</sup> INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, INDIA 2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT 65 (2012), <http://www.iipawebsite.com/rbc/2012/2012SPEC301INDIA.PDF> [<https://perma.cc/U2X2-X8HB>].

<sup>84</sup> *Super Cassettes Indus. v. Myspace, Inc.*, 2011 (47) PTC 49 (Del.).

<sup>85</sup> Navalgund, *supra* note 18, at 25.

<sup>86</sup> Lawrence Liang & Ravi Sundaram, Chapter 8: India, *in* MEDIA PIRACY IN EMERGING ECONOMIES, 339, 360 (Joe Karaganis ed. 2011), <http://piracy.americanassembly.org/wp-content/uploads/2011/06/MPEE-PDF-1.0.4.pdf> [<https://perma.cc/YD8W-RBTV>].

<sup>87</sup> *Id.*, at 360.

<sup>88</sup> *Id.*, at 361.

the online service providers and likely open the door to additional suits against the BitTorrent and other P2P sharing software's.

### C. *Inefficiency of the International Treatises and Conventions*

As seen above, different countries tried implementing various latent solutions at different levels in an attempt to curb copyright infringement through file sharing.<sup>89</sup> The inefficiency in national legislations of different countries has necessitated the need of going beyond the codes and enacting an international solution for copyright infringements.<sup>90</sup> The international law on this topic is laid down in the following three codes:<sup>91</sup>

- The Berne Convention
- The TRIPs Agreement
- The WIPO Copyright Treaty

The Berne Convention and the TRIPs have been enacted with the aim of protecting the rights of creators and their works.<sup>92</sup> “*The substantive standards of Berne are incorporated directly into the TRIPs Agreement*”.<sup>93</sup>

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<sup>89</sup> Scott Burger, *Eradication of a Secondary Infringer's Safe Havens: The Need for a Multilateral Treaty Addressing Secondary Liability in Copyright Law*, 18 MICH. ST. J. INT'L L. 143, 147 (2009).

<sup>90</sup> *Id.* at 155.

<sup>91</sup> Sara D. Marshman, *Giving a Country of Pirates a Chance: Using the Three-Step Test to Accommodate the Shifting of National Attitudes on Copyright Protection*, 43 GEO. WASH. INT'L L. REV. 703, 740 (2011).

<sup>92</sup> Berne Convention for the Protection of Literary and Artistic Works, WORLD INTEL. PROP. ORGANIZATION, [http://www.wipo.int/treaties/en/text.jsp?file\\_id=283698](http://www.wipo.int/treaties/en/text.jsp?file_id=283698) [<https://perma.cc/Y5J3-TZVS>]; Overview: the TRIPs Agreement, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_03\\_e.htm](https://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm) [<https://perma.cc/KM49-K4XY>].

<sup>93</sup> SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND 158 (2d ed. 2006).

“[The] Berne [Convention] and TRIPs both provide a number of positive contributions to international copyright law, but are lacking provisions relating to secondary liability.”<sup>94</sup> The most recent World Intellectual Property Organization Copyright Treaty<sup>95</sup> was enacted with a view to address some of the copyright issues such as direct trafficking of copyrighted works, mass piracy, cross-border infringements, etc, which however failed to provide a specific international cause of action to infringements caused by BitTorrent clients and the sites hosting their torrent files.<sup>96</sup>

The area of secondary liability, therefore, remains unaddressed by international Law. The following proposal in part II provides how the international copyright laws can be supplemented with a separate provision relating to the liability of providers of software’s such as BitTorrent thereby taking a step to prevent the mass copyright infringement.

## II. THE PROPOSAL: AMENDING TRIPs TO RECOGNIZE A MINIMUM STANDARD OF LIABILITY

The facts mentioned in Part I show us that all the international treaties although having numerous copyright laws have been unable to stop the piracy of copyrighted works being done using technologies like BitTorrent.<sup>97</sup> The result is therefore that software’s such as BitTorrent remain untouched from the legal claws of international legislations. Part II primarily focusses on establishing a new multilateral provision in the TRIPs agreement with defining circumstances and causes under which providers of the

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<sup>94</sup> Burger, *supra* note 89, at 148.

<sup>95</sup> *World Intellectual Property Organization Copyright Treaty*, (Dec. 20 1996), 36 I.L.M. 65, (1997) [hereinafter WIPO Copyright Treaty].

<sup>96</sup> Burger, *supra* note 89, at 148–49.

<sup>97</sup> *Id.* at 148.



BitTorrent software can be made liable for secondary infringement of a copyright.<sup>98</sup>

**A. The Reason behind a New Provision in the TRIPs Agreement**

Shrishail Navalgund summarized the background as:

After realizing the legal challenges posed to different nations, the commentators categorized the different copyright issues and chalked out the possible solutions for them.<sup>99</sup> The following proposals were considered by the commentators:

1. Mass licensing,
2. Compulsory licensing,
3. Voluntary collective licensing,
4. Voluntary contribution,
5. Technological protection,
6. Copyright law revision,
7. Administrative dispute resolution proceeding, and
8. Alternative compensation.<sup>100</sup>

However, each of the above-proposed solutions could not cover the issue of unauthorized copy problem by BitTorrent and its clients. This failure necessitated the need to establish a new provision in the TRIPs agreement so as to provide a global cause of action for secondary infringements. Considering it as a threat to their own sovereignty, there have been numerous times, when different nations refused to accede to laws enacted by international treaties therefore bringing down the notion of harmonizing the copyright laws.<sup>101</sup> For this very reason, it is essential that the provision

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<sup>98</sup> *Id.* at 155.

<sup>99</sup> Navalgund, *supra* note 18, at 30.

<sup>100</sup> *Id.* at 30.

<sup>101</sup> For instance, the United States was initially unwilling to accede to Berne because of the provisions relating to Moral Rights directly

is drafted in a way that would appeal the nations in giving up their sovereignty.

The current scenario has repercussions serious apprehensions in artists around the globe to create any new work, since the methods of obtaining his copyrighted work have become incredibly cheap and effortless.<sup>102</sup> Whereas changes can directly be made to domestic legislations to deal this problem, they would still suffice the cross-territorial nature of BitTorrent. “Simply said, if the providers of the BitTorrent software faced legal threats from an artist in any one country, they could simply move to another country with more lenient laws.”<sup>103</sup> This disparity and nihilism in national laws to prosecute BitTorrent has driven the need to define the circumstance under which the providers of BitTorrent shall stand liable for infringement.

### ***B. Proposed Text of Provision and Placement in TRIPS***

The WTO in comparison to the WIPO provides a better enforcement mechanism to its subsidiary treaties including the TRIPS Agreement.<sup>104</sup> This comment proposes the adoption of an additional article under TRIPS as the potential solution. The new provision under an already enacted and enforceable international treaty would set minimum standards to deal with cases of direct and indirect infringement in the WTO signatory countries. Under this

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conflicting with the Freedom of Speech in the U.S. Constitution, differences in copyright term, and a lack of any formalities as a prerequisite to copyright protection (the United States required notice and deposit, whereas Berne did not). EDWARD SAMUELS, *THE ILLUSTRATED STORY OF COPYRIGHT*. (1st ed. 2000); *see also* Scott Burger, *supra* note 89, at 155.

<sup>102</sup> Burger, *supra* note 89, at 157.

<sup>103</sup> *Id.* at 157.

<sup>104</sup> Alain J. Lapter, *How the Other Half Lives (Revisited): Twenty Years Since Midler v. Ford A Global Perspective on the Right of Publicity*, 15 TEX. INTELL. PROP. L.J. 239, 310 (2007).

scheme, the scope of protection would extend to individuals residing in any of the nations without having the fear that their work might be infringed in some other part of the world leaving them with no remedy.

An additional provision defining infringement under TRIPs would fit under Part II, Section 1 Titled: Copyright and Related Rights, after Article 9.<sup>105</sup> TRIPs attempt to protect the rights of copyright holder by prescribing various provisions but fails to mention what acts of intermediaries such as BitTorrent would constitute infringement. In that event, the proposed provision caters what is BitTorrent software, acts of providers of the BitTorrent software that would constitute infringement and guidelines that nations must follow in case of a complaint of infringement by any copyright holder residing in one of the Member Nations.

***C. Proposed Text of the Statute***

Addressing the issue of secondary liability and copyright infringement, the following provision is tailored broadly enough to include all acts of BitTorrent software acting indirectly as a middleman to copyright infringement. TRIPs has made provisions for enforcement of intellectual property rights; however, TRIPs fails to define which acts would constitute Infringement. Therefore, Article 9bis defining what acts will constitute infringement shall be the right provision for what measures should be taken to enforce the IP rights after the infringement.

STANDARDS CONCERNING THE  
AVAILABILITY, SCOPE, AND USE OF  
INTELLECTUAL PROPERTY RIGHTS

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<sup>105</sup> The placement of proposal in the TRIPs is an original thought. After reviewing the TRIPs Agreement, I found article 9 to be the most relevant to my issue in the paper. Therefore, the said proposal placed as Article 9bis in the TRIPs Agreement.

SECTION 1: COPYRIGHT AND  
RELATED RIGHTS

**Article 9bis<sup>106</sup>**

**1. Definition:**

*For the purposes of this agreement, the “BitTorrent software provider” means:*

*A provider of any services or software (including client or server software), or enabling tools that do any one or more of the following:*

*(A) filter, screen, allow, or disallow content;*

*(B) Pick, choose, analyze, or digest content;*

*or*

*(C) Upload, download, transmit, receive, display, forward, organize, reorganize, or translate content*

**2. Liability Standards for BitTorrent Software Providers:**

*The providers of BitTorrent Software shall be liable<sup>107</sup> for monetary relief or except as provided for other specific reliefs for infringement of copyright by reason of the transmitting, downloading, uploading, routing or providing connections for, material through their system or network controlled or operated by or for service providing or by reason of the intermediate or transient storage of that material in the course of such activities if:*

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<sup>106</sup> This proposal is an original thought and has been drafted carefully after reviewing provisions from the Communications Decency Act, the Digital Millennium Copyright Act and the European Directive 2001/29/EC.

<sup>107</sup> Here liability of BitTorrent software means that the liability shall be suffered by the providers of the BitTorrent Software.

*a. the downloading, uploading or any other infringing activity has primarily happened through BitTorrent software;*<sup>108</sup>

*b. the providers of BitTorrent software had knowledge or had reasonable means of obtaining knowledge that such infringing activity has or is likely to be caused in the future through the BitTorrent software irrespective of the intent;*<sup>109</sup>

*c. the providers of BitTorrent software had knowledge or had reasonable means of obtaining knowledge to believe that the content being transmitted, uploaded, displayed, downloaded, forwarded was coming from a site or any source<sup>110</sup> from which copyright infringement was likely to occur;*

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<sup>108</sup> The provision makes the providers of BitTorrent software liable for secondary copyright infringement if any infringing activity has been done using their software.

<sup>109</sup> The provision specifically targets the element of knowledge and makes the providers of BitTorrent software liable for possessing knowledge or possessing reasonable means of obtaining knowledge about the infringing activity.

<sup>110</sup> To understand provision (c), consider the following explanation: Every BitTorrent software consists of an internal element called “tracker” through which it is possible for them to determine the location from which the file is being received. Therefore, if any particular file is coming from a site like “The Pirate Bay” considered to host illegal content on their site, there arises a possibility that the said file may contain infringing content. Providers of BitTorrent could therefore immediately pop-up a disclaimer stating that, “the said file may contain copyrighted content and therefore should not be downloaded. And further in any case the user proceeds with the downloading of the said file, the providers of BitTorrent shall not be liable for any copyright infringement.”

*d. if the providers of BitTorrent software have contributed directly or indirectly by allowing the infringing activity to be performed by the user;<sup>111</sup> and*

*e. that the providers of BitTorrent software were aware that the infringing activity was one which could be reasonably foreseen by a person of reasonable prudence<sup>112</sup>*

*shall be held liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer, by any copyright owner or copyright owner's authorized licensee, who is injured by such misrepresentation, as the result of the intermediary provider failing in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.*

#### **D. Explanation of TRIPS Provision**

To give effect to the enforcement mechanism, the above draft contains elements from various national statutes around the world. The following elements portray the benefits of adopting the above-proposed clause in the TRIPs Agreement.

##### **1. The proposal focusses on the element of “Knowledge”**

The draft clause of the proposed statute acts as a sweet spot along the spectrum of national laws so as to

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<sup>111</sup> The provision targets situations in which the providers of BitTorrent software in spite of possessing the knowledge allow a user perform the infringing activity through their software.

<sup>112</sup> The provision makes the providers of BitTorrent software liable for any infringing activity foreseeable by any ordinary person.

include the broadest definition of all kinds of BitTorrent software and the acts that might constitute copyright infringement. It is strict enough to solve the problem of mass copyright on international and national fronts. The proposal is somewhat in line with the definitions in existence in the United States, the United Kingdom, European Union, and Canada. The proposal focusses mainly on the vital element of knowledge required for contributory infringement. While proving vicarious liability is difficult in cases of BitTorrent software since they lack the required financial interest in the work they are transmitting, the proposal focusses more on the element of knowledge obtained by providers of the BitTorrent software. The crux of the proposal focusses on two parts: 1) The providers of the BitTorrent software having the knowledge of the infringing activity and 2) acts performed using the BitTorrent software that would qualify as copyright infringements. Where most of the national legislation required the element of “intent” for secondary infringement, the above proposal avoids that requirement and instead focusses on “knowledge” for proving indirect infringement. The reason being that, providers of software and applications such as Napster, and BitTorrent possess knowledge or have reasonable means of obtaining knowledge that an infringing activity has or might take place through their software. An explanation to this would be that: “Every BitTorrent software or any other client software’s which use peer to peer networks consists of a ‘BitTorrent tracker’<sup>113</sup> which provide a list of files available for transfer and allow the client to find peers who may transfer the files.<sup>114</sup> Thus, if supposedly a file is being downloaded from

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<sup>113</sup> *BitTorrent*, *supra* note 9.

<sup>114</sup> Jahn Arne Johnsen, Lars Erik Karlsen & Sebjorn Saether Birkeland, *Peer-to-peer networking with BitTorrent 7*, DEPT. OF TELEMATICS, NOR. UNIV. SCI. & TECH., (DEC. 2005), <http://web.cs.ucla.edu/classes/cs217/05BitTorrent.pdf> [<https://perma.cc/FC97-UVU5>].

a site such as “The Pirate Bay”<sup>115</sup> already red flagged for transmitting pirated material, it would be possible using the tracker to obtain knowledge of where the file was coming from,<sup>116</sup> and the providers of BitTorrent software could immediately pop-up a disclaimer stating that “the said file may contain copyrighted content and therefore should not be downloaded.” Failure to alert the user would subject them to liability as per sub clause (c),<sup>117</sup> since they had a reasonable knowledge of the source from which the file was being received. They, however, simply contend that they do not have the sufficient control over the file. The lack of intent helps them to escape the liability of secondary infringement, thereby continuing to facilitate and contribute copyright infringement. The proposal specifically tends to define all the ways through which BitTorrent can be held liable for the presence of their knowledge and reasonable means for obtaining knowledge relating to the infringing activity. The present laws have failed to cope with the technology and therefore have backslided in making the providers of the software, such as BitTorrent, liable for facilitating copyrighted material through them. The proposal therefore serves as a detriment to providers of software such as BitTorrent who lack the requisite intent but possess substantial knowledge regarding the infringement.

## 2. Scope of Protection

The current national legislations of various countries along with international treaties such as Berne and TRIPS have failed to make providers of applications and software, such as BitTorrent, liable for secondary copyright

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<sup>115</sup> Enigmax, *The Pirate Bay Trial: The Official Verdict-Guilty*, TORRENTFREAK, <https://torrentfreak.com/the-pirate-bay-trial-the-verdict-090417/> [<https://perma.cc/6MTU-Y3VK>].

<sup>116</sup> Irrespective of having specific knowledge of what is contained in the file.

<sup>117</sup> See *supra* note 110 (stating the proposal clause 2, sub clause (c)).



infringement.<sup>118</sup> The result is that, in the present day, users are able to download numerous copyrighted content available on the internet with the help of such software, which cannot be subjected to liability due to the lack of intent and financial interest in the subject material thereby contributing to infringement fearlessly. The proposal makes providers of BitTorrent liable as they have the knowledge or reasonable means to obtain knowledge about the happening of any infringing activity through their medium. The providers of these software often claim they have no knowledge of the copyrightability and control over the material which is being transmitted through their platform.<sup>119</sup> Their assertions were that, “We do not control or influence the data itself. As an analogy using Web surfing, we are the Web browser and other people or companies are the Web sites.”<sup>120</sup> The best counter argument to this claim is the principle of contributory liability under the law of torts, stated by the Supreme Court in the case of Sony:

Copyright infringement, like patent infringement, is a tort. A contributory infringer is a species of joint-tortfeasor, who is held liable because he has contributed with another to the causing of a single harm to the plaintiff<sup>121</sup>

To better explain this, consider the following example:

Supposedly A and B are two people having a fight and B shoots A with a gun. The gun, however, is owned

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<sup>118</sup> See *supra* notes 89–96, the inefficiency of international treaties and conventions.

<sup>119</sup> The above claim was made by one of the leading members of the BitTorrent team. The said claim was transmitted as a response to an email from me asking the BitTorrent team regarding the measures taken for preventing copyright infringements.

<sup>120</sup> *Id.*

<sup>121</sup> Peter S. Nimmer & David Menell, *Unwinding Sony*, 95 CAL. L. REV. 941, 957 (2007).

by C. According to the tort law principles, C shall be equally liable with B for the murder of A, irrespective of the knowledge and intent to kill A. C cannot claim that he was not aware that B would commit such a crime and that such an event was not foreseeable.<sup>122</sup>

In a similar sense, the providers of BitTorrent software cannot claim that such an event of illegal downloading through their software was not foreseeable. The proposal, therefore, attempts to widen the scope of protection for the copyright holders by making the acts of intermediary liability for copyright infringement.

### **3. Reasons for Adopting the Proposal**

#### *a. Harmonization*

The first reason for adopting the proposed draft is to provide a solution to the uncertainty in the ways nations have dealt with the issue of secondary infringement by software, such as BitTorrent. This proposal gravitates the increase in protection of an individual's work and thus promotes public policy. The paramount aspect of the proposal is the resolution of the harmonization of copyright law on the international front to deal with this issue. Another reason is that the international codification as drafted in the proposed clause can be the best solution to harmonize the laws dealing with indirect infringement of copyright on a global scale.

#### *b. Dealing with International Infringement*

Given the fact that BitTorrent operates over the national borders, this proposal solves the issue by explicitly providing guidelines on infringement in the TRIPs agreement thereby making it the main body to resolve dispute associated with national and international copyright infringements. The proposal considers the changing social

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<sup>122</sup> The above mentioned example is an original thought and has been crafted to better explain the concept.

norms in the digital copyright world and creates a solution that meets the needs of consumers to conduct activities in cyberspace without the fear of their work being infringed. The flexibility in the solution will help in tackling any kind of copyright infringement that might happen on an international scale. This proposal, therefore, acts as a befitting key in breaking down the loophole of indirect infringement on a comprehensive scale and helps in blockading this facilitation of mass copyright infringement.

### III. RESPONDING TO THE CRITICISMS OF THE PROPOSAL

Critics might object that infringement by online intermediaries is one which does not need to be specifically addressed and argue that the current domestic legislation of countries overlaps with the proposed clause in part II. These potential criticisms shall be addressed in this last part of the paper.

#### A. *How the Proposal Squares with the Existing Safe Harbors?*

The above proposal could face objections with respect to two main contentions. The first is its non-compliance with the Sony Safe Harbors test and second being the Limitation of the ISP liability test. The criticisms have been elaborated in detail for a better understanding in the following section.

#### I. **The Sony Test: BitTorrent's substantial Non-Infringing Uses**

One of the greatest criticisms of the proposal could be the fact that it fails to comply with the Sony Doctrine laid down in the case of *Sony Corp. of America v. Universal Studios, Inc.*<sup>123</sup> Despite the fact that a lot of illicit material

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<sup>123</sup> 464 U.S. 417, 442 (1984).

is usually downloaded and transmitted through BitTorrent, there are commentators who have favored BitTorrent stating that it too like any other technology, has its own significant non-infringing uses.<sup>124</sup> However with the vague refinement in the Grokster Case,<sup>125</sup> the critics state that the Sony doctrine would still apply in the case of BitTorrent, if subjected to liability for contributory infringement. Where the proposed clause states that an intermediary shall be liable for copyright infringement if it had knowledge or reasonable means of obtaining knowledge of the infringing activity, the Sony doctrine immunizes it from contributory liability by stating that, “any technology merely . . . capable of substantial non-infringing use,” cannot be held liable for any kind of copyright infringement.<sup>126</sup> “The Supreme Court in *Sony*,<sup>127</sup> distinguished between commercial uses, where the likelihood of harm may be presumed, from non-commercial uses, where harm must actually be demonstrated.”<sup>128</sup> “In the latter regard, the plaintiff must thus prove by a ‘preponderance of the evidence’ that some meaningful likelihood of future harm exists.”<sup>129</sup> However, Bram Cohen in an recent interview stated that, “P2P doesn’t need a case made in its favor- it’s just technology. Once it’s out of the

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<sup>124</sup> Bryant Welch, *Bittorrent’s Messy Future: Controlling Copyright Infringement On Peer-To-Peer Networks*, 13 (2007), <http://www.jdsupra.com/legalnews/bittorrents-messy-future-controlling-c-62431/> [<https://perma.cc/S84V-SRVP>].

<sup>125</sup> *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 940–41 (2005); see also COPYHYPE, [www.copyhype.com](http://www.copyhype.com) [<https://perma.cc/U3RE-8ZT9>].

<sup>126</sup> Nimmer & Menell, *supra* note 121, at 943.

<sup>127</sup> 464 U.S. at 442.

<sup>128</sup> MICHAEL A. EINHORN, *MEDIA TECHNOLOGY AND COPYRIGHT, INTEGRATING LAW AND ECONOMICS*, 83 (2004).

<sup>129</sup> *Id.* In *Sony*, evidence that demonstrated market harm was inaccurate and worthy of dismissal. See *id.*

box you can't put it in the box, and that's the end of that".<sup>130</sup> This shows that he wrote his software to take advantage of orthodox laws of countries which lack sufficient provisions to make such software liable for any kind of copyright infringement. Also, where *Sony* was about the use of a Betamax VCR as a device for infringement, the BitTorrent case is entirely different. The reason being that in *Sony*, the Justices perceived that the VCR technology would not lead significant levels of infringement in the future and was therefore not harmful for the copyright owners.<sup>131</sup> In contrast to that, statistics relating to the amount of losses and the number of suits against BitTorrent shows that the technology has been used more for harming the laws and the copyright owners and less for the benefit of the people.<sup>132</sup> The result therefore, applying the *Sony* test is that if BitTorrent is made free from liability for having non-infringing purposes, it could lead to every copyrighted work being made available for free on the internet thus contributing to mass piracy anarchism.

## 2. ISP Safe Harbors:

Copyright legislation may cause more harm than good if it does not properly balance the competing policies that copyright law is intended to serve.<sup>133</sup> A criticism that could be portrayed to the proposal would be its non-compliance with laws of different countries. For example, The United States has its own set of safe harbors<sup>134</sup> provided

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<sup>130</sup> *In Praise of P2P*, THE ECONOMIST TECH Q. (Q4 2004), <http://www.economist.com/node/3422905> [<https://perma.cc/83GC-6NDQ>].

<sup>131</sup> Nimmer & Menell, *supra* note 121, at 1017–18.

<sup>132</sup> Carlisle, *supra* note 11.

<sup>133</sup> Peter Leonard, *Safe Harbors in Choppy Waters- Building a Sensible Approach to Liability of Internet Intermediaries in Australia*, 3 J. INT'L MEDIA & ENT. L. 221, 241 (2011).

<sup>134</sup> The four safe harbors are:

- a. Transitory digital network system;

under § 512 of the DMCA,<sup>135</sup> under which an intermediary could not be made liable under certain circumstances. Whereas an attempt has been made through the proposal to make intermediaries like BitTorrent liable for copyright infringement, authors like Peter Leonard on the other hand have stated that: “Although an intermediary must not have actual knowledge that it is hosting infringing material or be aware of facts or circumstances from which infringing activity is apparent, it is clear from the statute and legislative history that an intermediary has no duty to monitor its service or affirmatively seek infringing material on its system.”<sup>136</sup>

“Apart from The United States, E.U. Directive 2000/31/EC talks about a broad ‘safe harbor’ covering both copyright and other causes of action.”<sup>137</sup> Articles 12, 14 and 15 of the directive clearly define provisions that state that an intermediary shall not be liable for “mere conduit” and hosting and further states that there is no general obligation to monitor facts or circumstances indicating illegal activity.<sup>138</sup> The proposal therefore, apart from The United States, would contradict to the provisions of the EU Directives also. Countries such as Australia<sup>139</sup> and the UK<sup>140</sup>

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- b. System Caching;
  - c. Information residing on systems or networks at the direction of users; and
  - d. Information location tools.

17 U.S.C. § 512 (2012).

<sup>135</sup> Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

<sup>136</sup> Leonard, *supra* note 133, at 242. The DMCA is explicit: it shall not be construed to condition “safe harbor” protection on “a service provider monitoring its service or affirmatively seeking facts indicating infringing activity.” 17 U.S.C. § 512(m)(1); *see also* S. Rep. No. 105-190, at 44 (1998); H.R. Rep. No. 105-551, pt. 2, at 53 (1998).

<sup>137</sup> Leonard, *supra* note 133, at 243–44.

<sup>138</sup> E-Commerce Directive, *supra* note 64.

<sup>139</sup> Broadcasting Services Act 1992 (Cth) s 216b (Austl.).

<sup>140</sup> Digital Economy Act 2010, c. 24 (UK).

have started implementing their own safe harbors to limit the liability of online intermediaries.

Author Mark Lemley has explained drawbacks of safe harbors as follows:

Under the present, DMCA act, the safe harbors<sup>141</sup> protect intermediaries only of certain classes and performing specific functions such as hosting, storing information etc..<sup>142</sup> Also, since these exemptions were brought a long time back, their application to the recent technological crimes is not conceivable.<sup>143</sup> Further, a number of intermediaries who may take the defenses of safe harbors are imposed with charges of infringement as they are not fully aware of the scope and pertinence of these safe harbors.<sup>144</sup>

Proponents also argue that intermediaries are well-positioned to prevent unlawful or harmful content and that this is preferable to assessing liability after the fact.<sup>145</sup>

Thus, at a time when the federal parliaments of countries endeavor to address media and communication convergence through their new legislation, it is appropriate that the proposal should seek a converged approach to the liability of internet intermediaries.

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<sup>141</sup> See *supra* note 61.

<sup>142</sup> Mark Lemley, *supra* note 63, at 104.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 108. Compare *Id.* (rejecting § 512 immunity of a company that provided an indexing feature for infringing music supplied by others), with *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082 (C.D. Cal. 2001) (holding online auction site qualified for safe harbor as to listings of allegedly infringing copies of movies).

<sup>145</sup> CENTER FOR DEMOCRACY AND TECHNOLOGY, *Intermediary Liability And Responsibility Primer* (2012), <https://www.cdt.org/files/file/Intermediary-Liability-2p.pdf> [<https://perma.cc/RW69-NYCR>].

### ***B. Why the Proposal Should Be in the TRIPS Agreement***

Although criticisms could barge stating that the provision relating to infringement by online intermediaries is too narrow to be included in TRIPs, this is, in fact, the most appropriate instrument for the right because “TRIPs, as administered by the WTO, has an effective dispute resolution system, which is procedurally sound and enforceable against those signatories of its treaties”.<sup>146</sup> Since, the infringements through BitTorrent can happen from any part of the world, it would make no sense to amend all domestic legislation of all the countries to bring one harmonized law to deal with this issue in the near future. Thus, this provision is best placed in the TRIPs to help countries tackle the problem unanimously. The necessity to include this provision in the TRIPs is by reason of fear, that the pace with which technology has been growing in the present world, there will be day in the near future where legislation would just be mere documents and laws would be meaningless.

#### CONCLUSION

The infringements committed through software such as BitTorrent are evolving at a rapid pace. The differences in the legislation of countries has generated inconsistent treatment to the issue of mass copyright infringement. A provision in the TRIPs is one of the only ways to provide an international solution to the current lack of harmonization between countries that have failed to cope with the growing technological evolution. Adopting this proposal could be a vital step in matching the “evolving technology of

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<sup>146</sup> Eliana Torres, *The Celebrity Behind the Brand International Protection of the Right of Publicity*, 6 PACE INTELL. PROP., SPORTS & ENT. L.F. 116, 142 (2016).



BitTorrent”<sup>147</sup> in the present world and combat the mass violations of the copyright around the globe.

A proposal like this; would therefore be the best solution in preventing the ever-increasing occurrences of copyright infringement by BitTorrent.

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<sup>147</sup> Tim Brookes, *BitTorrent & Magnets, How Do They Work?*, MAKE USE OF (Mar. 16 2012), <http://www.makeuseof.com/tag/bittorrent-magnets-work-technology-explained/> [<https://perma.cc/V8H8-SZFL>]. Torrent sites and BitTorrent clients are starting to switch to providing plain text magnet links in a further attempt to escape the potential criminal liability that may arise in future. *Id.*