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Acupressure: The Emerging Role of Market Ordering in Global Copyright Enforcement

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ACUPRESSURE: THE EMERGING ROLE OF MARKET ORDERING IN GLOBAL COPYRIGHT ENFORCEMENT

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INTRODUCTION

IN autumn 2009, China's most popular "YouTube clone" video sharing sites—historically havens for pirated content—suddenly began purging unlicensed videos from their services.[1] Simultaneously, they

1. *See infra* Part II.A.

started spending enormous sums—hundreds of millions of dollars to date—on exclusive licenses for the same videos they had served for free only months before. This remarkable turnaround in China's "copyright Wild West" is all the more impressive because of its lasting effect: most major video streaming sites still license their professional content and remain largely free of piracy, leading one site's CEO to proclaim proudly, "This is an industry with law and order."[2]

In China, where copyright piracy is notoriously pervasive,[3] Internet businesses are fiercely competitive, and the expectations regarding copyright compliance are low, why would these market-leading sites alter their business models on a dime and devote as much as half of their total expenditures to content acquisition?[4] Was it the result of government pressure? Did copyright owners sue the sites into submission? Were the sites seeking to spruce up their reputations for investors? In fact, the surprisingly simple explanation is that copyright owners identified and exploited a vital economic pressure point: they prevailed upon major advertisers—whose business the video websites most covet—to pressure the websites into cleaning up their copyright act.[5]

In the example above, the copyright owners found a workable solution to an age-old problem in copyright law: copyright infringement is global, but enforcement is local. What recourse do copyright owners have in markets where infringement is endemic and enforcement is largely ineffective? The traditional response is to bring lawsuits in the market where infringement occurs. The international copyright system was designed to facilitate just that: it ensures copyright owners can enforce their rights, such as the rights of reproduction, distribution, display, or performance of their works, in many countries regardless of whether the copyright owner has ever published the infringed work there.[6] The international copyright system, however, is built on the assumption that rights granted in foreign jurisdictions are meaningfully enforceable. The reality is that in many countries, formal rights are difficult or nearly impossible to enforce effectively, which limits the efficacy of the current system.[7] Efforts to fix this problem have emphasized two strategies: refining the international copyright system through multilateral and bilateral agreements, and pressuring governments into providing the means for effective enforcement.[8]

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2. Clifford Coonan, *'Saturday Night Live' Launches on Chinese Video Site Sohu*, HOLLYWOOD REP. (Jan. 2, 2014, 12:03 AM), http://www.hollywoodreporter.com/news/saturday-night-live-launches-chinese-668177 (quoting Sohu.com CEO Charles Zhang).

3. *See* Eric Priest, *Copyright Extremophiles: Do Creative Industries Thrive or Just Survive in China's High Piracy Environment?*, 27 HARV. J.L. & TECH. 467, 472–81 (2014).

4. *Id.* at 487 (noting that in 2012 content acquisition accounted for one half of video website Youku Tudou Inc.'s expenditures).

5. *See infra* Part II.A.

6. *See infra* Part I.A.

7. *See infra* notes 33–35 and accompanying text; Peter K. Yu, *Enforcement, Enforcement, What Enforcement?*, 52 IDEA 239, 257 (2012).

8. *See infra* Part I.A.

While these high-level political and diplomatic efforts proceed slowly and with largely disappointing practical results in important markets such as China, Brazil, Russia, and India, among many others, rights holders increasingly recognize that effective enforcement may be achieved through indirect enforcement strategies to coerce compliance with existing copyright laws. This market-based enforcement occurs against the background structure of copyright law, but does not rely on enforcement through courts or administrative agencies. Rather, the approach uses vital commercial pressure points to induce key intermediaries to police their supply chains for infringement or to compel infringers to cease infringement. Under such approaches, the infringers' cessation is not precipitated by fear of copyright infringement liability and the potential damages, fines, or injunctions that might result from judicial or administrative enforcement. Indeed, in many jurisdictions, such enforcement has little deterrent effect.[9] Instead, these infringers fear losing access to key markets, contracts, and deals.[10]

Under the right conditions, such an approach has the potential to be more effective, both short and long term, than attempts to improve enforcement through treaty negotiations, formal amendments to national laws, and diplomatic pressure. In the short term, it is possible for a market-pressure approach to yield effective copyright compliance almost immediately—something that mere changes in law cannot easily accomplish. In the long term, coercing key infringers to "go legit" can help establish a new group of local stakeholders with an interest in shifting market-wide norms toward copyright compliance.

Market-pressure strategies for global copyright enforcement parallel similar initiatives in other fields of law, including environmental law and labor law, that face chronic enforcement difficulties and widespread violations in emerging markets.[11] Scholars in those fields have argued that pressuring influential intermediaries, such as major transnational corporations, to impose and enforce environmental or workplace safety standards on suppliers in emerging markets can result in greater compliance than traditional law enforcement efforts.[12]

To date, however, no legal scholarship has systematically studied this emerging trend in the copyright context. Although market-pressure strategies are becoming a bigger part of copyright owners' enforcement arsenal, no guiding principles or framework have been suggested for understanding or optimizing these strategies. It is likely that many entities engaging in market-pressure strategies are unaware they are even part of an emerging trend with strategic commonalities. This Article seeks to fill the gap in the literature by analyzing copyright owners' use of cross-industry market pressures in lieu of traditional copyright enforcement to

9. *See infra* notes 33–35 and accompanying text.
10. *See id.*
11. *See infra* Part III.C.
12. *See infra* notes 272–280 and accompanying text.

address widespread copyright infringement in territories where enforcement is substandard. While a robust strain of scholarship exists analyzing and critiquing private copyright enforcement strategies, including the employment of encryption technologies and contracts,[13] comparatively little scholarship exists analyzing the cross-industry enforcement partnerships now emerging with increasing frequency.[14] Scholarship that does consider the role of private cross-industry arrangements to reduce piracy typically focuses on partnerships aimed at disincentivizing or eliminating end-user infringements in the United States.[15] For example, some scholars have analyzed the "graduated response" approach that U.S.-based copyright owners and Internet service providers jointly established to penalize Internet subscribers tabbed as repeat infringers.[16] Another study analyzes the phenomenon of so-called "second-level agreements," whereby U.S. copyright owners prospectively license major U.S. websites such as YouTube for inclusion of their content in user-generated derivative works.[17] This Article, by contrast, examines the emerging trend in private cross-industry enforcement of pressuring "gatekeeper" intermediaries, both in the United States and abroad, to condition market access of some kind on compliance with copyright law in a corporate infringer's jurisdiction.

To that end, this Article presents two case studies in which the market-pressure approach has been used, or is being used, to address copyright infringement in markets with poor copyright enforcement records. In the first case study, introduced above, copyright owners prevailed upon the Chinese video sites' advertisers to pressure the websites into purchasing content licenses. The second case study canvasses U.S. software producers' novel strategy of combining U.S. unfair competition law and market pressures to curb widespread unlicensed software use by overseas manufacturers. This new theory of unfair competition holds that businesses that enjoy the cost savings from using inexpensive pirated software in their operations receive an unfair competitive advantage over businesses that use licensed information technology and thereby incur higher pro-

13. *See infra* Part III.A.

14. Yafit Lev-Aretz, *Copyright Lawmaking and Public Choice: From Legislative Battles to Private Ordering*, 27 HARV. J.L. & TECH. 203, 210 (2013) ("While the deference to private ordering in user–industry and inter-industry settings has been widely tackled in legal commentary, private ordering in the cross-industry context has yet to be studied in detail.") [hereinafter Lev-Aretz, *Copyright Lawmaking and Public Choice*].

15. *See* Yafit Lev-Aretz, *Second Level Agreements*, 45 AKRON L. REV. 137, 198 (2012) [hereinafter Lev-Aretz, *Second Level Agreements*]; Anne-Marie Bridy, *Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement*, 89 OR. L. REV. 81, 81–82 (2010).

16. *See, e.g.*, Bridy, *supra* note 15, at 84–85.

17. *See* Lev-Aretz, *Second Level Agreements*, *supra* note 15, at 139. Of course, given the global nature of the Web, the line between local and international is often blurred. *See* Graeme W. Austin, *Valuing "Domestic Self-Determination" in International Intellectual Property Jurisprudence*, 77 CHI.-KENT L. REV. 1155, 1155–57 (2002). The point here is not that the effects of such agreements are local (often they are not), but rather they are arrangements between U.S-based entities to address U.S.-based conduct, even if the ultimate effects are global.

duction costs.[18] Attorneys general in four states—California, Massachusetts, Tennessee, and Washington—have already invoked state unfair competition laws to sanction foreign manufacturers accused of selling goods produced using pirated software.[19] A primary objective of this approach is to pressure major businesses and manufacturing operations to purchase software licenses by threatening to limit their access to U.S. markets.[20]

Building on these case studies, this Article presents a framework for evaluating market-pressure strategies aimed at redressing infringement in markets where traditional copyright enforcement has been largely ineffective. It draws on theories of "optimal targeting" (i.e., strategies that enlist parties who are best situated to cost-effectively police wrongdoing) and social norms to argue that a successful market-pressure strategy involves identifying and pressuring an intermediary (or group of intermediaries) that has sufficient leverage over the infringer to foreclose market access (e.g., retail markets, markets for advertisers, and so on). It further argues that although some intermediaries might be in a strong position to apply initial pressure, either through formal contract-based rights or as a result of a business relationship with the infringer, they might be poorly positioned to police infringing behavior on an ongoing basis, either because they lack the practical ability to exercise ongoing control or because of the high costs of monitoring and enforcement. Therefore, a market-pressure strategy is most likely to succeed if it stimulates among the targeted infringers a reshaping of social norms concerning copyright compliance. Market-pressure strategies that do not result in the shaping of social norms among infringer groups are unlikely to be effective long term unless intermediaries are willing and able to shoulder the costs of enforcement (for example, imposing and enforcing contract terms requiring that a supplier's processes are copyright compliant).

This Article proceeds as follows. Part I introduces the international copyright system and describes the challenges U.S. copyright holders face

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18. *See generally* William Kerr & Chad Moutray, Nat'l Ass'n Mfrs., Economic Impact of Global Software Theft on U.S. Manufacturing Competitiveness and Innovation (2014); Andrew F. Popper, *Beneficiaries of Misconduct: A Direct Approach to IT Theft*, 17 Marq. Intell. Prop. L. Rev. 27 (2013).

19. *See* Press Release, Office of the Att'y Gen., Cal. Dep't of Justice, Kamala D. Harris Files Unfair Competition Lawsuits Over Use of Pirated Software in Apparel Industry (Jan. 24, 2013), http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-files-unfair-competition-lawsuits-over-use; Press Release, Office of the Att'y Gen. of the State of Mass., Company Fined for Using Pirated Software to Gain Unfair Advantage Over Massachusetts Businesses (Oct. 18, 2012), http://www.mass.gov/ago/news-and-updates/press-releases/2012/2012-10-18-narong-seafood-co.html; Press Release, Nat'l Alliance for Jobs & Innovation, State AGs Developing Groundbreaking Solutions to Battle IT Theft and Unfair Competition, ABA Panelists Report (June 26, 2013), *available at* http://www.businesswire.com/news/home/20130626006556/en/State-AGs-Developing-Groundbreaking-Solutions-Battle-Theft#.UtOA2HnpXHk [hereinafter ABA Panelists Report]; Press Release, Wash. Office of the Att'y Gen., *Washington's New Unfair Competition Law Protects Local Company from Software Piracy* (Apr. 3, 2013), http://www.atg.wa.gov/pressrelease.aspx?id=31143#.UxrAjdzpXi4.

20. *See infra* Part II.B.

in achieving legal redress for infringements in jurisdictions with subpar copyright enforcement. It also explains the principle of territoriality and why attempts to use U.S. courts to redress foreign infringements are rarely fruitful. Part II introduces two case studies in which copyright owners, faced with scant viable legal enforcement options, have turned to market-pressure models in hopes of achieving compliance with copyright law in a more targeted and effective manner than through traditional legal enforcement. It notes that the key commonality between the two cases is that in each, copyright owners seek to tie *market access* in some form to copyright law compliance, rather than attempting to coerce compliance through traditional legal copyright enforcement tactics. Part III sets forth a framework for analyzing market-pressure strategies. It argues that a hybrid enforcement strategy combining law and market-based pressures can be effective, but success is largely dependent on whether the strategy impels changes in the infringer group's copyright compliance norms.

Part IV applies this framework to analyze and evaluate the case studies described in Part II. It concludes that market-pressure strategies work best when private enforcement is ongoing after the initial pressure is applied. Ongoing enforcement can occur through infringer group self-policing or through sustained enforcement efforts of pressuring intermediaries (if the intermediaries are willing and able to cost-effectively police the infringement). Thus, the market-pressure strategy succeeded in the first case study—the Chinese video websites—because the targeted infringer group formed a relatively small, close-knit community that developed a symbiotic relationship with the pressuring intermediaries (the advertisers). When the advertisers applied pressure, the websites fairly easily assimilated the advertisers' norms, which were generally aligned with those of the copyright owners. In addition, the websites became content producers themselves, even more closely aligning their copyright compliance norms with those of the copyright owners, and motivating self-policing within the group. The challenges are steeper in the second case study, i.e., the use of U.S. unfair competition laws to address overseas software piracy. There, the targeted group—potentially any manufacturer (in any industry) that uses pirated software—is extremely loose-knit and diffuse. Applying pressure to a few individual manufacturers from diverse industries is unlikely to effectuate the crucial anti-copying norm shifts among infringers. In that case, the strategy must activate personal anti-copying norms in infringers (a challenging task), or the pressuring intermediary must be willing and able to cost-effectively control infringement on an ongoing basis. Lastly, Part IV makes recommendations for improving the efficacy of two ongoing efforts to use market-pressure strategies to tackle global infringement: (1) the infringement-as-unfair-competition strategy introduced in Part II, and (2) copyright owners' current efforts to limit global Internet peer-to-peer sites' access to lucrative online advertising.

I. THE TERRITORIALITY PRINCIPLE AND EXTRATERRITORIAL APPLICATION OF COPYRIGHT LAW

A. Territoriality and the International Copyright System

The territoriality principle long recognized internationally[21] and by U.S. courts[22] generally limits a state's power to prescribe legal rules to its own territory.[23] Traditionally, this presented a vexing challenge for copyright owners: they were powerless to prevent the copying and sale of their works outside their home countries, from whose laws authors' rights arose and at whose borders their rights terminated.[24] This harmed the revenues of authors and publishers, who were unable to protect or monetize their works in foreign markets and who had to compete in their own markets with cheap copies of unprotected foreign works and even cheap imported copies of their own works.[25] International copyright law developed largely to address these problems by ensuring that authors in one country enjoyed exclusive rights—and thus protection against unauthorized exploitation of their works—elsewhere.[26]

The backbone of international copyright law is the Berne Convention, established in 1886.[27] In addition to setting minimum standards for substantive copyright rights, Berne established the principle of "national treatment" in international copyright law.[28] That is, every Berne signatory must afford to works originating from other member states treatment that is no less favorable than it gives to works of its own nationals.[29] Because the United States is a Berne signatory, U.S. nationals receive protection automatically under the copyright laws of all other member nations.[30] This does not mean, however, that the Berne Convention vests authors with an "international copyright."[31] Rather, it creates separate rights in multiple parallel national copyright regimes.[32]

21. Paul Goldstein, International Copyright: Principles, Law, and Practice 63 (2001).

22. *See* Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 Va. J. Int'l L. 505, 509–16 (1997).

23. Jane C. Ginsburg, *Global Use/Territorial Rights: Private International Law Questions of the Global Information Infrastructure*, 42 J. Copyright Soc'y U.S.A. 318, 319 (1995).

24. *See* Goldstein, *supra* note 21, at 31.

25. *See id.*; Catherine Seville, The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century 41 (2006).

26. *See* Goldstein, *supra* note 21, at 29–47; Seville, *supra* note 25, at 41–71.

27. *See* Graeme B. Dinwoodie, *The Architecture of the International Intellectual Property System*, 77 Chi.-Kent L. Rev. 993, 994–99 (2002).

28. *See id.* at 994–95.

29. Berne Convention for the Protection of Literary and Artistic Works art. 5 (1971 Paris text), July 24, 2971, 111 U.N.T.S. 3 [hereinafter Berne Convention].

30. *See* Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 Ohio St. L.J. 733, 742 (2001).

31. Ginsburg, *supra* note 23, at 330.

32. *Id.* As Professor Ginsburg explains, "[a]n author and international copyright owner [is] . . . at once[ ] the proprietor of a French copyright, a U.S. copyright, a Mexican copyright, a Japanese copyright, and so on." *Id.*

The efficacy of this international copyright system based on territoriality and national treatment depends at the very least on each member country affording other nations' authors not only substantive rights, but also the ability to effectively enforce those rights. Owning copyright rights in China, India, and Brazil, for example, means little if enforcement efforts prove ineffective in those territories. Copyright owners' enforcement efforts are often frustrated in emerging markets due to endemic systemic deficiencies, including under-resourced and poorly coordinated enforcement agencies and civil remedies that are too low to deter widespread infringement.[33] Other obstacles to effective enforcement can include official corruption and local protectionism,[34] as well as chronically overburdened court systems that produce years of procedural delay or deter the filing of enforcement actions altogether.[35] Individual nations have sovereignty over all aspects of their domestic intellectual property (IP) laws, including enforcement, however. So for a century following the advent of Berne, there was little that nations or their creative professionals could do about a lack of effective enforcement in other territories.[36]

Recognizing this, in the 1980s IP owners in developed countries, particularly the United States, successfully lobbied their governments to tie the international IP regime, including its minimum IP enforcement standards, to international trade.[37] As a result, a nation can gain admission into the elite global trade body, the World Trade Organization (WTO), only by agreeing to adopt the minimum IP standards in the Berne Convention and the WTO's mandatory Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).[38] TRIPS provides that member countries that fail to comply with those standards may be subject to dispute resolution proceedings.[39] The purpose of establishing a global IP system tied to the WTO's dispute resolution mechanism was to give teeth to international IP commitments and improve and standardize enforcement

33. For a discussion of the factors contributing to copyright enforcement deficiencies in China, for example, *see* Priest, *supra* note 3, at 477–81; MARTIN K. DIMITROV, PIRACY AND THE STATE: THE POLITICS OF INTELLECTUAL PROPERTY RIGHTS IN CHINA 221–47 (2009); ANDREW C. MERTHA, THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA 133–47 (2006); Eric Priest, *The Future of Music and Film Piracy in China*, 21 BERKELEY TECH. L.J. 795, 822–34 (2006) [hereinafter, Priest, *The Future of Music and Film Piracy in China*].

34. *See* ARUL GEORGE SCARIA, PIRACY IN THE INDIAN FILM INDUSTRY: COPYRIGHT AND CULTURAL CONSONANCE 162 (2014); Lawrence Liang & Ravi Sundaram, *India*, *in* MEDIA PIRACY IN EMERGING ECONOMIES 377 (Joe Karaganis ed., 2011); Olga Sezneva & Joe Karaganis, *Russia*, *in* MEDIA PIRACY IN EMERGING ECONOMIES, *supra*, at 171–74; Priest, *The Future of Music and Film Piracy in China*, *supra* note 33, at 822–24.

35. *See, e.g.*, Pedro N. Mizukami et al., *Brazil*, *in* MEDIA PIRACY IN EMERGING ECONOMIES, *supra* note 34, at 227–29; SCARIA, *supra* note 34, at 161–62.

36. *See* Dinwoodie, *supra* note 30, at 734–46.

37. *See* PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? 61–73 (2002).

38. *See* TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

39. *Id.* art. 64.1.

conditions.[40]

Coupling international IP law with trade has successfully induced countries to harmonize their laws to meet international minimum standards, but it has proven less effective at improving enforcement conditions in troubled markets.[41] Proving that a country is noncompliant with TRIPS can be difficult.[42] Moreover, the threat of trade sanctions—and even their use—has not necessarily led to improved IP enforcement.[43]

Frustrated by the inefficacy of the WTO dispute resolution system and by stalled multilateral negotiations on IP enforcement,[44] developed countries turned their attention toward new avenues for establishing stringent and effective international IP standards.[45] These efforts have focused on negotiating a new generation of bilateral, plurilateral, and regional trade agreements[46] (including the controversial Anti-Counterfeiting Trade Agreement (ACTA)[47] and Trans-Pacific Partnership (TPP)[48]) often referred to as "TRIPS-plus" agreements because they require protection levels that exceed the minima mandated by TRIPS.[49] Critics of these next generation agreements are troubled that they allegedly result from non-transparent and undemocratic processes and take advantage of developing countries' weaker negotiating leverage.[50] Some also doubt these

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40. *See* Peter Van den Bossche & Werner Zdouc, The Law and Policy of the World Trade Organization 952–53 (3d ed. 2013).

41. *See* Yu, *supra* note 7, at 243.

42. *See id.* at 242. According to Professor Yu, developing nations recognized when negotiating TRIPS that "higher enforcement standards often come with a hefty price tag, difficult tradeoffs, and significant intrusions on national sovereignty." *Id.* They therefore sought to create wiggle room in their implementation obligations. *See id.* They demanded provisions that limited the amount of resources they must spend on IP enforcement and pressed for the inclusion of vague and undefined terms such as "reasonable" and "effective" that made it more difficult to establish noncompliance. *Id.*

43. *See* Priest, *supra* note 3, at 476–77, 489–90 (discussing the daunting challenge of enforcing copyright in China more than a decade after China's accession to the WTO, and despite the U.S. having brought two IP-related WTO cases against China).

44. *See* Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. Rev. 975, 988–98 (2011); *see also* Graeme B. Dinwoodie, *Private Ordering and the Creation of International Copyright Norms: The Role of Public Structuring*, 160 J. Institutional & Theoretical Econ. 161, 166–67 (2004) ("As momentum toward internationalization of copyright law grew, it might not have been apparent . . . that this movement would still meet substantial resistance. Post-TRIPS, copyright policymakers encountered difficulty in reaching international consensus on a variety of new copyright issues.") (footnotes omitted).

45. *See* Yu, *supra* note 7, at 243.

46. *Id.*

47. *See* Office of the U.S. Trade Rep., *Anti-Counterfeiting Trade Agreement (ACTA)*, http://www.ustr.gov/acta (last visited Jan. 14, 2015).

48. *See* Office of the U.S. Trade Rep., *The United States in the Trans-Pacific Partnership*, https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2011/november/united-states-trans-pacific-partnership (last visited Jan. 14, 2015).

49. *See* Margo A. Bagley, *Legal Movements in Intellectual Property: TRIPS, Unilateral Action, Bilateral Agreements, and HIV/AIDS*, 17 Emory Int'l L. Rev. 781, 792–93 (2003).

50. *See, e.g.*, Peter K. Yu, *A Tale of Two Development Agendas*, 35 Ohio N.U. L. Rev. 465, 555 (2009) (noting that the lack of transparency in the ACTA negotiations "has attracted an immense amount of criticisms in not only the less developed world, but also the developed world"); Yu, *supra* note 44, at 1011–15 (discussing the non-transparent and un-

agreements' potential to be effective because these agreements seem ill equipped to solve the vexing enforcement deficiencies that plagued TRIPS.[51]

B. Using U.S. Courts to Remedy Foreign Infringements

U.S.-based copyright owners are certainly entitled to bring copyright infringement claims in most foreign jurisdictions where infringing acts occur,[52] but in some jurisdictions that may be of little practical benefit. Some aggrieved right holders therefore seek to leverage the United States' more developed legal system and stronger IP norms extraterritorially by bringing actions in U.S. courts for infringing acts that occur abroad.[53]

As noted above, the territoriality principle generally limits the rights arising under the U.S. Copyright Act to those places that the law reaches.[54] Congress may state the intended reach of a statute's prescriptive jurisdiction; otherwise, courts may interpret the statute to determine the reach of prescriptive jurisdiction.[55] In any event, U.S. courts have long applied, and continue to apply, a presumption against extraterritorial application of the Copyright Act.[56]

Even if Congress intended for the Copyright Act to reach acts of infringement in other countries, rules of jurisdiction act as a practical limit on the law's extraterritorial reach.[57] In order for a right holder to bring an

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democratic nature of the ACTA negotiations); Susan K. Sell, *TRIPS Was Never Enough: Vertical Forum Shifting, FTAS, ACTA, and TPP*, 18 J. Intell. Prop. L. 447, 451–52 (arguing that the negotiations for plurilateral agreements such as ACTA and TPP result from developed nations engaging in "vertical forum shifting"—that is, "negotiating norm-setting, rule-making, implementation, and enforcement at levels below the multilateral level," which is a tactic that "clearly favors the powerful").

51. *See, e.g.*, Peter K. Yu, *TRIPS and Its Achilles' Heel*, 18 J. Intell. Prop. L. 479, 518 (2011).

52. U.S.-based copyright owners acquire enforceable rights, for example, in all 168 Berne Convention member countries. *See* Berne Convention art. 5, *supra* note 29; World Intell. Prop. Org., *WIPO-Administered Treaties: Contracting Parties > Berne Convention*, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15 (last visited Mar. 27, 2015) (listing 168 Berne Convention members).

53. *See* Bradley, *supra* note 22, at 506.

54. *See supra* notes 21–24 and accompanying text.

55. Marketa Trimble, *Advancing National Intellectual Property Policies in a Transnational Context*, 74 Md. L. Rev. 203, 213–14 (2015) (using the example of the U.S. Patent Act, in which Congress expressly limited the reach of prescriptive jurisdiction in § 271(a) to acts that occur "within the United States" while § 271(b) has been interpreted by courts to reach acts of inducement to infringe that occur beyond U.S. borders) (citing 35 U.S.C. § 271(a), (b) (2012)). According to Professor Trimble, three factors combine to determine the actual extent to which a national law is effective beyond national borders: the intended territorial reach of the law as envisioned by the legislature; the law's interplay with conflict of law rules, including rules of jurisdiction; and the actual territorial scope of the country's enforcement power. *Id.* at 214–15.

56. *See* Goldstein, *supra* note 21, at 97–99.

57. Trimble, *supra* note 55, at 214–15 (noting that rules of jurisdiction are limiting factors on the extent to which a national law is actually effective beyond national borders).

action in a U.S. court to redress a foreign infringement,[58] the court must have personal jurisdiction over the defendant and must also have jurisdiction over the subject matter.[59] A court in the United States has general jurisdiction over the defendant if the infringer is an individual domiciled in the forum or a corporation that has such "continuous and systematic" affiliations with the forum "as to render [the defendant corporation] essentially at home in the forum State."[60] In one case in which major Chinese Internet search engine Baidu was sued by a right holder in New York for copyright infringements that occurred in China, such "contacts" as listing on a stock exchange based in the forum, and hiring lawyers and accountants in the forum to assist with the listing, were held insufficient to justify general jurisdiction.[61] Alternatively, a court may exercise specific jurisdiction over a defendant if the controversy specifically "arises out of" the defendant's contacts with the forum.[62] Infringements that occur abroad, however, generally have no direct connection to a U.S. forum and so do not give rise to specific jurisdiction. In short, many foreign infringers are simply unreachable by U.S. courts because they lack sufficient contact with a U.S. forum to establish general or specific jurisdiction.

If a U.S. court has personal jurisdiction over a defendant that infringed abroad, it may also have subject matter jurisdiction. Claims under foreign IP laws generally do not raise federal questions, but in a case against a foreign defendant a U.S. plaintiff might be able to rely on diversity jurisdiction.[63] Alternatively, a court with general jurisdiction over the defendant may hear claims even for infringements that occurred abroad and therefore arise under foreign law if the court deems copyright infringe-

58. Of course, in the hyper-connected digital information age, what constitutes a "foreign" infringement is often unclear. *See* Austin, *supra* note 17, at 1155–57. Many infringing acts have transnational or multinational components, raising complex questions of jurisdiction and choice of law. That said, an enormous number of infringements are still entirely local in character: the Indian manufacturer that reproduces unauthorized copies of enterprise software in India, for example, or the Chinese-language website that provides unlimited unlicensed downloads from servers based in China that are inaccessible from computers with IP addresses based outside of China. *See* Marketa Trimble, *The Multiplicity of Copyright Laws on the Internet: Proposed Solutions, Objections to the Solutions, and the Realities of Cross-Border Copyright Enforcement*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 339, 400–01 (2015) (noting that even in the Internet context, geolocation and geoblocking technologies can minimize the likelihood of infringement in multiple jurisdictions). For the most part, the types of infringements with which this Article is concerned are local in character. However, the problem of global ad networks funding globally accessible rogue peer-to-peer sites, discussed *infra* in Part IV.C.2, can involve cross-border infringement scenarios.

59. *See* Bradley, *supra* note 22, at 578–79.

60. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011).

61. Stormhale, Inc. v. Baidu.com, Inc., 675 F. Supp. 2d 373, 375 (S.D.N.Y. 2009).

62. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984).

63. *See* Bradley, *supra* note 22, at 579. A federal court may exercise "diversity" subject matter jurisdiction when the plaintiffs and defendants are citizens of different states or countries and the amount in controversy exceeds $75,000. 28 U.S.C. § 1332 (2012).

ment to be a "transitory" cause of action.[64] Some U.S. courts have been willing to entertain copyright infringement claims arising under foreign law as transitory causes of action.[65] Most courts, however, hold that plaintiffs fail to state a claim under the U.S. Copyright Act for extraterritorial infringements because the Act lacks extraterritorial effect.[66] Regardless, this is unhelpful in most cases of infringement abroad because most such defendants are not domiciled in the U.S. and therefore are not subject to general jurisdiction here in the first place.

Even if a court has personal and subject matter jurisdiction, it may invoke the discretionary doctrine of *forum non conveniens* to dismiss the case when an adequate alternate forum exists (such as a court in the defendant's home country) and various public and private interest factors indicate dismissal would be proper.[67] Lastly, in the event that a U.S. court does exercise jurisdiction over a foreign defendant for a foreign act of infringement, and does not dismiss on *forum non conveniens* grounds, the defendant must have sufficient U.S. assets against which to enforce a judgment, otherwise litigation avails the plaintiff nothing.[68] In short, it is

64. *See* Trimble, *supra* note 58, at 357; 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 17.03 (2011) ("If the plaintiff has a valid cause of action under the copyright laws of a foreign country, and if personal jurisdiction of the defendant can be obtained in an American court, it is arguable that an action may be brought in such court for infringement of a foreign copyright law. This would be on the theory that copyright infringement constitutes a transitory cause of action, and hence, may be adjudicated in the courts of a sovereign other than the one in which the cause of action arose."). "Transitory" causes of action are those that may be heard in any court that has personal jurisdiction over the defendant. *See* Trimble, *supra* note 58, at 357.

65. *See* London Film Prods. Ltd. v. Intercontinental Commc'ns, Inc., 580 F. Supp. 47 (S.D.N.Y. 1984) (finding that the court had subject matter jurisdiction over a copyright infringement claim that arose solely from foreign acts of infringement); Creative Tech. Ltd. v. Aztech Sys. PTE, Ltd., 61 F.3d 696, 702 (9th Cir. 1995).

66. *See, e.g.*, Subafilms, Ltd. v. MGM-Pathe Commc'ns Co., 24 F.3d 1088, 1095 (9th Cir. 1994) (noting a "long-standing principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States'" and indicating an unwillingness to "overturn over eighty years of consistent jurisprudence on the extraterritorial reach of the copyright laws"); *see also* Bradley, *supra* note 22, at 523–24 ("[C]ourts consistently have held that U.S. copyright law, at least as a general matter, does not apply beyond U.S. territorial boundaries.").

67. *See, e.g.*, Lockman Found. v. Evangelical Alliance Mission, 930 F.2d 764, 766 (9th Cir. 1991) (dismissed on *forum non conveniens* grounds where U.S. plaintiff sued Japanese defendant for infringement occurring in Japan and defendant brought parallel suit against plaintiff pending in Japanese court); Creative Tech., Ltd. v. Aztech Sys. PTE, Ltd., 61 F.3d 696, 701 (9th Cir. 1995) (dismissed on *forum non conveniens* grounds where Singaporean plaintiff sued Singaporean defendant in U.S. court for infringement that occurred in United States); Murray v. British Broad. Corp., 81 F.3d 287, 290–92 (2d Cir. 1996) (dismissed on *forum non conveniens* grounds where British plaintiff sued British defendant for infringement that occurred in the United Kingdom). *But see* Boosey & Hawkes Music Publishers v. Walt Disney, 145 F.3d 481, 491–92 (2d Cir. 1998) (refusing to apply *forum non conveniens* doctrine where U.K. plaintiff sued U.S. defendant for infringement in eighteen foreign jurisdictions, but no infringing acts occurred in the United States); Bradley, *supra* note 22, at 580 ("A dismissal on *forum non conveniens* grounds is supposed to be the exception, not the rule. Moreover, choice of law, although an important factor in the *forum non conveniens* determination, is not the only factor to be considered, and courts often refuse to dismiss cases on *forum non conveniens* grounds despite the existence of foreign-law issues.") (footnotes omitted).

68. *See* Trimble, *supra* note 55, at 216.

extremely difficult to obtain a remedy in a U.S. court for acts of copyright infringement committed by foreign entities entirely beyond U.S borders.[69]

C. Remedying Extraterritorial Infringements through Indirect Copyright Liability

While many foreign infringers are beyond the reach of U.S. courts, many have key business associates that are not. Some of these business partners are important or even central to the foreign company's operations and financial well-being, such as major U.S.-based customers, suppliers, or advertisers. Imagine, for example, a Brazilian original equipment manufacturer (OEM) that infringes copyright by loading unlicensed copies of Windows, Excel, AutoCAD, or other enterprise software onto its computers used in manufacturing and business operations geared toward providing products and components to U.S. businesses. Imagine further that the OEM's livelihood depends on a few key U.S.-based customers, whose business financially supports the OEM and who directly benefit from the cost savings enabled by the OEM's use of free or inexpensive pirated software. (Large manufacturing and logistics operations in BRIC countries reportedly often use unauthorized software worth tens of thousands to millions of dollars.[70]) Do software companies have a cause of action in the United States against the OEM's U.S.-based customers? Similarly, might liability extend to U.S.-based companies that financially support copyright infringement by advertising on online video portals in China that routinely make unlicensed movies and television programs available to customers in China (but are inaccessible elsewhere)?[71]

U.S. copyright law has a well-developed body of doctrine for extending liability to third parties who do not engage in direct infringement but who facilitate, control, or benefit from the infringements of others.[72] The two major strains of secondary copyright liability are vicarious liability and contributory infringement.[73]

69. *See id.* at 254–55.

70. *See, e.g.*, Nat'l Ass'n of Att'ys Gen., Letter to Federal Trade Commission Commissioners and the Director of the Bureau of Competition, Nov. 4, 2011 (citing a Chinese parts manufacturer that uses unauthorized software valued at $5.2 million).

71. As discussed below, China does provide a safe harbor for online portals that passively host content at the direction of end users. *See* Priest, *supra* note 3, at 475 n. 30. Therefore, an online video portal hosting unlicensed content is not necessarily a copyright infringer, direct or contributory. However, as this Author has noted elsewhere, websites in China have been found to host (or at least have been suspected of hosting) unlicensed content at their own initiative in order to ensure a large stable of available, current content in order to attract users. *Id.* at 472–73.

72. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 929–30 (2005).

73. A third theory of indirect copyright liability, recently advanced by the U.S. Supreme Court, is "inducement" liability, which imputes liability to a third party who distributes a technology "with the object of promoting its use to infringe copyright." *Id.* at 914, 936–37.

1. *Vicarious Liability*

A U.S. court is unlikely to find vicarious or contributory liability for conduct amounting to business dealings that benefit the infringer but are not directly associated with the infringing activity. Under U.S. law, vicarious copyright liability arises when the third party obtains direct financial benefit from the infringement and has the power to cease the infringing conduct.[74] Courts have not strictly construed the test to require that the alleged vicarious infringer "directly" benefit from the infringement; even the mere prospect of indirect benefit is sufficient.[75] Accordingly, any potential indirect benefits (such as cost savings) that inure to the U.S. defendant's benefit might satisfy this prong.[76] Courts have applied the control element more strictly, however, and are unlikely to find liability if the third party does not have the right to shut down the infringing activity.[77] A U.S.-based customer or retailer is unlikely to have the right to force its overseas supplier to cease infringement or shut down operations if the supplier installs unlicensed software on company PCs overseas. Similarly, a U.S.-based advertiser will lack the right to shut down a foreign website on which its ad appears adjacent to infringing content.

2. *Contributory Infringement*

Contributory infringement arises when the third party has knowledge of the infringing activity and induces, causes, or materially contributes to the infringement.[78] Courts have held that contributory infringement requires "actual knowledge" of specific instances of infringement[79] or that there be circumstances indicating that the alleged contributory infringer should have known about the infringement.[80] One court has ruled, for example, that merely advertising on a website that hosts infringing material, without specific knowledge of the site's activities, fails to result in the requisite knowledge for contributory infringement purposes.[81] Courts have also required that the acts of alleged contributory infringement be directly related to, and substantially involved in facilitating, the primary

74. *See generally* Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 308 (2d Cir. 1963).

75. *See, e.g.*, Polygram Int'l Publ'g, Inc. v. Nevada/TIG, Inc., 855 F. Supp. 1314, 1331 (D. Mass. 1994) (citing H.R. Rep. No. 159-60 (1976)).

76. *Id.*

77. *See, e.g.*, Perfect 10, Inc. v. Visa Int'l Serv. Ass'n, 494 F.3d 788, 803–06 (9th Cir. 2007) (holding that credit card companies lack "control" for vicarious liability purposes because although their payment processing services helped enable and increase sales of infringing content online, the credit card companies lack the right, contractual or otherwise, to shut down the infringing websites, block the transmission of infringing files, or remove the sites from the Web).

78. *See generally* Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971).

79. *See* Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1172 (9th Cir. 2007).

80. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 487 (1984) (Blackmun, J., dissenting) ("[A] finding of contributory infringement has never depended on actual knowledge of particular instances of infringement; it is sufficient that the defendant have reason to know that infringement is taking place.").

81. Elsevier Ltd. v. Chitika, Inc., 826 F. Supp. 2d 398, 404–06 (D. Mass. 2011).

infringement.[82] Most U.S.-based customers or advertisers are unlikely to be in a position to know whether their foreign supplier or partner is engaging in infringement. Even if provided with notice (and therefore knowledge) of specific infringements, the U.S.-based entity's general business dealings with the foreign infringer are unlikely to be considered "material contributions" to the infringing activity.[83] Accordingly, current U.S. law on indirect liability is unlikely to extend liability to U.S.-based business associates of foreign infringers if the U.S. entity neither controls the foreign company nor materially contributes to the infringement.[84]

While U.S. law on secondary liability is unlikely to be helpful in connection with foreign acts of infringement, it is quite possible that, if faced with the issue, a U.S. court might not apply U.S. law at all. Rather, in IP cases, courts traditionally apply the law of the jurisdiction in which the act of direct infringement took place.[85] In such a case, a court might feel compelled to apply the foreign jurisdiction's law of contributory infringement.[86] Still, this may not be of much benefit to the plaintiff. The foreign jurisdiction's secondary liability rules may be narrower or less developed than U.S. law or less likely to extend liability. For example, in China indirect liability is an underdeveloped doctrine, subject to a high degree of uncertainty and judicial discretion.[87]

Ultimately, however, it seems U.S. courts are unlikely to find that they have subject matter jurisdiction at all with respect to secondary liability claims arising from purely foreign infringements.[88] While a U.S. court may be able to exercise personal jurisdiction over a U.S.-based defendant, the territoriality principle and choice of law rules cast serious doubt on whether a cause of action exists under U.S. law for secondary liability when the primary infringement occurs abroad.[89] Some federal courts have held they have subject matter jurisdiction under the U.S. Copyright Act when a defendant based in the United States "authorizes" others to

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82. *See* Demetriades v. Kaufmann, 690 F. Supp. 289, 294 (S.D.N.Y. 1988); NIMMER & NIMMER, *supra* note 64, § 12.04[A][3][a].

83. Perfect 10, Inc. v. Visa Int'l Serv. Ass'n, 494 F.3d 788, 796–98. (9th Cir. 2007).

84. *Id.* at 796.

85. Itar-Tass Russian News Agency v. Russian Kurier, 153 F.3d 82, 91 (2d Cir. 1998).

86. *Cf. id.* (discussing choice of law rules concerning copyright infringement generally).

87. *See* Seagull Haiyan Song, *A Comparative Copyright Analysis of ISP Liability in China Versus the United States and Europe*, 27 COMPUTER & INTERNET LAW. 2, 8 (July 2010) (observing that "China does not have specific secondary liability theories, including contributory, vicarious, or inducement theories developed in the United States," but that in online service provider copyright liability cases, Chinese courts "look to factors similar to those assessed by US courts, including an ISP's knowledge of infringement, intent, ability and rights to control infringing activity, financial benefits arising from infringing activities, and contribution to the infringing activity, for example"); Haitao Zhang, *P2P Operator Liable for "Contributory Infringement,"* KING & WOOD IP BULLETIN (Mar. 2008), *available at* http://www.kingandwood.com/article.aspx?id=P2P-Operator-Liable-for-Contributory-Infringement&language=en ("Currently, China provides no judicial interpretation regarding 'contributory infringement,' therefore, it is largely decided at the judges' discretion.").

88. *See* NIMMER & NIMMER, *supra* note 64, § 12.04 [D][2].

89. *See id.*

commit infringing acts that occur abroad.[90] More recent cases and a leading treatise reject that conclusion,[91] however, finding that it is now "generally accepted" that no liability exists under the U.S. Copyright Act for contributions to acts that occur beyond the territorial reach of U.S. law and thus do not infringe any right under the Act.[92]

In sum, U.S. courts are unlikely (and seem to be increasingly so) to find they have subject matter jurisdiction over controversies in which U.S. defendants' actions contributed to acts of infringement that occurred entirely beyond U.S. borders. Even if a U.S. court does hear such a case, the chances that it would hold a U.S.-based defendant indirectly liable for conduct amounting to general business interactions seem vanishingly small.[93]

Given the difficulty U.S.-based copyright owners often have enforcing their rights abroad or achieving extraterritorial application of U.S. law, copyright owners are increasingly turning to indirect, market-based enforcement strategies to impel compliance with copyright law.[94] The next Part introduces two case studies of such market-based enforcement.

II. ACHIEVING COPYRIGHT LAW COMPLIANCE THROUGH MARKET PRESSURES: TWO CASE STUDIES

This Part offers two case studies that show how copyright owners have employed market-based pressures to achieve copyright compliance in emerging markets. The first case study describes the efforts of movie and television program copyright owners to pressure Chinese video sharing websites to remove infringing content and purchase licenses. The second case study discusses software producers' efforts to pressure large foreign manufacturers into purchasing software licenses and ultimately changing copyright compliance norms among such manufacturers.

A. THE RISE OF COPYRIGHT LICENSING ON CHINESE VIDEO WEBSITES

1. Pressuring Advertisers to Police Chinese Video Websites for Pirated Content

Since their inception in the mid-2000's, sites such as Youku.com and Tudou.com, the leaders of China's fiercely competitive Internet video

90. Peter Starr Prod. Co. v. Twin Cont'l Films, Inc., 783 F.2d 1440, 1443 (9th Cir. 1986); ITSI T.V. Prods., Inc. v. Cal. Auth. of Racing Fairs, 785 F. Supp. 854, 862 (E.D.Cal. 1992).

91. Subafilms, Ltd. v. MGM-Pathe Commc'ns Co., 24 F.3d 1088, 1090–92 (9th Cir. 1994) (en banc); NIMMER & NIMMER, *supra* note 64, § 12.04[D][2].

92. Armstrong v. Virgin Records, Ltd., 91 F. Supp. 2d 628, 634 (S.D.N.Y 2000).

93. *See* Daryl J. Levinson, *Aimster and Optimal Targeting*, 120 HARV. L. REV. 1148, 1153 (2007) (noting courts' reluctance to hold third parties liable when the conduct does not directly include the commission of some forbidden act, reflecting courts' "discomfort with the notion of punishing an 'innocent' third party, even when the instrumental benefits of doing so are readily apparent").

94. *See infra* Part II.

streaming market,[95] were notorious for hosting unauthorized copyrighted video content.[96] During the first half-decade of their existence, these YouTube-style streaming video sites were rife with complete, unlicensed domestic and foreign television programs and films for free, on-demand public streaming, including such Hollywood hits as "Prison Break," "Lost," and "Transformers."[97] To remain competitive and attract viewers, such streaming video sites had to ensure they were serving users the latest and most desirable content.[98] Hosting the latest television dramas and films is especially important because Chinese Internet users have generally been more interested in viewing professionally produced content than user-generated content.[99]

Nevertheless, by 2010, both Youku and Tudou were removing unlicensed videos in earnest.[100] This fact alone is unremarkable, since Chinese copyright regulations provide online service providers with a safe harbor from copyright infringement liability if they expeditiously remove unlicensed content upon notification by the copyright owner.[101] Removal of content by service providers to comply with copyright safe harbor provisions rarely guarantees a net reduction in available unlicensed content, however, since the expunged content often quickly reappears on the same website.[102] What *is* remarkable is that much of the content Youku and Tudou removed from their sites remained unavailable thereafter, indicating that both companies were engaged in sincere, sophisticated, and pro-

95. *See Watch This Space*, ECONOMIST, (Mar. 17, 2012), *available at* http://www.economist.com/node/21550283 (citing estimates by one research firm ranking Youku.com as China's online video market leader with 21.8 percent of the market, and Tudou.com as the second most-used online video site in China with 13.7 percent market share, and noting that other estimates suggest both firms have an even larger market share).

96. *See, e.g.*, Bruce Einhorn, *The YouTube of China Goes Legit*, BLOOMBERG BUS. WK. (Mar. 31, 2011), *available at* http://www.businessweek.com/magazine/content/11_15/b4223044746164.htm#_jmp0_ ("Youku launched in 2006 as a local version of YouTube, which China's censors have long banned, and quickly became a premier place to download pirated movies and TV shows.").

97. *See, e.g.*, *id.*; Yi Zhou, *Genuine Copyright Dilemma for Video Sharing Websites*, CHINA INTELL. PROP. (Wang Hongjun trans., June 2009), *available at* http://www.chinaipmagazine.com/en/journal-show.asp?id=490; David Barboza, *Booming Demand for TV on the Internet in China*, N.Y. TIMES (July 18, 2010), *available at* www.nytimes.com/2010/07/19/business/global/19chinavideo.html?_r=0.

98. Wang Fei'er, *The Copyright Clash*, GLOBAL TIMES (Jan. 12, 2012), http://www.globaltimes.cn/content/691864.shtml.

99. *Id.*

100. Priest, *supra* note 3, at 486–87.

101. Xinxi Wangluo Chuanbo Baohu Quan Tiaoli (信息网络传播保护权条例) [Regulations for the Protection of the Right of Communication through the Information Network] (promulgated by the St. Council, May 10, 2006, effective July 1, 2006) ST. COUNCIL GAZ., Jul. 10, 2006, at 13 (China), *translated in* 3 CHINA PAT. & TRADEMARKS 90, 93–94 (2006).

102. *See* Andrew Orlowski, *China's Nonstop Music Machine*, REG. (Sept. 13, 2008), http://www.theregister.co.uk/2008/09/13/baidu_investigation/. Even in the United States, copyright owners complain that notice and takedown procedures create the potential for a frustrating game of cat and mouse that places significant burdens on copyright owners as well as Web companies, with few tangible results. *See* Paul Resnikoff, *It's Broken: Google Is Now Fielding 300,000 Takedown Requests a Week. . .*, DIGITAL MUSIC NEWS (May 24, 2012), http://www.digitalmusicnews.com/permalink/2012/05/24/google300000.

longed efforts to eradicate unlicensed content. Indeed, both companies began employing video "fingerprinting" technology to help them more readily identify and reject infringing videos uploaded by users.[103]

More importantly, in addition to removing the infringing content, Youku and Tudou began spending large sums to acquire exclusive online distribution rights.[104] With the disappearance of pirated content from the major video sites, exclusive rights, which had little value in an environment in which piracy was endemic, became the primary tool by which competing video sites could differentiate themselves.[105] The result was a meteoric rise in prices for exclusive online broadcast rights as video sites bid up prices in a scramble to lock up as much exclusive content (and thus viewers) as they could afford. In one example, the exclusive online broadcast rights for the popular Chinese television drama "Palace" reportedly sold in October 2011 for $290,000 per episode.[106] By comparison, just two years earlier the exclusive online rights for the most popular show on Chinese television, "Latent," sold for a mere $1,500 per episode.[107] By 2011, Tudou had spent nearly $50 million on content licenses, while content acquisition accounted for more than a quarter of Youku's total expenditures.[108] It is now common for a Chinese video site that acquires exclusive licenses to monetize them not only through its own website, but also to sublicense them to competing video websites to maximize viewership and revenue.[109] Websites that continue to host unauthorized content are now the target of lawsuits from competing sites that own exclusive rights. Indeed, Youku and Tudou sued each other for copyright infringement[110] before suddenly agreeing in March 2012 to merge in response to severe business model challenges that included the soaring cost of exclusive copyright licenses.[111]

What factors led to the unprecedented turnaround? In a market in which copyright enforcement is lax, competition for viewers and advertisers is fierce, costs are high (particularly for broadband fees), and revenues are modest, sites like Youku and Tudou presumably have little

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103. *See* Loretta Chao, *Top China Video Site Steps Up Its Piracy Fight*, WALL ST. J. (Apr. 19, 2010), http://www.wsj.com/news/articles/SB10001424052748703757504575193741 4615189.42. Unsurprisingly, the sites also use the technology as a censorship tool to help identify and remove politically verboten video content. *Id.*

104. Wang Fei'er, *supra* note 98.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *See* Aaron Back & Loretta Chao, *China's Youku Sues Rival Video Site Tudou*, WALL ST. J. (Dec. 16, 2011), http://online.wsj.com/article/SB10001424052970204553904577 101914136777678.html.

111. Kathrin Hille, *Youku and Tudou to Merge Amid Cost Rises*, FIN. TIMES (Mar. 12, 2012), http://www.ft.com/intl/cms/s/0/27d4df96-6c2f-11e1-8c9d-00144feab49a.html#axzz 1zythO5or ("The agreement [between Youku and Tudou to merge] comes as both companies are struggling with continuing losses because the cost of acquiring and producing content, and beefing up their infrastructure to ensure faster streaming speeds is outpacing the increase in advertising revenue.").

incentive to police themselves for copyright violations. After all, doing so increases their costs enormously (in the form of expensive content licenses, fees for video fingerprinting software, and administrative overhead associated with policing the site and managing licensed content) while limiting their available programming to licensed content only, thereby potentially diminishing their ability to attract and retain viewers.

The explanation, according to news reports and this Author's interviews with Youku and Tudou executives, is that at least some of the advertisers the major video sharing sites covet most—large, transnational consumer products companies such as Coca-Cola, McDonalds, PepsiCo, KFC, Sony, and General Motors—grew uncomfortable advertising on sites perceived to be havens for piracy.[112] Several Chinese video websites, since at least 2008, have collaborated directly with major international brands as advertising clients.[113] The specific impetus for the brands' discomfort with associations with pirate sites appears to have been lawsuits filed in Beijing in 2009 against two high-profile advertisers—The Coca-Cola Company and PepsiCo—who were named as contributory copyright infringers for placing advertisements on Youku that accompanied unli-

112. Interview with Executive, Youku.com Inc., in Beijing, China (Sept. 14, 2011); Interview with Robin Wang, Senior PR Assoc., Tudou, in Beijing, China (Sept. 14, 2011); Chao, *supra* note 103 ("Youku is betting the new fingerprint system will help it improve its reputation among advertisers who don't want to be associated with piracy. That association can be risky. Last year, an antipiracy group of Chinese Internet companies filed a number of lawsuits against Youku in Chinese courts, including one that alleged that a Coca-Cola Co. ad had run on Youku accompanying a clip from a Chinese TV show that Youku hadn't licensed."); *Two Anti-Piracy Alliances, Same Enemy*, CHINA INTELL. PROP. (Li Yu trans., Oct. 28, 2009), http://www.chinaipmagazine.com/en/journal-show.asp?id=532 (describing the deliberate efforts of copyright owners to include major advertising firms in their anti-piracy alliance, to increase awareness of the piracy issue among advertisers, and to pressure major brands); 优酷网上品牌广告全部消失 [*Brand Advertisers Disappear from Youku's Website*], JISHINET (Sept. 27, 2009), http://it.sohu.com/20090927/n267036711.shtml (describing the apparent sudden removal of major brand advertising from Youku, and reporting speculation that the removal was due to pressure from brands concerned about piracy); 可口可乐称若广告投放网站非法将撤广告, [*Coca-Cola Announces It Will Remove Advertising from Illegal Sites*], 网易财经 [NETEASE FIN. & ECON.] (Sept. 24, 2009), http://money.163.com/09/0924/18/5K0EL5MJ002526O3.html (reporting that The Coca-Cola Company was sued as a contributory infringer for placing ads on an unlicensed television drama on Youku, that suing advertisers has become a major focus of video copyright owners' anti-piracy efforts in China, and that Coca-Cola publicly announced in China that it will remove ads from any website that it confirms hosts illegal content); 罗添 [Luo Tian]," 版权诉讼令广告商撤退 视频网站生存临考 *Copyright Infringement Lawsuit Forces Advertisers to Withdraw from Websites*], 北京商报 [BEIJING BUS. NEWS] (Sept. 18, 2009), http://www.techweb.com.cn/business/2009-09-18/440505.shtml (noting that China's Association of Accredited Advertising Agencies sent a warning letter about infringing websites to its forty-one members, which account for eighty percent of ads purchased in China, and that the exodus of advertisers threatens the survival of China's online video websites); 广告商渐拒盗版分享网站 不当"从案犯" [*Advertisers Gradually Turn Down Video Sharing Sites Hosting Unlicensed Content*], XINHUANET (Aug. 31, 2009), http://news.sohu.com/20090831/n266287368.shtml (discussing major brands' serious concerns about advertising on video sharing websites that host pirated content, in particular their concerns about the deleterious effects on brand credibility, and concerns that pirate websites attract a high volume of "junk" traffic that is of low value to brands) [hereinafter *Advertisers Gradually Turn Down Video Sharing Site Hosting Unlicensed Content*].

113. *See* Loretta Chao, *Online Advertising Gets Boost in China*, WALL ST. J. (Dec. 11, 2008), http://www.wsj.com/articles/SB122893812034095363.

censed videos.[114] Sohu, one of China's major online portals and search engines, began investing heavily in its online video streaming services after witnessing the success of sites such as Youku and Tudou.[115] After unsuccessfully defending its own lawsuit in 2007 for hosting unlicensed Hollywood movie downloads through a subsidiary,[116] Sohu began to license legitimate content. Sohu CEO Charles Zhang, one of China's wealthiest and most influential Internet pioneers, reportedly grew convinced that the only way to build a successful video streaming business is through licensing content.[117] Zhang recognized, however, that building such a business is impossible if the industry-wide norms persist and one legitimate site is forced to compete with sites serving unlicensed content.[118] In 2009, Sohu allied with two small video websites and more than fifty video rights holders to sue infringing websites and pressure their advertisers.[119]

There was little reason for a company such as Coca-Cola to worry about the legal outcome in that case. The damages sought were relatively low (reportedly about $100,000),[120] and the damages awarded had the plaintiffs been successful almost certainly would have been a fraction of that amount.[121] Legal experts doubted the likelihood of success in any event,[122] and the Beijing court dismissed the allegations against Coca-Cola.[123] Nevertheless, it seems these lawsuits made the issue of association with pirated content real and immediate for brand owners. The advertisers are themselves owners of extremely valuable IP that they

114. *See* Wang Xing, *Web Video Piracy War Heats Up*, CHINA DAILY (Sept. 29, 2009), http://www.chinadaily.com.cn/bw/2009-09/28/content_8744294.htm#_jmp0; *Two Anti-Piracy Alliances, Same Enemy*, *supra* note 112.

115. *See* Wang Xing, *supra* note 114.

116. Sarah Novotny, *Beijing Slams Sohu for Posting U.S. Movies Online*, ADOTAS (Jan. 2, 2007), http://www.adotas.com/2007/01/beijing-slams-sohu-for-posting-us-movies-online/.

117. *See* Marika Heller, *Charles Zhang Regales IR/PS with Battle Stories from China's Internet Wars*, CHINA FOCUS (Feb. 14, 2014), http://chinafocus.us/2014/02/14/charles-zhang-regales-irps-battle-stories-chinas-internet-wars/.

118. *See* Clifford Coonan & Patrick Brzeski, *Chinese Film, Internet Video Companies Sue Search Giant Baidu in Anti-Piracy Push*, HOLLYWOOD REP. (Nov. 13, 2013), http://www.hollywoodreporter.com/news/chinese-film-internet-video-companies-655605#_jmp0_ (quoting Charles Zhang as saying, "We cannot keep competing because where thieves and robbers are having their way, law-abiding companies cannot survive.").

119. *See Two Anti-Piracy Alliances, Same Enemy*, *supra* note 112.

120. *See* Wang Xing, *supra* note 114 (noting that "[t]he lawsuit [was] seeking 686,386 yuan in compensation from Coca Cola and Youku.com").

121. In a 2009 study of damages claimed and awarded in fifty-four civil copyright suits in China, which included several cases involving major Western film studios and record labels as plaintiffs, the median copyright damages claimed was $251,313, but the median damages awarded amounted to $20,607—a mere 9 percent of median damages claimed. KRISTINA SEPETYS & ALAN COX, NERA ECON. CONSULTING, INTELLECTUAL PROPERTY RIGHTS PROTECTION IN CHINA: TRENDS IN LITIGATION AND ECONOMIC DAMAGES 13 (2009), http://www.nera.com/content/dam/nera/publications/archive1/PUB_IPR_Protection_China_0109_final.pdf.

122. *See, e.g.*, *Coca-Cola Announces It Will Remove Advertising from Illegal Sites, supra* note 112 (reporting legal commentator's opinion at the time of the litigation that the grounds for holding Coca-Cola liable were insufficient); Wang Xing, *supra* note 114.

123. Chao, *supra* note 103.

diligently defend against infringement in China and worldwide.[124] It would be hypocritical and arguably contravene company ethics and policy[125] to advertise with and thereby support Web companies that profit from the unauthorized use of others' IP.[126] For companies such as Youku and Tudou, already unable to generate sufficient advertising revenue to break even, losing the support of deep-pocketed international brands was simply not an option.

2. *Why Alternative Explanations of China's Internet Video Licensing Bubble Fall Short*

How can we be sure that pressuring advertisers to police the video sites' content was the primary impetus for the change? After all, there are at least four plausible alternative explanations. First, perhaps copyright enforcement was working: the websites might have begun purging pirated content in earnest because they feared (or grew weary of) copyright lawsuits over unlicensed videos. Second, the Chinese government might have successfully pressured online video websites to cease infringement. Third, both Youku and Tudou began concertedly removing pirated content and seeking licenses just one or two years prior to their initial public offerings on U.S. stock exchanges; perhaps the turnaround was designed to impress Western investors. Fourth, perhaps Chinese online video sites determined that in order to expand their business models and provide premium pay-per-view services, they needed content licenses. While all of these probably played a role in facilitating the change, the remainder of this Section argues that none satisfies as the primary explanation. Nevertheless, it is important to note preliminarily that even if the third reason (concern about investor perceptions) and fourth reason (business model shift) weighed prominently in the video websites' change of heart, these are also market-driven pressures that support this Article's general thesis that such pressures can be effective levers for attaining copyright compliance.

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124. *See, e.g.*, Emma Barraclough, *How Coca-Cola Protects Its Rights in Asia*, MANAGING INTELL. PROP. (Oct. 1, 2007), http://www.managingip.com/Article/1450469/How-Coca-Cola-protects-its-rights-in-Asia.html (observing that Coca-Cola's legal team deals with "many hundreds of counterfeits and infringements" each year).

125. Many large transnational companies have policies mandating respect for intellectual property rights of others. *See, e.g.*, SONY CORP., SONY GROUP CODE OF CONDUCT 6 (2014), http://www.sony.net/SonyInfo/csr_report/compliance/code_of_conduct.pdf ("In addition to vigorously defending Sony Group's own rights, it is imperative to respect the rights of others. Personnel must not knowingly misuse the intellectual property of others or violate their intellectual property rights."); MCDONALD'S CORP., STANDARDS OF BUSINESS CONDUCT 38 (2011), http://www.aboutmcdonalds.com/content/dam/AboutMcDonalds/Investors/9497_SBC_International_EN-US%20v2%20final%20061311.pdf (instructing employees to "[r]espect the proprietary rights of others, including patents, copyrights and trademarks").

126. Advertisers have grown increasingly sensitive in recent years to the potentially brand-tarnishing effects of appearing to support copyright infringement on the Web. *See infra* Part IV.C.2.

a. Copyright Enforcement

Did lawsuits by copyright owners take their toll, forcing Youku and Tudou to tire of the expense and hassle of copyright litigation, which became a fact of life for them as sites rife with unlicensed videos?[127] While the lawsuits were doubtless unwelcome and tiresome, concern about copyright litigation alone is inadequate to explain Tudou and Youku's change of heart. Given the generally low damages for infringement available under Chinese copyright law, litigation efforts provided little deterrence.[128] Other major Chinese sites, such as Baidu, China's largest search engine, have thrived in the face of persistent copyright litigation.[129]

b. Official Pressure

Alternatively, some commentators suggest that increased pressure from Chinese authorities was a significant catalyst for Youku and Tudou's expeditious about-face on copyright compliance.[130] Internet video providers have predictably drawn the attention and scrutiny of Chinese authorities. A cornerstone of authoritarian rule in China is strict media control, and audiovisual works are regulated as a potent ideological medium.[131] Various agencies have issued directives concerning the online video market. Most have been issued by the State Administration of Radio, Film, and Television (SARFT), which regulates and supervises radio,

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127. *See* Wang Xing, *supra* note 114.

128. Civil damages for copyright infringement are limited to the actual damages incurred by the right holder, or, where actual damages are difficult to compute, the plaintiff can recover the "illegal income" of the infringer. Where neither the plaintiff's actual damages nor the infringer's illegal income are ascertainable, the court can impose statutory damages of no greater than 500,000 RMB (approximately $79,000 USD). Art. 49, Zhonghua Renmin Gongheguo Zhuzuo Quanfa (中华人民共和国著作权法) [Copyright Law of the People's Rep. of China] (revised by the Standing Comm. Nat'l People's Cong., Feb. 26, 2010) P.R.C. LAWS. From 2006 to 2009, the average damage award for copyright infringement was 32,051 RMB (approximately $5,000 USD). Priest, *supra* note 3, at 477. In one example in the online media space, Baidu, which is China's largest search engine and a frequent copyright defendant, was found liable for infringing music copyrights by displaying lyrics without copyright owners' permission. *Id.* at 478. The court entered a judgment of 60,000 RMB ($8,800 USD) against Baidu. *Id.*

129. *See id.* at 496–98.

130. *See, e.g.*, Stan Abrams, *China's Video File Sharing Sites and the Drop in IP Infringement: Who's Responsible?*, CHINA HEARSAY (Jan. 31, 2011), http://www.chinahearsay.com/chinas-video-file-sharing-sites-and-the-drop-in-ip-infringement-whos-responsible/; *see also* Richard Wigley, *China's Online Video Providers Struck by PRC Copyright Enforcement and a Shifting Market Are Forced to Transform*, CHINA L. INSIGHT (Jan. 30, 2011), http://www.chinalawinsight.com/2011/01/articles/intellectual-property/chinas-online-video-providers-struck-by-prc-copyright-enforcement-and-a-shifting-market-are-forced-to-transform/ (concluding that Chinese video websites' increased compliance with copyright law is explained in part by the sites' recognition that authorized content creates more monetization opportunities, but also by the "[r]ecent efforts by the National Copyright Administration ('NCA') to identify and, if necessary, punish online copyright infringers related to pirated video works have shown the potential for meaningful results, with a number of links to pirated works already having been deleted").

131. Rogier Creemers, Explaining Audiovisual Media Piracy in China: Media Control, Enforcement and Globalization 91–92 (2012) (unpublished dissertation, Maastricht Univ.) (on file with Maastricht Univ.).

film, and television production and broadcasting.[132] As early as 2000, SARFT promulgated provisional regulations on online broadcast of film and television programs, which, among other things, established a permit requirement for entities engaged in disseminating audiovisual works on the Internet.[133] Subsequent SARFT rules and regulations reiterate the permit requirement and add that permit applicants must be wholly state-owned enterprises, and must already possess a television broadcast or news license.[134] These rules, like most SARFT rules concerning online video dissemination, are primarily aimed at reinforcing the government's censorship power and media control.

Nevertheless, there is little reason to conclude that government pressure played a major role in Youku and Tudou's turnaround on the piracy issue. While SARFT has occasionally made life uncomfortable for sites such as Youku and Tudou,[135] it has allowed them to skirt various rules for years. Youku and Tudou are foreign-invested, private enterprises that operated for years without a SARFT online video permit.[136] (As noted above, in 2012 Youku and Tudou merged.[137]) Although both companies later acquired SARFT permits,[138] neither actually holds the permit. Both

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132. *See* Dimitrov, supra note 33, at 129. In 2013, SARFT merged with the General Administration of Press and Publication to form the State Administration of Press, Publication, Radio, Film, and Television.

133. Art. 5, Xinxi Wangluo Zhuanbo Guangbo Dianying Dianshi Leijie Mujiandu Guanli Zanxing Banfa Guangfa Shezi (信息网络传播广播电影电视类节目监督管理暂行办法 广发社字) [Provisional Information Network Dissemination of Radio, Film and Television-Type Program Supervision Management Rules] (promulgated by the State Admin. of Radio, Film, and Television, Apr. 7, 2000), *translated in* China Copy. & Media, http://chinacopyrightandmedia.wordpress.com/2000/04/07/provisional-information-network-dissemination-of-radio-film-and-television-type-programme-supervision-management-rules/ ("The State Administration of Radio, Film and Television implements a permit system over dissemination of radio, film and television-type programmes through information networks. Only when holding an 'Online Dissemination of Radio, Film and Television-Type Programmes Permit', is it permitted to launch dissemination of radio, film and television-type programmes through information networks work.").

134. Arts. 6–8, Hulianwang Shiting Jiemu Fuwu Guanli Guiding (互联网视听节目服务管理规定) [Internet Audiovisual Program Service Management Regulations] (promulgated by the State Admin. of Radio, Film, and Television, Dec. 20, 2007, effective Jan. 30, 2008), *translated in* China Copy. & Media, http://chinacopyrightandmedia.wordpress.com/2007/12/20/internet-audiovisual-programme-service-management-regulations/.

135. *See* Jeremy Goldkorn, *Video Website Licenses for 247 Sites; Big Three Left in the Cold*, Danwei (June 23, 2008, 12:05 AM), http://www.danwei.org/media_regulation/video_website_licenses_247_sit.php ("SARFT has published a list of 247 organizations that are 'approved to host Internet audio-visual programs' in China. . . . But conspicuously missing from the list are the Big Three of the Chinese Youtube clones: Youku.com, Tudou.com and 56.com. Although 56.com has been off line for nearly two weeks after an apparent porblem [sic] with the authorities, these three websites have the largest amount of funding of any video websites in China, most of it foreign. By most accounts they are also the most popular video sites in China.").

136. Tudou Holdings Ltd., Registration Statement Under the Securities Act of 1933 at 30 (Form F-1) (June 16, 2011) [hereinafter Tudou SEC Registration Statement].

137. *See supra* note 111 and accompanying text.

138. Steven Schwankert, *China Approves Video Site Youku's License*, CIO (July 10, 2008, 8:00 AM), http://www.cio.com/article/430513/China_Approves_Video_Site_Youku

Youku and Tudou were incorporated in the Cayman Islands and are publicly traded in the United States.[139] As foreign-invested enterprises, they are forbidden from holding such permits. The permits are therefore held by "affiliated entities" in China (in what is typically referred to as a Variable Interest Entity—or VIE—corporate structure) with which Youku and Tudou have contractual arrangements.[140] In addition, Youku and Tudou have long been streaming foreign films and television programs in violation of SARFT regulations that prohibit the dissemination of foreign content that has not been approved for public screening.[141]

Some SARFT rules and regulations concerning Internet video do reference copyright law, vaguely directing providers of online audiovisual works to abide by copyright law and adopt "copyright protection measures."[142] Nevertheless, SARFT rules and regulations primarily concern

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_s_License (Youku obtained its SARFT license in September 2008); Tudou SEC Registration Statement, *supra* note 136.

139. Youku.com Inc., Prospectus (Form 424(B)(4)) (Dec. 8, 2010) [hereinafter Youku.com Inc.]; Tudou SEC Registration Statement, *supra* note 136.

140. Youku.com Inc., *supra* note 139, at 5; Tudou SEC Registration Statement, *supra* note 136, at 6. This structure, in which a foreign entity establishes an independent, privately-owned local operational entity, is known as the "Variable Interest Entity" (VIE) corporate structure. *See* T.K. Chang, *Retail Sector and E-Commerce*, *in* DOING BUSINESS IN CHINA § 7.09[3] (Michael J. Moser & Fu Yu eds., Release 25, 2014). The off-shore company holds no equity in the local entity, which is typically owned by a trusted Chinese national (for example, Youku's primary "affiliated entity" is jointly owned by Youku's CFO and the wife of the company's founder). Youku.com Inc., *supra* note 139, at 5. In the VIE structure, control of the local company and acquisition of its profits are achieved through a series of contractual agreements. Chang, *supra*, § 709[3]. While this structure is well established in China and to date has been accepted by Chinese authorities, the legality of the VIE structure remains an open question. *See* Joy Shaw & Lisa Chow, *China VIE Structure May Hold Hidden Risks*, FIN. TIMES (Nov. 11, 2011), http://www.ft.com/intl/cms/s/2/0a1e4d78-0bf6-11e1-9310-00144feabdc0.html#axzz20LTC20TN (quoting a Ministry of Commerce (MOFCOM) official as saying "'Currently MOFCOM still doesn't require all the VIE companies to notify their ongoing M&A deals with MOFCOM under the foreign investment policy. But VIE companies should be aware that MOFCOM has the right to retrospectively (investigate) historical deals,'" and reporting that "the lack of consensus on VIE partly reflects ongoing power struggles among various regulatory agencies, which all seek to expand regulatory authority").

141. *See* Steve Dickinson & Mathew Alderson, *China's Film Industry Promotion Law. How Do Tudou/Yokou Investors Sleep At Night?*, CHINA L. BLOG (Apr. 20, 2012), http://www.chinalawblog.com/2012/04/chinas-film-industry-promotion-law-how-do-tudouyokou-investors-sleep-at-night.html.

142. *See, e.g.*, Art. 5, Guangdianzongju Guanyu Jiaqiang Hulianwang Shiting Jiemu Neirong Guanli De Tongzhi (广电总局关于加强互联网视听节目内容管理的通知) [SARFT Notice Concerning Strengthening Internet Audiovisual Programme Content Management] (promulgated by the State Admin. of Radio, Film, and Television, Mar. 3, 2009) *translated in* CHINA COPY. & MEDIA, http://www.Chinacopyrightandmedia.wordpress.com/2009/03/03/sarft-notice-concerning-strenghhtening-internet-audiovisual-progamme-content-man agement-2/ ("Work units engaging in Internet audiovisual programme service must perfect a programme copyright protection system, strictly respect the provisions of copyright laws and administrative regulations, the disseminated programmes shall possess corresponding copyright. They must adopt copyright protection measures, protect the lawful rights and interests of copyright holders. All localities' radio, film and television management entities must administer according to the law, scrupulously perform their duties, realistically strengthen Internet audiovisual programme content management, supervise and urge the audiovisual programme websites to implement this diligently, consciously observe the above provisions, vigorously make effort to construct a harmonious, green network audio-

its powers of media control for purposes of political and social control (including blocking the dissemination of pornography, horror, and other genres that might not be politically sensitive but are believed to endanger the moral character of Chinese society).[143] Ensuring compliance with copyright law, while presumably a worthwhile aspiration in the view of SARFT officials, ranks at best a distant third behind controlling politically and culturally sensitive media. All of this is to say that if SARFT pressures online video sites, doing so on copyright enforcement grounds is unlikely given the other plausible grounds for claiming noncompliance that are more relevant to SARFT's mandate. While copyright and censorship are sometimes bedfellows in China, all the evidence suggests SARFT is far more concerned about the latter than the former. It is quite possible that Youku and Tudou's swift installation of their content ID systems was driven at least in part, and possibly in large part, by government pressure to provide more effective and responsive political and social content filtering. Once such content ID technologies were in place, utilizing them to police copyright infringement was an obvious and opportune deployment.

The primary agency tasked with copyright enforcement, the National Copyright Administration (NCA), has held annual campaigns aimed at reducing online piracy since 2005.[144] In 2010, the NCA initiated an anti-piracy campaign against online video infringers.[145] The long-term effect of the latest campaign is unclear, but it is worth noting that the NCA is a comparatively weak agency due to its low bureaucratic status and the fact that it historically engages in short-term enforcement campaigns that have little lasting effect.[146] It appears these recent online enforcement efforts follow the NCA's traditional campaign-style enforcement model.[147] In any event, the NCA began its online crackdown efforts in earnest well after Youku and Tudou had already taken steps to substan-

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visual programme environment."); Art. 15, Hulianwang Shiting Jiemu Fuwu Guanli Guiding (互联网视听节目服务管理规定) [Internet Audiovisual Programme Service Management Regulations] (promulgated by the State Admin. of Radio, Film, and Television, Dec. 20, 2007, effective Jan. 30, 2008), *translated in* China Copy. & Media, http://chinacopyrightandmedia.wordpress.com/2007/12/20/internet-audiovisual-programme-service-management-regulations/ ("Internet audiovisual programme service work units shall abide the provisions of copyright laws and administrative regulations, adopt copyright protection measures, protect the lawful rights and interests of copyright holders."); Art. 18, Hulianwang Deng Xinxi Wangluo Chuanbo Shiting Jiemu Guanli Banfa Di Yi Zhang Zongze (互联网等信息网络传播视听节目管理办法 第一章 总则) [Internet and Other Information Networks Audiovisual Programme Dissemination Management Rules] (promulgated by the State Admin. of Radio, Film, and Television, July 6, 2004, effective Oct. 11, 2004), *translated in* China Copy. & Media, http://chinacopyrightandmedia.wordpress.com/2004/07/06/internet-and-other-information-networks-audiovisual-programme-dissemination-management-rules/ ("Audiovisual programmes disseminated through information networks, shall conform to the provisions of the 'Copyright Law.'").

143. *See* Priest, *supra* note 3, at 482–83, 488–95.

144. *See* Youku.com Inc., *supra* note 139, at 135.

145. *See* Bo Qiu, *Blacklist System to Monitor Online Video Copyright*, China Daily (Jan. 29, 2011), http://www.chinadaily.com.cn/life/2011-01/29/content_11939475.htm.

146. Dimitrov, *supra* note 33, at 234–35.

147. *See* Bo Qiu, *supra* note 145.

tially reduce their unlicensed content.[148] Accordingly, it is unlikely that the NCA's efforts led to the turnaround, at least in the case of Youku and Tudou. An executive at Youku confirmed this, telling this Author that government pressure was "not a major issue" in Youku's decision to remove copyrighted material and implement a content identification system to help thwart infringement.[149]

c. Reputational Concerns Ahead of Planned IPOs

Some argue that the major video sites' sudden about-face on online video copyright compliance was motivated by a desire to burnish their reputations ahead of their public stock offerings in the United States.[150] According to this theory, Chinese theft of American IP is an inflammatory topic in the United States, and American investors will lack confidence in a company widely perceived as a Chinese copyright pirate. The risk of copyright litigation might make investors leery. Sites such as Youku and Tudou had no choice, therefore, but to clean up their acts pre-IPO.[151]

This is the most plausible alternative explanation among the four explored here, and to the extent that reputational concerns played a role in the websites' anti-infringement efforts it provides further evidence that market pressures may be more effective than traditional legal enforcement in challenging environments. Nevertheless, reputational concerns pre-IPO do not appear to have been as important a factor as advertiser relations. First, it is not clear that IP liability of Chinese websites ranked highly among the concerns of U.S. investors in 2009. Up to that point, accusations of piracy or the existence of copyright litigation had little negative effect on the performance of a Chinese Internet company's stock in the U.S. market. For example, Baidu's initial public offering on NASDAQ in 2005 created "the IPO market's biggest splash in at least five years,"[152] despite that Baidu was already dogged by copyright infringement lawsuits.[153] Baidu's stock price continued to soar notwithstanding a rash of copyright suits filed by domestic Chinese and major international

148. *See* Chao, *supra* note 103 (noting in early 2010 that Youku and Tudou were already well along in implementing a video fingerprinting system to reduce piracy).

149. Interview with Executive, Youku.com Inc., *supra* note 112.

150. *See, e.g.*, Li Chen, *Chinese Video Sites Spend Big to Keep Audience Attention*, TECHINASIA (June 24, 2011), http://www.techinasia.com/china-video-spend-money/ ("There's a recent trend among video websites in China to spend enormous amounts of money to acquire TV and movie content. In the past, such content was usually streamed without license, and as a result many Chinese video sites became wildly popular when they first started. But now that many of them have IPO'd (or intend to IPO) they are trying to go legit with licensed content.").

151. *See id.*

152. *See* Steve Gelsi, *Baidu.com More Than Triples*, MARKETWATCH (Aug. 5, 2005), http://articles.marketwatch.com/2005-08-05/news/30696294_1_ipo-market-ipo-price-baidu-com.

153. *See* Jeremy Goldkorn, *Baidu IPO: Investors Go Nuts But Doubts Remain*, DANWEI (Aug. 8, 2005, 1:13 PM), http://www.danwei.org/business_and_finance/baidu_ipo_investors_go_nuts_bu.php ("Baidu's Google-glow enchanted investors['] enthusiasm was not dampened in the slightest by an IPR infringement suit brought against the Chinese search engine

record labels alike, alleging that Baidu's MP3 search function willfully enabled mass copyright infringement.[154] In April 2008, the Chairman of the International Federation of the Phonographic Industry (IFPI), the industry association representing the four international major record labels at the time (Universal Music, Sony Music, EMI, and Warner Music), publicly singled out Baidu as "China's largest violator of music copyrights, generating huge revenue by deliberately providing access to illegal content."[155] Nevertheless, Baidu's stock price enjoyed a 20 percent increase in the thirty days following Kennedy's statement.[156] Sohu.com, another major Chinese Web portal also publicly traded in the United States, had been a defendant in high-profile lawsuits by the IFPI[157] and the Motion Picture Association prior to 2009,[158] but there is little indication this affected its stock price or reputation among investors.

In addition, online video sites could generally comply with notice and takedown procedures and thereby reduce their litigation risk.[159] Simple compliance with notice and takedown procedures would likely be sufficient to mollify investors on the risks of infringement litigation, particularly in the U.S. market, which seems quite forgiving on this point, and

by the producers of Zhang Yimou's film *House of Flying Daggers*, reported by Bloomberg just days before the IPO.").

154. *See* Priest, *supra* note 3, at 496–98.

155. *Baidu Faces Potential Multi-Billion Dollar Liability for Breaching Music Copyrights*, Music Indus. News Network (Apr. 9, 2008), http://www.mi2n.com/press.php3?press_nb=108736 (quoting IFPI Chairman John Kennedy).

156. *Baidu, Inc. (BIDU) Historical Prices*, Yahoo! Fin., http://finance.yahoo.com/q/hp?s=BIDU&a=03&b=1&c=2008&d=04&e=30&f=2008&g=d (showing that Baidu's stock price rose from $30.00 on April 7, 2007 to $35.91 on May 7, 2007).

157. *See* Jason Mick, *IFPI, Warner, Universal, Sony Attack Baidu, Yahoo, Sohu for Copyright Infringement*, Daily Tech (Feb. 6, 2008, 6:10 PM), http://www.dailytech.com/IFPI+Warner+Universal+Sony+Attack+Baidu+Yahoo+Sohu+For+Copyright+Infringement/article10585.htm.

158. *See* Liz Shackelton, *Chinese Fine Sohu and Shanghai Store for Copyright Infringement*, Screen Daily (Jan. 1, 2007), http://www.screendaily.com/chinese-fine-sohu-and-shanghai-store-for-copyright-infringement/4030039.article.

159. *See* Priest, *supra* note 3, at 474–75. A website enjoys a safe harbor from copyright liability if it: (1) clearly indicates that it provides its storage space to subscribers, (2) does not alter the works in question, (3) has no knowledge of or reasonable grounds for knowing of the infringing act, (4) does not seek to financially benefit directly from the works, and (5) expeditiously removes the content after receipt of the notice. Xinxi Wangluo Chuanbo Baohu Quan Tiaoli (信息网络传播保护权条例) [Regulations for the Protection of the Right of Communication Through the Information Network] (promulgated by the St. Council, May 10, 2006, effective July 1, 2006) St. Council Gaz., Jul. 10, 2006, at 13 (China), *translated in* 3 China Pat. & Trademarks 90, 93–94 (2006). The 2012 second revision draft of the Copyright Law of the People's Republic of China provides that a network service provider that fails to expeditiously remove or otherwise disable access to infringing content on its service "bear[s] joint and several liability with the [direct] infringer." Art 69, Zhonghua Renmin Gongheguo Zhuzuo Quanfa (Xiugai Caoan Di Er Gao) (中华人民共和国著作权法 (修改草案第二稿)) [Copyright Law of the People's Republic of China (Second Revision Draft)] (promulgated by the Nat'l Copyright Admin., Mar. 31, 2012, effective Jul. 31, 2012 Westlaw China). Indeed, the safe harbor regulations and procedures in China seem to particularly favor online service providers. Copyright owners and their representatives report the notice and takedown procedures are opaque, non-standardized, and burdensome on copyright owners, including high proof thresholds for establishing ownership. Priest, *supra* note 3, at 475.

millions spent on content licenses would be unnecessary. In an interview, a Youku executive confirmed this conclusion, telling this Author that the company was well along in reforming its approach to copyright before it had even decided to become a public company.[160]

d. Business Model Transition

Lastly, some observers suggest that major video sites such as Youku and Tudou were motivated to improve copyright compliance because they envision transitioning to subscription and on-demand, pay-per-view content delivery as their next-generation business model.[161] Successfully employing these models long term would require these companies to acquire licenses and establish a good rapport with copyright owners. The major video sites rely almost exclusively on advertising revenue, and at the time of this writing they have never been profitable doing so.[162] Both sites do indeed, therefore, hope subscription and pay-per-view offerings will become an important piece of their monetization puzzle.[163] It seems impossible to maximize the value of such offerings without the consent and cooperation of content owners. At the very least, placing content behind a pay wall would disqualify online video service providers from utilizing the legal safe harbor for hosting content posted at the direction of a user.[164]

This argument is premised on the idea that market conditions may force infringers into compliance even when legal sanctions are insufficient. To the extent that this was a motivating factor, therefore, it buttresses the argument that market pressures can be highly effective enforcement tools. However, it also appears not to have been the primary reason for the shift—mostly because the pressure to shift business models was far less than the pressure to maintain and increase ad revenue. Pay-per-view and subscription services are highly speculative and have generated modest revenue.[165] It is doubtful that a company such as Youku,

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160. Interview with Executive, Youku.com Inc., *supra* note 112.

161. *See* Wigley, *supra* note 130 ("Beyond today's model for monetization of online video in China, which is largely based on advertising revenues, there is a new and potentially huge market for paid downloads/streams of desirable content. In December of 2010, Youku.com began streaming the movie, 'Inception', at a cost to users of [5] RMB (approximately 75 U.S. cents), based upon a licensing deal between Youku.com and Warner Bros.").

162. *See Watch This Space*, *supra* note 95.

163. *See* Barboza, *supra* note 97 (observing that Tudou claims to be "positioning itself as a Chinese version of HBO"); Einhorn, *supra* note 96 (quoting Youku founder and CEO, Victor Koo, as saying "You can't build a business out of [unauthorized downloads]. If you can't monetize it, what's the point?").

164. *See supra* note 159.

165. According to Youku's investor documents, from 2007 to 2010 the company's non-advertising revenue "accounted for nil." *See* Youku.com Inc., *supra* note 139, at 75–76. In 2012, non-advertising revenue, including pay-per-view and subscription services, accounted for approximately $29 million of Youku's revenue, a substantial jump from previous years but still a modest 10 percent of 2012's total net revenue of $288,210, mostly derived from advertising. *See* YOUKU TUDOU INC., FORM 20-F: ANNUAL REPORT PURSUANT TO SEC-

with mounting losses and a desperate need to show profitability,[166] would invest $170 million in content licensing fees—as it did from 2010 to 2012—to grow speculative services that earn a small fraction of those expenditures.

As the foregoing discussion demonstrates, market pressures in the nature of coercing advertisers played the most prominent role in Chinese Internet video sites' rebirth as copyright adherents. This case study shows that in markets where copyright law enforcement is weak and piracy is the norm, one can achieve a shift to copyright-friendly norms through an indirect, market-pressure enforcement strategy. Importantly, it also shows that once this shift has occurred, the erstwhile pirate who now invests in content acquisition becomes more than just a licensee and revenue source; it becomes a stakeholder in the copyright ecosystem. After all, substantial investments in content acquisition provide little value if competitors continue to serve the same content without incurring the licensing costs. Indeed, pressuring third parties—in this case advertisers—caused those third parties to become indirect stakeholders in the copyright ecosystem as well. By using market pressures to increase the size of the copyright ecosystem and the number of its stakeholders, audiovisual copyright owners were able to ensure far greater, ongoing adherence to copyright law than they could have through direct legal enforcement of their rights. While the online video sites still have to prove their model, and piracy within the online video industry remains a threat, the market-pressure strategy has already paid enormous dividends to copyright owners.

B. Pressuring Overseas Manufacturers through U.S. Unfair Competition Laws

The second case study involves efforts by U.S. software copyright owners to address the widespread use of unlicensed enterprise software overseas. According to a 2012 study by the Business Software Alliance (BSA), the commercial value of unlicensed PC software use worldwide exceeds $63 billion annually.[167] Much of this commercial value derives from the widespread use of unlicensed enterprise software: among all computer users in the BSA study who self-reported unlicensed software use, busi-

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tion 12 or 15(d) of the Securities Exchange Act of 1934 for the Fiscal Year Ended December 31, 2012 (Apr. 26, 2013).

166. *See* Doug Young, *Big Investors Lose Taste for Pactera, Youku*, Seekingalpha.com (Sept. 16, 2013), http://seekingalpha.com/article/1696572-big-investors-lose-taste-for-pactera-youku?source=email_rt_mc_focus_0 (noting that one large institutional investor had divested its stake in Youku in part because "Youku Tudou is losing money and has given no indication of when it might become profitable" and that "CEO Victor Koo desperately wants to show the world he can make Youku Tudou into a profitable company").

167. Business Software Alliance, Shadow Market: 2011 BSA Global Software Piracy Study (2012), *available at* http://globalstudy.bsa.org/2011/downloads/study_pdf/2011_BSA_Piracy_Study-Standard.pdf [hereinafter 2011 BSA Global Software Piracy Study].

ness decision-makers ranked first.[168] The use of unlicensed business software in emerging markets is especially prevalent, as the BSA found that business decision-makers in emerging markets were more likely than their counterparts in mature markets to use unlicensed software.[169] Many emerging markets, which are characterized by their surging economies but weak legal systems and poor property rights enforcement,[170] have piracy rates that far outstrip those of mature markets.[171] Emerging markets with high estimated software piracy rates include Indonesia (where an estimated 86 percent of all PC software in use is pirated), China (77 percent), Thailand (72 percent), India (63 percent), and Brazil (53 percent).[172] While the piracy rates in each of these emerging markets except Indonesia has actually fallen over the past decade, progress remains slow and copyright owners' ability to monetize software use in numerous emerging markets lags far behind those markets' economic development.

Microsoft's experience in China is illustrative. In 1998, then-CEO Bill Gates famously revealed that part of the company's China strategy was to ensure first and foremost the proliferation of Microsoft's software products, even if at the time the majority of copies in China were unlicensed.[173] The idea, he said, was to get Chinese users "sort of addicted" to Microsoft's products, and then Microsoft would "somehow figure out how to collect sometime in the next decade."[174] He presumed that as China's economy and legal system develop, so too would the ability of, and incentives for, users to pay for software. Nearly two decades following his remarks however, software producers' ability to collect revenues in China remains elusive.[175] China's software piracy rates are still among the highest in the world, while its legitimate software sales in 2011 amounted to just 6 percent of those of the United States, despite China's far larger population.[176]

Some U.S. software producers allege that the immense copyright enforcement difficulties in emerging markets produce a galling inequity: many businesses in emerging markets fail to pay software licensing fees to U.S. copyright owners while those same businesses avail themselves of

168. *Id.* at 3.

169. *Id.*

170. YADONG LUO, MULTINATIONAL ENTERPRISES IN EMERGING ECONOMIES 5–6 (2002).

171. *See* 2011 BSA GLOBAL SOFTWARE PIRACY STUDY, *supra* note 167, at 6.

172. *Id.* The study also estimates PC software piracy rates for many developed countries, including the United States (19 percent), Japan (21 percent), Australia (23 percent), Germany (26 percent) and the United Kingdom (26 percent), and concludes that "[a]s a group, [emerging markets'] piracy rate was 68 percent in 2011 compared to an average of 24 percent in developed economies." *Id.*

173. Corey Grice & Sandeep Junnarkar, *Gates, Buffett a Bit Bearish*, CNET NEWS (July 2, 1998), http://news.cnet.com/2100-1023-212942.html (quoting Bill Gates' remarks before an audience at the University of Washington).

174. *Id.*

175. *See* Priest, *supra* note 3, at 529–30.

176. *See* 2011 BSA GLOBAL SOFTWARE PIRACY STUDY, *supra* note 167, at 6.

the economic opportunities afforded by access to U.S. markets.[177] This, copyright owners argue, harms not only software producers; it also harms competition.[178] Pervasive enterprise software piracy in emerging markets has, in the BSA's words, "broad ramifications, because software is an essential tool of production; companies that dodge the capital cost of it gain an unfair competitive advantage over companies that pay for software as they should."[179]

Determined to seize the attention of manufacturers in markets where copyright enforcement is weak, software copyright owners have urged that it be an actionable act of unfair competition to sell goods in the United States that were produced using unlicensed software.[180] Unfair competition law is a collection of tort doctrines aimed at remedying economic injuries to competing businesses that result from deceptive or unfair business practices.[181] It is a novel and innovative expansion of the law to hold businesses liable for anticompetitive effects of failing to purchase software licenses, and questions persist about the approach's legality,[182] the normative desirability of expanding unfair competition law in this manner, and the extent to which U.S.-based manufacturers are actually injured by overseas competitors' use of unlicensed software.[183] What is clear is that the idea found its inspiration in copyright owners' attempts to motivate large manufacturers to buy software licenses by establishing a market-based pressure point—access to U.S. markets—when traditional copyright enforcement measures fail.

The theory of copyright infringement as unfair competition is gaining traction in the United States among commentators and officials.[184] Law professor Andrew Popper recently argued that, "If a manufacturer steals software . . . instead of paying for it, its input costs are reduced as com-

177. *See* KERR & MOUTRAY, *supra* note 18, at 13; Arthur M. Mitchell III et al., *The Emerging Risks of Unauthorized IP in Your Supply Chain and How You Should Respond – Part II*, 26 INTELL. PROP. & TECH. L.J. 3, 8–9 (2014) (describing Thai seafood processor gaining an advantage in U.S. markets through its use of unlicensed software).

178. 2011 BSA GLOBAL SOFTWARE PIRACY STUDY, *supra* note 167, at 3.

179. *Id.*

180. *See* Mitchell III et al., *supra* note 177, at 4; Sharon Pian Chan, *Microsoft Presses State to Tackle Software Piracy*, SEATTLE TIMES (Mar. 14, 2011, 12:15 PM), http://seattletimes.com/html/businesstechnology/2014472018_btpiracy14.html.

181. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 (1995).

182. For example, do U.S. federal copyright and patent laws preempt the application of state unfair competition laws in this context? Is conditioning access to U.S. markets on the use of licensed software preempted under U.S. foreign relations law? Does it constitute impermissible discrimination under international trade law? For an analysis of these questions, *see* Sean A. Pager & Eric Priest, Infringement as Unfair Competition: A New Paradigm for Regulating Global Commerce (unpublished manuscript) (forthcoming 2016) (on file with author).

183. For a discussion of the cost advantage justification, *see* David J. Kappos & Gregory R. Baden, *Combating IP Theft Using Unfair Competition Law*, N.Y. L.J. (May 6, 2013), *available at* http://www.cravath.com/files/Uploads/Documents/Publications/3409818_1.pdf. For a study attempting to quantify the general economic harms to U.S. manufacturers that result from competitors' use of pirated software, *see generally* KERR & MOUTRAY, *supra* note 18, at 3–4.

184. *See, e.g.*, *id.*; Popper, *supra* note 18, at 28–29; Kappos & Baden, *supra* note 183.

pared to its competitors that pay for their IT. . . . The result is an uneven playing field, rewarding theft and penalizing those who respect the rule of law and pay for their information technology . . . ."[185] In a 2014 study titled "The Economic Impact of Global Software Theft on U.S. Manufacturing Competitiveness and Innovation," Harvard Business School professor William Kerr and National Association of Manufacturers chief economist Chad Moutray estimated that "[t]he unfair competitive advantage gained by overseas manufacturers from software theft cost manufacturers in the U.S. . . . $239.9 billion [in revenue between 2002–2012]."[186] Former FTC chairman William Kovacic and former Director of the United States Patent and Trademark Office David Kappos have also strongly advocated for the expanded application of unfair competition law to penalize unlicensed software use by foreign manufacturers that sell their products in the United States.[187] In November 2011, attorneys general from thirty-six states and three U.S. territories sent a letter to the commissioners of the Federal Trade Commission (FTC) urging them to use Section 5 of the FTC Act to address the unfair competition they allege results from selling goods in the United States that were produced using "stolen" information technology, including unlicensed software.[188]

The expansion of unfair competition doctrine to address competitive advantages arising from the use of pirated software is more than just a theory. As the following subsections detail, five states have already taken official action to penalize the sale of products for which the manufacturing process or supply chain utilized unlicensed software. Two of those states (Washington State and Louisiana) have passed specialized legislation penalizing the sale within their jurisdictions of products that utilize

185. Popper, *supra* note 18, at 29.

186. KERR & MOUTRAY, *supra* note 18, at 10. Empirically justifying this theory by establishing the economic advantages exclusively attributable to pirated software use is a challenge. In this study, commissioned by the National Association of Manufacturers (NAM) and the National Alliance for Jobs and Innovation, Kerr and Moutry attempt to establish and quantify the cumulative economic impact of global software piracy on U.S. manufacturers and the U.S. economy over a period of ten years. *Id.* They do so by estimating the size of the cost advantage firms around the world receive by using pirated software, and then estimating the effect of that cost advantage on key indicators of the U.S. manufacturing sector's competitiveness: revenue, GDP, and employment. *Id.* at 7. They conclude that in addition to the revenue loss to manufacturers, the U.S. GDP decreased by $69.6 billion and the U.S. manufacturing sector lost 42,000 jobs as a result of global software piracy. *Id.* at 4. The study's methodology, whether or not it portrays an accurate macro-level picture of the costs of global piracy to the U.S. manufacturing sector, provides little guidance on the vexing question of how to quantify direct economic harms suffered by a particular law-abiding U.S. manufacturer as a result of foreign competitors' use of infringing software. Ultimately, being able to quantify direct economic harm is key to establishing the actionable unfair conduct at the heart of this theory. (In the interest of full disclosure, this Author is a member of the National Alliance for Jobs and Innovation board of directors, but had no direct involvement in the coordination or drafting of this study.)

187. *See* Kappos & Baden, *supra* note 183; William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 933, 937–39, 944 (2010).

188. Nat'l Ass'n of Att'ys Gen., *supra* note 70.

"stolen IT" in their production or distribution,[189] and one of those statutes (Washington) has been invoked against a major Brazilian aircraft manufacturer.[190] Attorneys general in three other states (California, Massachusetts, and Tennessee) have invoked broadly worded, existing state unfair competition laws against manufacturers in other countries for utilizing unlicensed software.[191]

1. *Specialized "Anti-IT Theft" State Unfair Competition Laws*

a. Washington's Statute

The Washington legislation plainly aims to pressure overseas manufacturers to purchase licensed software by effectively conditioning access to the Washington market on the use of licensed software. To enhance its effectiveness, the statute also incentivizes major U.S. companies to apply direct economic pressure to manufacturers using pirated software. Titled "Stolen or Misappropriated Information Technology," the statute makes it an act of unfair competition to sell or make available for sale in the state any article or product manufactured "using stolen or misappropriated information technology in its business operations."[192] The statute defines "stolen information technology" as "hardware or software . . . acquired, appropriated, or used without the authorization of the owner [or licensee] of the information technology . . . in violation of applicable law."[193]

The statute targets two types of business entity.[194] First, it targets manufacturers of products that utilize stolen information technology at any point in the product's manufacture, distribution, marketing, or sale.[195] Thus, manufacturers of many types of products—furniture, automobile parts, electronics, and so on—are potentially liable if any computer used in the manufacturing, shipping, distribution, or promotion of the product ran an unauthorized copy of Windows, AutoCAD, Excel, or, in theory, any other proprietary software program. The liable "manufacturer" is the entity that directly produces or assembles an article; it does not include an entity that outsources production.[196] Thus, for example, a Chinese car manufacturer could face potential damages and an injunction if it utilized unlicensed software during the production of its automobiles, and the re-

189. *See* WASH. REV. CODE ANN. § 19.330.020 (West 2014); LA. REV. STAT. ANN. § 51:1427 (2014).

190. *See* Wash. Office of the Att'y Gen., *supra* note 19.

191. *See* Office of the Att'y Gen. of Mass., *supra* note 19; Cal. Office of the Att'y Gen., *supra* note 19; ABA Panelists Report, *supra* note 19.

192. § 19.330.020.

193. § 19.330.0107(a).

194. *See* § 19.330.020; § 19.330.080.

195. *See* § 19.330.020.

196. *See* § 19.330.010(4) ("'Manufacture' means to directly manufacture, produce, or assemble an article or product [made using stolen information technology], in whole or substantial part, but does not include contracting with or otherwise engaging another person, or that person engaging another person, to develop, manufacture, produce, or assemble an article or product [made using stolen information technology].").

sulting automobiles were sold in Washington in competition with cars produced using licensed software.[197] Likewise, even a U.S.-based automobile manufacturer could face liability if overseas plants it owns and controls used unlicensed software and the resulting automobiles were then sold in Washington.

Second, the statute provides for secondary liability of "third parties" that have a direct contractual relationship with the manufacturer, that have annual revenue exceeding $50 million, and that sell products in the state that were manufactured using stolen information technology.[198] Large retailers such as Wal-Mart, Target, Walgreens, and Costco are potentially liable "third parties" under the statute and therefore could face damages for selling a toaster, television, lamp, or other product manufactured at a plant that uses unlicensed copies of system software or design or logistics applications on computers involved in manufacturing operations. Companies that outsource their product manufacturing, or purchase components from a contract supplier, could also face secondary liability if those products or components were manufactured using stolen information technology and are sold in the state.[199]

Secondary liability arises under narrow conditions only.[200] Nevertheless, the purpose of the secondary liability provisions is clear: induce U.S.-based customers to police their supply chains. Indeed, a third party is excused from liability if it demonstrates that it imposed on the manufacturer a written code of conduct that included commitments not to use stolen information technology, or had written assurances from the manufacturer that the goods were manufactured without the use of stolen information technology.[201]

A manufacturer found liable may have sales of the affected products enjoined in the state or be required to pay actual damages or statutory damages (the latter being limited to the retail price of the stolen information technology).[202]

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197. *See* § 19.330.060(1)(b)(i), (ii); § 19.330.040.

198. § 19.330.080(1)(b); § 19.330.080(e).

199. *See* § 19.330.060(2)(d). In addition, the sale of offending products by certain retailers in the state could be enjoined in *in rem* proceedings if the court does not have personal jurisdiction over the manufacturer and if the manufacturer holds title to the goods. § 19.330.070.

200. In addition to the requirements noted above (the third party must have a direct contractual relationship with the manufacturer and annual revenue exceeding $50 million), a third party faces liability only if the manufacturer was sued first under the statute, the manufacturer had a judgment entered against it, and the manufacturer either failed to appear in court or had insufficient assets in the state. § 19.330.060(2)(a), (b), (d), (3).

201. § 19.330.080(1)(c)(i). Having such a code of conduct or written assurance alone, however will not suffice. If a manufacturer is sued under the statute and loses, the third party must, within 180 days, acquire proof from the manufacturer that it has ceased using stolen information technology, demand that the manufacturer cease using the stolen information technology, or cease purchasing from the manufacturer altogether. *Id.* (1)(c)(i)(A)–(C).

202. § 19.330.060(1)(b)(i), (ii), (3), (6)(a). Third parties' damages are limited to the lesser of the retail price of the stolen information technology or $250,000. *Id.* (3).

A central feature of the statute is its notice and cure provision.[203] As an unfair competition law, the statute does not give the copyright owner the right to bring an action directly against manufacturers.[204] However, neither the attorney general nor a competing manufacturer may bring an action until the copyright holder notifies the defendant manufacturer in writing based on a "reasonable and good faith investigation."[205] After the defendant manufacturer receives notice, it has ninety days to rebut or cure by establishing that it did not use stolen information technology or that it ceased using the stolen information technology.[206] In addition, the notice and cure period may be extended an additional ninety days if the defendant manufacturer takes steps toward ensuring that the unlicensed information technology is replaced by licensed copies.[207]

The purpose behind the notice and cure provision is clear: pressure overseas manufacturers to purchase licensed software, give them ample opportunity to do so, and let them off the hook once they do. After receiving the software rightholder's notice, all the defendant needs to do to halt the proceedings is ensure that it (or, in the case of a liable third party, its overseas supplier or manufacturing partner) has purchased software licenses within six months.[208]

There are numerous broad exceptions built into the statute.[209] Many of the exceptions and safe harbors appear to have been negotiated by industries concerned about the breadth of the statute as originally conceived. Even with the exceptions, however, the statute remains broad enough to

203. *See* § 19.330.060; § 19.330.050.

204. Such an action, if permitted, would raise federal copyright preemption issues, particularly if the copyright infringement occurred in the United States. Only the state attorney general or a competing manufacturer who did not use software unlawfully may bring an action. § 19.330.060(1), (5). In order for a competing manufacturer to bring an action, it must show that (1) it produces competing goods sold in Washington state, (2) its production of those goods did not benefit from the use of stolen information technology, and (3) it suffered "economic harm" as a result of the competitor's use of pirated software, which can be demonstrated by showing that the alleged stolen information technology is valued at $20,000 or more. *Id.* (5).

205. *Id.* The notice must identify the allegedly illegally used information technology and the applicable law violated (for example, the copyright law of the overseas jurisdiction where the unauthorized copying took place). *Id.*

206. *Id.*

207. *Id.*

208. *See* § 19.330.050(1).

209. For example, end consumers are exempt from liability, as are smaller retailers that earn less than $50 million in annual revenues. *See* § 19.330.080. There are subject matter exclusions, as well: the statute does not apply to services, including online and restaurant services, pharmaceuticals, and food and beverages. *See* § 19.330.010(1). The statute also seeks to avoid federal preemption problems and conflicts with other areas of IP law. *See* Popper, *supra* note 18, at 57–58. Thus, it disallows any claim if the end product is copyrightable or is merchandise manufactured pursuant to a copyright or trademark license. *See* § 19.330.030. It also disallows claims in which the allegation of stolen information technology is based upon a claim of patent infringement or trade secret misappropriation under U.S. law. *Id.* Furthermore, no claim may be brought under the statute if the allegation that the information technology is stolen is based on a claim that its use violates the terms of an open source software license. *Id.*

accomplish its goal: put manufacturers on notice that they face liability in the United States for selling products produced with pirated software.

In April 2013, the Washington State attorney general invoked the Washington IT theft statute to penalize the large Brazilian aircraft manufacturer Embraer for using unlicensed Microsoft software in its product development and selling those products in Washington.[210]

b. Louisiana's Statute

Louisiana's specialized unfair competition statute, passed in 2010, is far terser and in some ways far broader than Washington's statute.[211] It provides merely that,

> It shall be unlawful for a person to develop or manufacture a product, or to develop or supply a service using stolen or misappropriated property, including but not limited to computer software that does not have the necessary copyright licenses, where that product or service is sold or offered for sale in competition with those doing business in this state.[212]

Under the Louisiana statute, a manufacturer of any type of product (without the broad exemptions of the Washington statute) is potentially liable if the product was made using unlicensed software and subsequently sold in the state.[213] Arguably, direct liability could extend to any producer that manufactures a product, or perhaps even outsources the manufacture of a product, using unlicensed software if that product is subsequently sold in Louisiana.[214] The Louisiana statute, therefore, potentially provides an even larger swath of producers with an incentive to favor "legitimate" supply chains and pressure contract partners and subsidiaries overseas to purge their systems of unlicensed software. On the other hand, the Louisiana statute does not include the express third-party liability provisions of the Washington statute.

2. Existing State Unfair Competition Laws

Proponents of the unfair competition approach argue that in states with no specialized unfair competition statutes specifically targeting IT theft, existing broad state unfair competition laws may be employed to the same effect.[215] In their 2011 letter to the FTC, for example, the attorneys general suggest that state unfair competition statutes modeled after Section 5 of the Federal Trade Commission Act (so-called "mini-FTC Acts") could be used to sanction this form of alleged unfair competition

210. *See* Wash. Office of the Att'y Gen., *supra* note 19.
211. *See* LA. REV. STAT. ANN. § 51:1427 (2014).
212. *Id.* (1).
213. *See id.*
214. *Compare id.*, *with* § 19.330.080(1)(b).
215. *See* Nat'l Ass'n of Att'ys Gen., *supra* note 70, at 2; Kappos & Baden, *supra* note 183, at 2–3.

at the state level.[216] A number of states, including Massachusetts, California, Florida, Vermont, and Montana, have facially broad statutes prohibiting unfair business conduct.[217] For example, Section 17200 of the California Business and Professions Code authorizes the state attorney general to seek an injunction and civil penalties for acts of unfair competition, broadly defined to include "any unlawful, unfair or fraudulent business act or practice."[218] Similarly, Massachusetts's unfair competition law broadly prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce," giving the attorney general broad discretion to define unfair competition.[219]

At the time of this writing, three states—Massachusetts, California, and Tennessee—have invoked general unfair competition statutes to penalize foreign manufacturers for selling in those states goods produced using unlicensed software.[220] In 2012, the Massachusetts attorney general brought an action under the Massachusetts unfair competition law, quoted above, against a Thai seafood distributor. [221] The attorney general argued that by "avoiding the cost of obtaining legitimate licenses to software used in its business activities," the Thai company "was able to reduce its costs and gain an unfair advantage over local companies that paid for the right to use such software products."[222] The distributor agreed to pay a $10,000 civil penalty and cease using pirated software.[223] In 2013, the California attorney general invoked California's unfair competition statute to bring actions against two apparel manufacturers, from India and China, both of which allegedly used unlicensed software in their business operations.[224] Also in 2013, Tennessee's attorney general announced a settlement with a Thai tire manufacturer that allegedly used pirated software in its business operations while competing with Tennessee tire manufacturers.[225]

3. *Unfair Competition Under the Federal Trade Commission Act (FTC Act)*

Section 5 of the FTC Act grants the Commission extremely broad powers to prohibit "unfair or deceptive acts or practices in or affecting com-

216. *See* Nat'l Ass'n of Att'ys Gen., *supra* note 70, at 2 ("Many of our states have laws that can be used to address this harm, including statutes patterned after the Federal Trade Commission Act, other consumer protection laws and, in the case of Washington and Louisiana, statutes specifically designed to address this problem.").

217. *See* Popper, *supra* note 18, at 36–39; FLA. STAT. ANN. § 501.202(2) (West 2014); MONT. CODE ANN. § 30-14-103 (West 2013); VT. STAT. ANN. tit. 9, § 2453(A) (West 2014).

218. *See* CAL. BUS. & PROF. CODE §§ 17200, 17202, 17204, 17206(a) (West 2014).

219. MASS. GEN. LAWS ANN. ch. 93A § 2(a) (West 2014).

220. *See* Office of the Att'y Gen. of Mass., *supra* note 19; ABA Panelists Report, *supra* note 19.

221. *See* Office of the Att'y Gen. of Mass., *supra* note 19.

222. *Id.*

223. *Id.*

224. *See* Cal. Office of the Att'y Gen., *supra* note 19. The cases remain pending at the time of this writing.

225. *See* ABA Panelists Report, *supra* note 19.

merce."[226] Congress intentionally drafted Section 5 broadly to address new unfair trade practices that do not fall within conduct proscribed by the Sherman Act or the Clayton Act.[227] Despite its potential to be a significant force in shaping competition policy in the United States in antitrust matters and beyond, it remains a little-used provision that has played an insignificant role in competition policy.[228] Nevertheless, commentators including former FTC commissioner William Kovacic argue that the FTC should more vigorously employ Section 5 to address anticompetitive business practices.[229] Professor Popper agrees with the attorneys general[230] that it is a proper exercise of FTC power under Section 5 to sanction manufacturers who avail themselves of unlicensed software and sell the resultant products in the United States.[231]

In short, software copyright owners are pressing state attorneys general, legislators, and federal regulators to recognize the illicit use of software in a product's supply chain as actionable unfair competition. Copyright owners have begun to explore and articulate a new and evolving market-pressure strategy to remedy foreign software piracy, and are enlisting the help of an increasingly sympathetic U.S. manufacturing sector to do so.

C. Summarizing the Case Studies

The key commonality between the case studies in this Part is that they seek to tie *market access* in some form to copyright law compliance, rather than attempting to stamp out piracy or coerce copyright compliance through direct copyright enforcement strategies. In the case of the Chinese online video portals, copyright compliance is a prerequisite for accessing the market for major transnational advertisers. In the case of foreign manufacturers using pirated software in their business operations, copyright compliance is a prerequisite for accessing U.S. markets.

III. THEORETICAL FRAMEWORK: PRIVATE ORDERING, OPTIMAL TARGETING, AND SOCIAL NORMS

This Part proposes a framework for analyzing and evaluating the market-pressure strategies employed in the case studies in Part II. This framework draws on theory from three areas of legal scholarship: private ordering, optimal targeting, and social norms. This Part argues that while many of the market-pressure strategies described in this Article involve

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226. *See* 15 U.S.C. § 45(a)(1), (a)(4)(B) (2014).

227. *See* William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 Antitrust L.J. 929, 930 (2010).

228. *Id.* at 932–33.

229. *See generally id.*; Albert A. Foer, Am. Antitrust Inst., Section 5 as a Bridge Toward Convergence, 2, 3, 9–10 (Oct. 17, 2008), *available at* https://www.ftc.gov/sites/default/files/documents/public_events/section-5-ftc-act-competition-statute/afoer.pdf.

230. *See* Nat'l Ass'n of Att'ys Gen., *supra* note 70.

231. Popper, *supra* note 18, at 36, 51–52.

some private ordering or are analogous to certain private ordering strategies, they are unlikely to raise many of the concerns that scholars have highlighted with respect to private ordering in the copyright context. It further argues that a successful market-pressure strategy begins with identifying and pressuring an intermediary (or group of intermediaries) with sufficient leverage over the infringer to foreclose market access (retail markets, advertising markets, and so on). In many cases, however, intermediaries will be in a strong position to apply initial pressure, either through contract or as a result of a business relationship with the infringer, but will be in a poor position to police infringing behavior on an ongoing basis. Therefore, a market-pressure strategy is most likely to be successful if it stimulates the reshaping of the infringer group's copyright compliance social norms.

A. Private Ordering

Some market-pressure strategies analyzed in this Article involve private leveraging of market forces to compel compliance with copyright law. In this sense, they involve aspects of "private ordering"—i.e., voluntary arrangements by private parties through contract or customary norms.[232] To the extent, however, that there even is such a thing as "pure" private ordering in lieu or in absence of "public" regulation,[233] that does not describe the market-pressure strategies analyzed herein. These strategies are unambiguously hybrid in nature: they may leverage private relationships, but do so to achieve compliance with the law. Nevertheless, even if they are not "pure" private ordering strategies, market-pressure strategies potentially arouse some of the concerns scholars express about private ordering. It is therefore worthwhile to summarize those concerns and consider whether they apply in this context.

A rich literature explores private ordering in the copyright space, focusing on private parties' use of technology, contracts, and collective rights management to develop extralegal norms and standards.[234] As Yafit Lev-Aretz points out, most of that scholarship considers copyright

232. *See* Niva Elkin-Koren, *Copyrights in Cyberspace—Rights Without Laws?*, 73 Chi.-Kent L. Rev. 1155, 1161 (1998); Margaret Jane Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 Chi.-Kent L. Rev. 1295, 1297 (1998).

233. *See* Radin & Wagner, *supra* note 232, at 1297–98 (arguing that the notion of purely "private" ordering is illusory because law provides a background structure—for example, property and contract rules—that defines the boundaries and enables the enforcement of private arrangements).

234. *See, e.g.*, Elkin-Koren, *supra* note 232, at 1167–72; Radin & Wagner, *supra* note 232, at 1310–11; Dinwoodie, *supra* note 44, at 166–69; Yochai Benkler, *An Unhurried View of Private Ordering in Information Transactions*, 53 Vand L. Rev. 2063, 2065–66 (2000); Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management,"* 97 Mich. L. Rev. 462, 470–74 (1998) [hereinafter Cohen, *Lochner in Cyberspace*]; Lev-Aretz, *Copyright Lawmaking and Public Choice*, *supra* note 14, at 210–11, 249; Robert P. Merges, *The End of Friction? Property Rights and Contract in the "Newtonian World" of On-Line Commerce*, 12 Berkeley Tech. L.J. 115, 118–19, 127–28 (1997); Julie E. Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 Berkeley Tech. L.J. 1089, 1090–91 (1998); Bridy, *supra* note 15, at 83–84.

private ordering in two contexts: user–industry relationships (e.g. copyright owners' attempts to employ technology and contracts to achieve levels of content protection equal to or exceeding that afforded by copyright law), and inter-industry relationships (e.g. employing collective rights organizations to reduce transaction costs).[235] Scholars have paid less attention to the type of private ordering most germane to this Article[236]: cross-industry partnerships, which involve private agreements or understandings between copyright owners and technology providers or other industry players, particularly to address enforcement issues.[237] One example is the "three strikes" policies that some Internet service providers have voluntarily adopted, by which the service provider sends warnings to, and potentially even disrupts the service of, users engaged in infringing activities such as unauthorized file sharing.[238] Another example is the voluntary online advertising "best practices"—which several online ad networks have adopted—concerning ad placement on websites known to facilitate a large volume of infringing activity.[239]

The debate surrounding copyright and private ordering has revolved around two main arguments: those optimistic about private ordering tout the lowered transaction and enforcement costs and concomitant efficiency gains that result from private rule making, agreements, and construction of shared norms.[240] Those skeptical about private ordering, on the other hand, worry that such arrangements result from closed, opaque processes involving private parties without public input.[241] They also worry that self-help through means such as electronic contracting and digital rights management technologies affords copyright owners even greater control over their works than the law does, resulting in diminished access to knowledge.[242]

235. Lev-Aretz, *Copyright Lawmaking and Public Choice*, *supra* note 14, at 249–50.

236. The unfair competition approach discussed in Part II.B, above, is not a private ordering strategy. It is, however, an indirect enforcement strategy that parallels certain private ordering strategies. In particular, the Washington State IT Theft statute is overtly designed to incentivize U.S. retailers and manufacturers to develop and enforce private measures—industry norms and contractual provisions—aimed at reducing the use of pirated software by overseas suppliers. *See supra* Part II.B.1.

237. Lev-Aretz, *Copyright Lawmaking and Public Choice*, *supra* note 14, at 250.

238. Bridy, *supra* note 15, at 84–85; Peter K. Yu, *The Graduated Response*, 62 FLA. L. REV. 1373, 1374 (2010).

239. *See infra* Part IV.C.2.

240. *See generally* Merges, *supra* note 234, at 116–17, 135; Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293, 1294–95, 1307 (1996); Robert P. Merges, *From Medieval Guilds to Open Source Software: Informal Norms, Appropriability Institutions, and Innovation* 18–20 (Working Paper, 2004), *available at* http://ssrn.com/abstract=661543.

241. *See, e.g.*, Bridy, *supra* note 15, at 126 (recommending that "privately implemented graduated response regimes," by which Internet users' access might be disrupted in response to large volumes of infringing activity, should build in substantial consumer protections); Dinwoodie, *supra* note 44, at 177 ("The central political question[ ] that is essential to the legitimacy of publicly-structured private ordering is that the forms of structuring are sufficient to ensure that the outcomes produce—when implemented through private ordering—a balance of rights and access that furthers the optimal supply of knowledge.").

242. *See, e.g.*, Cohen, *Lochner in Cyberspace*, *supra* note 234, at 559.

Concerns about the expansion of copyright control through private means such as technology and contract are less germane to the market-pressure enforcement strategies discussed herein. In general, the strategies focused on in this Article aim to improve compliance with existing copyright law and norms, not to achieve greater control through private mechanisms.

More relevant are the process-related concerns that cross-industry deals will be struck, and norms will develop, with consideration of the interests of only those copyright owners and technology companies at the bargaining table.[243] In theory, negative externalities could result from private enforcement arrangements. One can imagine, for example, copyright owners in the China online video context[244] pressuring advertisers to ensure video websites expunge all unlicensed uses of content. Such measures would be over-inclusive, as the expunged content would include parodies, incidental or de minimis uses, and other uses that might be considered "fair" under Chinese copyright law.[245] Likewise, in the context of pressuring ad networks not to place ads on "infringing" websites, as discussed in Part IV.C.2, below, the public interest would be harmed by norms or practices that result in the shuttering of websites that facilitate access to a small amount of infringing content and a substantial amount of non-infringing content.[246]

In practice, such ratcheting up of standards has not materialized with respect to the market-pressure strategies discussed herein. Under the market-pressure model, the key *demandeurs* are intermediaries (e.g., brand owners) who care only that their infringing business associates (e.g., websites) comply (or appear to comply) with basic copyright norms. The intermediaries have little reason to advance a maximalist copyright agenda. Indeed, a maximalist approach might undermine their interests.[247] Copyright owners employ the market-pressure enforcement

243. *See* Lev-Aretz, *Copyright Lawmaking and Public Choice*, *supra* note 14, at 254; Bridy, *supra* note 15, at 124–31.

244. *See supra* Part II.A.

245. For a discussion of fair use under Chinese law, *see* Zhiwen Liang, *Beyond the Copyright Act: The Fair Use Doctrine Under Chinese Judicial Opinions* 56 J. COPY. SOC'Y U.S.A. 695 (2009).

246. *See infra* Part IV.C.2.

247. For example, in the unfair competition context discussed in Part II.B, *supra*, U.S.-based customers have little reason to favor a maximalist approach that might increase the cost of software licenses and accordingly increase the cost of manufacturing. Likewise, in the context of online video websites in Part II.A, *supra*, advertisers arguably benefit most when the sites host the best content. In theory, the more robust the copyright environment, the more challenging and expensive it is for websites to acquire the newest, most desirable content. A maximalist copyright approach would therefore result in websites offering less attractive content, leading to diminished viewership. To support content costs, advertisers would be paying more for the opportunity to reach that diminished viewership. True, some advertisers contend that more traffic does not necessarily equal more value since major brands consider much of the traffic on infringing websites be of low value. *See Advertisers Gradually Turn Down Video Sharing Site Hosting Unlicensed Content*, *supra* note 112. As this Author has pointed out in the China context, however, it is probably wrong to assume that piracy does not attract affluent consumers. *See* Priest, *supra* note 3, at 480 (citing 2008 China National Reading Survey Report indicating that more than half of those surveyed

model because they have difficulty achieving basic copyright compliance under highly challenging enforcement conditions, not out of a desire to ratchet up copyright standards.[248]

The questions of process and the public interest also have an international dimension with respect to these market-pressure strategies. Two points in this regard are worth raising. First, while most of the private strategies discussed herein are transnational, they generally do not involve extrusion of U.S. law. The goal of these strategies is to coerce infringers to comply with their existing home laws, not with U.S. law or a set of supranational copyright norms or rules.[249] In that sense, these strategies are quite compatible with the territoriality principle.[250] Second, when normatively evaluating such transnational market ordering strategies, it is important to consider the effect on stakeholders, including the public, in the infringer's jurisdiction. After all, the applicable copyright law and corresponding public interest typically will be those of the jurisdiction in which the infringement occurred. In this regard, the case of the Chinese video sites[251] provides a useful data point on the strategy's effect on the major stakeholders: copyright owners, advertisers, video websites (the erstwhile infringers), and the public. In that example, copyright owners enjoyed an unprecedented rise in online licensing fees, and creators both large and small were compensated for their productions.[252] Most importantly, the copyright owners who arguably benefitted the most were local Chinese producers.[253] The websites burnished their brands, particularly in the eyes of major advertisers, leading to more lucrative cross-branding opportunities.[254] The websites were also able to better distinguish their services from competitors' through the use of exclusive licens-

holding college and graduate degrees purchased pirated content, and that nearly 60 percent of individuals categorized as enterprise leaders, management, and professionals bought pirated goods).

248. *Cf.* Sean A. Pager, *Accentuating the Positive: Building Capacity for Creative Industries into the Development Agenda for Global Intellectual Property Law*, 28 AM. U. INT'L L. REV. 223, 265 (2012) (noting that combating the pervasive commercial piracy problem in Nigeria's film industry "need not entail advancing any 'maximalist' agenda beyond adhering to traditional copyright norms, nor does it pose undue risks to freedom of expression").

249. The analysis here might be different if major intermediaries place requirements, contractual or otherwise, on partners that entail something beyond mere compliance with local copyright law. In the environmental protection context, for example, some U.S.-based contract buyers impose contractual environmental standards that exceed those required by local law. *See, e.g.*, Michael P. Vandenbergh, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54 UCLA L. REV. 913, 931 n.77, 950 (2007).

250. *See supra* Part I.A.

251. *Supra* Part II.A.

252. *See supra* Part II.A.

253. *See* Loretta Chao, *China's Youku Goes Hollywood*, WALL ST. J. (Jan. 6, 2011), http://www.wsj.com/articles/SB10001424052748703675904576063510245910424 ("Chinese companies say most U.S. content gets less traffic from Chinese viewers than popular Chinese TV series do.").

254. *See* Melita Kuburas, *Youku Tudou Turns Quarterly Profit of $7.3M, Talks Content Strategy*, STREAM DAILY (Feb. 28, 2014), http://streamdaily.tv/2014/02/28/youku-tudou-turns-profit-of-7-4m-discusses-2014-strategy/ (noting that Youku Tudou Inc. works with nearly five hundred advertisers and produces sponsored content for major international brands including Mercedes Benz and Mini Cooper).

ing fees.[255] Advertisers could work confidently with video websites and not worry about tarnishing their reputations.[256] Finally, the public continued to have access to large amounts of high-quality, free, ad-supported content, which, as long as it was licensed, was no longer subject to takedowns.

There is little to suggest that the copyright owners in the two case studies above sought to do more than substitute an effective enforcement mechanism for failed copyright enforcement systems.[257] In other words, the main objective seems to be to motivate companies that benefit substantially from infringement to comply with the copyright law of their jurisdictions.[258] Accordingly, the remainder of this Article will analyze these strategies under the assumption that that is the aim, and that this aim is fully compatible with the public interest balances embodied in the copyright laws (recognizing, as well, the attendant public choice concerns[259] that are beyond the scope of this Article).

B. The Role of "Powerbroker" in the Market-Pressure Model

Legitimate concerns about process and private ordering notwithstanding, market-pressure strategies are promising surrogates for traditional copyright enforcement because at their best such strategies effectively leverage powerful entities that can influence infringers. In this way, market-pressure strategies parallel traditional copyright enforcement, in which the state's enforcement elements (e.g., courts and administrative agencies) act as "powerbrokers," wielding influence over the infringer that the copyright owner, absent the state's backing, does not usually have. (*See* Figure 1, below.) In jurisdictions where the state's influence over infringers is weak, the state may be replaced in the enforcement chain by a powerful "third party" with greater influence over the infringer. In some cases, that third party possessing power to influence the infringer might be a key client or business partner (or group thereof), as was the case with the Chinese video websites and their advertisers discussed in Part II.A. (*See* Figure 2, below.)

As we saw in the infringement-as-unfair-competition case study,[260] the "third party" surrogate might even be the government of a state other

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255. *See* Wang Fei'er, *supra* note 98.

256. *See, e.g.*, *Marketing in China: Youku Tudou's Ad Campaign Delivered Millions of Views, 2 Billion Impressions*, eMarketer (Sept. 26, 2014), http://www.emarketer.com/Article/Marketing-China-Youku-Tudous-Ad-Campaign-Delivered-Millions-of-Views-2-Billion-Impressions/1011227 (interviewing Youku Tudou Inc. executive who describes a recent successful Intel viral marketing campaign on Youku).

257. *See supra* Parts II.A, B.

258. *See supra* Parts II.A, B.

259. *See generally* Jessica Litman, Digital Copyright (2001) (describing the highly politicized process of copyright lawmaking in the United States).

260. *See supra* Part II.B.

than that in which the infringement occurred.[261] In the case of overseas manufacturers using pirated software, the copyright remedies in their home country have little deterrent effect on infringing behavior. Copyright owners therefore seek to leverage the U.S. government's power to restrict access to its markets. In such a case, the government of the second state may be motivated to act in this role if it perceives a sufficient harm to its domestic interests (e.g., harm to U.S.-based competitors), and a law exists that empowers or compels the state to act or back a private right of action. (*See* Figure 3, below.) To motivate a *private* third party to effectively back the rights of another, a motivating factor must be located. Motivation can take myriad forms: it could be a sense of intrinsic or public shame derived from social norms about standards of proper conduct, it could be threatened economic consequences (such as customers' threats of a boycott), or it could be legal action threatened or initiated against the third party.

THE ROLE OF POWERBROKERS IN DIRECT AND INDIRECT COPYRIGHT ENFORCEMENT CHAINS[262]

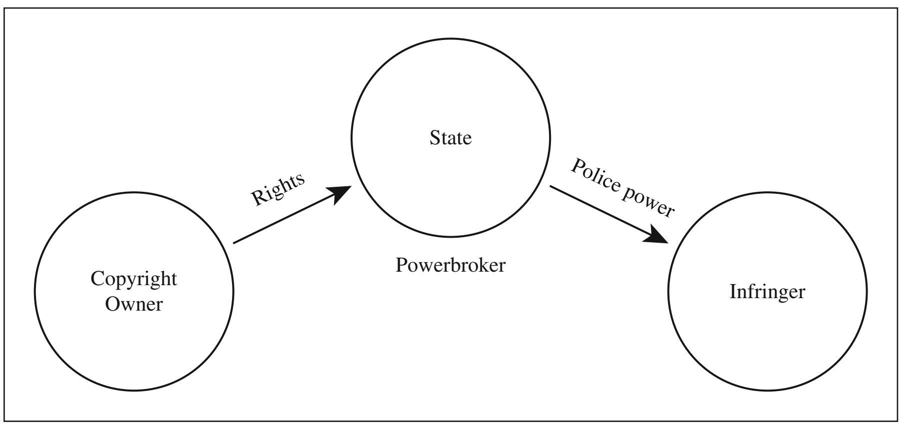

Figure 1 — Diagram depicting traditional copyright enforcement power relationships.

261. As noted above, this might raise trade discrimination issues under international law for the second state. *See* Pager & Priest, *supra* note 182. Although that analysis is beyond the scope of this Article, discriminatory laws or application of laws may be permitted in limited circumstances where a compelling state interest is found. *See id.*

262. Circles indicate parties, arrows indicate levers of influence, and dotted lines indicate where a "powerbroker" intermediary is substituted for the state with jurisdiction over the infringer for copyright infringement.

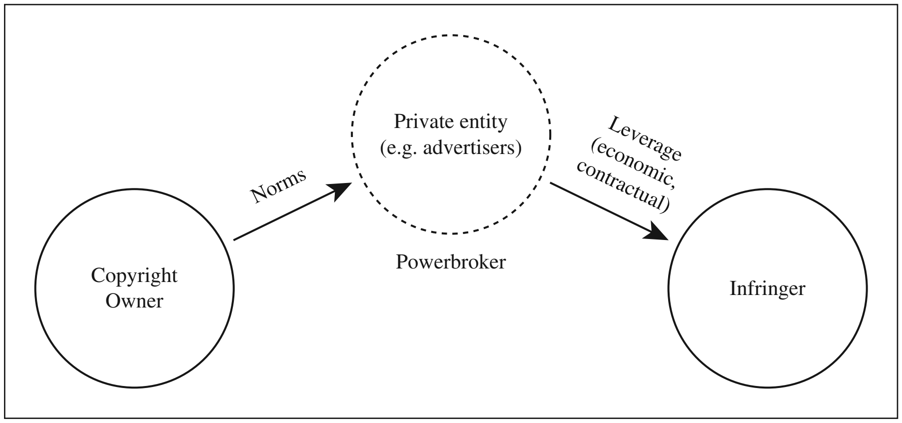

Figure 2 — Market-pressure enforcement model, substituting the state with a private entity or group thereof (such as advertisers) possessing economic leverage over the infringer.

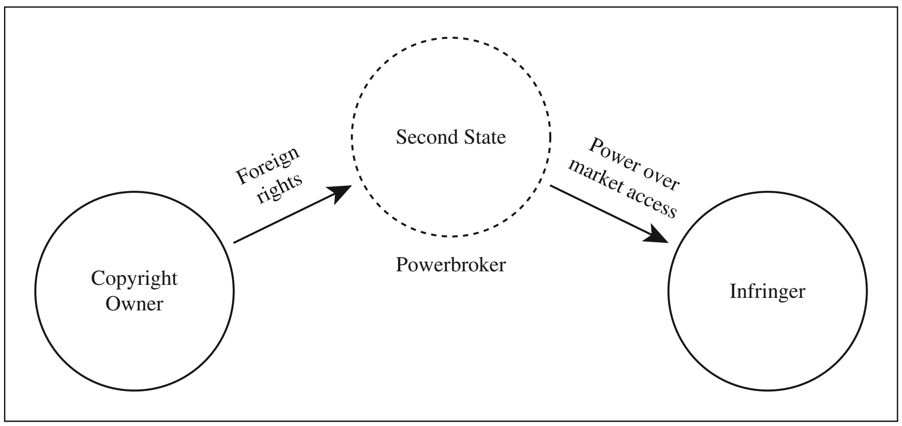

Figure 3 — Market-pressure enforcement model, replacing a state that has jurisdiction over the infringer in a copyright action (likely the infringer's domicile or the country where the infringement occurred) with a second state that has the power to limit the infringer's access to the second state's markets. (The infringement-as-unfair-competition approach discussed in Part II.B, supra*, exemplifies this model.).*

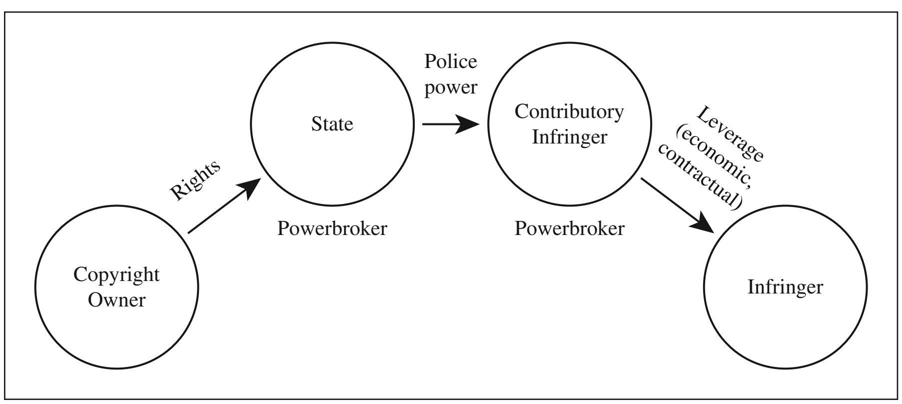

Figure 4 — Traditional copyright enforcement power relationships in the contributory infringement context.

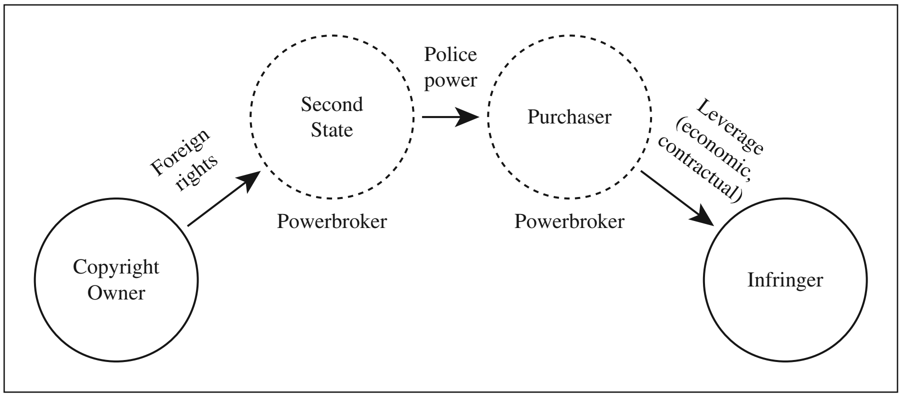

Figure 5 — Market-pressure enforcement model, replacing a state that has jurisdiction over the infringer in a copyright action (likely the infringer's domicile or the country where the infringement occurred) with a second state that has police power leverage over purchasers in the second state, who in turn have economic or contractual leverage over the infringer. (The secondary liability provisions of the Washington State "Anti-IT Theft" unfair competition statute described in Part II.B.1.a, supra*, exemplify this model.)*

C. Optimal Targeting and the Importance of Reshaping Infringer Norms

Examples abound in which the law imposes legal liability on third-party "gatekeepers" who are well positioned to disrupt the illegal activity of others.[263] Contributory copyright liability discussed in Part I, above, is a well-known example from the copyright field, but many areas of law, including tort law and securities law, extend liability from a primary wrongdoer to a "gatekeeper" or "enabler."[264] Daryl Levinson uses the term "optimal targeting" to denote strategies that engage the parties who are best situated to police wrongdoing.[265] As he argues, often "[t]he optimal target of liability is not the wrongdoing injurer but rather some other individual, institution, or group that is well situated to monitor and control the wrongdoer's behavior and can be motivated to do so by the threat of 'indirect liability.'"[266] Levinson's notion of optimal targeting extends beyond gatekeepers motivated by legal liability, however.[267] It encompasses the broader notion that any time a third party's influence can be brought to bear against a wrongdoer, it can be an effective and efficient solution so long as two conditions are met: (1) the target of the indirect liability is able to control the wrongdoing in a cost-effective way, and (2)

263. *See* Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third Party Enforcement Strategy*, 2 J.L. Econ. & Org. 53, 53–54, 62–64 (1986); Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 Yale L.J. 857, 888–92 (1984); Daryl J. Levinson, *Collective Sanctions*, 56 Stan. L. Rev. 345, 361–62, 365–67 (2003) [hereinafter Levinson, *Collective Sanctions*].

264. Levinson, *Collective Sanctions*, *supra* note 263, at 365–67.

265. Levinson, *supra* note 93, at 1154.

266. *Id.* at 1148.

267. *See id.* at 1154–60.

the subsidiary costs of indirect liability are not too high.[268]

The two case studies in Part II are examples of attempts at "optimal targeting," used to spur behavioral changes in jurisdictions in which direct legal action produces suboptimal results. In the first, the key advertisers are primary economic underwriters of the Chinese video websites, and are themselves part of a community of major transnational companies that identify with group norms of IP compliance.[269] In the second case study, major software producers have targeted state governments around the United States and motivated them, through various political and public interest levers, to use their substantial power and influence to induce overseas manufacturers to cease pirated software use.[270] In addition, the Washington State unfair competition statute expressly made certain in-state parties secondarily liable, providing a potentially powerful incentive for in-state businesses to police the infringements of their contract suppliers.[271]

Scholars in fields such as environmental law and labor law have recommended using analogous market-pressure strategies to induce major multinational companies to police suppliers in markets where regulatory failure exists.[272] Like copyright law, environmental regulations in many emerging markets suffer from inadequate enforcement, and territoriality and sovereignty issues limit their enforcement in other jurisdictions.[273] In response to this regulatory failure, consumers and non-governmental organizations have pressured a number of influential "powerbroker" multinational companies to contractually impose environmental standards on their overseas subsidiaries and suppliers.[274] Multinationals who contractually impose environmental obligations include major retailers Wal-Mart, Costco, and Target, and many leading manufacturers in the automotive, personal computer, lumber, and industrial machinery and equipment industries.[275] When these contractual provisions are enforced, evidence suggests that they have a positive effect on the environment in exporting countries or, at a minimum, on the rate at which firms in those countries comply with their home country's environmental laws or with private environmental standards.[276] Similarly, in the context of labor standards, Annette Burkeen argues that private-ordering strategies aimed at pressuring transnational companies to enforce international labor norms through supply-chain contracting and corporate codes of con-

268. *Id.* at 1150–51 (citing Judge Posner's rule in *In Re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003)).

269. *See supra* Part II.A.

270. *See supra* Part II.B.

271. *See supra* Part II.B.1.a.

272. *See generally* Vandenbergh, *supra* note 249; Annette Burkeen, *Private Ordering and Institutional Choice: Defining the Role of Multinational Corporations in Promoting Global Labor Standards*, 6 WASH. U. GLOBAL STUD. L. REV. 205 (2007).

273. Vandenbergh, *supra* note 249, at 920–21.

274. *Id.* at 919–21.

275. *Id.* at 950–55.

276. *Id.* at 955–56, 970.

duct are more likely to improve global labor conditions than international or national laws alone.[277] As is true in the environmental context, ongoing enforcement of privately imposed standards is crucial to success.[278] Aspirational corporate codes of conduct that are not binding on suppliers or buyers have been mostly ineffectual.[279] Indeed, the most effective arrangements appear to be those in which major buyers are pressured to accept joint legal liability for substandard wages or working conditions in their suppliers' facilities.[280]

Identifying a suitably influential intermediary is only one element of an effective market-pressure strategy. In many cases, the ideal target for inducing a behavioral change will be in a suboptimal position to police the infringing behavior on an ongoing basis. This is true with respect to both of the case studies in Parts II.A and II.B, above. In the first, the advertisers have neither the resources nor the information necessary to determine whether each website properly licensed the potentially thousands of videos with which their ads may appear. In the second case study, U.S.-based competing manufacturers and state attorneys general are in a suboptimal position to identify and sanction on an ongoing basis the use of unlicensed software. Contractual obligations, such as in the above example concerning environmental supply-chain contracting, are enforceable on an ongoing basis.[281] But in the absence of a norm shift, the success of supply-chain contracting initiatives depends on the contracting customer's proactive enforcement of the supplier's obligations.[282]

A second element, therefore, of a successful market-pressure strategy is optimization of the conditions for reshaping the copyright compliance and infringement norms of the infringer group. An examination of market-pressure strategies requires, therefore, a review of the relevant aspects of social norms theory to help identify under what conditions a shift in norms from infringing to non-infringing behavior is most likely to be achieved.

D. Anti-Copying Social Norms

A strategy of compelling copyright compliance through market pressures is most likely to succeed long term if it effectuates a permanent shift in the norms—that is, widely adhered-to patterns of behavior[283]—surrounding copyright infringement in the target community. Strategies that

277. Burkeen, *supra* note 272, at 212–13, 247–54.
278. *Id.* at 247–54.
279. *See* Mark Anner et al., *Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks*, 35 Comp. Lab. L. & Pol'y J. 1, 5 (2013) ("There is a growing consensus, at least among social scientists, that codes of conduct and auditing programs have failed to eliminate, or perhaps even substantially reduce, incidents of labor violations in global supply chains.").
280. *See id.* at 14–42.
281. *See* Vandenbergh, *supra* note 249, at 942–44.
282. *See id.* at 918.
283. Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks*, 89 Va. L. Rev. 505, 537 (2003).

focus on deterrence and not on causing norm shifts might achieve short-term gains, such as prompting the one-off purchase of content licenses by individual Chinese online video websites, or one-off software license purchases in the case of individual manufacturers sued under a state's unfair competition law. However, it is difficult to sustain such pressures long term against one or a handful of infringers, let alone against entire industries.

A major function of law is to guide and shape social norms.[284] Social psychology research shows that the law works best when the incentives or motivations for compliance transcend pure coercion and punishment avoidance and the law's target group members internalize its objectives because they perceive it to be just or to confer private benefits.[285] Where IP laws have been less effective, they have failed to induce broad, sustained anti-infringement norms.[286] As Paul Goldstein put it, a copyright law that relies solely on legal deterrence to achieve its ends by punishing every transgression "would be as futile as it is costly."[287] Rather, "copyright's most effective role [is] as a norm for self-enforcement."[288] It is important for architects of market ordering strategies designed to achieve copyright law compliance to recognize that where compliance is low, pro-copyright norms are weak. The most successful market-pressure strategies, therefore, will not only deter infringement but also induce the creation of anti-infringement norms.

1. Close-Knit Groups

In recent years, a strand of scholarship on IP and social norms has provided insights into the conditions that lead to successful development of anti-copying social norms. Two conditions highlighted in the literature are of particular relevance here. First, anti-copying norms are most effective in smaller, tightly integrated social groups.[289] This is because integrated

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284. *See* Cass R. Sunstein, Free Markets and Social Justice 61 (1997); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 Mich. L. Rev. 338, 349 (1997); Arti K. Rai, *Regulating Scientific Research: Intellectual Property Rights and the Norms of Science*, 94 Nw. U. L. Rev. 77, 88 (1999); Raymond T. Nimmer, *Information Wars and the Challenges of Content Protection in Digital Contexts*, 13 Vand. J. Ent. & Tech. L. 825, 833 (2011).

285. Ben Depoorter et al., *Copyright Backlash*, 84 S. Cal. L. Rev. 1251, 1267–1268 (2011) [hereinafter Depoorter et al., *Copyright Backlash*]; *cf.* Tom R. Tyler & Steven L. Blader, *The Group Engagement Model: Procedural Justice, Social Identity, and Cooperative Behavior*, 7 Personality and Soc. Psychol. Rev. 349 (2003); Erik J. Girvan, *Rethinking the Economic Model of Deterrence: How Insights from Empirical Social Science Could Affect Policies Towards Crime and Punishment*, 5 Rev. Law & Econ. 461, 467–72 (2009) (canvassing social psychological research that demonstrates the important role of social norms and reputation effects in deterring criminal behavior).

286. *See* Strahilevitz, *supra* note 283, at 595.

287. Paul Goldstein, Copyright's Highway 214 (2003).

288. *Id.*; *see also* Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 21 Berkeley Tech. L.J. 651, 661–65 (2006) (arguing that increasing copyright enforcement activity or penalties is less likely to be as efficient or effective as a normative strategy).

289. *See* Kal Raustiala & Christopher Sprigman, The Knockoff Economy 81, 176–77 (2012).

group dynamics foster interpersonal relationships through which information is exchanged and social rewards and sanctions, which are central to the efficacy of social norms, can be applied.[290] Rewards can take the form of increased levels of esteem in the eyes of peers for enforcing or observing accepted norms,[291] or enhanced future opportunities for exchange with group members by signaling willingness to enforce or observe accepted norms.[292] Likewise, sanctions for a failure to enforce or observe accepted norms involve the loss of esteem or future opportunities for exchange among group members. Consequently, the larger and more loose-knit the relevant group, the less effective or present norms tend to be.[293]

Second, anti-copying norms are most common between rival producers who identify with and seek the approval of a particular professional community.[294] A substantial body of recent scholarship examines "negative IP spaces"—fields of commercial or social interaction that are mostly unregulated by IP laws—in which community norms have developed around copying. Scholars writing in this vein explore the intellectual-property-like, community-enforced norms that govern acts of copying in such diverse fields as comedy,[295] roller derby,[296] tattoos,[297] magic,[298] and French cuisine.[299] These insights generally derive from examinations of norms concerning copying among competing *producers* of ideas or information. Anti-copying norms generally are less relevant to wide-scale infringements by *consumers* or users of information goods, as opposed to producers.[300] One reason why anti-copying norms are more likely to arise among producers rather than consumers is that producers who copy the works of others *as producers* are more likely make their copies public, while much consumer copying is private (or pseudo-private, in the case of Internet file sharing). The public nature of copying by producers not only makes the copying potentially more egregious, offensive, and damaging to the originator and thus more "action-worthy," but also makes it far easier for the originator to discover and act upon the copying.

290. *See* Robert C. Ellickson, Order Without Law: How Neighbors Settle Disputes 181 (1991).

291. *See* McAdams, *supra* note 284, at 355–72.

292. *See* Eric A. Posner, Law and Social Norms 18–27 (2000).

293. *Id.*; Strahilevitz, *supra* note 283, at 557–62.

294. Raustiala & Sprigman, *supra* note 289, at 177.

295. *See id.* at 97–122.

296. *See* David Fagundes, *Talk Derby to Me: Intellectual Property Norms Governing Roller Derby Pseudonyms*, 90 Tex. L. Rev. 1093, 1093 (2012).

297. *See* Aaron Perzanowski, *Tattoos & IP Norms*, 98 Minn. L. Rev. 511, 512–14 (2012).

298. *See* Jacob Loshin, *Secrets Revealed: Protecting Magicians' Intellectual Property Without Law*, *in* Law and Magic 123–42 (Christine A. Corcos ed., 2010).

299. *See* Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 Org. Sci. 187 (2008).

300. Raustiala & Sprigman, *supra* note 289, at 177. Raustiala and Sprigman do highlight some situations in which consumers have internalized anti-copying norms and been active in policing transgressions of those norms, such as comedy fans who post videos online demonstrating close similarities between comedy routines in order to publicly shame comedians who allegedly use others' jokes without permission. *Id.* at 115.

2. *Loose-Knit Groups*

Can norms develop to change behavior even in settings that do not involve close-knit groups, and in which the behavioral change would lead to a net *loss* for each individual actor? Norm theorists in the legal literature have addressed this question in the contexts of environmental protection[301] and peer-to-peer file sharing.[302] Both contexts involve large numbers of generally unassociated individuals for whom compliance with socially beneficial or legally prescribed norms (environmental responsibility and pro-copyright behavior) would result in personal detriment.

In the environmental law context, activists face a collective action problem. Individuals are not incentivized to reduce their toxic emissions because no individual's behavioral change would meaningfully reduce emissions overall, while the immediate individual payoff for doing so is negative in terms of the financial cost or effort required.[303] Michael Vandenbergh argues that the best way to induce socially beneficial behavior that contradicts the individual's immediate self-interest is to activate "personal norms"—that is, "obligations that are enforced through an internalized sense of duty to act and guilt or related emotions for failure to act"—rather than social norms enforced through group sanctions and rewards.[304] Citing social psychology literature on norm activation, Vandenbergh argues that a concrete personal norm against socially undesirable behavior, such as toxic emission, will arise when "new information induces the individual to believe that . . . individuals' behavior in the aggregate causes an environmental problem and that reductions in the behavior (e.g., backyard burning or driving) . . . by individuals in the aggregate will ameliorate the problem."[305]

A robust body of scholarship examines the social norms that have taken root in loose-knit peer-to-peer file-sharing networks on the Internet.[306] File sharers violate copyright law—often knowingly[307]—by downloading copyrighted works from others, and by placing copyrighted digital files on their hard drives for others to download.[308] File-sharing

301. Michael P. Vandenbergh, *Order Without Norms: How Personal Norm Activation Can Protect the Environment*, 99 NW. L. REV. 1101 (2005).

302. *See generally* Strahilevitz, *supra* note 283; Depoorter et al., *Copyright Backlash*, *supra* note 285; Yuval Feldman & Janice Nadler, *The Law and Norms of File Sharing*, 43 SAN DIEGO L. REV. 577 (2005); Ben Depoorter & Sven Vanneste, *Norms and Enforcement: The Case Against Copyright Litigation*, 84 OR. L. REV. 1127 (2005) [hereinafter Depoorter & Vanneste, *Norms and Enforcement*].

303. Vandenbergh, *supra* note 301, at 1108.

304. *Id.* at 1104.

305. *Id.* at 1123–24.

306. *See* Strahilevitz, *supra* note 283, at 509–10; Depoorter et al., *Copyright Backlash*, *supra* note 285, at 1253–55; Feldman & Nadler, *supra* note 302, at 578; Depoorter & Vanneste, *Norms and Enforcement*, *supra* note 302, at 1127.

307. According to one study, the propensity to engage in file-sharing activities among frequent file sharers actually increased with an increase in the severity of copyright law sanctions. *See* Depoorter et al., *Copyright Backlash*, *supra* note 285, at 1281–83.

308. There is disagreement about whether merely making a copy of a work publicly available for unauthorized download, irrespective of any actual dissemination of that work, violates the copyright owner's distribution right under U.S. law. *Compare* Capitol Records,

networks are loose-knit communities, largely comprised of strangers, which can number in the tens of millions.[309] The prevailing norm on peer-to-peer networks is copyright law non-compliance.[310] Shifting to copyright compliance would result in the negative payoff that users would cease to access free content.[311] There is little mystery surrounding why individuals engage in downloading activity on file-sharing networks: the price for noncompliance (the probability of being sued by copyright owners) is low, while the payoff—access to a vast array of free content—is high.[312] It is not obvious, however, why many engage in *uploading*—that is, the act of making files available to strangers even though uploading is generally not required in order to participate in file-sharing networks. Uploading therefore confers on the uploader no immediate benefit and, to the contrary, renders her vulnerable to severe legal consequences.

File sharers are willing to upload against the law and their own interests because certain norms—the *reciprocity* norm in particular—guide file-sharing communities despite those communities' vast and loose-knit character.[313] The reciprocity norm is the basic, powerful norm that motivates individuals to reciprocate the actions of others and cooperate in response to cooperation by others.[314] Lior Strahilevitz posits that individuals on file-sharing networks are motivated to alleviate feelings of guilt or indebtedness engendered by others' willingness to cooperate by sharing

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Inc. v. Thomas, 579 F. Supp. 2d 1210, 1226 (2008) (holding that an infringing distribution requires "actual dissemination"), *with* Hotaling v. Church of Jesus Christ of Latter-Day Saints, 118 F.3d 199, 201 (4th Cir. 1997) (holding that merely making an unauthorized copy of a work available to the public violates the distribution right). However, the unauthorized copying of a file into one's "shared" folder for dissemination on peer-to-peer networks could violate the reproduction right. *See* 17 U.S.C. § 106(1) (2012).

309. *See* Felix Oberholzer-Gee & Koleman Strumpf, *File Sharing and Copyright*, *in* 10 Innovation Policy and the Economy 19, 24–25 (Josh Lerner & Scott Stern eds., 2010) (noting that at various points in time file-sharing networks the Pirate Bay and Napster had 25 million and 30 million users, respectively).

310. *See* Feldman & Nadler, *supra* note 302, at 584–91.

311. *See* Depoorter et al., *Copyright Backlash*, *supra* note 285, at 1288 (noting that peer-to-peer users who internalized the anti-copyright norms before questions of file sharing's legality were settled "might experience loss aversion when the previously 'free' access to content made available by the new technology is suddenly illegal"). This may be changing in the music space, as new free, legal digital delivery services become mainstream, such as Spotify, Pandora, and iTunes Radio, all of which deliver large catalogs of free, licensed music. Nevertheless, the free versions of these services are ad-supported and suffer from significant encumbrances or limitations (for example, the presence of ads, restrictions on interactivity, low bit rates, and the inability to download and keep files) that may make such services second-best options for many file sharers.

312. *See* Feldman & Nadler, *supra* note 302, at 609–11; Strahilevitz, *supra* note 283, at 580–82 (arguing that younger file sharers "have been socialized to believe that the copyright laws and the courts are largely ineffectual").

313. *See* Strahilevitz, *supra* note 283, at 561–62. There is evidence that many file sharers are also motivated to share because of anti-copyright norms. Depoorter et al., *Copyright Backlash*, *supra* note 285, at 1284–85. For many in the file sharing community, the moral justifications for file sharing derive from deeply held anti-copyright beliefs (even if these beliefs reflect a self-serving bias), *Id.*, which increase in intensity as copyright enforcement activity increases. *Id.* This norm inversion (file sharing is right because copyright is wrong) emboldens file sharers to make files available to strangers despite no immediate benefits from doing so and despite being potentially subject to severe legal sanctions. *Id.*

314. Schultz, *supra* note 288, at 699; Strahilevitz, *supra* note 283, at 561–62.

files.[315] This, in turn, may lead to "reciprocity cascades," in which individuals' propensity to illegally share copyrighted files is not only reinforced but also amplified through feedback effects within the group.[316] Mark Schultz observes a similar phenomenon among the fans of "jambands," but in those communities the reciprocity norm fosters *anti*-infringement behavior.[317] Jambands, such as the Grateful Dead, permit fans to record the bands' live performances and distribute them freely if the fans comply with the band's rules. Those rules typically require that the fan recordings not be sold commercially and that any of the band's professional studio or live recordings not be shared freely.[318] A desire to cooperate and reciprocate the generosity of the band and of other fans motivates individuals to comply with copyright law and behave within the scope of a jamband's permissions.[319] The reciprocity norm also motivates fans to sanction, through public shaming or exclusion from the community, other fans who sell fan recordings or otherwise break the band's rules.[320] While the reciprocity norm may be enforced through social sanctions, as it sometimes is in the jamband fan communities,[321] it is also a personal norm of the type Vandenbergh highlighted because an internalized sense of duty often motivates compliance with the rules.[322]

In short, anti-copying norms are most likely to arise or take root in close-knit communities of rival content producers. Under certain conditions, however, norms can arise even in loose-knit communities of consumers—possibly even when norm compliance leads to net negative payoffs for the individual. Theoretical and descriptive accounts in the legal scholarship of norm activation in loose-knit groups focuses on personal norms, that is, norms such as reciprocity that are enforced not through community rewards and sanctions but through an internalized sense of duty or a desire to alleviate feelings of guilt or indebtedness.

E. Summary

Per the foregoing, the following conditions appear to be crucial to a successful market-pressure strategy. First, the targeted powerbroker, which can be an individual entity, a group of entities, or even a state, must be able to motivate the infringer to cease the infringement in a cost-effective way. The costs of inducing the powerbroker, furthermore, cannot be excessive.[323] Second, because policing the infringement on an ongoing basis is costly and powerbrokers may be poorly positioned to do it, the strategy should maximize the conditions for effectuating anti-in-

315. Strahilevitz, *supra* note 283, at 563.
316. *Id.* at 567–68.
317. Schultz, *supra* note 288, at 681.
318. *Id.* at 680–81.
319. *Id.* at 710–14.
320. *Id.* at 717.
321. *See id.*
322. *See supra* notes 303–305 and accompanying text.
323. *See supra* notes 265–268 and accompanying text.

fringement norms in the target infringer group. Anti-infringement norms are most likely to take root in close-knit groups of rival content producers, but loose-knit groups of consumers may also develop personal norms based on an internalized sense of duty and reciprocity. The following Part evaluates the case studies in Part II through this lens, and then draws some conclusions about maximizing the efficacy of market-pressure strategies aimed at infringements abroad.

IV. DISCUSSION

This Part analyzes and evaluates both of the case studies introduced in Part II under the framework outlined in Part III. It then makes recommendations for optimizing market-pressure strategies that copyright owners are currently employing to address two vexing international infringement problems: (1) the ongoing infringement-as-unfair-competition-strategy introduced in Part II, and (2) emerging efforts by content owners to pressure advertisers and online ad networks to limit peer-to-peer sites' access to lucrative online advertising.

A. The Development of Anti-infringement Norms Within the Community of Major Chinese Internet Video Sites

The Chinese Internet video sites' remarkable transition from hosting pirated content to hosting mostly licensed content appears to satisfy many of the conditions for developing group anti-copying norms set forth above. This likely explains why the market-pressure strategy in that case was so successful. Namely, the advertisers were well positioned to pressure the video websites. Moreover, although the advertisers were not in a position to cost-effectively control the websites, the symbiotic relationship between the advertisers and the websites put the advertisers in a strong position to transmit to the websites general IP compliance norms, so the community of websites could police itself. In addition, the major Chinese video websites are a close-knit group, and indeed they can even be characterized as rival producers, further increasing the likelihood that anti-copying norms could take root.

1. *Optimal Targeting and Norm Transmission*

There may be some question as to whether targeting the Chinese video websites' advertising partners satisfies the first part of Levinson's "optimal" targeting test.[324] That is, the advertisers were in a strong position to apply economic pressure on the video websites, but they were not necessarily well positioned to "control" the websites in a cost-effective way, since they were poorly positioned to police the websites on an ongoing basis. The advertisers have neither the resources nor the information necessary to determine whether each website properly licensed the potentially thousands of videos with which their ads appear at any given time.

324. *See supra* note 268 and accompanying text.

Perhaps Levinson's test is satisfied because the advertisers had the ability and willingness to remove ads (and precious advertising revenue) if the websites did not comply with copyright, and that is all the "control" that is required.[325] This view, however, may gloss over an important reality of the advertisers' and websites' relationship. The advertisers have considerable power to influence the video sites, to be sure, but their relationship with the sites may be best characterized as symbiotic: the websites need the advertising revenue, but the advertisers also need the websites, since young audiences in China overwhelmingly turn to the Internet now for video content.[326] If the advertisers were to withdraw completely and permanently from video websites, it is unclear to what platform they would turn to access that critical demographic.[327] As for the video sites, their credibility with advertisers matters, and the websites recognize that a healthy, constructive partnership with major advertisers is critical to their long-term business development and competitiveness.[328]

Therefore, the advertisers seem to have the requisite control to satisfy Levinson's test, but the "control" in this case derives not only from the advertisers' power to withdraw their ads but also from their symbiotic relationship with the video sites, which enabled the advertisers to transmit their IP norms to the sites. The advertisers signaled to Chinese video sites the IP norms of their community by making it clear that they were not comfortable associating their brands with pirated content.[329] This may have occurred simultaneously with, and partly as a result of, one

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325. *See* Levinson, *supra* note 93, at 1154–56.

326. *See* Sabrina, *China TV and Online Videos Report 2013: Almost Half Don't Watch TV Anymore*, China Internet Watch (Oct. 22, 2013), http://www.chinainternetwatch.com/4254/china-tv-online-videos-report-2013/ (citing data by market research firm ZDC indicating that nearly half of the survey respondents do not watch broadcast television anymore, and nearly 80 percent of viewers between the ages of eighteen and thirty-five preferred watching online video over television); Jenny Ng et al., Value Partners, TV 2.0: Young China Takes TV Viewing Online 1, *available at* http://www.valuepartners.com/downloads/PDF_Comunicati/Perspective/value-partners-tv_2.0-young_china-takes_tv-viewing_online-jenny-ng-tiger-shan-max-_parry-rogelio-bakels.pdf (reporting results of survey of urban Chinese secondary school and university students between ages seventeen and twenty-two finding that "[t]he Chinese youths surveyed . . . spend most of their time downloading and streaming online video as opposed to watching traditional TV," with nearly half of the youths surveyed claiming to watch no broadcast television at all).

327. Youku CEO Victor Koo suggests that online video is critical for brand owners in China: "This is the first generation of people [in China] buying cars and fridges. Video is much more important [for brands in China than it is for brands in the United States, where consumers have more brand awareness]. You cannot transmit the branding through text banners and pictures." Malcolm Moore, *Youku Founder Victor Koo Believes Only China Can Help His Company Grow, Make Money and Even Beat Piracy*, Telegraph (Dec. 14, 2010), http://www.telegraph.co.uk/finance/china-business/8201764/Youku-founder-Victor-Koo-believes-only-China-can-help-his-company-grow-make-money-and-even-beat-piracy.html#_jmp0_.

328. *See, e.g.*, Press Release, Youku Tudou Inc., Advertisers Turn to Youku Tudou Dual-Platform Solutions (Dec. 13, 2012), http://ir.youku.com/phoenix.zhtml?c=241246&p=irol-newsArticle_print&ID=1766959 (touting the company's strong relationship with major advertisers).

329. *See supra* Part II.A.

member of the online video website group (Sohu.com) taking the lead on anti-piracy issues in the community and joining lawsuits against the advertisers.[330] These factors likely combined to trigger the websites' investment in exclusive content licenses and their consequent internalization of copyright compliance norms and community self-policing. It is worth noting that the small community of major Chinese video sites is able to self-police in part because the infringements are public, so other stakeholders in the community can easily discover and act upon them.

The second element in Levinson's test for efficient application of indirect liability—that the subsidiary costs of indirect liability not be excessive—clearly is met.[331] As noted above, pressuring advertisers in this case resulted in net benefits for all the stakeholders in China's online video ecosystem.[332]

2. *The Reception of Anti-Infringement Norms by the Close-Knit Community of China's Video Websites*

To stem online video piracy in China, copyright owners focused their efforts on the video portals, in particular the handful of major players with the majority of the market share.[333] At the time that legal threats against advertisers sparked the video content licensing frenzy among online video streaming services in 2009, seven sites occupied a combined three-fourths of the online video market.[334] The small size of the relevant group of key players made it more likely that a forceful change in direction by one or a few members of the group would signal impending change to the rest.

By allying in 2009 with two small video websites and more than fifty video rights holders to sue infringing websites and (more importantly) their advertisers,[335] Sohu.com arguably acted as what Cass Sunstein calls a "norm entrepreneur," proactively leading a change in industry norms.[336] This might have been significant. In Robert Ellickson's view, norm entrepreneurs who propose new approaches for the group are the "key participants in norm creation."[337] The changes that followed were swift and striking as major online video sites scrambled to avoid losing relationships with advertisers,[338] calling to mind another Sunstein term:

330. *See supra* Part II.A.
331. *See supra* note 268 and accompanying text.
332. *See supra* notes 251–256 and accompanying text.
333. Yining Ding, *Websites Vie for Profit from Free Online Video Streaming*, SHANGHAI DAILY, Mar. 10, 2010, at B4, *available at* http://www.shanghaidaily.com/Opinion/biz-commentary/Websites-vie-for-profit-from-free-online-video-streaming/shdaily.shtml (reporting the fourth quarter 2009 market share of the top seven Chinese streaming video websites).
334. *Id.*
335. *See supra* Part II.A.
336. SUNSTEIN, *supra* note 284, at 36.
337. Robert C. Ellickson, *How Norm Entrepreneurs and Membership Associations Contribute to Private Ordering: A Response to Fagundes*, 90 TEX. L. REV. 247, 249–50 (2012).
338. *See supra* Part II.A.

"norm cascade," that is, a rapid shift toward a new norm.[339]

As the major online video sites invested heavily in exclusive content licenses, each became a stakeholder in the promotion of a legitimate online video ecosystem. Their interests concerning the protection of copyright became aligned not only with those of copyright owners but also with those of the other members of the online video community that invested in exclusive content licenses. This common interest led the major Chinese video portals to form alliances to pool content licenses and share costs,[340] and also to jointly sanction those members of the community who failed to observe the new norms.[341] For example, in November 2013, Sohu, Youku-Tudou, and Tencent, China's three largest online video platforms, teamed up with copyright owners to sue major Chinese search engine and online video platform Baidu, which had been slow to adopt the new norms against hosting unlicensed content.[342] At the time of the suit, Youku-Tudou CEO Victor Koo expressly noted the shift in norms and the desire to strengthen them further within the Chinese online video industry:

> Koo said mainstream video sites had managed to establish a healthy eco-system through competition and collaboration, including a focus on respecting intellectual property.
> "We hope more people can join in, and together, with government, authorities and copyright holders, [we hope] to strengthen cooperation, enhance technical measures, fight against hotlink[ing], combat piracy and jointly promote the process of genuine network[ing]," Koo said.[343]

Charles Zhang of Sohu.com recently made a similar observation to the Hollywood Reporter:

> "The more content we buy, the less piracy we get," Zhang said. "We buy the content and we file lawsuits against the pirate sites. Basically, for domestic TV drama and American TV series, the majority of the Chinese audience is now watching legitimate content. I'm very happy to see a campaign that started in 2009 result in such a great victory. This is an industry with law and order."[344]

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339. SUNSTEIN, *supra* note 284, at 38.

340. Mark Lee, *Tencent, Sohu, Baidu Unit to Form Online Video Alliance*, BLOOMBERG.NET (Apr. 24, 2012), http://www.bloomberg.com/news/2012-04-24/tencent-sohu-baidu-unit-to-form-online-video-alliance.html (reporting that "Tencent Holdings Ltd., Sohu.com Inc., and Baidu Inc.'s iQiyi.com unit said they will form an alliance to offer online video services in China, a month after industry leader Youku Inc. agreed to buy [ ] rival [Tudou] to cut costs").

341. Coonan & Brzeski, *supra* note 118.

342. *See id.*

343. *Id.*

344. Coonan, *supra* note 2.

3. *Chinese Online Video Websites as a Community of Rival Content Producers*

In addition to the relatively close-knit nature of the "community" of major Chinese video websites, the second condition for successfully establishing anti-copying norms is also present: the video websites are no longer just content purchasers and distributors; they are now rival content *producers*, as well.[345] As exclusive licensees who invested significant sums to distribute movies and programs online,[346] each video website effectively steps into the shoes of the content producer. Furthermore, as Chinese video websites seek to reduce their reliance on licensed content and the high costs associated with it, and as they seek to differentiate themselves from rivals, several have invested in self-produced films and programs for exclusive distribution through their platforms.[347] Norms tend to be highly role-specific.[348] As the Chinese online video sites' roles shift from content distributor to content licensee to content producer, the accompanying group norms among the Chinese video websites themselves have also predictably shifted from no expectation of copyright compliance to high expectations of copyright compliance.

4. *Summary*

In short, the strategy of pressuring large companies who advertise on Chinese websites was successful for the following reasons:

- The targeted "powerbrokers"—the advertisers—are members of a close-knit group of major transnational companies that are owners of valuable IP. IP protection is an important aspect of their identity. Thus, they could be successfully "shamed" into pressuring the video websites.
- The targeted infringer group—the video websites—form a relatively small, close-knit community of major online video sites in China that developed a symbiotic relationship with large advertisers.
- While the advertisers are probably poorly positioned to police the websites on an ongoing basis, because of the close cooperative relationship between the websites and advertisers, the websites were in prime position to receive the community norms of the advertisers and internalize those norms.
- By obtaining exclusive licenses and becoming content producers as well, the websites—like other close-knit groups of content producers—developed an intrinsic need to self-police. This self-policing is possible in part because infringements that occur on video sites are public and therefore easily discovered and acted upon.

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345. *See* Einhorn, *supra* note 96; Back & Chao, *supra* note 110; Li Chen, *supra* note 150.

346. *See supra* Part II.A.

347. *See* Steven Millward, *Tencent: Our Video Site is Now China's Biggest, Ready to Charge for Hollywood Movies*, TECHINASIA (Dec. 21, 2012), http://www.techinasia.com/tencent-video-site-hollywood-content/.

348. SUNSTEIN, *supra* note 284, at 42.

B. Infringer Norms and the Infringement-as-Unfair-Competition Approach

The infringement-as-unfair-competition strategy of software producers[349] is still relatively early-stage, so fewer conclusions can be drawn. However, the trend suggests that the conditions for developing successful anti-infringement norms are relevant to this context, as well. Namely, so long as promoters of the infringement-as-unfair-competition strategy define their target group broadly (e.g., overseas manufacturers who use pirated software), the approach is unlikely to be as successful as that employed against the Chinese video sites.

1. *Pressuring Foreign Manufacturers by Limiting Access to U.S. Markets*

As discussed in Parts II–III, above, the infringement-as-unfair-competition approach substitutes the U.S. government (federal or state) in the enforcement chain for governments of jurisdictions where copyright enforcement is weak. By doing so, copyright owners can leverage the U.S. federal or state government's control over U.S. market access—doubtless a key pressure point for many foreign manufacturers. The U.S. state and federal governments certainly have the ability to influence entities seeking to access their markets. As was the case with the advertisers in the first case study,[350] however, the U.S. federal or state governments are not in a strong position to control or police the infringement on an ongoing basis. The government does not have independent information about infringing uses of software by manufacturers overseas, and even if software companies are able to supply reliable information on infringements, state attorneys general and the FTC lack the resources to maintain a concerted and prolonged enforcement campaign against even a fraction of the many manufacturers using pirated software. The solution is to design the market-pressure strategy so as to help usher in a change in infringer norms that will enable self-policing, or else to introduce another powerbroker into the equation that can more effectively control the infringing activity.

2. *Diffuse and Loose-Knit Infringer Community*

The challenge of initiating a change in infringer norms is manifest. First, the "community" of non-U.S. manufacturers targeted by this effort is anything but a small, close-knit group. Unlike the small group of major Chinese video websites, the universe of large, non-U.S. manufacturing entities is vast, diverse, and geographically diffuse. Reflecting this diversity and diffusion, the unfair competition strategy so far has not been focused on a single country or industry. Even the relatively few enforcement actions that state attorneys general have brought to date have targeted defendants from four different countries (China, Thailand,

349. *See supra* Part II.B.
350. *See supra* Part II.A.

India, and Brazil) and in five different industries (apparel, oil equipment manufacturing, seafood processing, tire manufacturing, and aerospace).[351] Inducing a change in behavioral norms across multiple industries in multiple countries seems like an impossible goal to attain through a handful of sporadic actions brought by state attorneys general. These actions have generated international press[352] and triggered numerous global law firms to issue client advisories.[353] But it is far from clear that the actions initiated to date are leading to demonstrable widespread changes in foreign manufacturers' infringing behavior, or that a substantial number of similar future actions would.

3. *Consumers, Not Producers*

Second, in addition to being a loose-knit group, the manufacturers targeted by the unfair competition strategy are not rival software producers. In this way, they are again distinguishable from the Chinese video websites, which shifted from infringers of content to exclusive licensees and then to producers of their own content.[354] Unlike the Chinese video websites, manufacturers targeted by software companies have no obvious stake in the creation and maintenance of new copyright compliance norms. A shift from pirated software use to licensed software use would therefore produce for the infringer no immediate benefit, save eliminating the already remote possibility that the company would be sued, either for copyright infringement in its home territory or for unfair competition in the United States. The shift to licensed software would, however, produce immediate harms for the infringer in the form of higher operating costs.

4. *U.S. Retailers as Powerbrokers to Control Infringing Activity*

The Washington State IT theft law contains an intriguing alternative.[355] By extending liability to major retailers that sell goods produced using pirated software, the law creates an incentive for those retailers to police their supply chains. The practice of environmental supply-chain contracting demonstrates that motivating purchasers to contractually impose

351. *See supra* Part II.B.

352. *See, e.g.*, James R. Hagerty & Shira Ovide, *Microsoft Pursues New Tack on Piracy*, WALL ST. J. (Mar. 16, 2014), http://online.wsj.com/news/articles/SB10001424052702303287804579443442002220098.

353. *See, e.g.*, ARTHUR M. MITCHELL III ET AL., WHITE & CASE LLP, THE EMERGING RISKS OF UNAUTHORIZED IP IN YOUR SUPPLY CHAIN AND HOW YOU SHOULD RESPOND (2013) (client advisory issued by Tokyo office of global law firm White & Case); GIBSON, DUNN & CRUTCHER LLP, WASHINGTON STATE PASSES NEW UNFAIR COMPETITION LAW TO CRACK DOWN ON PIRATED SOFTWARE (2012) (client advisory issued by global law firm Gibson, Dunn, & Crutcher); Alan C.W. Chiu, *Hong Kong: How the US's New Anti-IT Theft Approach Affects Asia's Businesses*, MAYER BROWN JSM (Dec. 6, 2012), http://www.mayerbrown.com/How-the-USs-New-Anti-IT-Theft-Approach-Affects-Asias-Businesses-12-06-2012/ (client advisory issued by Hong Kong office of global law firm Mayer Brown JSM).

354. *See supra* Part II.A.

355. *See supra* Part II.B.1.a.

legal compliance obligations can have positive effects.[356] Under the Washington model, U.S.-based purchasers would be motivated to impose and police compliance obligations on an ongoing basis or face liability.[357] This imposes enforcement costs on purchasers, however, and barring a shift in infringer norms, this strategy will be effective only if purchasers can enforce the contract terms in a cost-effective way. Nevertheless, there are reasons to believe that enforcement costs need not be unduly burdensome. First, many foreign manufacturers and contract suppliers may be self-motivated to proactively demonstrate compliance. Many suppliers doubtless understand the importance of cultivating a reputation for professionalism and high standards, and affirmatively demonstrating compliance with contract terms is an effective way to communicate a commitment to professionalism and standards and retain valued customers. Retailers and purchasers could also form coalitions and organizations to monitor and improve compliance, as they have done in other areas such as labor standard compliance.[358] Moreover, purchasers no doubt have to ensure compliance with other contractual commitments from time to time; so adding this additional requirement to their compliance checklist does not seem onerous. The real question is how much will copyright compliance increase costs for both sides—if costs are deemed to be too high, one or both sides will lose motivation, contractual provisions and even potential secondary liability notwithstanding.

5. Summary

While the jury is still out on the efficacy of the infringement-as-unfair-competition market-pressure strategy, the following features characterize the strategy:

- In all unfair competition actions, the targeted powerbroker is a state. When government at the state (or federal) level chooses to recognize this theory of unfair competition, it is a formidable powerbroker because it wields considerable leverage over foreign infringers seeking to access U.S. markets.
- The targeted infringer group—foreign manufacturers who utilize pirated software in their supply chain—is a large, diffuse, and loose-knit group of consumers of software, making the challenge of effecting a change in infringer norms daunting.
- The Washington State IT theft law provides for the introduction of another powerbroker into the enforcement chain: any retailer or other "third party" that exceeds $50 million in annual revenue, sells or acquires products produced using infringing software, and has a contractual relationship with the manufacturer.[359] This enables a more finely tuned market-pressure strategy by motivating the infringer's powerful U.S.-based business associates to control the in-

356. *See supra* Part III.B.
357. *See supra* Part II.B.1.a.
358. *See* Burkeen, *supra* note 272, at 249.
359. *See supra* Part II.B.1.

fringement. However, without a corresponding shift in infringer norms, this strategy is only as good as the quality of ongoing enforcement these powerbrokers are willing and able (and motivated) to provide.

C. Implications for Market-Pressure Strategies Going Forward

The remainder of this Part draws on the above framework to make recommendations for improving the efficacy of two emerging market-pressure strategies. First, it makes recommendations for optimizing the infringement-as-unfair-competition strategy going forward.[360] Second, it makes recommendations concerning a developing effort by U.S.-based copyright owners to undermine infringing websites (frequently based overseas) by limiting the sites' access to lucrative online advertising networks.

1. Going Forward: Infringement-as-Unfair-Competition

a. Selective Targeting of Manufacturers

The discussion above highlights a major challenge for the use of U.S. unfair competition laws to redress overseas copyright infringement: the target infringer group is a diverse, diffuse, loose-knit collection of consumers of software goods that do not self-identify around copyright norms. If, as argued above, norms are key to a successful market-pressure strategy,[361] then the copyright owners' first step should be to strategically narrow the universe of targeted infringers. The strategy would be to identify and target small groups of manufacturers in industries evincing relatively robust group dynamics (for example, strong industry associations) or that are most likely to be receptive to adopting norms of copyright compliance (perhaps because the industry is known to increasingly value its own IP). Such a strategy might involve targeting unfair competition actions exclusively at a few major manufacturers in one particular industry—perhaps even further narrowing that pool to manufacturers in one country.[362]

Ideally, this approach would have two important effects. First, high profile actions will provide high profile notice to other industry members, for which the message will resonate most profoundly if it appears they are in a targeted industry. Second, major players that invest in software licenses as a result of an unfair competition action might themselves feel disadvantaged against competitors using pirated software. This could lead to circumstances akin to those of the Chinese video websites, whose in-

360. *See supra* Parts II.B & IV.B.
361. *See supra* Part III.D.
362. It is worth noting that the more that targeted actions (especially by government officials such as state attorneys general) are seen as discriminating against one foreign jurisdiction, the more vulnerable the approach is to scrutiny and possible nullification under international trade law. *See generally* Pager & Priest, *supra* note 182.

terests aligned with those of copyright owners once the websites invested in content licenses and piracy directly threatened the value of those investments.[363] Once one or a few influential members of an industry group become stakeholders in relation to the software piracy issue, they may be willing to employ whatever resources are available through industry associations to positively influence competitors. As more industry members adopt the software licensing norm, the group norm will become stronger and the pressure on holdouts greater.

b. The Challenge of Motivating Infringers to Police Themselves, and the Importance of Activating "Personal" Norms

The preceding paragraphs assume that effective group-based social sanctions could be brought to bear against nonconforming group members. The challenge with this assumption is that, as noted in Part III, anti-piracy norms are most easily developed among producers or distributors of copyrighted goods, not consumers such as the targeted manufacturers.[364] Among consumers, effectuating a shift in *personal* norms surrounding the use of pirated goods has been the more effective strategy.[365] It is easy to imagine that not all—and perhaps not many—industry groups or associations will have the will or ability to impose effective social sanctions on members that transgress any anti-piracy norms that develop. Assuming group sanctions will often not be available, it makes sense for proponents of the unfair competition strategy to consider how to activate "personal" norms against the use of pirated software.

The personal norms of reciprocity and guilt can be powerful deterrents to self-interested infringing behavior.[366] Activating them is a challenge, however, because they require the internalization of a sense of duty to act out of guilt or a desire to "repay" the generosity of others.[367] Activating such sentiments and internal commitments in a critical mass of corporate "persons" is an enormous but potentially achievable task within some narrow target groups. For example, if the targeted manufacturers are part

363. *See supra* Part IV.A. The analogy is not perfect, to be sure. Two ways in which this situation differs from that of the Chinese video websites is that the video websites usually purchased exclusive licenses, and the content they serve is the very product being monetized. Thus, competitors that serve pirated versions of the same content directly undermine the exclusive licensee's revenue stream. As exclusive licensees, the video websites have "stepped into the shoes" of the copyright owners, naturally helping to facilitate a shift to copyright compliance norms among major video websites. By contrast, manufacturers who purchase software licenses are not "stepping into the shoes" of copyright owners, as they merely acquire nonexclusive licenses to use (not distribute or sell) the software, and competitors who use pirated software do not directly undermine competing manufacturers' revenue streams. Nevertheless, competitors who use pirated software do enjoy a competitive advantage, at least in theory. They do not have to incur the sometimes substantial software license fees, and can reinvest those cost savings into their businesses by investing in capital equipment, hiring additional labor, or engaging in research and development. *See* KERR & MOUTRAY, *supra* note 18, at 8.

364. *See supra* Part III.D.

365. *See supra* Part III.D.

366. *See supra* Part III.D.

367. *See supra* Part III.D.

of an industry that values IP, then reaching out to the industry to aid with IP training or enforcement might help drive home the hypocrisy of pirating someone else's IP while seeking to enforce one's own. It might also activate feelings of reciprocity. Reaching out to other industries in emerging markets to provide training or helpful new technologies might also activate such sentiments. Imagining the many ways in which software copyright owners could strategically interact with target manufacturer communities to activate personal norms is beyond the scope of this Article. The key point is the importance of incorporating into the market-pressure strategy a sophisticated strategy for activating group and even personal anti-infringement norms.

c. Pressuring U.S.-based Corporate Buyers to Police Infringing Conduct

Of course, efforts to apply market pressures or effect norm shifts need not only target the infringers. An alternative strategy is to pressure multinational retailers and corporate buyers, who also potentially benefit from the cost savings that result from utilizing pirated software in the upstream supply chain.[368] Inducing multinational purchasers to condition their business on assurances from the supplier that only licensed software was used in the production of the goods is another way of conditioning manufacturers' access to U.S. markets. Even if they do not benefit from the infringement, holding multinational retailers and purchasers liable might still be an effective way to avoid harm to the copyright owner.[369]

The Washington State "Stolen IT" law in fact envisions and enables this strategy by extending unfair competition liability to certain in-state third parties such as retailers or companies that outsource production to manufacturers that use pirated software.[370] Indeed, the statute implicitly recognizes the importance of inculcating "personal" anti-piracy norms in U.S.-based buyers by expressly rewarding them, through liability exemption, for establishing internal policies and practices aimed at ensuring their suppliers use licensed software.[371] To date, no action has been brought against third parties under the statute, and aggressive enforcement by the Washington attorney general against in-state retailers and other businesses may be politically unpalatable. If this statutory provision is aggressively enforced, however, and if in-state purchasers diligently monitor their supply chains, this approach is sound and likely effective from the standpoint of deterring the use of pirated software by overseas manufacturers.

368. *See supra* Part II.B.1.a.
369. Levinson, *supra* note 93, at 1148.
370. *See supra* Part II.B.1.a.
371. WASH. REV. CODE § 19.330.080(1)(d) (2011) (detailing the third-party liability exemption for any "person [who] has made commercially reasonable efforts to implement practices and procedures to require its direct manufacturers, in manufacturing articles or products for such person, not to use stolen or misappropriated information technology").

In theory, U.S.-based purchasers could be effective, relatively low-cost enforcers. As is demonstrated in the environmental contracting context,[372] to ensure success the purchasers must diligently enforce their agreements with suppliers.[373] The key difference between the environmental protection and software copyright protection contexts is that the former is a cause célèbre and U.S.-based companies are responding to pressure from activist consumers, investors, and environmental NGOs,[374] while the latter is not a priority for most outside the software industry, which wields little direct influence over businesses in other industries. Employing secondary unfair competition liability is one way the software industry may motivate downstream U.S.-based purchasers and manufacturers to police their supply chains. Extralegal strategies can also be effective, however. If the software industry makes a compelling case to U.S. companies and officials about the direct harms to U.S. businesses and the economy from competing with companies that use pirated IT goods, then it could stimulate the intrinsic and extrinsic motivations for U.S. downstream purchasers to earnestly police their supply chains. The software industry has made inroads toward persuading U.S. manufacturers that foreign software piracy hurts revenues and undermines their competitiveness in the global marketplace.[375] Concurrently, some current and former U.S. officials publicly decry foreign software piracy's broader effects on the United States' global competitiveness and jobs outlook and actively seek ways to remedy the problem.[376] These efforts may motivate industry associations to adopt and enforce voluntary standards and even certification programs aimed at policing supply chains for pirated software use.[377]

2. *Pressuring Brands and Online Ad Networks that Support Global Infringing Websites*

Another copyright battle is escalating with several close parallels to the case studies analyzed above: copyright owners are pressuring advertisers, including major brands, whose lucrative ads support infringing websites accessible in the United States and around the world.[378] In a typical copy-

372. Vandenbergh, *supra* note 249, at 918, 961, 970 ("The efficacy of this private [environmental] contracting is a function of the extent and content of the standards as well as of their enforcement").

373. *See supra* notes 276–278 and accompanying text.

374. Vandenbergh, *supra* note 249, at 915, 921–22.

375. *See* Kerr & Moutray, *supra* note 18, at 4 (study commissioned in part by the National Association of Manufacturers concluding that software piracy cost U.S. manufacturers $239.9 billion in revenue from 2002–2012 and reduced their innovative capacity, while costing the U.S. manufacturing sector over 42,000 jobs).

376. *See supra* note 187–189 and accompanying text.

377. *Cf.* Vandenbergh, *supra* note 249, at 921–25 (discussing the helpful role that standard-setting in private organizations plays in fostering private-sector policing of environmental abuses).

378. *See* Jack Marshall, *More Ad Dollars Flow to Pirated Video*, Wall St. J. (May 7, 2014), http://online.wsj.com/news/articles/SB10001424052702304810904579507962005985196; Ben Sisario & Tanzina Vega, *Playing Whac-a-Mole with Piracy Sites*, N.Y. Times, Jan. 29, 2013, at B3.

right enforcement scenario, the state plays the role of powerbroker, using its police power to back the copyright owner's rights in a civil action.[379] The state often lacks sufficient leverage over infringing websites, however, because many sites primarily devoted to infringement are based overseas; thus, obtaining jurisdiction over them as a legal matter, or exercising power over them as a practical matter, is a challenge.[380] Even when the state can properly exercise jurisdiction, website owners may be able to obscure their identity, creating further enforcement challenges. When efforts to pass federal legislation designed to provide copyright owners with more powerful online copyright enforcement tools failed,[381] copyright owners and even the White House have looked to private ordering and market pressures to solve these enforcement challenges by motivating major brands and online advertising networks to more closely monitor their ad placements.[382]

As the Wall Street Journal recently observed, "It's easy for websites to make a profit selling online advertising. All they have to do is avoid paying for content."[383] A 2012 study, funded in part by Google, found that advertising financially supports 86 percent of peer-to-peer search websites worldwide that facilitate access to a vast array of unlicensed, downloadable content.[384] A 2014 study by Internet consumer advocacy group the Digital Citizens Alliance[385] estimated that large ad-supported sites that host or link to infringing content average $3–$4 million annually in ad revenue, and the 596 sites sampled in the study attracted a total of $226.7 million in ad revenue.[386] A 2013 study by the Annenberg Lab at the University of Southern California identified numerous major brands whose ads were located on and supporting infringing sites.[387] The nearly three dozen major brands whose ads were observed on multiple infringing sites included American Express, AT&T, BMW, Nokia, State Farm Insurance, Toyota, Visa, Verizon, and Volkswagen.[388]

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379. *See supra* Part III.B.

380. *See supra* Part I.

381. *See generally* YOCHAI BENKLER ET AL., SOCIAL MOBILIZATION AND THE NETWORKED PUBLIC SPHERE: MAPPING THE SOPA-PIPA DEBATE (2013).

382. Sisario & Vega, *supra* note 378; Jon Healey, *A Non-SOPA Broadside Aimed at Online Piracy Hotbeds*, L.A. TIMES (July 15, 2013), http://www.latimes.com/opinion/opinion-la/la-ol-online-advertising-movie-music-piracy-20130715-story.html; Katy Bachman, *White House Pushes More Voluntary Actions to Protect IP*, ADWEEK (June 20, 2013), http://www.adweek.com/news/technology/white-house-pushes-more-voluntary-actions-protect-ip-150540.

383. Marshall, *supra* note 378.

384. BSA SYSTEMS, THE SIX BUSINESS MODELS FOR COPYRIGHT INFRINGEMENT: A DATA-DRIVEN STUDY OF WEBSITES CONSIDERED TO BE INFRINGING COPYRIGHT 11 (2012).

385. *See About Us*, DIGITAL CITIZENS ALLIANCE, http://www.digitalcitizensalliance.org/cac/alliance/content.aspx?page=about (last visited Jan. 11, 2015).

386. DIGITAL CITIZENS ALLIANCE, GOOD MONEY GONE BAD: DIGITAL THIEVES AND THE HIJACKING OF THE ONLINE AD BUSINESS 8 (2014).

387. JONATHAN TAPLIN, U.S.C. ANNENBERG INNOVATION LAB AD TRANSPARENCY REPORT (Feb. 14, 2013).

388. *Id.* at 4.

Under growing pressure from copyright owners and federal officials, AOL, Google, Microsoft and Yahoo—operators of some of the largest online advertising networks—developed a set of voluntary best practices.[389] Under these guidelines, which the Association of National Advertisers and the American Association of Advertising Agencies have adopted,[390] online ad networks pledge to "[m]aintain policies prohibiting websites that are principally dedicated to . . . engaging in copyright piracy," but need not proactively monitor sites.[391] Rather, in the spirit of the notice and takedown provisions of the Digital Millennium Copyright Act (DMCA),[392] ad networks need only ensure that copyright owners can conveniently notify them about such sites.[393] While this leaves the bulk of the enforcement burden with copyright owners, the guideline's DMCA parallels do have the virtue of discouraging copyright owners from using a market-pressure strategy as an end-run around the DMCA safe harbor. If copyright owners notify ad networks about a site dedicated to piracy, the best practices document suggests a wide range of responses: the ad network can request that the site cease to engage in piracy; it can temporarily stop placing ads on the site until the network confirms it has ceased infringing; or it can remove the site altogether from the ad network.[394]

The strategy is similar to the one copyright owners successfully employed in the context of Chinese pirate video streaming sites: single out the brands whose advertisements appear on infringing websites and shame them as major IP owners to pressure the websites.[395] At first glance, such a strategy should be even more effective in the United States, which has a far better copyright enforcement record than China. To date, however, efforts to pressure brands in the United States have had little effect on the frequency with which their ads appear on infringing websites.[396] What explains this apparent paradox?

The answer appears to lie in the structure of the online ad market in each country, and in particular in the immediacy of the brand–website relationship. Counterintuitively, China's historically poor copyright enforcement record probably facilitated the video websites' clean-up efforts beginning in 2009. This is because, given the modest expectations for copyright compliance in China, the market-leading video sites infringed

389. *See* Healey, *supra* note 382.
390. Lucia Moses, *New Report Says How Much Advertising Is Going to Piracy Sites*, Adweek (Feb. 18, 2014), http://www.adweek.com/news/advertising-branding/new-report-says-how-much-advertising-going-piracy-sites-155770#_jmp0_.
391. *Best Practices Guidelines for Ad Networks to Address Piracy and Counterfeiting*, *available at* http://www.2013ippractices.com/bestpracticesguidelinesforadnetworkstoaddresspiracyandcounterfeiting.html#_jmp0_ (last visited Jan. 11, 2015) (alteration added) [hereinafter *Best Practices*].
392. 17 U.S.C. § 512(c).
393. *See* Healey, *supra* note 382.
394. *Best Practices*, *supra* note 391.
395. See *supra* Part II.A.
396. *See* Marshall, *supra* note 378 ("Thanks to the rise of automated ad-buying technologies, more ad dollars are flowing to sites with stolen copyrighted content than ever before, ad executives say.").

openly while simultaneously building lucrative direct relationships with major brands.[397] These relationships afforded the brands influence over the websites. In the United States, by contrast, the relationship between brands and infringing sites is far more convoluted, in part because the high enforcement environment pushes pirate sites underground, resulting in shadowy operations with no direct relationships with major brands,[398] and in part because there are layers of automated and human intermediaries between the brand owner and the website.[399] In fact, many large companies whose ads end up on sites that primarily offer infringing content claim that they were not aware of their ads' placement, and that they do not wish to have their brands associated with such sites.[400]

Accordingly, copyright owners have had little success effectuating a change through market pressuring in this context because the enforcement chain too frequently lacks a powerbroker with sufficient leverage over infringing websites. Although the brand owners' interests do appear mostly aligned with those of copyright owners—major brand owners observe general norms around protecting and respecting IP,[401] and owners worry that an association with pirate sites might tarnish their brands[402]—they lack the kind of direct relationships with infringing sites that existed in the context of the Chinese video websites. Brand owners therefore have little leverage over, or even knowledge of, infringing sites earning income from their ads. Marketers increasingly use a variety of brokers and automated ad exchanges to more widely disseminate their ads to targeted demographics across the Web.[403] Through these layers of revolving intermediaries, marketers often lose control of where their ads appear. In addition, even affirmatively blocking ads from appearing on known pirate sites often has little effect. Unlike the Chinese video websites in 2009, who were themselves building brand loyalty among users and advertisers, many pirate sites accessible in the United States are not playing the long game, and they use the opacity of automated ad buying to their advantage.[404] Their strategy is to attract large audiences with free

397. *See supra* note 113 and accompanying text.

398. *See* Marshall, *supra* note 378.

399. Suzanne Vranica, *A 'Crisis' in Online Ads: One-Third of Traffic Is Bogus*, WALL ST. J., (Mar. 23, 2014), http://online.wsj.com/news/articles/SB10001424052702304026304579453253860786362.

400. *See* Marshall, *supra* note 378.

401. *See id.*

402. *See id.*

403. *Id.* ("Marketers are increasingly buying online ad space through complicated automated marketplaces and chains of brokers, instead of directly from website owners themselves. When marketers place ads through these channels, they can't be sure where they might appear across the Web.").

404. *Id.* ("Piracy sites are well aware [that ad networks often lose control over where their clients' ads appear on the Internet], and use it to their advantage. Ad executives say it is relatively easy for these sites to force their way into these automated marketplaces and to gain access to big-brand ad budgets. Even if those sites are found by ad companies and blocked from their systems, they often succeed in disguising themselves and finding a way back in."); Vranica, *supra* note 399 (noting the lack of transparency in automated online ad buying).

content and bilk ad networks for as long as possible until the advertisers are alerted and withdraw their ads.[405] At that point, the pirate site operators simply re-launch, disguised under a different domain name, and the cycle begins anew.[406] More than one online advertising executive has likened the process to playing a game of "Whac-A-Mole."[407] Under such circumstances, brand owners' ability to pressure infringing websites is significantly undermined.

In theory, pressuring online ad networks is a more promising strategy, since they are intermediaries between brand owners and infringing websites. Online ad networks therefore appear better positioned than brands to act as powerbrokers over infringing sites. For several reasons, however, the results of the strategy have been disappointing. First, ad networks' interests are often misaligned with those of copyright owners, making it difficult to activate any intrinsic anti-piracy norms or motivations.[408] Online ad networks profit from placing ads on the most popular destinations, and sites facilitating peer-to-peer file-sharing access are popular. According to online usage metrics company TruOptik, peer-to-peer file sharing remains the third largest digital media and social networking application on the Web, behind only Facebook and YouTube.[409] Ad networks that blacklist peer-to-peer sites therefore choose to forgo a significant source of potential revenue.[410] Some appear unwilling to do that.[411] Second, some ad networks drag their feet due to ambiguity over which sites to sanction.[412] The industry best practices suggest contemplating action only against sites that are "principally" dedicated to infringing uses "and have no substantial non-infringing uses"[413]—terms that are in-

405. *Id.*; *see* Marshall, *supra* note 378.

406. *Id.*

407. *See id.*; Sisario & Vega, *supra* note 378.

408. *See* Gordon Platt, *Advertising Week: Digital Piracy—It's Worse Than You Think*, PRIVACYNET (Sept. 24, 2013), http://www.privacy-net.com/ad-week-digital-piracy-its-worse-than-you-think/ (reporting on an ad industry panel during which panelist Bob Liodice, CEO of the Association of National Advertisers, opined that one reason the online advertising community has not solved the problem of supporting infringing sites is that no one in the community has taken "ownership" of the piracy problem, and that to take control of the problem industry stakeholders must collaborate in a systematic way and make the piracy problem "personal").

409. Paul Resnikoff, *P2P Is Still Bigger than Spotify, Soundcloud, Twitter, Instagram & Pandora. . .*, DIGITAL MUSIC NEWS (June 4, 2014), http://www.digitalmusicnews.com/permalink/2014/06/04/p2p-still-bigger-spotify-soundcloud-twitter-instagram-pandora (citing statistics from TruOptik).

410. JONATHAN TAPLIN, USC ANNENBERG LAB AD TRANSPARENCY REPORT (June 12, 2013) (noting several online ad networks, including Propellerads, ExoClick, Admxr, Adcash, and Infolinks, that repeatedly rank among the top ten networks serving ads to pirate sites) [hereinafter USC ANNENBERG LAB JUNE 2013 REPORT]; Marshall, *supra* note 378 (quoting Farnaz Alemi, content protection counsel at the Motion Picture Association of America, as saying, "While the [online advertising] industry as a whole has some cleaning up of its act to do, there are some significant players that appear clearly to be turning a blind eye to blatant infringement—and profiting from it.").

411. *See* USC ANNENBERG LAB JUNE 2013 REPORT, *supra* note 410; Marshall, *supra* note 378.

412. *See* Healey, *supra* note 382.

413. *Best Practices*, *supra* note 391.

herently imprecise and open to interpretation and debate.[414] While some, such as the Annenberg Lab, use the volume of DMCA takedown notices that a site receives as a proxy for volume of infringing activity, others counter that takedown requests are merely unproven allegations and therefore insufficient to trigger action.[415] Third, it is unclear exactly who is best positioned to pressure the ad networks. Ad networks on the web are numerous and serve a broad spectrum of marketers from major brands (many of which are likely to have concerns about being associated with unlicensed content) down to online gambling outfits and non-branded companies (many of which probably do not).[416] Not all advertisers are necessarily willing to pressure ad networks. Furthermore, trade groups are unsure about how to apply pressure, or are unwilling to do so. Although the American Association of Advertising Agencies, for example, has adopted the best practices noted above, they cite antitrust concerns for their reluctance to take a more proactive stance by issuing "blacklists" of known high-piracy sites.[417] In short, there is enough misalignment of interests with copyright owners, and enough legal dubiety, to effectively stall attempts by copyright owners and some major brands to pressure the ad networks into more aggressively taking ownership of the problem.[418]

The challenges copyright owners face pressuring global infringing sites demonstrates the limits of the market-pressure strategy. Without a powerbroker routinely positioned with leverage over infringing sites or online ad networks, and therefore with no way to effectively transmit extrinsic norms of copyright compliance or activate similar intrinsic norms, efforts to pressure infringing sites will continue to be frustrated. Given the opaque and byzantine present structure of the online advertising ecosystem, the state remains the most potentially effective powerbroker. A well-tailored legislative solution that gives copyright owners more effective enforcement tools for deterring websites primarily devoted to infringing activities is likely to be more effective than a market-pressure strategy under the current conditions. Nevertheless, new legislation spe-

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414. *See* Healey, *supra* note 382 (noting that this flexibility "leaves the agreement seemingly toothless, but it's necessitated by the fact that piracy happens on legitimate sites as well as rogue ones," and that "there's a lot of gray area between YouTube [a site with some infringing content but large amounts of non-infringing content] and the Pirate Bay [a site with some non-infringing content but large amounts of infringing content]").

415. Sisario & Vega, *supra* note 378.

416. *See* USC Annenberg Lab June 2013 Report, *supra* note 410, at 1–2 (noting that the uTorrent peer-to-peer client reportedly serves over five billion ads every month, most of which "are for Poker software and other non-branded companies").

417. Sisario & Vega, *supra* note 378 (citing comments by Dick O'Brien, the executive vice president and director of government relations at the American Association of Advertising Agencies).

418. This does not necessarily mean that online ad networks could not be far more proactive and effective at tackling the problem if they chose to be. As the Future of Music Coalition blog argued, "[B]rands successfully avoid their products being served on pornographic sites—why should pirate platforms be any different?" Casey, *Ad Networks Face Criticism for Pirate Placements*, FutureBlog (Feb. 5, 2013), https://futureofmusic.org/blog/2013/02/05/ad-networks-face-criticism-pirate-placements.

cially addressing online infringement is highly unlikely for some time in the political aftermath of the Stop Online Piracy Act (SOPA) and the PROTECT IP Act (PIPA).[419]

Short of a legislative solution, a radical reformation of the online advertising system holds the greatest promise for a successful market-pressure strategy. The prospect is not entirely far-fetched. A handful of emerging companies provide online IP risk assessment to brands and ad networks,[420] and some Internet ad industry insiders are openly calling for sweeping structural reform.[421] If one goal of the reform is to better enable market pressures to reduce online infringement, the above analysis may provide some useful guidelines. In general, the closer and more direct the relationship between advertisers and the websites on which their ads appear, the more leverage the advertisers have over the sites and thus the more likely a market-pressure strategy is to work. Building direct, one-to-one relationships between brand owners and websites is the best way to ensure the proper leverage and accompanying norm transmission. Given the Web's immensity, however, limiting one's online marketing channels to a relatively small number of key trusted partner sites might not be realistic for many marketers. In that case, brand owners should work diligently with major online advertising networks to build trusted ad networks that permit brand owners to retain significant control over where their ads are displayed. If the system is structured so that advertisers can hold online ad networks directly accountable for where the ads appear, then there is far more likely to be an alignment of interests between copyright owners, brand owners, and online ad networks. Such an alignment will be instrumental in replicating in the United States and elsewhere the success that copyright owners had pressuring online video websites in China.

419. *See generally* Benkler et al., *supra* note 381; *see also* Kim Hart, *Pols Fear 'SOPA Backlash,'* Politico (Mar. 8, 2012) ("Lawmakers are tiptoeing around issues that could tick off tech heavyweights such as Google or Amazon. They don't want a legislative misstep to trigger the same kind of online revolt that killed the Stop Online Piracy Act in the House and the Protect IP Act in the Senate in January."); Christopher S. Stewart, *As Pirates Run Rampant, TV Studios Dial Up Pursuit*, Wall St. J. (Mar. 3, 2013), http://www.wsj.com/articles/SB10001424127887324906004578292232028509990 (noting the failure of SOPA and PIPA to pass and that there is no new bill planned); Platt, *supra* note 408 (quoting Rick Cotton, Senior Counselor for IP Protection at NBCUniversal, as saying, "I don't think we're looking remotely at a legislation solution," which he viewed in any event as the "least optimal solution").

420. *See, e.g.*, *Veri-Site Solutions*, http://www.veri-site.com/solutions.html (last visited Feb. 15, 2015); WhiteBullet, *Brand-Protecting Solutions*, http://www.white-bullet.com/brand-protection-solutions (last visited Feb. 15, 2015).

421. *See* Lev-Aretz, *Copyright Lawmaking and Public Choice*, *supra* note 14, at 251; Randall Rothenberg, *IAB Head: 'The Digital Advertising Industry Must Stop Having Unprotected Sex,'* Bus. Insider (Feb. 5, 2014), http://www.businessinsider.com/iab-randall-rothenberg-supply-chain-2014-2 (op-ed by president and CEO of trade association the Interactive Advertising Bureau, arguing that problems such as click fraud, privacy concerns, and copyright piracy are "symptoms of a more destructive failing: The digital advertising supply chain is too open," and "industry behavior change [is needed] at an unprecedented scale").

CONCLUSION

Faced with ineffective law enforcement options for widespread infringement in numerous emerging markets, copyright owners are emulating a strategy used with increasing frequency by stakeholders in other compliance-challenged fields such as environmental protection and labor conditions:[422] motivate influential third parties to pressure wrongdoers into legal compliance. In particular, copyright owners are experimenting with market pressure points that impose economic hardship on businesses that benefit from infringement. Since severe copyright enforcement challenges in many territories are unlikely to be resolved quickly, transnational market pressuring will be an increasingly important part of the international IP landscape. Until now, however, little analysis has been done to understand these strategies' effects, find commonalities, and identify what factors are most likely to predict success. The case study on advertisers' successful pressuring of online video sites in China demonstrates that under the right conditions, the model can be successful and beneficial for all the key stakeholders: copyright owners, intermediaries or "powerbrokers," the public, and even the infringers.

Motivating a well-positioned "powerbroker" intermediary to coerce infringers into copyright compliance can be an appealing and effective option. A powerbroker might be a private entity that has influence over the infringer, or it might be a U.S. state government, for example, that conditions access to state markets on the infringer's compliance with the copyright laws of the infringer's home country.

A market-pressure strategy is most likely to be successful when it takes into account the interplay between indirect enforcement (finding a suitable "powerbroker" to pressure infringers) and social norms theory. The most effective strategy will induce the infringer group to comply with copyright on an ongoing basis. The above analysis of market-pressure strategies targeting online advertisers in both China and the United States demonstrates that swaying infringer group norms toward copyright compliance is most likely to occur when the infringer group is close-knit and has a direct relationship with, and is directly influenced by, the pressuring intermediary. Having direct influence helps the intermediary transmit, and the infringer group internalize, norms of copyright compliance. Ongoing enforcement may then be achieved through self-policing within the infringer group as a result of internalized anti-infringement norms. The more closely the infringer group members' interests come to be aligned with those of copyright owners, the more likely the strategy will be successful. Thus, when infringing Chinese video websites feared losing advertisers and therefore bought exclusive content licenses and produced their own content, their interests closely aligned with copyright owners' and the websites became highly motivated to police infringement within their own community.

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422. *See supra* Part III.C.

If achieving a shift in infringer norms is impracticable, it may be possible to induce a "powerbroker" intermediary to contractually impose standards on business partners engaged in infringement, and perhaps even to develop industry-wide standards and best practices around expectations of copyright compliance. These intermediaries will incur enforcement costs, however. That approach is therefore only as effective as the intermediaries' willingness and ability to incur those costs on an ongoing basis.