Learning from Copyright's Failure to Build Its Future

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INTRODUCTION

Since file sharing emerged in the late 1990s, copyright infringement has been widespread and virtually impervious to legal sanctions. Despite the best efforts of industry representatives and the lawmakers acting at their behest, attempts to scare and shame copyright infringers into compliance with the law have fallen flat.

Part I of this Note discusses the ongoing conflict between modern copyright law and socially acceptable behavior, specifically copyright infringement through digital means. Part II explores the various attempts, and subsequent failures, to curb infringement through deterrence measures. Part III explains why deterrence has been ineffective by exploring psychological models of law-abiding behavior and their implications for copyright, given what we know of infringing behavior. Part IV explores the education and publicity campaigns that have been implemented in an attempt to change the public's perception of copyright infringement. Part IV also explains under a psychological approach why these campaigns have been unsuccessful. Part V draws on a cognitive approach to jurisprudence to advocate for a new form of copyright to supplement and work around the failing current paradigm.[1]

I. THE PROBLEM

Creative works protected by copyright cannot be duplicated or shared without the express consent of the author.[2] Nonetheless, digital file sharing is incredibly common as Internet users of all ages and demographics download millions of copyrighted works on a daily basis.[3] This trend extends well beyond the usual suspects, college students. Almost half of all adults and three-quarters of young

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1. Copyright discussion may encompass music, film, written works, and other creative works. In this Note, the lobbying and education efforts of both the music and film industries will be discussed because they frequently work in concert and employ similar strategies. The solutions advocated in this Note, however, apply more effectively to the realm of music and written works. The nature of film and music are so different, from creation to distribution to consumption, that a single legal regime for all creative works is neither logical nor practical.

2. 17 U.S.C. § 106 (2012).

3. Mohsen Manesh, *The Immorality of Theft, the Amorality of Infringement*, 2006 STAN. TECH. L. REV. 5, ¶ 4, http://stlr.stanford.edu/STLR/Articles/06_STLR_5 ("Each day, millions of Internet file-sharers share and download millions of songs and movies, each time infringing on the copyright of the owner. These file-sharers transcend nationalities and cultures. Though most are college students, file-sharers exist in nearly all age groups, across both sexes, and in all socioeconomic classes.").

people have bought, copied, or downloaded infringing material.[4] A single file-hosting website claimed to have fifty million visits to its website daily before its recent decommission.[5] Copyright infringement is as common as breaking the speed limit: "Almost everyone has recorded copyrighted television broadcasts, photocopied copyrighted writings, or made duplicates of cassette tapes or compact discs containing copyrighted songs."[6]

This widespread disregard of copyright law poses a large, growing problem, but not for the reasons one might think. Commonplace rhetoric in the copyright debate is that infringement harms artists and the national interest in encouraging creative production.[7] The Recording Industry and Artist Association (RIAA), which claims to represent the entire music industry,[8] alleges that file sharing has a "devastating" effect on "songwriters, recording artists, audio engineers, computer technicians, talent scouts and marketing specialists, producers, publishers and countless others[,]" impacting the entire United States economy.[9] Allegedly, "[t]he eventual result is there's no reason to be an artist, because you have to give away your work for free."[10] The apocalyptic rhetoric of special interests,[11] however, seems inflated at best, as file sharing has now continued undeterred for over a decade and new music artists continue to emerge and thrive.[12] Even claims of the economic

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4. JOE KARAGANIS, AM. ASSEMBLY, COPYRIGHT INFRINGEMENT AND ENFORCEMENT IN THE US 2 (2011), http://piracy.americanassembly.org/wp-content/uploads/2011/11/AA-Research-Note-Infringement-and-Enforcement-November-2011.pdf.

5. Ed O'Keefe & Ian Shapira, *Department of Justice Site Hacked After Megaupload Shutdown, Anonymous Claims Credit*, WASH. POST (Jan. 20, 2012), http://www.washingtonpost.com/business/economy/department-of-justice-site-hacked-after-megaupload-shutdown-anonymous-claims-credit/2012/01/20/gIQAl5MNEQ_story.html?tid=pm_business_pop.

6. Ann Bartow, *Arresting Technology: An Essay*, 1 BUFF. INTELL. PROP. L.J. 95, 96 (2001).

7. *See* Geraldine Szott Moohr, *Defining Overcriminalization Through Cost-Benefit Analysis: The Example of Criminal Copyright Laws*, 54 AM. U. L. REV. 783, 792 (2005).

8. This claim is disputed by digital music distributors. *See, e.g.*, Jeff Price, *What the RIAA Won't Tell You—TuneCore's Response to the NY Times Op-Ed by RIAA CEO Cary H. Sherman*, TUNECORE BLOG (Feb. 16, 2012), http://blog.tunecore.com/2012/02/what-the-riaa-wont-tell-you-tunecores-response-to-the-ny-times-op-ed-by-the-riaa-ceo-cary-h-sherman.html.

9. *Who Music Theft Hurts*, RIAA, http://www.riaa.com/physicalpiracy.php?content_selector=piracy_details_online.

10. Mark Lewis, *Metallica Sues Napster, Universities, Citing Copyright Infringement and RICO Violations*, SOUNDSPIKE (Apr. 13, 2000, 12:35 PM), http://www.soundspike.com/story2/781/metallica-sues-napster-universities-citing-copyright-infringement-and-rico-violations/ (quoting Metallica attorney Howard King on the effects of file sharing).

11. "Left unchecked, Napster threatens the livelihood of every writer and musician." Howard King, *Why Metallica Sued Napster*, FINDLAW, http://writ.news.findlaw.com/commentary/20000501_king.html.

12. In 2010, 75,000 new albums were released, compared to a mere 38,000 in 2003. Timothy B. Lee, *Why We Shouldn't Worry About the (Alleged) Decline of the Music Industry*, FORBES (Jan. 30, 2012, 6:45 PM), http://www.forbes.com/sites/timothylee/2012/01/30/why-we-shouldnt-worry-about-the-decline-of-the-music-industry/; *see also* Joel Waldfogel, *Bye, Bye, Miss American Pie? The Supply of New Recorded Music Since Napster* 8 (Nat'l Bureau of Econ. Research, Working Paper No. 16882, 2011), *available at* http://www.nber.org/papers/w16882.pdf (stating that 97,751 new albums were released in 2009).

damages caused by infringement[13] are unsubstantiated at best and patently false at worst.[14]

Claims of the economic harms of copyright infringement obscure a larger problem: the impact ongoing infringement has on the integrity of the legal system, law enforcement, and the legislature.[15] "[P]ublic respect for the law and legal authorities has been steadily declining over the past fifty years. . . . At this time, dissatisfaction with the law and legal system is widespread and the public generally holds lawyers and judges in low regard."[16] Tom R. Tyler, professor of law and psychology at Yale, states that in order to maintain a law-abiding society, citizens must obey the law because it coincides with their values, not because they fear punishment.[17] Prohibiting behaviors that are known to be common practice jeopardizes the law's legitimacy and credibility.[18] Even if people believe a behavior is wrong, they will not respect the law if they believe the punishment for the act is

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13. The RIAA claims "music sales in the U.S. have dropped 53 percent, from $14.6 billion to $7.0 billion in 2011[,]" blaming copyright infringers for the loss. *Scope of the Problem*, RIAA, http://www.riaa.com/physicalpiracy.php?content_selector=piracy-online-scope-of-the-problem. Statistics supporting these claims are highly criticized and fairly dubious. Two economists at the University of Kansas and Harvard Business School found that file sharing had a limited effect on sales. *See* Felix Oberholzer & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. POL. ECON. 1, 3 (2007). "[L]arge content owners need to prove that any losses they incur are the result of copyright infringements, as opposed to dreadful business practices." Bartow, *supra* note 6, at 117.

14. While the four major record labels have seen decreased revenues, the music industry as a whole has seen huge growth from 1999 to 2009: from $132 billion to $168 billion. Lee, *supra* note 12. The story is more controversial in the film industry as box office receipts and gross revenues are hitting record highs and executives are taking home record salaries, yet jobs are inexplicably still being cut, and these cuts are blamed on copyright infringers. *See* Stephen C. Webster, *Movie Executives See Record Profits, Salaries Despite Piracy Fear-Mongering*, RAW STORY (Dec. 13, 2011, 1:05 PM), http://www.rawstory.com/rs/2011/12/13/movie-executives-see-record-profits-salaries-despite-piracy-fear-mongering/.

15. This threat is very real and its effects extend beyond copyright law. "[I]n recent years . . . there have been suggestions that the public ignores laws as simple as stopping at red lights and as key to society as paying taxes." Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account When Formulating Substantive Law*, 28 HOFSTRA L. REV. 707, 709 (2000); *see also id.* at 731 (describing a decline in the perceived legitimacy and trustworthiness of the law and legal authorities, as well as general respect for the law, stemming from inability to change laws that are inconsistent with personal morals).

16. Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT'L L. & POL. 219, 230 (1997).

17. *See* Tyler & Darley, *supra* note 15, at 708 ("To have a law-abiding society, we must have a polity in which citizens have social values that lead them to feel responsible for following rules, irrespective of the likelihood of being caught and punished for rule breaking.").

18. "If the law prohibits behaviors that are widely known to be common practices, it might lose some of its overall legitimacy or credibility." Yuval Feldman & Janice Nadler, *Expressive Law and File Sharing Norms* 14 (Nw. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Paper No. 05-18, 2005).

disproportionate and unjust.[19] These warnings describe exactly the situation in copyright law, as criminal sanctions and civil penalties have become more extreme for infringement, which is socially an increasingly accepted behavior.

Copyright has conformed to a basic description of overcriminalization and risks the same consequences:

> If the community believes these severe sanctions are disproportionate to the offense, especially if only a small percentage of personal infringers are targeted, then enforcing criminal infringement crimes may be detrimental. To the extent that citizens reject rules that target people unfairly, they may similarly reject the legal system that promulgates and enforces such rules.[20]

As citizens reject copyright, not only does the law fail its constitutional purpose, it also undermines the effectiveness of the legal system.[21] The widespread disregard of copyright laws reflects an already decreased respect and deference to the legislature that created the law.[22] Wholesale disregard of copyright law must be addressed, not for the artists or for the economy but for the legitimacy of the legal authorities governing our society. While copyright law is not solely responsible for the decline of respect for the legal system or the legislature,[23] this Note will demonstrate that it is a topic that shows a clear and remediable divergence between public opinion and law-making trends.

II. ATTEMPTS TO DETER THEFT THROUGH LEGAL SANCTIONS

"The effective rule of law requires that citizens comply with the regulatory rules enshrined in the law and enforced by legal authorities. Most recent discussions of such compliance rest upon the idea that law-breaking behavior is deterred by the risk of being caught and punished for wrongdoing."[24]

Thus, some argue that increasing the penalties for copyright infringement is the only way to gain compliance.[25] They insist that if more people are charged or

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19. Moohr, *supra* note 7, at 804 n.75 ("[T]he deterrent effect of sentences may be undermined when the community views punishment as disproportionate and unjust." (citing Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 481 (1997))).

20. *Id.* at 805.

21. *See* Tyler & Darley, *supra* note 15, at 709 ("If the law is to be effective in fulfilling its regulatory role, most citizens must obey most laws most of the time.").

22. "If authorities are legitimate, people are generally willing to accept the rules they create, whatever those rules might be." Tyler, *supra* note 16, at 229.

23. Congress recently tied its all-time low approval rating at ten percent, a public assessment that's been in decline for the past decade. Ariel Edwards-Levy, *Congress Approval Rating Hits All-Time Low in Gallup Poll*, HUFFINGTON POST (Aug. 15, 2012, 9:08 AM), http://www.huffingtonpost.com/2012/08/14/congress-approval-rating-all-time-low-gallup-poll_n_1777207.html.

24. Tyler & Darley, *supra* note 15, at 707.

25. *See* Brian M. Hoffstadt, *Dispossession, Intellectual Property, and the Sin of Theoretical Homogeneity*, 80 S. CAL. L. REV. 909, 963 (2007). "The results of this study also

jailed, or perhaps if the "right" people are held accountable, fear of the law will induce compliance. This deterrence-oriented approach is manifest in more stringent laws, both civil and criminal, as well as a dramatic increase in litigation surrounding copyright.

Although copyright law has existed since 1790,[26] the criminalization of copyright violations has taken place mostly in the last thirty years,[27] with Congress creating the first felony provisions in 1982.[28] "[F]ile-sharing has played an essential role in the shaping of criminal law sanctions . . . , based on the idea that a few instances of harsh sanctions against infringers will provide a deterrent to other potential culprits and prove more cost-effective than widespread civil litigation."[29] Congress originally began ramping up copyright protections in response to pressure from the computer software industry, well before the explosion of mainstream file sharing.[30] When file sharing began in the late 1990s, the previously obscure crime of copyright infringement became a mainstream activity virtually overnight.[31] Groups such as the RIAA and Motion Picture Association of America (MPAA), acting on behalf of rights holders and allegedly on behalf of artists themselves,[32] attempted to address the growing disobedience by lobbying for more favorable laws as well as suing those involved with file sharing.[33] Even with felony provisions in place, copyright infringement was only criminal when committed for profit or for commercial purposes until the No Electronic Theft (NET) Act of 1997, which "sought to amend criminal copyright infringement provisions by criminalizing computer theft of copyrighted works, whether or not the infringer

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suggest that the RIAA may need to step up its prosecution of individual illegal file sharers." Joshua J. Lewer, R. Nicholas Gerlich & Nancy Turner, *The Ethics and Economics of File Sharing*, 35 SW. ECON. REV. 67, 76 (2008). "Congress stated that the best way to deter future infringement and to provide incentives to comply with the law was to make 'the cost of infringement . . . substantially exceed the cost of the compliance.'" Kate Cross, Comment, *David v. Goliath: How the Record Industry Is Winning Substantial Judgments Against Individuals for Illegally Downloading Music*, 42 TEX. TECH L. REV. 1031, 1036 (2010) (quoting 145 CONG. REC. H12884 (daily ed. Nov. 18, 1999) (statement of Rep. Berman)).

26. Irina D. Manta, *The Puzzle of Criminal Sanctions for Intellectual Property Infringement*, 24 HARV. J.L. & TECH. 469, 481 (2011).

27. *See* Hoffstadt, *supra* note 25, at 923.

28. Piracy and Counterfeiting Amendments Act of 1982, Pub. L. No. 97-180, 96 Stat. 91.

29. Manta, *supra* note 26, at 503.

30. *Id.* at 481–82.

31. *See* Matthew Green, *Napster Opens Pandora's Box: Examining How File-Sharing Services Threaten the Enforcement of Copyright on the Internet*, 63 OHIO ST. L.J. 799, 801–02 (2002).

32. *Cf.* Courtney Love, *Courtney Love Does the Math*, SALON (June 14, 2000, 3:02 PM), http://www.salon.com/2000/06/14/love_7/ (discussing the fact that artists in the music industry don't own the copyrights to their music).

33. The RIAA and MPAA have also recently launched elaborate plans to penalize alleged file sharers through private mechanisms contractually arranged with Internet service providers, outside the limits of the legal system. The results of these arrangements have yet to be seen at the time of this writing. *See What Is a Copyright Alert?*, CTR. COPYRIGHT INFO., http://www.copyrightinformation.org/alerts; Mitch Stoltz, *U.S. Copyright Surveillance Machine About to Be Switched On, Promises of Transparency Already Broken*, ELEC. FRONTIER FOUND. (Nov. 15, 2012), https://www.eff.org/deeplinks/2012/11/us-copyright-surveillance-machine-about-be-switched-on.

derives a direct financial benefit from his misappropriation."[34] The RIAA and MPAA also convinced Congress to increase criminal penalties to a felony level, punishing infringers with fines of up to $250,000 and five years in prison.[35] The deterrent effects of these criminal penalties have since been described as "dismal."[36]

In 1999, Congress raised the limit for civil damages in infringement cases to $30,000 for each act of infringement and $150,000 for each knowing act.[37] The RIAA and MPAA have pursued civil litigation, first seeking to obtain compliance by shutting down the file-sharing services, much like closing roads to prevent people from exceeding the speed limit. Cases such as *A&M Records, Inc. v. Napster, Inc.*[38] and *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*[39] broke new ground in copyright liability, but even when litigation was successful in shutting down one service, several more services emerged to take its place.[40] These new services adapted to the changing legal precedents, eliminating central file hosting, adopting anti-infringement warnings, and decentralizing their servers to frustrate future legal interventions.[41]

Perhaps realizing the hopelessness of continuing to sue every new file-sharing service, the RIAA adopted possibly the next most hopeless strategy. In September 2003, the RIAA began suing individual consumers for file sharing,[42] and it has since "filed, settled, or threatened legal actions against at least 30,000 individuals."[43] Of the millions of people file sharing, the RIAA has targeted "numerous children, a seventy-one year old grandfather, unemployed single mothers, people who do not own computers, a homeless man, a deceased woman, and a nineteen-year-old transplant patient."[44] The highly publicized litigation campaigns successfully taught the public that file sharing is illegal,[45] but any

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34. Manta, *supra* note 26, at 482–83.

35. *Id.* at 506.

36. Hoffstadt, *supra* note 25, at 915 (noting the "dismal efficacy" of sentencing for intellectual property crimes).

37. BRIAN T. YEH, CONG. RES. SERV., R41415, STATUTORY DAMAGE AWARDS IN PEER-TO-PEER FILE SHARING CASES INVOLVING COPYRIGHTED SOUND RECORDINGS: RECENT LEGAL DEVELOPMENTS 2–3 (2010), http://www.fas.org/sgp/crs/misc/R41415.pdf.

38. 239 F.3d 1004, 1020, 1024 (9th Cir. 2001) (holding that file-sharing software company hosting shared files could be held liable for contributory and vicarious copyright infringement).

39. 545 U.S. 913, 918–19 (2005) (holding that file-sharing software companies could be held liable for inducing copyright infringement in the course of marketing their software).

40. M. Eric Johnson, Dan McGuire & Nicholas D. Willey, *The Evolution of the Peer-to-Peer File Sharing Industry and the Security Risks for Users*, 41 PROC. INT'L CONF. SYS. SCI. (2008), *available at* http://csdl2.computer.org/comp/proceedings/hicss/2008/3075/00 /30750383.pdf.

41. *Id.*

42. Manesh, *supra* note 3, ¶ 32.

43. *RIAA v. The People: Five Years Later*, ELEC. FRONTIER FOUND. (Sept. 30, 2008), https://www.eff.org/wp/riaa-v-people-five-years-later.

44. Cross, *supra* note 25, at 1033.

45. *See* Manesh, *supra* note 3, ¶ 38 ("Users know that file sharing is infringement and therefore illegal. Moreover, the recent suits against individual users make clear that file-sharers risk facing possible legal sanctions for their conduct.").

deterrent effect they had on infringement has since proven only temporary and fleeting.[46] Civil litigation is also expensive and inefficient since most copyright infringers do not have particularly deep pockets and thus cannot pay a court-ordered judgment substantial enough to cover the cost of litigation, much less the penalty itself.[47]

Private litigation campaigns and criminal prosecutions have sparked a sizable pushback. Predictably, civil litigation has been highly successful at antagonizing music consumers,[48] even more so due to the fact that the RIAA uses the winnings of its civil suits to fund further lawsuits, rather than turning the winnings over to the artists allegedly harmed.[49] Over-enforcing copyright law has a chilling effect on legitimate public use of copyrighted materials,[50] including otherwise promising new genres and markets built on sampling and remixing the work of others.[51] Beyond stifling new markets, endless litigation campaigns also pose a threat to new and existing information-sharing technologies.[52]

Perhaps most importantly, enforcing laws that lack social support is likely to actively impede the formation of social norms that support the law.[53] As it turns out, enforcing laws that are viewed as unfair can be very counterproductive:

> New, rigidly enforced restrictions on use and access to copyrighted content, especially if accompanied by increased costs, may motivate otherwise law-abiding copyright users to circumvent copyright controls (or at least to feel increasing sympathy for those who do so). . . . [T]hese restrictions do not appear to foster enhanced or principled

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46. Lewer et al., *supra* note 25, at 74; *see also* Manesh, *supra* note 3, ¶ 34.

47. *See* Manta, *supra* note 26, at 503.

48. *See* Alfonso Maruccia, *EFF Report: RIAA Legal Crusade Losing Credibility*, SIR ARTHUR'S DEN (Oct. 2, 2008), http://kingofgng.com/eng/2008/10/02/eff-report-riaa-legal-crusade-losing-credibility/ (citing *RIAA v. The People: Five Years Later*, *supra* note 43).

49. Mike Masnick, *Music Labels Have No Plans to Share Any Money They Get from the Pirate Bay with Artists*, TECHDIRT (July 31, 2012, 7:08 AM), http://www.techdirt.com/articles/20120730/18253419886/music-labels-have-no-plans-to-share-any-money-they-get-pirate-bay-with-artists.shtml.

50. *See* Moohr, *supra* note 7, at 804.

51. REPUBLICAN STUDY COMM., RSC POLICY BRIEF: THREE MYTHS ABOUT COPYRIGHT LAW AND WHERE TO START TO FIX IT 4 (2012), http://lauren.vortex.com/WITHDRAWN-Republican-Study-Committee-Intellectual-Property-Brief.pdf (withdrawn).

52. Litigation against software and technology developers (as infringement enablers) "will chill the development of new technologies, which can be just as useful and creative as other content. Those technologies not dissuaded by the chilling effect of almost certain litigation will be underground and decentralized, formulated to evade copyright suits, and very difficult to enjoin." Bartow, *supra* note 6, at 100. For a demonstration of the legitimate uses for file-sharing technologies in particular, see *The 4-Hour Project*, discussing an author's use of file-sharing technology and community to promote his creative work and circumvent a controversial publishing market comparable in many ways to the music industry. *The 4-Hour Project*, BITTORRENT BLOG (Nov. 16, 2012), http://blog.bittorrent.com/2012/11/16/the-4-hour-project/#more-2274.

53. Moohr, *supra* note 7, at 805 ("[E]nforcing rules that do not embody a shared community norm may actually undermine the formation of a norm against the forbidden conduct.").

> respect for copyrights. Instead, they may actually be undermining the perceived legitimacy of the copyright laws among the copyrighted work consuming populace.[54]

The RIAA recently took deterrence to a new level, contracting with Internet service providers to deny Internet access to consumers *suspected* of infringing copyrights.[55] The reaction of consumers, who have begun to regard Internet access as a right rather than a privilege or product,[56] has yet to be seen. The following analysis suggests, however, that this attempt to scare or "educate" copyright infringers while circumventing the legal system will be no more successful at deterring infringement than lawsuits have been.

III. CONSUMERS CAN BE SUED FOR $150,000, FINED $250,000, AND JAILED FOR FIVE YEARS FOR DOWNLOADING MUSIC, SO WHY DO PEOPLE *STILL* DO IT?

From a psychological standpoint, it is hardly surprising that increased punishments for copyright infringement have failed to coerce widespread compliance with the law. A number of studies have found that deterrence is the least effective method of garnering legal compliance.[57] In order for sanctions to deter illegal conduct, people must believe they are very likely to be prosecuted if they engage in that conduct; however, murder is the only crime that currently meets this certainty threshold.[58] Threats and warnings are fairly ineffective in deterring illegal behavior, and even the perceived risk of certain punishment has only a minor influence on law breaking.[59]

Psychologists, economists, and other academics have tried time and again to explain how "[m]illions, who would never steal a CD or DVD from a music store, unhesitatingly share and download songs and movies on the Internet."[60] Theories range from social complacency, to Machiavellian personalities, to Robin-Hood-esque altruism, to basic economic rationality.[61] These studies are typically built

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54. Ann Bartow, *Electrifying Copyright Norms and Making Cyberspace More Like a Book*, 48 VILL. L. REV. 13, 17 (2003).

55. *See* Martha Neil, *RIAA to Stop Suing over Music Downloads; ISPs Are New Copyright Cops*, A.B.A. J. (Dec. 19, 2008, 2:21 PM), http://www.abajournal.com/news/article/riaa_to_stop_suing_over_music_downloads_isps_are_new_copyright_cops/.

56. Nidhi Subbaraman, *UN Report: Internet Access Is a Basic Human Right*, NBC NEWS (June 3, 2011, 6:40 PM), http://www.nbcnews.com/technology/technolog/un-report-internet-access-basic-human-right-122942.

57. "Legal prohibitions are an example of external sanctions which . . . are relatively weak deterrents of antisocial behavior because most instances of deviance are likely to go undetected by the mechanisms that exist to enforce and prosecute them." Ameetha Garbharran & Andrew Thatcher, *A Case for Using a Social Cognitive Model to Explain Intention to Pirate Software*, 7 J. EHEALTH TECH. & APPLICATION, no. 2, 2009, at 87, 89. "[P]eople's compliance with the law is, at best, weakly linked to the risks associated with law-breaking behavior." Tyler & Darley, *supra* note 15, at 713.

58. *See* Tyler, *supra* note 16, at 222–23.

59. *See* Tyler & Darley, *supra* note 15, at 713.

60. Manesh, *supra* note 3, ¶ 39.

61. "The prevalence of these activities may thus be creating an environment in which

upon the assumption that file sharing is morally wrong because illegal activity is always morally wrong.[62] Perhaps this is why the results of these studies are far from conclusive and many of their findings cannot be distinguished as pre-action reasoning or post-action rationalizations. While these studies ask, "How do you justify breaking the law?" they ought to ask, "Why does it not bother you to break the law?" Moral condemnation is either stated or implied, overlooking the importance of whether file sharers actually believe their actions are wrong.

A. Citizens Will Obey Laws That Are Morally Sound, Legitimate, or Both

Fundamentally, people who engage in file sharing do not seem to believe their actions are actually morally *wrong*.[63] "[B]oth statistical and anecdotal evidence suggests that file sharers see nothing wrong with infringement. To millions, theft is immoral, infringement is not."[64] One of the most powerful factors in determining whether citizens will obey a law is whether they agree with the law, based on their own morals and the perceived legitimacy of the law.[65] Normally this works out well, as there is a surprising consensus among Americans regarding what is morally

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students come to accept this *unethical* and illegal behavior as no different from speeding on the freeway when everyone else is doing it." Lewer et al., *supra* note 25, at 71 (emphasis added); *see also* Sulaiman Al-Rafee & Timothy Paul Cronan, *Digital Piracy: Factors that Influence Attitude Toward Behavior*, 63 J. BUS. ETHICS 237, 239–41 (2006) (considering perceptions of outcomes of infringement, gender and age of infringers, and whether infringers exhibit Machiavellian tendencies); Joe Cox, Alan Collins & Stephen Drinkwater, *Seeders, Leechers and Social Norms: Evidence from the Market for Illicit Digital Downloading*, 22 INFO. ECON. & POL'Y 299, 301 (2010) (speculating as to an altruistic "Robin Hood" syndrome driving the behavior of content uploaders); Darryl A. Seale, Michael Polakowski & Sherry Schneider, *It's Not Really Theft!: Personal and Workplace Ethics that Enable Software Piracy*, 17 BEHAV. & INFO. TECH. 27, 29 (1998) (suggesting consumers justify infringement based on an assessment of CDs and DVDs costing consumers disproportionately more than they cost to produce).

62. *Cf.* Garbharran & Thatcher, *supra* note 57, at 91 ("The findings of this study suggested a significant, direct and positive causal relationship between moral justification and deficient self-regulation (diminished self-control) which in turn, had a significant, direct and positive causal relationship with intention to continue downloading music." (citing Robert LaRose & Junghyun Kim, *Share, Steal, or Buy? A Social Cognitive Perspective of Music Downloading*, 10 CYBERPSYCHOL. & BEHAV. 267, 267–77 (2007))); Alexander Peukert, *Why Do 'Good People' Disregard Copyright on the Internet?*, *in* CRIMINAL ENFORCEMENT OF INTELLECTUAL PROPERTY 151, 163–64 (Christophe Geiger ed., 2012).

63. Oliver R. Goodenough & Kristin Prehn, *A Neuroscientific Approach to Normative Judgment in Law and Justice*, 359 PHIL. TRANS. ROYAL SOC'Y B 1709, 1721 (2004) ("On a very basic level, these copiers do not seem think that this kind of behaviour is *really* wrong." (emphasis in original)).

64. Manesh, *supra* note 3, ¶ 6 (citations omitted); *see also* Seale et al., *supra* note 61, at 36 ("Although the maximum penalties for copyright infringement have recently been increased, results from this and other studies confirm that a high proportion of people believe the behaviour is permissible.").

65. *See* Tyler & Darley, *supra* note 15, at 714; Tyler, *supra* note 16, at 224 ("[M]orality [i]s the primary factor shaping law-related behavior. A second important factor concern[s] views about the legitimacy of the law.").

right and wrong.[66] Despite our tremendous differences culturally, demographically, and socially, we agree to an impressive extent on the moral culpability of actions.[67] In the realm of intellectual property, the consensus is that infringement is not morally wrong and thus the law does not deserve compliance.[68]

People will voluntarily comply with laws that align with their personal morals.[69] Tyler explains:

> Values become a part of the person and lead them to exercise self-regulation over their behavior so that their behavior is consistent with the internal principles and values that define their sense of themselves. In such a situation, people do not so much comply with the law as they accept and consent to it, deferring to law and legal authority because they feel it is the right thing to do.[70]

This moral foundation is the most effective basis for a successful system of laws. A stable law-abiding society does not rest on fear and apprehension but rather on the desire to act appropriately and ethically according to socially accepted standards.[71] Assessments of the morality of a law, and thus whether or not to comply with it, are largely made by intuition, as conscious rationalizations have a markedly subordinate effect in determining the moral status of conduct.[72] Within the context of copyright infringement especially, moral attitudes toward the law have been found to be the only variable that predictably affects compliance.[73]

In the absence of a corresponding moral foundation, if the society is one that respects the rule of law, citizens will often obey laws as long as they perceive those laws as being legitimate.[74] When moral foundations are shifting or uncertain, yielding changing social norms, the law may only command compliance if it is

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66. Tyler, *supra* note 16, at 227.

67. *See* Andrew von Hirsch, *Doing Justice: The Principle of Commensurate Deserts*, *in* SENTENCING 243, 248 (Hyman Gross & Andrew von Hirsch eds., 1981) (citing Peter H. Rossi, Emily Waite, Christine E. Bose & Richard E. Berk, *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 AM. SOC. REV. 224 (1974)).

68. Tyler, *supra* note 16, at 226 ("In the case of intellectual property law, these findings imply that one crucial problem is the lack of a public feeling that breaking intellectual property laws is wrong. In the absence of such a conception, there is little reason for people to follow intellectual property laws.").

69. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 64 (1990).

70. Tyler & Darley, *supra* note 15, at 715.

71. *Id.* at 707.

72. Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 814 (2001).

73. As compared to other factors studied, "the only significantly biting constraint upon illegal downloading is a moral judgment made by the respondent: those that found the activity morally condemnable were significantly less likely to engage in market transactions across all categories of participation." Cox et al., *supra* note 61, at 305.

74. "Sometimes legal authorities cannot rely upon or create a moral consensus behind the law. In such situations, they rely upon the public view that they are legitimate authorities and, as such, ought to be obeyed." Tyler & Darley, *supra* note 15, at 722. "If citizens believe that legal authorities are legitimate, they regard them as entitled to be obeyed." *Id.* at 716; *see also* Manesh, *supra* note 3, ¶ 49.

perceived as legitimate.[75] To reiterate, "both morality and legitimacy have an effect on compliance that is: (1) separate from the influence of risk assessments; and (2) stronger than the impact of risk assessments."[76]

B. Citizens Do Not Believe Infringement Is Morally Wrong

Many writers have acknowledged that copyright lacks the moral underpinnings that accompany traditional crimes such as theft.[77] While primetime television shows like *CSI* and *Law & Order* demonstrate nightly how emotionally stirring crime can be, Americans have no emotional reaction to infringement.[78] Making copies of creative works to share is simply not intuitively wrong,[79] even to consumers who are sensitive to doing the right thing.[80] Consumers are not alone either, as thirty-five percent of artists, the creators whom copyright is meant to incentivize, believe downloading a music or movie file should be legal.[81] Thus, while study participants will offer rationalizations to reconcile their behavior with their general (and honest) respect for the law,[82] they do not feel compelled to change their behavior or obey the law.[83] Copyright sanctions stand without moral

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75. Moohr, *supra* note 7, at 804 ("People who have not internalized the legal standard may obey the law because they respect its legitimacy, even when social norms are in transition. But if respect and legitimacy are diminished, people will be less likely to obey or to impose informal sanctions on others."). Seale, Polakowski, and Schneider found no divergence between personal morals and social norms. Although these are arguably distinct concepts, they appear to align functionally with regard to compliance with the law. Seale et al., *supra* note 61, at 29.

76. Tyler & Darley, *supra* note 15, at 717; *see also* Manesh, *supra* note 3, ¶ 42–47 (describing the neuroscience-based Hybrid Theory of Moral Cognition, wherein people make decisions based on unconscious intuition combined with conscious reasoning).

77. *See, e.g.*, Manesh, *supra* note 3, ¶ 40 ("[T]heft is intuitively wrong, but infringement is not."); Moohr, *supra* note 7, at 794.

78. *See* Oliver R. Goodenough, *Institutions, Emotions, and Law: A Goldilocks Problem for Mechanism Design*, 33 VT. L. REV. 395, 400 (2009).

79. "[U]p to sixty percent of those queried do not think it is wrong to use copyrighted material . . . ." Geraldine Szott Moohr, *The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory*, 83 B.U. L. REV. 731, 734 (2003).

80. *See* Peukert, *supra* note 62.

81. MARY MADDEN, PEW INTERNET & AM. LIFE PROJECT, ARTISTS, MUSICIANS AND THE INTERNET (2004), http://www.pewinternet.org/~/media/Files/Reports/2004/PIP_Artists.Musicians_Report.pdf.pdf; *see also* Chuck D, *'Free' Music Can Free the Artist*, N.Y. TIMES, Apr. 29, 2000, at A13. Increasingly, artists are electing to release their music online, either for free to sample or with the suggestion of a donation directly to the artist. Peukert, *supra* note 62, at 158 ("[M]ore and more works are made available by right holders for free downloading.").

82. *See* Manesh, *supra* note 3; *see also* Garbharran & Thatcher, *supra* note 57, at 2 ("Moral disengagement was the strongest, significant predictor which offers support for its inclusion in models for explaining antisocial conduct, in general, and software piracy intentions, in particular."); *id.* at 5 ("[M]oral disengagement refers to the extent to which one is able to distance oneself from the moral consequences of one's actions through one or more rationalisations . . . .").

83. "[I]f so many are willing to infringe but not to steal, they must be doing so based on some moral distinction." Manesh, *supra* note 3, ¶ 7.

foundation and the accompanying social norms, and they directly conflict with other, established social norms.[84] These norms undermine the effects of criminal prosecution,[85] as those prosecuted are not branded with the same social stigma that normally attaches to felons.[86] For a number of years, academics and others argued that infringers might simply be unaware that copyright infringement is illegal, or find the law too difficult to understand.[87] True or not, this argument underscores the fact that copyright infringement lacks the moral impulse of compliance—if people felt infringement was wrong like they feel theft and murder are wrong, they would not need to understand the law to act legally.

C. Citizens Do Not Believe Copyright Law Is Legitimate

As it turns out, knowledge of copyright law has very little effect on citizens' willingness to infringe.[88] In a law-abiding society such as the United States,[89] this is

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84. "The public seems to be operating on an implicit standard of fair use, believing that some types of behavior are acceptable and others are not. For example, the public appears to feel that they should only have to pay for something once." Tyler, *supra* note 16, at 228; *see* Moohr, *supra* note 7, at 795 ("[P]eople are less likely to abide by the law because they have not internalized this new standard, which conflicts with the competing social norm that copyrighted material is available for personal use."); Moohr, *supra* note 79, at 771–73 (noting the presence of a powerful competing social norm—that the public is free to use copyrighted material so long as their use is personal and stating that "[w]hen individuals use information products, a powerful and competing social norm is implicated—that information, knowledge, and ideas are free for all to use and enjoy"); *see also* Bartow, *supra* note 6, at 97 ("Those who use libraries on a regular basis may very well see free access to information as a societal good rather than a felonious transgression."); Whitney D. Gunter, *Internet Scallywags: A Comparative Analysis of Multiple Forms and Measurements of Digital Piracy*, 10 W. CRIMINOLOGY REV. 15, 16 (2009), http://wcr.sonoma.edu/v10n1/Gunter.pdf ("[I]nterviews and focus groups have shown that digital pirates hold many beliefs about the ethics of their behavior and find solidarity with other pirates sharing these beliefs."). Illegal file sharing in and of itself presents a solidified social norm. *See generally* Ben DePoorter, Francesco Parisi & Sven Vanneste, *Problems with the Enforcement of Copyright Law: Is There a Social Norm Backlash?*, 12 INT'L J. ECON. BUS. 361 (2005).

85. Moohr, *supra* note 7, at 797 ("[T]he absence of a robust social norm against copyright infringement indicates that a criminal law will not deter infringement at the desired level.").

86. *Id.* at 796.

87. *E.g.*, Bartow, *supra* note 54, at 23 ("Sheldon Halpern has suggested . . . that because copyright law is fractured, inconsistent and difficult to understand, perhaps copyright laws do not have a normative role . . . ."); Feldman & Nadler, *supra* note 18, at 40.

88. "Similarly, Reid et al. . . . found no relationship between awareness of copyright law and unauthorized copying." Seale et al., *supra* note 61, at 38 (citing R.A. Reid, J.K. Thompson & J.M. Logsdon, *Knowledge and Attitudes of Management Students Toward Software Piracy*, 33 J. COMPUTER INFO. SYS. 46 (1992)). "Swinyard et al. . . . in their cross-cultural analysis of the morality of software piracy, argue that knowledge of copyright laws does little to discourage unauthorized copying. Their results indicate that . . . many people weigh the outcomes or benefits of illegal copying, more than the legal concerns." *Id.* at 28 (citing W.R. Swinyard, H. Rinne & A.K. Kau, *The Morality of Software Piracy: A Cross-Cultural Analysis*, 9 J. BUS. ETHICS 655 (1990)).

rather unusual—typically, citizens are willing to obey a law on grounds of legitimacy alone, either because they respect the process that created the law,[90] or they respect the intended effects of the law.[91] The fact that citizens infringe copyright—even when they know doing so is illegal—is a powerful, objective indication that the law itself is regarded as illegitimate, foundationally and functionally, and thus not deserving of civil obedience. Although federal laws are generally perceived as legitimate, "Congress' decision to increase criminal penalties was driven by interest groups seeking copyrights protected by criminal sanctions as a means of restricting entry into an increasingly profitable market."[92] Consequently, existing copyright law is widely and accurately viewed as the result of lobbying by special interests—namely the RIAA, MPAA, and similar organizations with vested interests in a biased legal standard.[93] As if to highlight the questionable political landscape surrounding copyright, the Republican Study Committee (RSC) recently released a controversial and insightful memo calling for copyright reform of the nature described in this Note—only to withdraw the memo within twenty-four hours,[94] at the behest of MPAA and RIAA lobbyists.[95]

Even though special interests lobbied to make the law what it is, the law could still be viewed as legitimate if the public saw the law as serving its best interests.[96]

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89. Bartow, *supra* note 6, at 118 ("In cyberspace as in real space, most U.S. citizens (or 'netizens') are law abiding most of the time."); Tyler, *supra* note 16, at 228 ("Americans have traditionally been law abiding. Studies of citizen behavior suggest that Americans both feel strongly obligated to obey the law and generally do so in their everyday lives.").

90. Tyler & Darley, *supra* note 15, at 723 ("[L]egitimacy is linked to the fairness of the procedures used by authorities to make decisions. Consequently, legal authorities can maintain their legitimacy by making decisions ethically.").

91. Tyler, *supra* note 16, at 233 ("[W]hen citizens are reacting to laws passed by Congress the primary reason they obey those laws is that they think that Congress is concerned about them and trying to do what is right for all citizens. Citizens are also affected by judgments that Congress is neutral and treats all citizens equally."). The prohibitionist movement serves as an example of what happens when Congress's intentions are rejected by the public. *See* Tyler & Darley, *supra* note 15, at 719.

92. Lanier Saperstein, Comment, *Copyrights, Criminal Sanctions and Economic Rents: Applying the Rent Seeking Model to the Criminal Law Formulation Process*, 87 J. CRIM. L. & CRIMINOLOGY 1470, 1472 (1997); *see also* Moohr, *supra* note 7, at 799 ("The expense of civil suits and the problem of collecting damages from consumers motivate the industry to shift the cost of enforcement to the criminal justice system and ultimately to taxpayers.").

93. Manta, *supra* note 26, at 472 ("[A] number of industries lobby for stronger protection for soft IP (especially copyright) . . . ."); *see also* Moohr, *supra* note 7, at 798.

94. Mike Masnick, *That Was Fast: Hollywood Already Browbeat the Republicans into Retracting Report on Copyright Reform*, TECHDIRT (Nov. 17, 2012, 4:59 PM), http://www.techdirt.com/articles/20121117/16492521084/hollywood-lobbyists-have-busy-saturday-convince-gop-to-retract-copyright-reform-brief.shtml; Matthew Yglesias, *The Case of the Vanishing Policy Memo*, SLATE (Nov. 19, 2012, 2:23 PM), http://www.slate.com/articles/business/moneybox/2012/11/rsc_copyright_reform_memo_derek_khanna_tries_to_get_republican_study_committee.html; *see also* REPUBLICAN STUDY COMM., *supra* note 51.

95. *See* Masnick, *supra* note 94 ("[A]s soon as it was published, the MPAA and RIAA apparently went *ballistic* and hit the phones hard, demanding that the RSC take down the report. They succeeded." (emphasis in original)).

96. Tyler, *supra* note 16, at 233 ("If citizens trust that their leaders are trying to do what is best for them, they defer voluntarily to legal rules. In the area of intellectual property law,

The Constitution authorizes Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[97] Thus, Congress is instructed "to enact laws that give authors certain rights in their work for a limited time *for the purpose of promoting progress*."[98] Unfortunately, academics and industry commentators alike have commented that copyright law heavily favors copyright holders while disregarding the public interest.[99] It is difficult to argue that sanctions on infringement are in society's best interests when file sharing has done nothing to curb the development of new creative works[100] and may in fact be a boon to emerging artists and smaller labels.[101]

D. When Laws and Morals Clash, One Must Change

When a law lacks moral foundation and also fails to stand on legitimacy, the gap between the public's morals and the letter of the law must be addressed. Increasing sanctions will not change the public's view of what is or is not morally sound conduct.[102] The discrepancy between the public's morals and the written law can be

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this means that people need to believe that the rules established serve reasonable social purposes and are not simply efforts to create profits for special interest groups, such as large corporations.").

97. U.S. CONST. art. I, § 8, cl. 8.

98. Moohr, *supra* note 7, at 789 (emphasis added).

99. *See id.* at 802 ("[T]reating personal use infringement as a type of theft creates a bias in copyright law that upsets the balance between the two purposes of copyright law. Using criminal law to deter unlawful copying emphasizes one purpose of copyright law, to encourage creation of new work. That emphasis on the incentive to create implies that the goal of maintaining public access is less important, an implication that undermines the balance between the dual mandates of copyright law.").

100. *See supra* Part I.

101. Many have argued that file sharing, as a form of sampling, leads to increased sales. *See, e.g.*, Ram D. Gopal, Sudip Bhattacharjee & G. Lawrence Sanders, *Do Artists Benefit from Online Music Sharing?*, 79 J. BUS. 1503, 1503 (2006) ("Contrary to conventional wisdom, we find that lowering the cost of sampling music will propel more consumers to purchase music online as the total cost of evaluation and acquisition decreases."). Recent studies have empirically demonstrated that this is, in fact, the case, as file sharers also legally purchase more music than the general population. Joe Karaganis, *Where do Music Collections Come From?*, AM. ASSEMBLY (Oct. 15, 2012), http://piracy.americanassembly.org/where-do-music-collections-come-from/; *see also* Bartow, *supra* note 6, at 115 ("It needs to be established through empirical research that nonprofit use of digital copying and sharing technologies actually and appreciably affects the royalties of authors and artists before this argument is accorded much weight."); *id.* at 119–20 ("[I]f the technology's primary effect is to redistribute wealth from traditional music companies to entities utilizing alternative modes of distribution, without affecting most artists and authors (or perhaps helping them in the process), then the technology [and infringement have] not compromised the goals of copyright law."); Ernesto, *10,000 Artists Sign Up for Pirate Bay Promotion*, TORRENTFREAK (Nov. 5, 2012), http://torrentfreak.com/10000-artists-signed-up-for-pirate-bay-promotion-12110/ ("[T]housands of lesser known artists are eager to become featured on the [Pirate Bay]'s homepage. . . . Those who were lucky enough to be featured have enjoyed a healthy career boost and in some cases earned thousands of dollars from file-sharing fans.").

102. *See* Richard A. Posner & Eric B. Rasmusen, *Creating and Enforcing Norms, with*

addressed either by changing the law to coincide with commonly held values or by educating the public about the merits and value of the law.[103] In a political environment increasingly characterized as the RIAA versus the criminal public, the only changes to the law have taken it further from the public's view of legitimacy; instead of making laws that the public will accept and support, much attention and most efforts have been directed at correcting the deviant public's apparently underdeveloped moral compass.[104]

IV. WINNING THE HEARTS AND MINDS OF THE PEOPLE BY CALLING THEM THIEVES

In conjunction with their heightened efforts at civil enforcement, the RIAA and MPAA have conducted massive marketing campaigns aimed at educating the public about the "correct" moral implications of copyright infringement. The RIAA has attempted to convince colleges to do the work for it, for instance, by revoking network access from students suspected of file sharing.[105] The MPAA has branded home DVDs with anti-infringement ads proclaiming the now-familiar mantra:

> YOU WOULDN'T STEAL A CAR
> YOU WOULDN'T STEAL A HANDBAG
> YOU WOULDN'T STEAL A TELEVISION
> YOU WOULDN'T STEAL A DVD
> DOWNLOADING PIRATED FILMS IS STEALING
> STEALING IS AGAINST THE LAW[106]

These organizations have attempted to persuade the public that copyright infringement is the same as stealing physical property, hoping that existing morals forbidding theft would take root in the world of intellectual property.

It is debatable whether either the government or private interests can forcibly alter existing morals or social norms that have already taken root in the

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Special Reference to Sanctions, 19 INT'L REV. L. & ECON. 369, 370 (1999) ("Norms are not necessarily promulgated at all. If they are, it is not by the state."); Moohr, *supra* note 7, at 797 n.45 ("[U]sing criminal law to educate the public gives short shrift to the retributive, moral justification for criminal law. . . . [C]riminal law is most appropriately used to enforce established community norms. Violators are subject to moral condemnation and stigma precisely because the criminal law embodies and expresses the community's norms.").

103. Tyler & Darley, *supra* note 15, at 726.

104. *See* Ram D. Gopal, G. Lawrence Sanders, Sudip Bhattacharjee, Manish Agrawal & Suzanne C. Wagner, *A Behavioral Model of Digital Music Piracy*, 14 J. ORGANIZATIONAL COMPUTING & ELEC. COMM. 89 (2004); Tyler, *supra* note 16, at 229 ("[W]e need to create an awareness of and commitment to the moral principles that underlie formal laws. In particular, the public's awareness of the reasons underlying intellectual property rules needs to be developed more effectively, so that a basis for a positive moral climate can be created."); D. Ian Hopper, *FBI Pushes for Cyber Ethics Education*, ABC NEWS (Oct. 10, 2012), http://abcnews.go.com/Technology/story?id=119369&page=1.

105. *See RIAA Launches New Initiatives Targeting Campus Music Theft*, SLYCK (Feb. 28, 2007, 1:01 PM), http://www.slyck.com/forums/viewtopic.php?p=390661.

106. Patricia Loughlan, *"You Wouldn't Steal a Car . . ." Intellectual Property and the Language of Theft* 1 (Sydney Law Sch., Legal Studies Research Paper No. 08/35, 2008).

community.[107] Since copyright seems to be a morally neutral subject that does not elicit strong positive or negative reactions from consumers, it is not unreasonable to think that the public could be persuaded to adopt a moral standpoint on the issue. Trying to adopt for copyright the existing moral culpability for theft of private property was certainly a promising approach to correcting the discrepancy between the law and the public's morals—and the resulting behavior.

Theoretically promising or not, equating infringement to theft has clearly failed. "The relentless 'piracy is a crime' message . . . just irritates people";[108] educating the public on the merits of the law is, of course, only effective if the law aligns with public morals.[109] Copyright infringement is not theft—literally, legally, philosophically, or cognitively. While the literal, legal, and philosophical differences can rationally explain the rejection of the theft argument, exploring the cognitive differences between theft and infringement offers promising insights for the future of copyright and indicates that copyright does have moral implications that could resound with the public.

A. Literally and Intuitively

In the most literal sense, copyright infringement is not theft.[110] If a criminal steals a computer, he deprives the owner forever of control, use, or benefits derived from that computer. If a criminal copies a song from another's computer, the owner of the computer and song is not deprived of property, no resources are consumed, and no one is harmed (unless it can be proven that the criminal otherwise would have purchased the song from the artist). Possessing intellectual property in no way precludes others from using it,[111] in obvious contrast to stealing a car.[112] Intellectual property is a rather unique concept and differs substantially from the ubiquitous concept of tangible personal property.[113] Those differences are not merely theoretical, as "at an intuitive level, people do distinguish between property rights

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107. A sociological study conducted in Sweden addressing the argument that changing the law will change the corresponding social norms found that social norms were unaffected by changes to copyright law. Måns Svensson & Stefan Larsson, *Intellectual Property Law Compliance in Europe: Illegal File Sharing and the Role of Social Norms*, 14 NEW MEDIA & SOC'Y 1147 (2012), *available at* http://nms.sagepub.com/content/14/7/1147. *But see* Mark F. Schultz, *Reconciling Social Norms and Copyright Law: Strategies for Persuading People to Pay for Recorded Music*, 17 J. INTELL. PROP. L. 59, 81–86 (2009) (arguing "copynorms" can and should be changed when they clash with the law).

108. Helen O'Hara, *You Wouldn't Steal a Car . . .* , EMPIRE BLOG (Apr. 3, 2009, 11:06 PM), http://www.empireonline.com/empireblogs/words-from-the-wise/post/p499.

109. *See* Tyler & Darley, *supra* note 15, at 726.

110. *See* Bartow, *supra* note 6, at 96 ("These actions [(infringement)] don't seem like theft at the level of abstraction on which most people operate.").

111. Seale et al., *supra* note 61, at 29.

112. *See* Bartow, *supra* note 6, at 97.

113. Seale et al., *supra* note 61, at 29; *see also* Hoffstadt, *supra* note 25, at 914 ("Critically, intellectual property is distinct from most other forms of property because it is a 'public good' insofar as it is naturally nonrivalrous (that is, it is not consumed when used) and nonexclusive (that is, more than one person can use it at the same time)." (citations omitted)).

that inhere in physical objects and those that inhere in intangibles."[114] Treating copyright infringement as synonymous to common theft naturally makes many citizens uncomfortable.[115]

B. Legally and Technically

In *Dowling v. United States*, the Supreme Court rejected the argument that copyright infringement was tantamount to physical theft or that it should be treated as such.[116] Professor Brian M. Hoffstadt explored this legal distinction: "[T]raditional property law concepts have been imported into intellectual property law with little or no consideration given to the theoretical and utilitarian distinctiveness of intellectual property."[117] Theft of physical property interferes with the owner's rights to enjoy his or her property but also permanently dispossesses the owner of the property itself.[118] Copyright infringement only interferes with the right holder's exclusivity rights, while it dispossesses no one of property—arguably the worse of the two harms caused by actual theft.[119] Thus, "[a]lthough the theft paradigm would initially seem to be the most appropriate for all types of property, such a homogenous approach to property theory yields a paradigm that is logically unsound and has spawned a pragmatic quagmire."[120] Hoffstadt concludes that infringement is much more comparable to trespass, if it must be compared to a crime involving physical property, as trespass also involves a mere interference with exclusive rights.[121] Hoffstadt's analysis of the legal principles underlying these crimes demonstrates their technical differences. However, he subsequently relies entirely on deterrence principles and describes copyright infringers as immoral "civil-judgment-proof persons (to whom only the

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114. Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L.J. 167, 212 (2002); *see also* Peukert, *supra* note 62, at 20.

115. *See* Moohr, *supra* note 79, at 733.

116. Loughlan, *supra* note 106, at 4.

117. Hoffstadt, *supra* note 25, at 911; *see also id.* at 950 ("Despite the attractiveness of treating all property similarly and hence equating criminal infringement of intellectual property rights with the theft of tangible property, this homogenous approach overlooks the salient fact that the intrusion occasioned by these two types of criminal activity is theoretically distinct.").

118. *Id.* at 915 ("Theft of a tangible item involves two distinct theoretical harms: the owner is dispossessed of the property and the owner's use and enjoyment of that property is subject to interference due to the dispossession." (emphasis omitted)).

119. *See id.* at 958 ("When a criminal . . . infringes a copyrighted work, . . . the criminal has only inflicted one type of harm—he has interfered with the asset owner's exclusive right to control the intellectual property.").

120. *Id.* at 960 (emphasis omitted).

121. *Id.* at 916 ("[T]he theoretically sound approach in imposing [a] sentence for intellectual property crimes is to apply—not the theft paradigm under-girding the Guidelines—but instead a trespass paradigm, one that focuses on the defendant's interference with the owner's exclusive use and enjoyment of the intellectual property asset." (emphasis omitted)).

criminal law may be a deterrent),"[122] and calls for useless increases to deterrence efforts while ignoring the effects of personal morals and social norms on behavior, even as he acknowledges their existence and relevance to copyright.[123]

C. Philosophically, Why These Laws Exist

Philosophically, theft and infringement have deep and irreconcilable differences. Although both involve "property," the purposes underlying tangible and intellectual property rights are quite distinct.[124] Theft violates the most basic of property rights that provide the foundation for society.[125] The principles of property law are thousands of years old and, although they benefit culture and society, the laws exist principally to protect the individual.[126] Copyright law is, by contrast, a very new convention, created *by* society *for* society.[127] Thus, intellectual property is a tool with which Congress is to promote progress of science and the arts for society.[128] While property law exists to benefit individuals and supports society as a byproduct, intellectual property rights exist to benefit society and support artists as a byproduct. Theft is a direct violation of the principles of property law and undermines society. Copyright infringement does not harm society unless it actually discourages the artist from creating new works.[129] The economic analysis of copyright espoused by industry[130] and adopted by some politicians,[131] which

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122. *Id.* at 913.

123. *See id.* ("[S]ome judges may be inclined to impose lower sentences as a means of recognizing that intellectual property infringement is not generally perceived to be a serious crime . . . .").

124. Moohr, *supra* note 79, at 733 ("The common understandings that underpin theft law do not transfer easily to the realm of information, knowledge, and ideas.").

125. *See* Oliver R. Goodenough & Gregory Decker, *Why Do Good People Steal Intellectual Property?*, *in* LAW, MIND, AND BRAIN 345, 357–59 (Michael Freeman & Oliver R. Goodenough eds., 2009), *available at* http://ssrn.com/abstract=1518952. *Contra* THOMAS HOBBES, THE LEVIATHAN (Oxford University Press 1947) (1651) (arguing that property is a social construct, devoid of biological or ancestral foundations).

126. *See* Goodenough & Decker, *supra* note 125, at 357–59.

127. In contrast to property's deep and intuitive roots, "[i]ntellectual property is nothing more than a socially-recognized, but imaginary, set of fences and gates. People must believe in it for it to be effective." Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT'L L. 613, 616 (1996).

128. U.S. CONST. art. I, § 8, cl. 8.

129. Seale et al., *supra* note 61, at 27 ("[S]ociety often benefits from the free exchange of ideas. Many philosophers and economists contend that intellectual property rights should not be protected by law . . . ." (citing D. M. Davidson, *Reverse Engineering Software Under Copyright Law: The IBM PC BIOS*, *in* OWNING SCIENTIFIC AND TECHNICAL INFORMATION 147 (V. Weil and J.W. Snapper eds., 1989))).

130. *See* Julian Sanchez, *750,000 Lost Jobs? The Dodgy Digits Behind the War on Piracy*, ARSTECHNICA (Oct. 8, 2008, 12:30 AM), http://arstechnica.com/tech-policy/2008/10/dodgy-digits-behind-the-war-on-piracy/ (discussing "dodgy" claims that file sharing costs the U.S. economy $250 billion and 750,000 jobs).

131. *E.g.*, Press Release, Senator Patrick Leahy, Leahy, Hatch, Grassley Unveil Targeted Bill to Counter Online Infringement (May 12, 2011), *available at* http://www.leahy.senate.gov/press/leahy-hatch-grassley-unveil-targeted-bill-to-counter-online-infringement.

maintains that copyright must be used to protect jobs and profits, is inappropriate to the extent it serves economic goals rather than the constitutionally sanctioned goal of progressing science and the arts for all of society.[132]

D. Cognitive Foundations and Their Respective Morals

The philosophical foundations of property and intellectual rights lead us to the cognitive differences that underlie theft and infringement. Behaviors far removed from our ancestral roots, unlike the theft of physical property, lack innate moral foundations in our minds.[133] "Infringement does not violate our intuitive understanding of ownership. As a result, the act of infringement does not trigger the same negative intuitive response as theft of tangible property."[134] Professor Goodenough, in conjunction with neuroscientists, has explored the cognitive foundation that intellectual property *does* rest on. He posits that the human brain may not be physically wired to recognize intellectual property as tangible objects deserving of "emotionally reinforced normative judgment."[135] "We may respect, even revere, creativity; we may keep knowledge private as a secret; but we are also happy to appropriate ideas, expression, and other products of the intellect, and put them to our own use, with little, if any, qualm."[136] Considering the psychological, cognitive, and possibly biological roots of this respect for ideas, Goodenough theorizes that creativity is more appropriately coupled with prestige and status than with monetary reward.[137] Considering infringement according to his theory in other contexts, such as plagiarism, we discover a moral foundation exists for infringement, albeit one starkly different from that underscoring physical property.[138] From an ancestral perspective, intellectual properties and ideas are either hoarded for personal benefit or shared for social recognition and acclaim.[139] This exchange for acclaim or respect for the choice not to distribute relies heavily on a relationship between the parties.[140]

Although artists certainly enjoy economic benefits in addition to acclaim, Goodenough's theory finds support from many perspectives. If consumers processed intellectual property in purely economic terms, none would purchase

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132. Moohr, *supra* note 79, at 733 ("[T]he results of criminalizing personal use of copyrighted material are inconsistent with the underlying policy of copyright law.").

133. *See* Manesh, *supra* note 3, ¶¶ 54, 62.

134. *Id.* ¶ 74.

135. Goodenough & Prehn, *supra* note 63, at 1721.

136. Goodenough, *supra* note 78, at 400.

137. *See* Goodenough & Decker, *supra* note 125, at 361–62.

138. *See* Green, *supra* note 114, at 242 ("[T]he norm-based rule of attribution—despite some fraying around the edges—is still viewed, at least by those within the relevant communities, as imposing a powerful moral imperative. As we seek ways to make our intellectual property law more robust, we would do well to look to the normative structures surrounding plagiarism for guidance.").

139. *See* Goodenough & Decker, *supra* note 125, at 361–62.

140. Goodenough & Prehn, *supra* note 63, at 1721 ("In such a context, inhibitions on exploitation and use . . . depend on a relationship between the parties.").

music on iTunes given the availability of free music on file sharing services,[141] yet iTunes and other digital distribution services have been very successful[142] and have a demonstrable impact on the demand for copyright-infringing content.[143] If artists processed intellectual property in purely economic terms, none would make music under the old business model because artists make very little or even no money in the employ of huge record labels, and yet these artists have continued to make music.[144] Some artists have demonstrated their noneconomic drive by embracing digital distribution directly, and in so doing embraced their fans—making their music available online for free, accepting donations, and circumventing the antiquated recording industry by relying on relationships with those who listen to them.[145]

The theory holds outside the music industry on a more basic level. Goodenough describes how, for academics and scholars, "copying, re-use, and adoption is the best reward" for their work, provided they are given proper credit.[146] Research conducted among children demonstrates that they understand the ownership of ideas by the age of five and innately dislike the unauthorized copying of those ideas.[147] The study of children failed to address the effects of attribution. Experience tells us someone is not a "copycat" if they give the originator credit for the idea—the individual then turns from a copycat into a promoter. Goodenough posits that fans repay their favorite artists with appreciation and social deference.[148] However, fans who claim to repay artists by sharing their music with new audiences, attending their concerts, and promoting the artist among peers are

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141. Record labels clearly *do* operate in strictly economic terms, as James Gianopulos, cochairman of Twentieth Century Fox stated: "We can't compete with free. That's an economic paradigm that doesn't work." Anne Thompson, *Tinseltown Follies*, N.Y. MAG., May 5, 2003, at 16.

142. *See RIAA Launches New Initiatives Targeting Campus Music Theft*, *supra* note 105 ("A legal marketplace that barely existed in 2003 is now a billion dollar business showing real promise.").

143. Brett Danaher, Samita Dhanasobhon, Michael D. Smith & Rahul Telang, *Converting Pirates Without Cannibalizing Purchasers: The Impact of Digital Distribution on Physical Sales and Internet Piracy*, 29 MARKETING SCI. 1138, 1138 (2010) (finding that "NBC's decision to remove its content from iTunes in December 2007 is causally associated with an 11.4% increase in the demand for NBC's pirated content").

144. *C.f.* Cord Jefferson, *The Music Industry's Funny Money*, ROOT (July 6, 2010, 5:48 AM), http://www.theroot.com/views/how-much-do-you-musicians-really-make?page=0,1 (noting for every $1000 in music sold, the average musician takes home roughly $23.40); Love, *supra* note 32 ("Of course, [the band] had fun. Hearing yourself on the radio, selling records, getting new fans and being on TV is great, but now the band doesn't have enough money to pay the rent and nobody has any credit.").

145. Eric Garland, *The 'In Rainbows' Experiment: Did It Work?*, NPR MUSIC BLOG (Nov. 16, 2009, 10:00 PM), http://www.npr.org/blogs/monitormix/2009/11/the_in_rainbows_experiment_did.html.

146. Goodenough & Decker, *supra* note 125, at 362.

147. Kristina R. Olson & Alex Shaw, *'No Fair, Copycat!': What Children's Response to Plagiarism Tells Us About Their Understanding of Ideas*, 14 DEVELOPMENTAL SCI. 431, 431 (2011).

148. Goodenough & Decker, *supra* note 125, at 362–63.

dismissed by most current literature as trying to rationalize unconscionable file sharing behavior.[149]

E. Summarizing What the Theft and Infringement Comparison Teaches Us

Existing copyright laws were built on the premise that copyright violations could be punished in ways directly analogous to property violations.[150] Deterrence efforts and education campaigns have attempted to convince the public that the two actions carry identical moral implications. Considering the literal, legal, theoretical, and cognitive differences between tangible and intellectual property, it is no wonder that file sharing norms have flourished despite legal sanctions and condemning rhetoric. Comparing infringement to theft only serves to reinforce social norms condoning infringement, further distancing the law, common behavior, and the underlying morals.[151] "[T]he language of theft in the discourse of intellectual property ought at least to be constantly noted for what it is, that is, an inaccurate and manipulative distortion of legal and moral reality."[152] Pursuing theft rhetoric at this point obscures and detracts from the real issues surrounding copyright law.[153] Deterrence has not worked and will not work within the bounds of reason,[154] the body of law is viewed as illegitimate, and attempts to change the public's amoral view of copyright as property have been a complete flop.

V. MAKING THE HARD DECISION TO END PROHIBITION

When public morality aligns with a law, compliance can be increased through education and publicity. [155] When public morality *does not* align with the law, the law must be reexamined and the discrepancy must be addressed.[156] Copyright law must be modernized, returned to a legitimate legal foundation, and reconciled with public intuitions about what is morally right.[157] Given the political challenges

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149. *See supra* text accompanying note 61.

150. Manta, *supra* note 26, at 473 ("[P]olicymakers have largely relied upon analogies to property law in their decisions to introduce and legitimize criminal sanctions for violations of IP laws.").

151. *See* Seale et al., *supra* note 61, at 38.

152. Loughlan, *supra* note 106, at 2.

153. *Id.* at 9 ("There is a serious and complicated political issue about the optimal balance to be struck between intellectual property rights and social freedoms and decent, ordinary language is the appropriate language of the issue.").

154. *See* Moohr, *supra* note 7, at 796 ("[I]n order to obtain adequate deterrence of copyright infringement, legislators may need to increase penalties to unpalatable levels that do not reflect the harm or moral content of the violation, increase markedly the dollars spent on enforcement, or both.").

155. Tyler & Darley, *supra* note 15, at 739; *see also* Goodenough, *supra* note 78, at 401 ("If some more compelling emotional basis for compliance cannot be found, aspects of IP law may simply need to be rethought.").

156. Tyler & Darley, *supra* note 15, at 739.

157. *Id.* at 719 ("To sustain its moral authority, the law must be experienced as consistent with people's sense of morality. If not, people's desire to do what is morally right will not lead them to support legal authorities and obey the law.").

inherent in copyright reform, namely the enormous lobbying power of those invested in the current legal scheme, existing copyright cannot be reformed in a constructive way, only supplemented.[158]

Congress should create a new form of copyright available through the existing U.S. Copyright Office. Artists creating new content would have the option to use either new copyright or the older scheme. Although private licensing agreements, such as Creative Commons,[159] already exist to circumvent copyright law, these do nothing to restore legitimacy to the law. New copyright must be firmly grounded in constitutional authority, favoring the public and the progress of the arts, while providing adequate incentives for artists. It must also rest firmly on moral foundations, namely the relationship between artists and consumers. Eventually, new copyright can supplant, rather than supplement, existing copyright.

"The Constitutional mandate expresses a two-fold purpose: to encourage authors to create expressive material and to provide public access to that material. Copyright law is thus a means to an end, rather than an end in itself."[160] When artists' interests and those of the public conflict, the public's interests should be favored, quite the opposite of current copyright law.[161]

The draconian deterrence methods available for current copyright can have no place in new copyright. There should be no criminal sanctions for noncommercial personal infringement, and civil penalties should not so grossly violate principles of commensurate punishment and fairness.[162]

> [C]alling something 'criminal' is an ideological and moral claim. It categorizes a particular behaviour as an act that causes social harm, one that injures everyone in a geographically defined area. The act is no longer a private matter, nor a dispute to be settled by the parties directly involved. Furthermore, calling an act a crime is a claim for public resources, a summons that obligates the state to monitor and enforce.[163]

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158. International treaties may also prevent overhaul of existing copyright laws, requiring a workaround solution.

159. *About the Licenses*, CREATIVE COMMONS, http://creativecommons.org/licenses/.

160. Moohr, *supra* note 7, at 789 (citation omitted).

161. This conclusion is highly controversial; most academics have lost sight of the forest through the trees and seem to have accepted the argument that artists' interests are as important as those of the public for which they are creating content. *See* Hoffstadt, *supra* note 25, at 966 ("[T]he protection afforded to intellectual property rights represents a trade-off between the encouragement of creative works by offering them some form of statutory protection, and the publication and dissemination of those works in the public domain; tipping the balance in either direction diminishes at least one of the *competing policy goals*." (emphasis added)).

162. *See* von Hirsch, *supra* note 67, at 66–76 (discussing the importance of the law coinciding with the public's perception of fairness).

163. Laureen Snider, *Theft of Time: Disciplining Through Science and Law*, 40 OSGOODE HALL L.J. 89, 94–95 (2002); *see also* DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 103 (2008) ("Penal statutes must proscribe a nontrivial harm or evil; hardship and stigma may be imposed only for conduct that is in some sense wrongful; violations of criminal laws must result in punishments that are deserved; and the burden of

Criminal penalties are inappropriate when they produce greater harm than the acts they aim to deter.[164] Presently, criminal penalties are not preventing infringement, but they *are* eroding the perceived legitimacy of the legal system.[165] They could hardly do otherwise when copyright law is punished more severely than some states address assault or drunk driving, crimes that are widely condemned morally and socially. All the while the harm caused by infringement has not been shown and many argue for the benefits of file sharing to artists.[166] It makes no sense to criminalize behavior that is arguably good for artists, content generators, and supposed victims of copyright infringement.[167]

In addition to barring unreasonable criminal penalties, new copyright must address civil allowances. A civil penalty of $80,000 for downloading a song available for $0.99 on iTunes is painfully disproportionate to the damage caused and shocks the conscience.[168] Besides making civil penalties more proportional to the damage caused (for instance awarding damages comparable to the actual cost of the content), new copyright should require plaintiffs to show actual harm, as they are for other lawsuits such as product liability, not the mere possibility of harm.[169] Awarding damages because an alleged infringer *might* have otherwise purchased content creates a double standard that is not lost on the public. For example, Universal Music Group won a sizable $100 million in its lawsuit against My.MP3.com despite the fact that Universal "made no effort to show that it had lost sales as a result of My.MP3.com."[170] A legal system is much more likely to be

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proof should be placed on those who advocate the imposition of criminal sanctions.").

164. *See* Moohr, *supra* note 7, at 786 (citing Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, *in* THE UTILITARIANS 162 (Dolphin Books 1961) (1789)); *see also* Hoffstadt, *supra* note 25, at 962 ("The appropriate vehicle for assessing the intellectual property owner's loss, if any harm is actually caused but is difficult to measure, is the cost that the owner would charge for a license to use the asset.").

165. Moohr, *supra* note 7, at 804 n.75 ("[U]se of criminal sanctions for morally neutral laws dilutes the effectiveness of community condemnation for criminal conduct in general." (citing Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 421 (1958))).

166. Gopal et al., *supra* note 101; *see also* David Blackburn, *On-line Piracy and Recorded Music Sales* 24–25 (Harvard Univ., Working Paper, 2004), *available at* http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.117.2922&rep=rep1&type=pdf (finding 75% of artists benefit from online file sharing).

167. *See supra* note 101 and accompanying text.

168. Cross, *supra* note 25, at 1038; *see also* Tyler & Darley, *supra* note 15, at 720 ("'[I]f a rule derived by desert theorists is judged overwhelmingly by the community to be unjust, such disagreement may cast some doubt upon the accuracy of the rule in assessing a person's moral blameworthiness' . . . . [P]eople are less likely to accept the law, since it will not correspond to their own sense of what is right and wrong." (quoting PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME 6 (1995))).

169. *See* Bartow, *supra* note 6, at 117.

170. *Id.*; *see also id.* at 119 ("If, as some observers suspect, the ultimate goal of content providers is to eliminate circumvention not only so they can capture escaping access fees, but so they can also ratchet up access fees, at a minimum they should not be allowed to pursue that goal without demonstrating entitlement to relief by establishing quantifiable losses.").

respected and abided by if it is perceived as fair.[171] Draconian criminal and civil penalties for noncommercial infringement are a tremendous barrier to the law's being perceived as legitimate and must be drastically revised for new copyright. The penalties for infringement must be directly proportional to the perceived seriousness of the crime.

In order to gain voluntary compliance with new copyright, it is vital that the law rest on a moral foundation.[172] Professor Goodenough's theory indicates a strong moral foundation could come from building a renewed relationship between consumers and artists.[173] One way to enforce this relationship would be to place a floor on the percent of sales proceeds that must make their way to artists' own pockets.[174] If consumers know that for every dollar they spend, at least one-half, or even one-third, of that dollar is guaranteed to go to the artist, they are much more likely to find a legal way to purchase the media.[175] This theory is proven by ticket sales, which are perceived as more beneficial to artists themselves and have remained strong despite the availability of free content online.[176] Artists have demonstrated the value of this relationship with their fans by making their music available (legally) for free online and successfully soliciting direct donations. Restoring the relationship between artists and consumers will also remove the ambivalence consumers feel about harming faceless corporations.[177] Ensuring that every song not purchased actually results in loss to the artist will add a personal and moral foundation to the law.[178] Although legislating this type of solution may be

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171. Tyler & Darley, *supra* note 15, at 739.

172. *See* Tyler, *supra* note 16, at 225.

173. The very technologies vilified by the industry as facilitating copyright infringement could hold the key to bringing artists closer to consumers than ever: "Inexpensive techniques for promoting and distributing works could promote creation of large numbers of diverse works. Such technologies could actually result in the originators of creative works capturing a greater portion of the income streams that their efforts generate, especially where digital technologies significantly reduce production and transaction costs." Bartow, *supra* note 6, at 107. Some suggest that existing intermediaries are obstacles to establishing functional norms: "[O]verarching norms that are inclusive of, and responsive to, the needs of end consumers are unlikely to emerge, largely due to the power imbalance between large copyright owners and discreet individuals." Bartow, *supra* note 54, at 24 (citing Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981, 985 (1996)).

174. This suggestion is far from novel, as it has been advanced by academics and actually implemented in California. *See* Bartow, *supra* note 6, at 110.

175. Compare this to current industry arrangements wherein artists receive roughly 2.34% of every dollar spent on their music. *See* Jefferson, *supra* note 144.

176. *See* Lee, *supra* note 12 ("From 1999 to 2009, concert ticket sales in the US tripled from $1.5 billion to $4.6 billion, vastly exceeding the growth of inflation and population growth.").

177. *See* Dena Cox, Anthony D. Cox & George P. Moschis, *When Consumer Behavior Goes Bad: An Investigation of Adolescent Shoplifting*, 17 J. CONSUMER RES. 149, 152 (1990) ("It may be easiest to rationalize theft when it is targeted at large, impersonal organizations.").

178. Manesh, *supra* note 3, ¶ 76 ("Empirical evidence already suggests the mind makes an intuitive distinction between harm through direct, personal contact and indirect and impersonal contact.").

repugnant to ideals of free trade, industry players—namely those currently perceived as hoarding a disproportionate piece of the pie—could easily ensure that artists receive a portion of sales proceeds.

To accompany this new relationship, awareness campaigns should be conducted, not only to announce new copyright, but to reframe infringement: no longer as theft, but instead as free-riding. Free riders are morally culpable and antagonized in our society,[179] albeit not as intensely as thieves, and the foundation for that culpability rests much closer to how consumers view copyrighted content. Calling a thief a murderer does not make him feel bad, it just angers or confuses him. Calling a free loader a thief has not done any good either. Calling the behavior what it is may actually generate some moral culpability and the corresponding voluntary compliance.

Lawmakers should seriously consider granting new copyright only short duration and limited renewal periods. Current provisions are unjustifiably extreme, guaranteeing exclusive rights for the lifetime of the artist and an additional seventy years thereafter. These provisions do nothing to serve the public interest and are far more extreme than necessary to incentivize creative works. Copyright establishes a narrow government-condoned monopoly in order to incentivize creative output, not to establish dynasties for successful artists' families (if artists kept ownership of their copyrights). Shorter copyright duration would have international implications that are outside the scope of this Note.

Private services could also do much to support the success of new copyright. With cloud-streaming technologies and services such as Spotify, intermediaries are making it increasingly easy for consumers to view and access one another's music collections. Services that wish to promote new copyright could provide publicly visible file classifications or certifications, signifying which files music consumers have purchased and guaranteeing they have contributed to the author. Any system carrying this sort of indicator would contribute to fostering a social norm that supports respect for the consumer-artist relationship.[180] Rather than using promotional merchandise as an additional income stream, self-promoting artists should give t-shirts and other publicly visible merchandise to paying fans in order to publicize the consumer-artist relationship.

Like any issue, copyright law does not exist within a void and any discussion of change must consider the existing industry that controls and relies on existing copyright schemes. New copyright, as this Note has proposed it, would be better for artists and consumers and would stand a chance of restoring legitimacy to a branch of law that is currently something of a joke. The only people who have reason to take issue with new copyright are intermediaries like the RIAA. For many years, the RIAA has represented a legitimate interest in the copyright debate. Not only did the RIAA contractually represent artists themselves, but corporate intermediaries in their position were also logistically necessary. These behemoth intermediaries provided the capital needed to create industry-standard quality

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179. *See generally* Robin P. Cubitt, Michalis Drouvelis & Simon Gächter, *Framing and Free Riding: Moral Judgments, Emotional Responses, and Punishment in Social Dilemma Games* (Univ. of Nottingham, 2007), *available at* http://www.gate.cnrs.fr/afse-jee/Papiers/96.pdf.

180. *See* Tyler, *supra* note 16, at 225.

creative works as well as the network necessary for creative works to reach anywhere beyond a local audience.[181] Today, however, corporate resources are unnecessary to create commercial-quality media.[182] Similarly, the Internet has built a distribution system and network available to all artists, with no agent and no corporate contracts necessary.[183] Intermediaries like the RIAA cling to antiquated business models that are impractical and unnecessary.[184] The intermediaries' only remaining argument is that they employ thousands and that their industry needs to be kept afloat through protectionist lawmaking. This economic argument may be valid in some arenas, but not in intellectual property. The Constitution does not authorize copyright for economic purposes and if those economic purposes do not

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181. Necessary resources aside, intermediaries have also been known to abuse their power.

> For example, the rock musician Prince was limited by Warner Brothers Records, Inc., to producing one record every eighteen months, even though he wanted to release a record every seven months, presumably because such limitations made his music more unique and valuable. The company also refused to release a three-CD set that Prince wanted to craft and distribute. These may have been prudent business decisions with respect to Warner Brothers' profits, but they did not further the copyright goals of creation and dissemination of artistic works.

Bartow, *supra* note 6, at 108 (citations omitted); *see also id.* at 113 ("If single entities own or control both creative products and retail sales channels, consumers may be at their mercy with respect to both access and pricing.").

182. Wilson Castleman, Do Artists Need Record Labels? 4 (Dec. 15, 2009) (unpublished student paper) (on file with Washington University's Olin Business School), *available at* http://apps.olin.wustl.edu/cres/research/calendar/files/wcastlemanartists.pdf ("[I]nexpensive personal recording technology is constantly improving and decreasing in cost, meaning that near studio-quality recording is available to almost anyone who has a computer.").

183. *See* Bartow, *supra* note 6, at 99 ("Low barriers to entry foster competition, which poses threats to industries accustomed to oligarchic control of distribution, such as the music, movie, and publishing industries, and foments both opportunity and uncertainty. Savvy, preexisting real-space distributors with good industry relationships and quality products and services would intuitively be in the best positions to utilize innovative new modes of content distribution in a profitable manner. Conversely, large, ponderous entities that buttress their industry hegemony through distortive exploitation of power imbalances rather than effective business practices are appropriately concerned that increased competition can threaten their market dominance."); Moohr, *supra* note 79, at 758 ("The tools of digitization, broadband capacity, and the Internet make low-cost distribution a reality that may stimulate creation. Although in its infant stages, Internet commerce allows authors, musicians, and others to sell their work directly to consumers. Avoiding the added costs imposed by distribution companies may decrease costs to consumers.").

184. Traditional retail outlets have also not been shy about fighting the transition to convenient digital distribution of content, apparently more concerned about the threat of convenient new business models than the alleged threat of copyright infringement. *See* Danaher et al., *supra* note 143, at 1138–39 (discussing Walmart's and Target's aggressive reactions to Disney's decision to distribute content through iTunes). Danaher et al. go on to find, ironically, that such resistance is unwarranted as "customers who cannot purchase digitally may turn to piracy, [but] they do not consider DVD box sets—at least those sold on Amazon.com [or through traditional retailers]—as a substitute to digital downloads." *Id.* at 1139.

serve the greater creative needs of society, it is unclear under what authority Congress is acting. If these businesses want to remain relevant, they should do so by modernizing their business models rather than lobbying for destructive legislation.

CONCLUSION

In order to maintain a functional, law-abiding society, we must address the declining respect for the legal system and the legislature. Copyright law stands as a prime candidate for reform, as the public has soundly rejected the current legal framework, as well as attempts to teach "correct" morals. "The effectiveness of intellectual property law is . . . heavily dependent on gaining voluntary cooperation with the law."[185] In order to gain voluntary compliance, the law must rest on legitimate foundations and must align with, rather than contradict, the morals held by the people.

"History teaches that change in the old order is a practical certainty."[186] Private companies can make content available conveniently and inexpensively, and the legislature can give consumers an actual reason to prefer legal purchases to infringement. By creating copyrights like those described in this Note, a morally potent relationship can be forged between consumers and artists. Even those consumers who are not compelled by the moral foundations of the new legal order would be more likely to respect and follow the law knowing that it was established on constitutional foundations to benefit the public and to incentivize artists, rather than to serve a dying industry's persuasive lobbyists.

185. Tyler, *supra* note 16, at 224 (emphasis omitted).
186. Moohr, *supra* note 79, at 732.