

# CONTEMPORARY AND HISTORICAL COMPARISON OF AMERICAN AND BRAZILIAN LEGAL EFFORTS TO CORRAL DIGITAL MUSIC PIRACY AND P2P SOFTWARE

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## I. INTRODUCTION

Today, legal purchases of music from online retailers are skyrocketing. Digital music sales across the globe reached 2.9 billion dollars in 2007, up forty percent from the previous year.<sup>1</sup> With hundreds of legal music services in business on the internet, legal digital music download services have seen dramatic growth in sales. Legal digital music downloads for purchases are projected to surpass traditional compact disc sales by 2012.<sup>2</sup>

This enormous market demand helped spur the development of technologies that allow computer files to be shared over the internet which, in turn, sparked an onslaught of illegal distribution of copyrighted digital music. One of the worst offending countries was Brazil.<sup>3</sup> It is estimated that in 2003, Brazil accounted for seven-hundred and eighty-five million dollars in combined total losses to the copyright based industries in the United States (U.S.), including software, records and music, entertainment software, and motion pictures.<sup>4</sup>

This exposé will survey the similarities and differences between the Brazilian and American copyright laws as they relate to digital music piracy, from historical, contemporary, and philosophical perspectives. There are two primary advantages to this comparative analysis. The first advantage is that this analysis identifies approaches to copyright that may benefit the respective legal systems. The second advantage is that it explains the difficulties that the two legal systems are currently having as they transition through legal principles that would permit the systems to accommodate the kaleidoscope of technological changes that are sweeping through global communications and economies. Part I will provide the overall structure and goals of this analysis. Part II will explain the historical, political, and legal events that provided the context for the current Brazilian copyright law and the direction Brazilian government officials would like their country to take in the years to come. Part III will

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1. JOHN KENNEDY, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, IFPI DIGITAL MUSIC REPORT 6 (2008), available at <http://www.ifpi.org/content/library/DMR2008.pdf> (last visited Mar. 14, 2010).

2. Lisa Van der Pool, *Music downloads to surpass CD sales by 2012, Forrester study says*, BOSTON BUSINESS JOURNAL, Feb. 19, 2008, <http://www.bizjournals.com/boston/stories/2008/02/18/daily10.html> (last visited Mar. 14, 2010).

3. INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 2008 SPECIAL 301 REPORT 8, available at [http://www.ustr.gov/assets/Trade\\_Sectors/Intellectual\\_Property/Special\\_301\\_Public\\_Submissions\\_2008/asset\\_upload\\_file141\\_14486.pdf](http://www.ustr.gov/assets/Trade_Sectors/Intellectual_Property/Special_301_Public_Submissions_2008/asset_upload_file141_14486.pdf) (last visited Mar. 14, 2010).

4. Brazil–U.S. Business Council, *Counterfeiting and Piracy in Brazil: The Economic Impact* 4 (2003), available at [www.brazilcouncil.org/.../Counterfeiting\\_and\\_Piracy\\_in\\_Brazil.pdf](http://www.brazilcouncil.org/.../Counterfeiting_and_Piracy_in_Brazil.pdf) (last visited Mar. 14, 2010).

briefly outline the history of U.S. copyright law and the problems this country currently faces with regard to digital music piracy. Part IV will explore the specific differences between Brazilian and U.S. copyright laws as they exist today and their application to digital music piracy, paying particular attention to the “fair use” doctrine that originated in the United States and the marriage between criminal and civil copyright principles within the Brazilian legal system. Part V will then briefly discuss the effects of recent efforts to reform both countries’ copyright laws in the respective legal systems. Part VI will conclude by relating this article to the objectives of each country’s copyright legislation and to the larger objective of international recognition of all countries’ copyright protection.

## II. BRAZIL

### A. *Brief Timeline of Brazil’s Copyright Laws*

Brazil’s 1824 and 1891 Constitutions<sup>5</sup> were completely devoid of any mention of civil copyright protection.<sup>6</sup> It was not until Law 496, also known as the *Medeiros e Albuquerque Law*,<sup>7</sup> was enacted in 1898 that this constitutional gap was filled and non-criminal protection against infringements of copyright was provided. This placed Brazil more in line with the international movement of its time which was shifting countries toward increased authors’ rights.<sup>8</sup> The framework for Law 496 was that copyright protection was to be strictly construed in favor of the author in light of seven clearly identified limitations and exceptions.<sup>9</sup> For example, Limitation Two permitted newspapers to reproduce works from other publications as long as they gave credit, and Limitation Five permitted the reproduction of art in a book as long as the book’s main contents were text, and credit was given to the artist.<sup>10</sup> Law No. 496’s framework of providing copyright protection with delineated exceptions and limitations continued to be used in the 1916 Civil Code as well as in the subsequent 1973 and 1998 Civil Codes that are used today.<sup>11</sup> The principles behind the copyright

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5. See generally C.F. (1824); C.F. (1891).

6. Pedro Nicoletti Mizukami et al., *Exceptions and Limitations to Copyright in Brazil: A Call for Reform*, in ACCESS TO KNOWLEDGE IN BRAZIL: NEW RESEARCH ON INTELLECTUAL PROPERTY, INNOVATION AND DEVELOPMENT 67, 73–74 (Lea Shaver ed., 2008).

7. Law No. 496 of January 1, 1898, Col. Leis. Rep. Fed. Brasil.

8. Mizukami, *supra* note 6, at 70.

9. *Id.* at 109.

10. *Id.* at 75.

11. *Id.*

limitations of Law No. 496 were derived from the concepts established by the 1886 Berne Convention for the Protection of Literary and Artistic Works, which required its signatories to provide a particular level of copyright protection to their authors.<sup>12</sup> Although Brazil was not a signatory of the Berne Convention until 1922, Law 496 borrowed some of the guidelines and provisions from the doctrines espoused by the Berne Convention, as evident in the way it defined copyright: “[t]he rights of an author of any literary, scientific, or artistic work consists in the faculty, owned exclusively by himself, to reproduce or authorize the reproduction of his work through publishing, versioning, acting, performing, or through any other means.”<sup>13</sup>

Understanding the importance of international agreements and the need for an aggressive stance towards copyright enforcement, Brazil signed onto the 1994 Agreement on Trade Related Aspects of Intellectual Property Rights (also known as the TRIPS Agreement),<sup>14</sup> which incorporates many of the concepts set forth in the Berne Convention, including expansion of copyright protection to include computer programs.<sup>15</sup> The TRIPS Agreement sets forth the floor for copyright protection to which each signatory must adhere, such as a minimum fifty year extension of copyright terms after the death of the author (two notable exceptions being that films must have a fixed fifty year extension and phonographs must have at least a twenty year extension).<sup>16</sup> The TRIPS Agreement also mandates, among other things, criminal prosecution for copyright violations as well as the enactment of national laws regulating copyright protection for computer programs.<sup>17</sup> Brazil’s adoption of the TRIPS Agreement and the Berne Convention doctrine functioned to steer Brazil towards a much more restrictive interpretation of copyright protection, combining with all previous copyright-regulating Brazilian decrees to form the current Law No. 9.610, which is Brazil’s current and presiding copyright regulation.<sup>18</sup>

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12. See generally Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 201 Stat. 2853, 1161 U.N.T.S. 30 [hereinafter Berne Convention].

13. Law No. 496, *supra* note 7; Berne Convention, *supra* note 12.

14. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 108 Stat. 4809, 1869 U.N.T.S. 299, 33 I.L.M. 1125 (1994) [hereinafter TRIPS].

15. *Id.* pt. II, § I, art. 10.

16. *Id.* art. 12; see also World Trade Organization, *Overview: The TRIPS Agreement*, [http://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm#copyright](http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm#copyright) (last visited Mar. 14, 2010).

17. TRIPS, *supra* note 14, pt. III, § I, arts. 41, 61.

18. See Marcos J. Basso and Adriana C.K. Vianna, *Intellectual Property Rights and the Digital Era: Argentina and Brazil*, 34 U. MIAMI INTER-AM. L. REV. 277, 298 (2003); see generally Law No. 9.610, Feb. 19, 1998, D.O. (Brazil), available at <http://www.cultura.gov.br/site/categoria/politicas/direitos-autorais-politicas/leis-e-outros/lei-de-direito->

Law 9.610 brought about major changes to the previous era of copyright law. These changes include a term of copyright at life plus seventy years (increased from fifty years), reducing payment to the copyright owner on resale of his work to five percent of the sale price, expressly stating that the sale of the author's work does not equate to a sale of the copyright contained therein, and creating a presumption that an assignment of copyright is limited to a five-year period and only to the country in which the assignment was issued (unless there is a written agreement to the contrary).<sup>19</sup>

Additionally, recent treaties such as the World Intellectual Property Organization Copyright Treaty<sup>20</sup> and the World Intellectual Property Organization Performances and Phonograms Treaty<sup>21</sup> have provided a detailed comprehensive framework available for countries to follow. Unfortunately, however, Brazil has not ratified the treaties and has, instead, chosen to adopt select provisions in the treaties into its Civil and Criminal Codes.

#### *B. Article 184 - Dealing with Crimes against Intellectual Property*

In 2003, the Brazilian legislature approved the latest change to Article 184 of the country's Criminal Code, which authorizes law enforcement to criminally prosecute copyright infringement.<sup>22</sup> The amendment raised the minimum penalty from one year to two years in prison for persons convicted of illegally reproducing, distributing, renting, selling, acquiring, smuggling into the country, or storing protected copyright works with the intent to profit from reproductions.<sup>23</sup> This extension of prison time was important because, beforehand, sentences of one year or less could be commuted or postponed indefinitely by the courts (which was done regularly).<sup>24</sup> Persons convicted of copyright infringement without intent to

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autoral-n%25C2%25BA-961098 (last visited Mar. 14, 2010).

19. Law No. 9.610, tit. II, ch. III, nos. 37, 38, 41 & ch. V, no. 51.

20. See generally WIPO Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S. 152.

21. See generally WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 2186 U.N.T.S. 245.

22. Decree No. 2.848, art. 184, of Dec. 7, 1940, D.O.U. of 12.07.40. (Brazil); see also *Brazil Moves to Stiffen Copyright Penalties*, MANAGING INTELLECTUAL PROPERTY WEEKLY NEWS, June 1, 2003, available at <http://www.managingip.com/Article.aspx?ArticleID=1326348> (last visited Mar. 14, 2010); International Intellectual Property Alliance, *2007 Special 301 Report: Brazil*, Feb. 12, 2007, available at <http://www.iipa.com/rbc/2007/2007SPEC301BRAZIL.pdf> (last visited Mar. 14, 2010).

23. Decree No. 2.848, *supra* note 22.

24. *Id.*

profit face a detention of three months to a year, or a fine.<sup>25</sup> The amendment also changed the way expert testimony is handled and the procedures for seizing and destroying intellectual property contraband.<sup>26</sup> Thanks to increased pressure from copyright holders for more protection of their works, this amendment was enacted and was specifically designed to address the mounting problem of piracy in Brazil.<sup>27</sup>

### C. *Downloading from the Internet*

Recent efforts by the Senate indicate that the legislature wants to strengthen the criminal law and its ties to copyright.<sup>28</sup> In July 2008, a bill passed in the Senate that would make it a crime to use the Internet for file sharing of copyrighted material without authorization from the copyright owners.<sup>29</sup> In a published brief, professors at the Fundação Getúlio Vargas (FGV) School of Law in Rio de Janeiro suggest that passing the bill would have consequences that would extend far beyond usage of the Internet.<sup>30</sup> Given the breadth of the wording of the bill, activities involving cell phone usage and portable mp3 players would be affected as well.<sup>31</sup> Violators would be subject to one to three years in prison, as well as a fine.<sup>32</sup> Professors at FGV have proposed that the bill be amended to include scienter, requiring either fraud or “unlawful advantages” to be proven in order for the activity to be considered a crime.<sup>33</sup>

### D. *Constitutional Concerns*

Brazil’s most recent Constitution was enacted in 1998 and contains both strengths and deficiencies with respect to authors’ rights.<sup>34</sup> For

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25. *Id.*

26. *Id.*

27. *Id.*

28. Elvira Lobato, *Baixar Arquivo na Internet Pode Viver Crime* [Downloading files from the Internet to become a crime in Brazil], *Folha Online* (Brazil), July 3, 2008, available at <http://www1.folha.uol.com.br/folha/informatica/ult124u418749.shtml> (last visited Mar. 14, 2010); see also Posting of A2K, <http://www.a2kbrasil.org.br/ENG/Downloading-files-from-the> (July 3, 2008) (last visited Mar. 14, 2010).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. A2K, *supra* note 28.

34. C.F. (1998), available at <http://www.v-brazil.com/government/laws/titleII.html> (last visited Mar. 14, 2010).

example, the Brazilian Constitution contains strong support for authors' rights by expressly stating that these rights are in the class of fundamental rights available to all of Brazil's citizens.<sup>35</sup> The Brazilian Constitution also establishes the *direito de arena*<sup>36</sup> and provides "protection of individual holdings in collective works and the reproduction of the image and voice, even in sports activities,"<sup>37</sup> which gives authors the right over works in their entirety rather than solely their individual contribution to the works.<sup>38</sup> What is lacking in the 1998 Constitution is a stated reasoning for bestowing the right of copyright.<sup>39</sup> Unlike the United States Constitution, which explicitly states why copyright law exists,<sup>40</sup> there is no rationale available to the legal profession as to why Brazilian authors' works should be given protection under Brazilian law.<sup>41</sup> Filling this gap would provide a legal foundation with which the judicial system could justify expansion of copyright law to address emerging technologies.

#### E. Recent Efforts to Reform Brazil's Copyright Laws

Brazil's Ministry of Culture is a federal institution whose primary purpose is to develop and implement policies that ensure the strategic recognition of Brazilian culture, both nationally and internationally.<sup>42</sup> The most recent and most renowned Brazilian Minister of Culture, who is also one of Brazil's most popular musicians, is Gilberto Gil.<sup>43</sup> Gil has called for more international regulation of copyright protection for consumers as well

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35. *Id.* art. 5.

36. Law No. 9.615 of Mar. 24, 1998, Col. Leis Rep. Fed. Brasil, art. 42; *see also* Joseph Robert Terrell, *O Direito de Arena e o Contrato de Licença de Uso de Imagem* [*The Right of the Arena and the Contract for License of Use and Image*], REVISTA JUS VIGILANTE [JUS VIGILANTE JOURNAL] (Brazil), Sept. 13, 2009, at 1, *available at* <http://jusvi.com/artigos/628> (last visited Mar. 14, 2010) ("Right of the arena" provides sports teams control over the transmission and retransmission of sporting events, with exceptions made for journalistic and educational usage).

37. C.F. art. 5(XXVIII)(a).

38. Terrell, *supra* note 36, at 7; *see also* Swisscam, *Doing Business in Brazil* 57 (2008), *available at* [http://www.swisscam.com.br/assets/files/publicacoes/doing\\_business\\_pt.pdf](http://www.swisscam.com.br/assets/files/publicacoes/doing_business_pt.pdf) (last visited Mar. 14, 2010).

39. Swisscam, *supra* note 38, at 57.

40. U.S. CONST. art. I, § 8, cl. 8.

41. *See* Mizukami, *supra* note 6, at 70.

42. *See* Gilberto Gil, Brazilian Minister of Culture, Speech at New York University, *available at* [http://www.nyu.edu/fas/NewsEvents/Events/Minister\\_Gil\\_speech.pdf](http://www.nyu.edu/fas/NewsEvents/Events/Minister_Gil_speech.pdf) (last visited Mar. 14, 2010).

43. *See* Martin LaMonica, *Brazil's Minister of Culture Calls for Free Digital Society*, CNET NEWS, Sept. 27, 2007, at 1, [http://news.cnet.com/8301-10784\\_3-9786370-7.html](http://news.cnet.com/8301-10784_3-9786370-7.html) (last visited Mar. 14, 2010).

as exploration of legal and personal use of copyrighted material.<sup>44</sup> Gil has also been a staunch supporter of the Creative Commons<sup>45</sup> licensing regime for the digital culture that is rapidly emerging as the platform of choice for musicians and artists.<sup>46</sup>

In September 2007, Gil gave his rendition of what reforms are needed in Brazil to one the countries largest newspapers, *Folha de São Paulo*:

*It's been ten years since the last Brazilian Copyright Law amendment, and now it's time for society to consider if there's a need for an update. Many are the (dissatisfactions) with the current model, to begin with the authors, who do not feel entirely protected nor well remunerated. In addition to that, there is the challenge of the new digitally-based business models and also, the deepening of democracy and Brazilians' will to access culture, as part of their integral human formation. Today the law is too anachronistic to take care, in a balanced way, of both authors and consumers and citizens. The mere reproduction of a musical file into an mp3 player contravenes our authors' legislation, which makes no difference between a private copy and a copy with piracy purposes. Both authors and consumers would agree that that is a relevant way of spreading culture and remunerating artists . . . .*<sup>47</sup>

Gil has also spoken adamantly about the role of government in Brazilian copyright law, as he did at the opening of the seminar entitled "The Protection of Copyright Law: Collective Management and the Role of the State" held in Porto Alegre in July 2008 [translated from Portuguese]:

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44. *Id.* at 2.

45. See generally Creative Commons, History, <http://creativecommons.org/about/history> (last visited Nov. 5, 2009); Lamonica, *supra* note 43; *From Political Prisoner to Cabinet Minister: Legendary Brazilian Musician Gilberto Gil on His Life, His Music and the Digital Divide*, DEMOCRACY NOW!, [http://www.democracynow.org/2008/6/25/from\\_political\\_prisoner\\_to\\_cabinet\\_minister](http://www.democracynow.org/2008/6/25/from_political_prisoner_to_cabinet_minister) (last visited Mar. 14, 2010).

46. Larry Rohter, *Gilberto Gil and the Politics of Music*, N.Y. TIMES, Mar. 12, 2007, available at <http://www.nytimes.com/2007/03/12/arts/12iht-gil.4882061.html> (last visited Mar. 14, 2010); Lamonica, *supra* note 43, at 3; see also Cameron Parkins, *Gilberto Gil on Democracy Now*, CREATIVE COMMONS, June 25, 2008, at 1, <http://creativecommons.org/weblog/entry/8405> (last visited Mar. 14, 2010).

47. Forum Nacional de la Democratização da Comunicação [National Forum for the Democratization of Communication] (Brazil), A Importancia dos Direitos Autorais [The Importance of the Right of the Author], [http://www.fndc.org.br/print.php?p=conteudo&cont\\_key=183662](http://www.fndc.org.br/print.php?p=conteudo&cont_key=183662) (last visited Mar. 14, 2010).



After so many years for missing this scenario, the Brazilian state, through the Ministry of Culture, has been increasingly directed to resume a role in the area [of copyright law]. Distortions and deficiencies of the system currently in force are increasingly visible in large parts of society, which ask that the Ministry of Culture . . . act in search of greater rationality and legitimacy of this system, through the promotion of changes in some points of the Copyright Act . . . .

The rights of authors are positively in the Brazilian Constitution as fundamental rights. Moreover, the substantive provisions of the Berne Convention are now part of Annex III of the Agreement Establishing the WTO, known by the acronym TRIPS. Therefore, they are duty-bound nationally and internationally. They are reflected by the conditions of their effective exercise by the authors and the institutions entrusted by the authors of this day and age.<sup>48</sup>

A department within the Ministry of Culture, the Department of Digital Policy, is headed by Claudio Prado.<sup>49</sup> In an interview for a Digital Media Policy blog, Prado reiterates Gil's zeal for progressive thinking with regard to digital media:

We believe that media convergence has been obliging the world to reconsider some legal marks. The digital broadcast of [works] is a fantastic chance to spread knowledge access. In Brazil, the Ministry of Culture has been holding a National forum to discuss with the society what should be changed on those legal marks. Our efforts are concentrated in finding a balance between the authors' right to protect their own creations and the universal right of access to information.<sup>50</sup>

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48. Gilberto Gil, Brazilian Minister of Culture, Pronunciamento do Ministro da Cultura, Gilberto Gil, por Ocasiao da Abertura do Seminario "A Defesa do Direito Autoral: Gestao Coletiva e o Papel do Estado" [Keynote Address by the Ministry of Culture at the Opening Seminar "In Defense of the Right of the Author: Collective Management and State Function"] (July 31, 2008), <http://www.cultura.gov.br/site/2008/07/31/discurso-do-ministro-da-cultura-gilberto-gil-por-ocasio-da-abertura-do-seminario-a-defesa-do-direito-autoral-gestao-coletiva-e-o-papel-do-estado/> (last visited Mar. 14, 2010).

49. Press Release, Ministry of Culture (Brazil), Democracia Tecnologica ou Tecnologia Democratica? [Technological Democracy or Democratic Technology?] (Dec. 11, 2007) (on file with author), <http://www.cultura.gov.br/site/2007/12/11/democracia-tecnologica-ou-tecnologia-democratica-2/> (last visited Mar. 14, 2010).

50. Interview with Claudio Prado, Head of the Department of Digital Policy, Ministry of Culture (Brazil) (July 31, 2008), available at <http://blog.ito.com/dmp/2008/07/digital-media-policy-in-brazil.html> (last visited Mar. 14, 2010).

## III. UNITED STATES

A. *Brief History of U.S. Copyright Law As It Relates to Digital Media*

Peer-to-peer (P2P) file sharing software is computer software that connects users of the software to a network where users can download computer files directly from the computers of other users on the network. In 2005, the United States Supreme Court decided *MGM Studios, Inc. v. Grokster, Ltd.*,<sup>51</sup> holding that companies that distribute P2P file sharing software could be sued for copyright infringement if the software's primary purpose is non-infringing use.<sup>52</sup> Understanding the ramifications of *Grokster* as it relates to digital music piracy requires familiarity with the evolution of protected media over the history of U.S. copyright law.

U.S. copyright law is an extension of Article I, Section VIII, Clause VIII of the United States Constitution, which states that "the Congress shall have power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."<sup>53</sup> The United States Congress adopted the first U.S. copyright law in 1790, providing protection for "maps, books, and charts," giving their authors exclusive rights to publish their works.<sup>54</sup> The bailiwick of copyright protection was greatly expanded when the Copyright Act of 1976 was enacted, which broadened protection to include works in all media and for all possible derivative uses as soon as it is fixed in "any tangible medium of expression."<sup>55</sup>

International recognition of U.S. copyrights also became important as the global economy strengthened. Like Brazil, the United States also adopted the principles established in the Berne Convention in 1989 and subsequently, the 1994 TRIPS Agreement.<sup>56</sup> In doing so, copyright protection for these works is internationally enforced in that U.S. copyright

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51. 545 U.S. 913 (2005).

52. *Id.* As opposed to the traditional method of downloading where the files sit in a centrally maintained server that users connect to and download files from, with no direct connection between users. See generally D. SCHODER ET AL., *Core Concepts in Peer-to-Peer Networking*, in P2P COMPUTING: THE EVOLUTION OF A DISRUPTIVE TECHNOLOGY 2 (R. Subramanian & B. Goodman ed., 2005).

53. U.S. CONST. art. I, § 8, cl. 8.

54. U.S. Copyright Act of 1790; see also WILLIAM F. PATRY, PATRY ON COPYRIGHTS §1:19, 1-216, 1-221 (2007).

55. 17 U.S.C. § 102 (1999).

56. Berne Convention, *supra* note 12; TRIPS, *supra* note 14.

holders could now effectively have their copyrights protected within the countries who are also signatories of these agreements.

The term of the copyright has evolved over time as well. The 1790 Act gave authors a fourteen-year term of protection, with an option to renew the copyright for an additional fourteen years.<sup>57</sup> Today, due to the enactment of the Sonny Bono Copyright Term Extension Act in 1998, the copyright owner enjoys a copyright term enduring for the author's life plus an additional seventy years after the author's death and for works for hire, the copyright term is ninety-five years from publication or one hundred and twenty years from creation, whichever is shorter.<sup>58</sup>

### B. *The Current Legal State of P2P Networks in the United States*

Despite the *Grokster* decision, P2P networks continue to exist today in limited form<sup>59</sup> and with some uncertainty as to their future within the United States.<sup>60</sup> Although copyright advocates and members of the music recording industry tend to agree that the *Grokster* decision clarified that software companies that develop programs intending to induce copyright infringement could be liable for the infringements,<sup>61</sup> there are few published appellate cases that cite to it, lending credence to the notion that most P2P software companies simply do not have the financial resources to take on the Recording Industry Association of America (RIAA) and record companies.<sup>62</sup> Criticisms of the *Grokster* decision are that the standard the court created for deciding infringement-inducing liability is ambiguous and

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57. U.S. Copyright Act of 1790; see also United States Copyright Office, *Information Circular*, available at <http://www.copyright.gov/circs/circ1a.html> (last visited Mar. 14, 2010).

58. See generally Sonny Bono Copyright Term Extension, 17 U.S.C. § 304; see also United States Copyright Office, *Copyright Basics*, available at <http://www.copyright.gov/circs/circ1.html#hlc> (last visited Mar. 14, 2010).

59. The Pirate Bay (<http://www.thepiratebay.org>) and Internet Chat Relay (<http://www.irc.org>) are two examples of P2P networks that are in existence today, the former being a Sweden-based website where users can upload and download files of any kind and the latter being an online chat system where users in a chatroom can share files with each other.

60. John O. Hayward, *Grokster Unplugged: It's Time to Legalize P2P File Sharing*, [http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=john\\_hayward](http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=john_hayward) (last visited Mar. 14, 2010); see also Wired's 2005 prediction in *The Real Lesson of Grokster*, June 29, 2005, available at <http://www.wired.com/science/discoveries/news/2005/06/68033> (last visited Mar. 14, 2010).

61. Center for Democracy & Technology, *Interpreting Grokster: Limits on the Scope of Second Liability for Copyright Infringement*, 2006 STAN. TECH. L. REV. 3, 3 (2006).

62. As evident from all the P2P networks that went out of business before *Grokster* did. See MTV's 2001 article, *Record Industry Sues Morpheus and Other Decentralized Sharing Services*, available at <http://www.mtv.com/news/articles/1449535/20011003/story.jhtml> (last visited Mar. 14, 2010).

has had a chilling effect on technological innovation in the realm of digital music distribution.<sup>63</sup>

As software companies start to make their way through the legal maze created by the *Grokster* decision, demand for acquisition of licenses from copyright holders will undoubtedly grow.<sup>64</sup> Obtaining these licenses is crucial if these companies are to avoid liability for potentially millions of copyright infringements through the use of their online music distribution systems. What is not known is whether or how these companies will address the issue of obtaining licenses from the hundreds of thousands of living copyright owners, a task that will likely prove to be astronomically costly, if not impossible. With iTunes, the new Napster, and other major software companies establishing themselves firmly in the online music marketplace, P2P networks styled after *Grokster* no longer have a viable business model and at this point, must adopt a “wait and see” attitude as to how the doctrinal significance of *Grokster* will play out in the courts.<sup>65</sup>

### C. Pursuing Copyright Infringers

Recently, the RIAA has intensified its efforts to expand the scope of copyright infringement.<sup>66</sup> Of note is the latest successful case brought by the RIAA against Jammie Thomas.<sup>67</sup> On October 4, 2007, a jury returned its verdict against Thomas, a single mother of two from Minneapolis, Minnesota, in the amount of 222,000 dollars for twenty-four counts of copyright infringement.<sup>68</sup> The RIAA brought this highly anticipated suit alleging that Thomas used computer software to share twenty-four digital music files with other users of the software, permitting these users to illegally download the music files from her hard drive to their hard drives without purchasing the musical works.<sup>69</sup> The RIAA alleged that Thomas used a free P2P music service to share 1,702 music files on her computer with other users of the service, which made the music on her computer

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63. Alvin Chan, *The Chronicles of Grokster: Who is the Biggest Threat in the P2P Battle?*, 15 UCLA ENT. L. REV. 291, 294 (2008).

64. *Id.* at 305.

65. *Id.* at 300.

66. Electronic Frontier Foundation, *RIAA v. The People: Five Years Later*, <http://www.eff.org/wp/riaa-v-people-years-later> (last visited Mar. 14, 2010).

67. *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1210 (D. Minn. 2008).

68. *Id.* at 1212; see also Greg Sandoval, *RIAA wins key victory; accused file sharer must pay \$220,000*, CNET NEWS, Oct. 4, 2007, [http://news.cnet.com/8301-10784\\_3-9791383-7.html?part=dtx](http://news.cnet.com/8301-10784_3-9791383-7.html?part=dtx) (last visited Mar. 14, 2010).

69. *Thomas*, 579 F. Supp. 2d at 1212–13; see also Sandoval, *supra* note 68 (regarding number of music files found to be infringed).

available for other users to download.<sup>70</sup> The RIAA argued that this “making available” of copyrighted material constitutes infringement, even though there was no evidence of actual distribution of the music to other users.<sup>71</sup> Based on an erroneous jury instruction and supporting case law against the “making available” of copyrighted material serving as distribution of the material, the verdict against Thomas was set aside and a retrial is expected.<sup>72</sup>

A federal district court in Connecticut has recently rejected the “making available” argument, thereby diminishing the RIAA’s case.<sup>73</sup> The final outcome of these and other cases filed by the RIAA and record companies is of much interest to the intellectual property community as the RIAA has so far failed to win a single copyright infringement case against a P2P user.<sup>74</sup> A win for the RIAA in any of the cases based on the “making available” argument would have far-reaching effects in copyright law.<sup>75</sup>

#### D. Fair Use and Downloading Music

Codified in the Copyright Act of 1976 is the notion of “fair use.”<sup>76</sup> Fair use of copyrighted material is not infringement.<sup>77</sup> Examples of fair use include commenting upon, criticizing or creating a parody of a copyrighted work.<sup>78</sup> Practically speaking, fair use serves as a defense to copyright infringement if one of the previously stated uses is called into question, as has been seen in many federal court cases.<sup>79</sup>

Downloading music from P2P services with the intent to “try before you buy” also does not qualify as fair use. In *BMG Music v. Gonzalez*, Gonzalez claimed she downloaded music files using P2P software to “sample” the music before she purchased the files elsewhere.<sup>80</sup> When the

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70. Although, technically, the RIAA could have sued for infringement based on all the files on her computer, remedy was sought for only 24 of these files. *RIAA v. The People*, *supra* note 66, at 7.

71. *Thomas*, 579 F. Supp. 2d at 1215.

72. *Id.* at 1221, 1226.

73. *Atlantic Recording, Corp. v. Brennan*, 534 F.Supp.2d 278, 281–82 (D. Conn. 2008).

74. *RIAA v. The People*, *supra* note 66, at 7; *see also* David Kravets, *Judge Declares Mistrial in RIAA-Jammie Thomas Trial*, <http://blog.wired.com/27bstroke6/2008/09/not-for-publica.html> (last visited Mar. 14, 2010).

75. *See Thomas*, 579 F. Supp. 2d at 1221, 1228 (regarding disproportionate damage awards).

76. Copyright Act, 17 U.S.C. § 107 (1992).

77. *Id.*

78. *Id.*

79. 17 U.S.C. § 107; *see, e.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 572 (1994).

80. 430 F.3d 888, 889–90 (7th Cir. 2005).

suit was brought, she claimed she had not infringed the copyrights, but rather that her actions were “fair use” of the material.<sup>81</sup> It was established, however, that she failed to erase thirty songs on her computer even after she determined that she was not going to purchase them.<sup>82</sup> The Seventh Circuit Court of Appeals disagreed with Gonzalez, finding that downloading music was not “fair use” of copyrighted material based on the principle established in *Grokster* that the primary use of free P2P music download services is to infringe on copyrighted material.<sup>83</sup>

Downloading music, even if the downloader already owns the music being downloaded, does not constitute fair use. In *UMG Recordings, Inc. v. MP3.com, Inc.*, the website MP3.com attempted to set up an online service where subscribers can listen to music they already own using music files that MP3.com copied and stored on its web servers.<sup>84</sup> The recording company UMG brought suit for copyright infringement and the website claimed fair use as a defense since the website users already owned the music the website was sharing with them.<sup>85</sup> Although MP3.com implemented means by which the website could verify if a subscriber actually owned the music that was to be downloaded, the court held that the initial act of copying the music to the web servers constituted infringement and that fair use did not apply in this case.<sup>86</sup>

#### *E. Reform of U.S. Copyright Laws*

Recent legislation has aimed to correct the shortcomings of U.S. copyright law with regard to modern technology. In 1998, the Digital Millennium Copyright Act (DMCA) was signed into law by President Bill Clinton and was a significant step towards ensuring digital copyright protection.<sup>87</sup> The Act created a framework through which criminal penalties can be imposed on persons who intentionally bypass systems put in place to protect against copyright infringement, such as Digital Rights Management (DRM)<sup>88</sup>. These security measures are the frontline defense against digital piracy because they prevent computers from being able to

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81. *Id.* at 889.

82. *Id.* at 890.

83. *Id.* at 890; see *MGM Studios, Inc. v. Grokster*, 545 U.S. 913, 948 (2005).

84. *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 350 (S.D.N.Y. 2000).

85. *Id.*

86. *Id.*

87. Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, § 404, 112 Stat. 2860 (1998).

88. *Id.* § 1204.

read the music files.<sup>89</sup> Understanding that public policy dictates that there are certain instances in which these security measures can and should be circumvented, Congress listed exemptions to this anti-circumvention policy for particular institutions, such as the Library of Congress and literary works distributed as e-books.<sup>90</sup> These exemptions are re-examined every three years to ensure that each exemption does not “adversely [affect] non-infringing uses due to the prohibition on circumvention.”<sup>91</sup>

Additionally, the Family Entertainment and Copyright Act of 2005 (FECA)<sup>92</sup> was Congress’ attempt to stymie music piracy before the illegally copied works are actually distributed. For instance, FECA authorized criminal prosecution of persons who illegally record films in movie theaters.<sup>93</sup>

Despite Congress’ efforts to curb digital copyright infringement and protect the rights of private companies to make money, some would argue that an eye must be kept on the needs of the public. Mark Lemley, Professor at Law at Stanford University Law School and Director of the Stanford Program in Law, Science, and Technology, had the following to say on this issue:

While reducing copyright infringement is an important goal, it cannot and should not be the only goal of public policy. Congress should also be concerned that overzealous enforcement of copyright will create a hostile environment for technological innovation and entrepreneurial business models. It should strive to balance these important interests, providing effective copyright protection but also preserving an environment in which innovation can thrive.

Nor can Congress simply rely on assurances from the copyright industry that they will foster innovation themselves, or target only “bad” and not “good” innovations. The content industry has proven short-sighted, time and again trying to stifle technologies that ultimately proved beneficial not only to society but even to copyright owners. They tried—and fortunately failed—to shut

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89. See generally Rita Lewis, *What is DRM and Why Should I Care?*, FIREFOX NEWS, Jan. 1, 2008, <http://firefox.org/news/articles/1045/1/What-is-DRM-and-why-should-I-care/Page1.html> (last visited Mar. 14, 2010).

90. DMCA, Pub. L. No. 105–304 § 404; see also U.S. Copyright Office: Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works, <http://www.copyright.gov/1201/> (last visited Mar. 14, 2010) [hereinafter *Rulemaking on Exemptions*].

91. *Id.*

92. Family Entertainment and Copyright Act, Pub. L. No. 109–9, 119 Stat. 218 (2005).

93. *Id.*

down jukeboxes, radio, cable television, the VCR, and the mp3 player. Perhaps it should not surprise us that publicly traded companies should have a short-run focus, looking at this quarter's bottom line and not what will benefit society in the long run.<sup>94</sup>

Other scholars would rather Congress address the myriad of problems within the current copyright licensing framework. The Honorable Mary Beth Peters, United States Register of Copyrights, argues that combating music piracy effectively must involve a drastic revision of the antiquated provisions within Section 115 of the Copyright Act.<sup>95</sup> This section of the Act provides governance for compulsory licensing of the reproduction and distribution rights for nondramatic musical works by means of physical phonorecords and digital phonorecord deliveries.<sup>96</sup> Peters argues that this section rarely functions to compel licensing, but rather simply sets the ceiling on the royalty rate in privately negotiated licenses, placing artificial limits on the marketplace.<sup>97</sup> The "one-at-a-time" structure of this section makes it difficult, if not impossible, for online music services to acquire the vast amount of licenses needed for the tremendous libraries of music that must be made available to customers.<sup>98</sup> Peters believes that while *Grokster* has leveled the playing field in favor of legitimate music services entering the online marketplace, the Supreme Court decision will be for naught if Congress does not reshape the methods through which royalties are paid and, more importantly, modernizes the statutory licensing regime so that it can permit the quick and efficient clearing of necessary exclusive rights for large numbers of works.<sup>99</sup>

Still others would rather rewrite U.S. copyright law altogether. Pamela Samuelson, co-director of the Berkeley Center for Law and Technology, suggests that questions are being raised too rapidly with regard to emerging technology and innovation for existing copyright law to answer

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94. Mark Lemley, *Testimony Before the Senate Committee on the Judiciary* (2005), [http://judiciary.senate.gov/hearings/testimony.cfm?id=1624&wit\\_id=4687](http://judiciary.senate.gov/hearings/testimony.cfm?id=1624&wit_id=4687) (last visited Mar. 14, 2010) [hereinafter *Lemley Testimony*].

95. 17 U.S.C. § 115 (2008); Mary Beth Peters, *Testimony Before the Senate Committee on the Judiciary* (2005), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=1624&wit\\_id=4682](http://judiciary.senate.gov/hearings/testimony.cfm?id=1624&wit_id=4682) (last visited Mar. 14, 2010) [hereinafter *Peters Testimony*].

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*



them effectively.<sup>100</sup> Samuelson writes that the copyright laws should include only the core elements necessary for copyright protection and that any other provision be included only if accompanied by a justification for why the provision was adopted.<sup>101</sup> The laws “should . . . articulate the purposes . . . it seeks to achieve and offer . . . guidance” as to how these purposes should be balanced when there are competing principles.<sup>102</sup> Perhaps more importantly, U.S. copyright laws should be written in “plain English” so that ordinary people can understand the statutes and the reasons why each provision is part of the basic statutory framework.<sup>103</sup>

Given the many challenges facing the United States Congress in the next decade, including the Iraq War, global warming, and the economy, these reforms will likely be set on the back burner. As the online marketplace rapidly grows and highly contentious issues manifest themselves, Congress and the Courts will have no choice but to address reform of U.S. copyright law.<sup>104</sup>

#### IV. A COMPARISON OF BRAZIL AND UNITED STATES’ APPROACHES TO COMBATING MUSIC PIRACY

##### A. *Legal Scholarship*

Given the surprisingly small breadth of legal scholarship concerning Brazilian copyright, there are particular aspects of the law that are prime for comparison with the United States. The prevalent opinion within the Brazilian legal profession is that strong copyright protection is crucial to musical and cultural innovation and that the limitations and exceptions contained within the laws must be strictly construed by the judiciary.<sup>105</sup> Copyright scholarship is limited to Law No. 9.610, occasionally Law No. 9.609 (copyright of software), the Penal Code and international treaties.<sup>106</sup> Brazilian copyright law is studied as a closed-subsystem of Brazilian law, rather than as an arm of a much larger body of law.<sup>107</sup>

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100. See generally Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551 (2007).

101. *Id.* at 569.

102. *Id.* at 560.

103. *Id.* at 559–60.

104. See generally Samuelson, *supra* note 100.

105. Mizukami, *supra* note 6, at 109.

106. *Id.* at 110; see also Decree No. 2.848, *supra* note 22; TRIPS, *supra* note 14.

107. Mizukami, *supra* note 6, at 110–11.

The United States, on the other hand, is replete with legal scholarship in the realm of copyright. Brazil's inability to articulate the rationale behind using a system of limitations and exceptions and continued treatment of copyright protection as existing under the umbrella of criminal law, is a stark departure from American fair use.<sup>108</sup> Historically, United States' legal scholarship tends to show that a balance must be struck between public and private interests by giving exclusive property rights to authors and fostering a competitive marketplace by providing readily accessible material to the public of works of authorship and the ideas they encompass.<sup>109</sup>

### B. Criminal Enforcement

Criminal enforcement through Article 184 remains the primary method for addressing digital copyright infringement in Brazil. Since Brazilian copyright law was born out of the Penal Code, and the current limitations and exceptions model provides little flexibility for interpretation, copyright enforcers are left with little to work with besides the criminal code.<sup>110</sup>

The United States relies less heavily on criminal enforcement than Brazil, although that may be changing. A recent statutory enactment in the United States seems to indicate that Congress is seeking to strengthen the relationship between the criminal and civil aspects of copyrights.<sup>111</sup> In October 2008, President Bush signed into law the Enforcement of Intellectual Property Act of 2008 (EIPA), which authorizes the creation of an Intellectual Property "Czar" who will be responsible for implementing a nationwide plan to combat piracy and "report directly to the President and Congress regarding domestic international intellectual property enforcement programs."<sup>112</sup> Originally, the EIPA also included provisions that would have given the United States Department of Justice authorization to investigate and enforce civil as well as criminal copyright laws; however, the Department of Justice successfully lobbied against these provisions, arguing that civil prosecution of copyright infringement would take away from criminal enforcement resources and add another layer of bureaucracy to copyright enforcement.<sup>113</sup> As a result of a "Copyright Office

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108. *Id.* at 110.

109. Frank Pasquale, *Beyond Napster: Using Antitrust Law to Advance and Enhance Online Music Distribution*, 8 B.U.J. SCI. & TECH. L. 451, 488 (2002).

110. *Id.* at 72-73.

111. S. 3325, 110th Cong., tit. II (as passed by Senate, July 24, 2008), available at <http://www.techlawjournal.com/cong110/bills/senate/eipr/20080724is.pdf> (last visited Mar. 14, 2010).

112. *Id.* tit. IV, § 401(b)(1)(D).

113. For an account of some of the problematic provisions within the bill, see Grant Gross, *US*

Roundtable,”<sup>114</sup> these provisions were removed prior to the law’s enactment;<sup>115</sup> however, Congress’ original intent may be a sign of things to come.

### C. Civil Enforcement

It is difficult to determine the state of civil enforcement of copyright in Brazil as no one has come forward claiming to have been sued.<sup>116</sup> Brazil has seen an increase in civil actions brought on by the IFPI and the Brazilian Association of Record Producers [Associação Brasileira dos Produtores de Discos] (ABPD); however, the lawsuits focus exclusively on users that upload music with digital libraries containing more than 3,000 files.<sup>117</sup> Users who download music have not been targeted at all.<sup>118</sup> With a recent ruling that forbids Internet Service Providers from divulging the identities of its users, the probability of large-scale litigation seems low.<sup>119</sup>

Civil enforcement in the United States, on the other hand, remains vigilant. Litigators have a plethora of legal tools in place to assist them in their civil actions. The RIAA has brought lawsuits against over 30,000 individuals for copyright infringement between 2003 and 2008.<sup>120</sup> The suits have targeted every party involved, from the downloader to the uploader to the software company and internet service provider. Statutory damages for each infringement can reach 150,000 dollars,<sup>121</sup> providing great financial incentive for attorneys to take these cases. As a result, United States litigation trends stand directly opposite to that of Brazil.

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DOJ: Copyright Protection is Flawed, September 24, 2008, [http://www.pcworld.com/article/151493/.html?tk=rss\\_news](http://www.pcworld.com/article/151493/.html?tk=rss_news) (last visited Mar. 14, 2010).

114. Sherwin Siy, *Roundtable on Copyright Damages: “What are we doing here?”*, Sept. 24, 2008, <http://www.publicknowledge.org/node/1369> (last visited Mar. 14, 2010).

115. Richard Esguerra, *Bush Signs Intellectual Property Enforcement Bill*, available at <http://www.eff.org/deeplinks/2008/10/bush-signs-intellectual-property-enforcement-bill> (last visited Mar. 14, 2010); Press Release of Senator Ron Wyden, Senate Drops Civil Enforcement Provisions from Intellectual Property Act (Sept. 30, 2008), available at <http://wyden.senate.gov/newsroom/record.cfm?id=303564> (last visited Mar. 14, 2010).

116. Mizukami, *supra* note 6, at 99.

117. *Id.*

118. *Id.*

119. *Id.* at 100.

120. RIAA v. The People, *supra* note 66, at 1.

121. 17 U.S.C. § 504 (2004).

*D. Public Policy*

The United States has always based its public policies on intellectual property protection on the philosophy that copyrights were to be dispensed as an incentive and reward for innovation.<sup>122</sup> The copyright holder gains the exclusive right to profit from the work and society, as a whole, benefits by having a work available that would otherwise have been kept secret.<sup>123</sup> The American philosophy stands in stark contrast to Brazil's view of intellectual property rights where its delineated exceptions and limitations are viewed as a concession to the public, given as an expression of the author's generosity and not as a matter necessary to promote innovation.<sup>124</sup> The current Brazilian philosophy serves to promote protection of industry through the proxy of authorship by focusing entirely on the author, despite the idea that authors have non-waivable moral rights over their works, while simultaneously afforded the right to replace themselves as authors with any corporate agent.<sup>125</sup>

## V. RECOMMENDATIONS TO THE UNITED STATES AND BRAZIL

*A. Brazil*

Currently in Brazil, if consumers purchase a music compact disc for personal use and copy the music to their computer or other storage device, they are in violation of Brazilian intellectual property law. Also in jeopardy of violating the law would be people who record television shows for viewing at a later time and those who seek to parody copyrighted materials. The result is that there are possibly millions of citizens acting in direct violation of the law on a regular basis, which would be comical if it were not actually happening. Blame for this seemingly illogical situation rests on the strictness with which the exceptions and limitations are enforced in Brazil. Judges in Brazil's civil law system are not permitted to expand the unnecessarily narrow scope of Brazilian copyright law despite the onslaught of technology that is available today. Simply put, Brazilian legislation has not embraced the concept of fair use, unlike the United

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122. Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=494424](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=494424) (last visited Mar. 14, 2010).

123. *Id.* at 2.

124. Paula Martini, *Brazilian Limitations and Exceptions to Copyright: Impacts on A2K*, <http://icommons.org/articles/brazilian-limitations-and-exceptions-to-copyright-impacts-on-a2k> (last visited Mar. 14, 2010) [hereinafter *Limitations*].

125. *See id.*

States.<sup>126</sup> Should Brazil adopt a policy similar to fair use, copyright infringements that many Brazilians commit on a daily basis would become a thing of the past.

Moreover, limitations and exceptions provisions in the law must be revised to be flexible and organic so that they can stand strong in the face of rapidly changing global markets and technologies.<sup>127</sup> For example, there should be a right to private copying for personal use of legally purchased digital musical works and exceptions made for libraries and other educational uses.<sup>128</sup>

### B. *United States*

In this post-*Grokster* world, there are three actions Congress can take to ease the burdens currently placed on copyright holders and innovators. First, Congress can pass laws to make it easier for copyright holders to target those who infringe on their copyrights.<sup>129</sup> Part of the reason why P2P software services are being swept up in the copyright lawsuits is that it is difficult for copyright holders to pursue legal actions against the infringers directly.<sup>130</sup> By taking the infringement pressure off the P2P software companies, copyright owners would have less inclination to go after intermediaries, such as the software companies, in a way that endangers technological innovation.<sup>131</sup>

Second, with the advent of music services that require thousands of musical works in order to give customers the online content they desire, a system should be put in place to make it much easier to clear intellectual property rights.<sup>132</sup> Simplifying the complex rules involved in the current process of clearing rights would help foster innovation and make current copyright enforcement more effective.<sup>133</sup>

Finally, technology and software companies must gain better insulation against unreasonable liability.<sup>134</sup> The current system is designed to punish the direct infringers with both civil and criminal penalties. Enforced in this manner, the remedies to copyright owners serve the

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126. *Id.*

127. *See generally Limitations, supra* note 124.

128. *See id.*

129. *Lemley Testimony, supra* note 94.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Lemley Testimony, supra* note 94.

purpose of restitution for the copyright owner and deterrence to the infringer.<sup>135</sup> As the current laws are enforced today however, copyright owners are gaining windfalls because it is the intermediary technology companies that are ending up in lawsuits merely because they are providing a product that some of its customers are misusing.<sup>136</sup>

## VI. CONCLUSION

It is time for the legislative bodies for both countries to understand that existing copyright law is not adequate in the face of the world's current technological landscape. Brazil's current copyright law makes any Internet user a potential criminal and copyright infringer. The current U.S. copyright law is labyrinthine and convoluted, which only serves to fatten the wallets of mega-corporations and lobbyists with enough money and legal firepower to make their way through the licensing system. With both countries leaning more and more heavily on their criminal systems for intellectual property relief, average Internet users must not only guard against getting lawsuits from copyright holders, but must also consider that their seemingly innocent online activities may land them in prison. Consumers are confused, frustrated, and angry and will continue to voice their concerns loudly until their concerns are addressed.

There are some reasons to be optimistic. Brazil and the United States are two global digital powerhouses whose intellectual property philosophies and laws seem to be cross-pollinating.<sup>137</sup> In fact, there are currently efforts to revise each country's copyright laws based on the Berne Convention and the TRIPS Agreement<sup>138</sup> so that future intellectual property laws can reach a level of understanding and achieve change that would be more supportive of the Third World's social development,<sup>139</sup> promote and protect innovation, and safeguard the public's interest in intellectual property.

Both the United States and Brazil stand to gain much by strengthening their solidarity with regard to intellectual property. As access to the Internet becomes more widespread throughout Brazil, U.S. copyright industries will find that Brazil will become an increasingly important market to have a handle on—that is, if the laws can keep up.

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135. *Id.*

136. *Id.*

137. See generally Michael A. Ugolini, *The Protection of Intellectual Property in Brazil*, 5 NAFTA: L. & BUS. REV. AM. 430, 431 (1999).

138. See generally Graeme W. Austin, *Social Policy Choices and Choice of Law for Copyright Infringement in Cyberspace*, 79 OR. L. REV. 575 (2000).

139. See generally Peter Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653 (2005).