

# **THE CRIME OF COPYRIGHT INFRINGEMENT: AN INQUIRY BASED ON MORALITY, HARM, AND CRIMINAL THEORY**

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Digitization and broadband make music, movies, and novels increasingly available to consumers. They also make information products more vulnerable to unauthorized use, and thus present a potent challenge to the venerable domain of copyright. The old order, marked by a finely tuned and always precarious balance between protecting rights of creators and maintaining public access, is adjusting to these and other technological changes that have yet to run their course. Their adjustments necessarily implicate the law, even the criminal law.

Changing technology impels copyright holders to seek more protection from the law for their increasingly valuable products. In an effort to retain control over distribution systems, industries that publish or deliver copyrighted material join in those efforts. Consumers, who want to exercise their traditional rights under copyright law and to utilize the new technology, exert an opposing pressure on lawmakers, as do the manufacturers of devices that deliver information and knowledge. Although it is unclear what form a new order will take, the potent combination of technological development and economic incentives is difficult to resist. History teaches that change in the old order is a practical certainty.<sup>1</sup> As in the past, the law will play a

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<sup>1</sup> See DEBORA L. SPAR, *RULING THE WAVES: CYCLES OF DISCOVERY, CHAOS, AND WEALTH FROM THE COMPASS TO THE INTERNET* (2001) (tracing cycles in which technological pioneers first break the rules, then pursue profit through commercialization, and finally pressure the state to enforce new property rights, standards, and competition laws).

significant role in balancing conflicting interests and in deciding the parameters of the new order.

At this point in the unfolding story, Congress appears to have embraced the old order. Since the early 1980s, Congress has strengthened existing rights in copyright and created a plethora of new rights.<sup>2</sup> Two new laws expand criminal liability for infringing copyrights. The No Electronic Theft Act of 1997 (NET) reaches infringement of copyrighted material for personal as well as commercial use.<sup>3</sup> The Digital Millennium Copyright Act of 1998 (DMCA) takes a more proactive stance by providing criminal penalties for acts that may lead to infringement.<sup>4</sup>

Treating purposeful infringement of copyrighted material as a crime seems, at first appraisal, like an easy case. As members of Congress reasoned, a copyright is a type of property, and knowingly taking or using property without permission is a crime. Yet a lingering doubt creates uneasiness when unauthorized use of knowledge, ideas, and information is treated as common theft. The common understandings that underpin theft law do not transfer easily to

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<sup>2</sup> See, e.g., Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995) (codified as amended at 17 U.S.C. § 106(6) (2000)) (granting copyright owner the exclusive right to perform the copyrighted work by means of digital audio transmission); Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (lengthening the term to life of the author plus seventy years) (codified at 17 U.S.C. § 302); Copyright Renewal Act of 1992, Pub. L. No. 102-307, title I, § 102 (a), (d), 106 Stat. 264, 266 (codified as amended at 17 U.S.C. §§ 304 (a), (c) (2000)) (making copyright renewal automatic); Semiconductor Chip Protection Act of 1984, Pub. L. No. 98-620, 98 Stat. 3347 (codified as amended at 17 U.S.C. §§ 901-14 (2000)) (extending copyright protection to “mask work[s]”); Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified at 17 U.S.C. §§ 1201-1205 (Supp. IV 1998)). For criticism of this trend, see sources cited in LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 269 n.68 (1999).

<sup>3</sup> See No Electronic Theft (NET) Act, 17 U.S.C. § 506 (a)(2) (2000)) (providing criminal punishment for reproducing or distributing, “including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000”). See also *infra* text accompanying notes 18-29.

<sup>4</sup> See Digital Millennium Copyright Act (DMCA), 17 U.S.C. §§ 1201 et seq. (barring circumvention of encryption codes designed to bar access or to prevent copying). See also *infra* text accompanying notes 30-39.

the realm of information, knowledge, and ideas.<sup>5</sup> The products of intellectual effort and the progress of the entire community are linked in significant ways, and knowledge and ideas, even those in popular music and business software, have not been subject to the more absolute rules that govern physical property.

This Article explores those lingering doubts by measuring the new laws against the doctrines that generally justify criminal law. Criminal theory suggests it is appropriate to punish conduct that imposes a community harm or that breaches a moral standard. I conclude that, in contrast to predatory practices of competitors or to the self-enriching facilitation of copying by file sharing services, neither justification wholly supports treating infringement for personal use as a crime. The moral consensus that would condemn personal use is far from robust and the harm rationale provides only an equivocal basis for criminalization. Moreover, the results of criminalizing personal use of copyrighted material are inconsistent with the underlying policy of copyright law. Instead of extinguishing lingering doubts, this analysis confirms them.

Part I presents the new criminal copyright infringement statutes and explains how these provisions, which depart drastically from past practice, affect the use of copyrighted material. In setting out the principles to be used in the analysis, Part II presents two bases, criminal law and copyright law, from which to consider the issue. The review of criminal theory identifies the reasons for treating conduct as a crime: to prevent harm to the community or to punish immoral

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<sup>5</sup> See *Dowling v. United States*, 473 U.S. 207, 217 (1985) (“[I]nterference with copyright does not easily equate with theft, conversion, or fraud.”); Stuart P. Green, *Plagiarism and the Limits of Theft Law: Some Preliminary Thoughts on Norms and the Criminalization of Intellectual Property Law*, 54 HASTINGS L.J. 167 (2002) (stating that criminal penalties for violation of intellectual property rights “seem out of place”).

conduct. The review of copyright principles recalls the purpose of copyright protection: to provide limited rights to copyright holders in exchange for benefits that accrue to the public.

Part III considers how the notion of harm applies to the unauthorized use of protected material by competitors and consumers. Despite the authority of the state to criminalize conduct that causes community harm – and its power to define harm – the analysis of harm reveals problematic issues. One problem involves identifying and measuring the economic losses of copyright holders from infringement. Second, the harm caused by competitors and commercial facilitators of infringement is not the same as that of those who infringe for personal use. An individual infringer imposes a relatively small, separate increment of economic loss, which when combined with other de minimis infringements, may cause significant injury to the copyright holder. Imputing that total harm to the slight harm generally imposed by personal use presents significant fairness concerns that weigh against criminalizing personal use of protected material.

An alternate vision conceives harm as an injury to the national interest in copyright policy, a conception of harm that necessarily considers the rationale of copyright law. But here too, the harm justification is not compelling. Criminalizing infringement emphasizes one objective of copyright policy, to encourage innovation, at the expense of its second objective, to maintain public access to information. Imposing criminal sanctions when infringement is for personal use and for circumventing copy protections constricts public access to copyrighted material, which may in turn result in reduced innovation. Moreover, criminalizing on the basis of accumulative harm effectively imputes the risk of harm to national policy to individuals who have only an attenuated connection to that harm. The attenuated connection between personal

use infringement and the risk that the national copyright policy will be harmed may not warrant criminal sanctions.

The analysis in Part IV considers the second justification for criminal sanctions, the moral content of infringement for personal use. Startling data – up to sixty percent of those queried do not think it is wrong to use copyrighted material – expose a significant gap between prevailing social norms and the official norm embodied in the criminal copyright statutes. The gap may be explained by the common understanding that knowledge and ideas are not subject to the same control that exists with physical property. Indeed, traditional copyright law corroborates this view through its doctrines of fair use and limited rights. In addition, as current controversies demonstrate, this gap between community norms and the criminal law of copyright infringement makes enforcement difficult. Finally, the analysis considers another argument for criminalization – to harness the educative effect of criminal law – but ultimately rejects its use as a means to create a social norm against infringement.

In sum, the inquiries into the harm and morality of copyright infringement indicate that the new criminal statutes are not entirely consistent with the legal frameworks that authorize them. The analysis reveals the indeterminacy and elasticity of the harm justification, which lawmakers relied upon in enacting the new statutes. It also points out limits to the morality rationale, especially when the community does not share the norm embodied by the law. Finally, the analysis, as a whole, illustrates the need for a rigorous consideration of the harm to be prevented and of all of the effects of new criminal laws.

## **I. The Criminal Copyright Infringement Laws**

Two new criminal provisions target copyright infringement: the No Electronic Theft Act

of 1997 (NET), which criminalizes noncompetitive infringement, and the Digital Millennium Copyright Act of 1998 (DMCA), which provides criminal penalties for, among other conduct, circumventing encryption codes that are designed to protect copyrighted material. To fully grasp the import of their provisions, it is useful to review criminal copyright infringement as it existed before the new laws were enacted.<sup>6</sup>

Preventing infringement by competitors of those who hold copyrights is a core feature of copyright law; indeed, infringement by competitors for commercial purposes has been a crime since 1897.<sup>7</sup> This crime was categorized for eight decades as a misdemeanor, not a felony. This fact cautions against reading it as a long-standing congressional endorsement of a criminal solution to copyright infringement.<sup>8</sup> Until passage of the NET, the criminal offense applied only to those who infringed "for profit," and only economic competitors were subject to criminal liability.<sup>9</sup>

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<sup>6</sup> For a fuller treatment of the history of the regulation of criminal copyright infringement, see MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 15.01 [A], [B] (Dec. 1998) (outlining general aspects of criminal infringement and providing historical background); Lydia Pallas Loren, *Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement*, 77 WASH. U. L. Q. 835, 840-49 (1999) (providing a historical overview); Mary Jane Saunders, *Criminal Copyright Infringement and the Copyright Felony Act*, 71 DENV. U. L. REV. 671, 673-80 (1994) (tracing the evolution of criminal sanctions for copyright infringement); Note, *The Criminalization of Copyright Infringement in the Digital Era*, 112 HARV. L. REV. 1705 (1999) (summarizing the development of copyright infringement as a criminal offense).

<sup>7</sup> See *Dowling*, 473 U.S. at 221 n.14 (1988) (recounting that in 1897 Congress made willful infringement of certain rights in dramatic or musical compositions a misdemeanor offense, punishable by imprisonment for up to one year, and in 1909 extended the provision to all types of copyrighted work).

<sup>8</sup> See Roger J. Miner, *Considering Copyright Crimes*, 42 J. COPYRIGHT SOC'Y U.S.A. 303, 305 (1995) (noting that felony sanctions for copyright infringement were enacted almost two-hundred years after the first copyright statute and eighty-five years after the first criminal provision).

<sup>9</sup> Although a 1976 amendment changed infringement for profit to infringement "undertaken for purposes of commercial advantage or private financial gain," it retained the element of an economic motive. See NIMMER, *supra* note 6, at 15.01[B][1] ("One constant about the 1976 Act . . . is that criminal exposure . . . required all the elements for civil copyright liability, plus the added two ingredients of willful infringement for purpose of commercial advantage or private financial gain."); Loren, *supra* note 6, at 841 (emphasizing that the 1976 formulation did not

Unlike the civil provisions,<sup>10</sup> the criminal statute was thus confined to copying and distribution for commercial purposes.<sup>11</sup> The requirement of financial gain reflected congressional concern that copyright holders should themselves be able to exploit their creations for profit. In exempting personal users from criminal liability, the requirement also accommodated the public policy of maintaining public access to copyrighted material.

The congressional reluctance to impose criminal liability for copyright infringement, noted by the Supreme Court as recently as 1988,<sup>12</sup> quickly faded in the face of technological developments. New legislation applied penal sanctions to protect all types of copyrighted material,<sup>13</sup> increased the severity of criminal penalties,<sup>14</sup> and utilized criminal provisions to

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change the requirement of a financial motive); Note, *supra* note 6, at 1708 (noting that the change made clear that defendants need not actually obtain financial benefit).

<sup>10</sup> Infringers who act without intent to obtain financial advantage are subject only to civil penalties. Plaintiffs who elect statutory damages and comply with registration requirements may receive between \$500 and \$20,000 in damages. Punitive damages of up to \$100,000 and attorney's fees may be awarded for willful infringement. 17 U.S.C. § 504(c) (2000).

<sup>11</sup> See *United States v. LaMacchia*, 871 F. Supp. 535, 539 (D. Mass. 1994) (“Since 1897 . . . the concept differentiating criminal from civil copyright violations has been that the infringement must be pursued for purposes of commercial exploitation.”); Note, *supra* note 6, at 1706 (noting the original criminal provision introduced the paradigm of differentiating criminal from civil copyright violations based on whether the infringement was pursued for purposes of commercial exploitation).

<sup>12</sup> See *Dowling*, 473 U.S. at 225 (observing that the “step-by-step” approach to criminalization was consistent with congressional sensitivity to the special concerns implicated by copyright laws).

<sup>13</sup> For example, in 1992, the offense of infringing any type of copyrighted material was made a felony. Copyright Felony Act, 18 U.S.C. § 2319(b)(c) (2000) (applying to infringement of reproduction and distribution rights of all copyrighted material including software and books, as well as film and music when infringement involved at least ten copies with a retail value of \$2500 over a 180-day period). See also 17 U.S.C. § 506(c)-(e) (2000) (authorizing criminal sanctions for the fraudulent use of copyright notices and to false representations in obtaining a copyright).

<sup>14</sup> Under the 1992 law, maximum penalties for first offenders were increased to five-year prison terms. Copyright Felony Act, 18 U.S.C. § 2319(b)(c) (2000). Punishment is enhanced when criminal copyright infringement is a predicate act for money laundering offenses and for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO). See 18 U.S.C. § 1963(a) (2000) (allowing fines and up to twenty years in prison); 18 U.S.C. § 1956(a)(1) (2000) (allowing fine up to \$20,000, or imprisonment for up to twenty years, or both).

protect quasi-copyright material.<sup>15</sup> Although these changes significantly altered criminal copyright law, the statutes essentially applied only to copying for financial gain, leaving intact the historical division between competitive and noncompetitive infringement.

Then, in the early 1990s, it became possible to post misappropriated digitized software programs on electronic bulletin boards, making them available to the public at no cost. As the *LaMacchia* case made clear, this conduct – misappropriating and distributing without a profit motivation – did not violate criminal copyright laws.<sup>16</sup> The case stimulated Congress to enact the NET,<sup>17</sup> which eliminated the requirement of financial gain and thus of commercial purpose. Congress had removed the historical division that had protected noncompetitive users from criminal liability. The following year, in enacting the DMCA, Congress went further by criminalizing conduct that might lead to infringement. The next sections present these two new laws in more detail.

### **A. Infringement Under the New Electronic Theft Act**

The basic criminal copyright infringement offense, which prohibits willfully infringing a

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<sup>15</sup> Congress enacted a criminal anti-bootlegging statute covering live musical performances that are not otherwise protected by copyright. See 18 U.S.C. § 2319A (2000) (criminalizing unauthorized recording, transmission to the public, and sale or distribution of or traffic in unauthorized recordings of live musical performances). First-time offenders are subject to five-year prison sentences and fines. *Id.* See also *United States v. Moghadam*, 175 F.3d 1269 (11th Cir. 1999) (providing legislative background and rejecting constitutional challenges to Anti-Bootlegging Act). A counterfeiting provision bans the transportation or disposal of a counterfeit copyrighted work in order to prevent selling a copy as the bona-fide product. See 18 U.S.C. § 2318 (2000). This offense is a predicate act for civil claims and criminal charges under RICO. See 18 U.S.C. § 1960(b) (2000).

<sup>16</sup> See *LaMacchia*, 871 F. Supp. at 544-45 (finding that criminal copyright provisions did not apply to defendant's conduct because he did not act for commercial advantage). *LaMacchia* had set up a free electronic exchange program for software and had no intention of profiting from the endeavor. The court also rejected the government theory that defendant had committed wire fraud. *Id.*

<sup>17</sup> See H.R. Rep. No. 105-339, § 4, at 3 (1997) (stating that the purpose of the NET was to “reverse the practical consequences” of *LaMacchia*); 141 Cong. Rec. S11, 452-54 (daily ed. Aug. 4, 1995) (statement of Sen. Leahy) (“[T]he bill would expressly prohibit willfully infringing a copyright by assisting others in the reproduction or distribution . . . of an infringed work [and] ensure coverage of activities such as those of alleged in *LaMacchia*”).

copyright for purposes of commercial advantage or private financial gain, continues to require a financial motive.<sup>18</sup> The NET simply added a provision that criminalizes infringements that are not undertaken for a financial purpose.<sup>19</sup> This provision applies to copying and distributing copyrighted material, and includes the use of computers.<sup>20</sup> It is now a crime to reproduce or distribute copyrighted work, within a 180-day period, whose total value is more than \$1000.<sup>21</sup> Congress' purpose was to reach noncompetitive infringements by individuals, such as hackers and disgruntled employees, who do not have a financial motive for copying. Thus the threshold retail value of \$1000 is best understood as exempting de minimis infringements, rather than as an indicator of financial motivation.

The NET also changed the definition of "financial gain,"<sup>22</sup> to encompass "anything of

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<sup>18</sup> 17 U.S.C. § 506(a)(1) (2000) ("Any person who infringes a copyright willfully . . . for purposes of commercial advantage or private financial gain . . . shall be punished as provided under section 2319 of title 18, United States Code.")

<sup>19</sup> *Id.* at (a)(2) ("Any person who infringes a copyright willfully . . . by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000, shall be punished as provided under section 2319 of title 18, United States Code."). The offense is subject to terms of imprisonment ranging from less than one to ten years. *See* 18 U.S.C. § 2319 (2000) (providing scaled penalties that are linked to the number of infringing copies made during a certain time period, whether the infringement is a first offense, the type of material copied, and the specific rights that were infringed). The sentencing guidelines implement this scheme. *See* U.S.S.G. § 2B5.3 (2002). The ultimate sentence is also a function of the value of the infringing material. *See id.* at § 2B1.1.

<sup>20</sup> *See* 17 U.S.C. § 506(a)(2) (2000). The NET also lengthened the statute of limitations for criminal prosecutions from three to five years. *See* 17 U.S.C. § 507(a) (2000).

<sup>21</sup> The offense is subject to terms of imprisonment ranging from less than one to ten years. *See* 18 U.S.C. § 2319 (2000) (providing scaled penalties that are linked to the number of infringing copies made during a certain time period, whether the infringement is a first offense, the type of material copied, and the specific rights that were infringed). The penalties for commercial infringement are harsher than those for noncommercial infringement. Professor Loren provides a helpful table that contrasts the penalty schemes. *See* Loren, *supra* note 6, at 847. The sentencing guidelines implement this scheme. *See* U.S.S.G. § 2B5.3 (2002). The ultimate sentence is also a function of the value of the infringing material. *See* U.S.S.G. § 2B1.1 (2002).

<sup>22</sup> *See* No Electronic Theft Act, 17 U.S.C. § 506(a)(2) (2000) (defining "financial gain" to include the "receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works").

value, including the receipt of other copyrighted works."<sup>23</sup> As used in other federal criminal provisions, the term "anything of value" is generally interpreted broadly to include almost any benefit received by a defendant.<sup>24</sup> By this indirect means, the traditional "for profit" provision now includes infringements that had, in the past, triggered only civil liability.<sup>25</sup>

Two aspects of criminal infringement were not changed. The government must still establish that the defendant acted willfully, and this element distinguishes criminal from civil infringement.<sup>26</sup> The offense also requires that infringing conduct be "unlawful,"<sup>27</sup> which means

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<sup>23</sup> See NIMMER, *supra* note 6, at § 15.01 (stating that the NET redefined the element of financial gain "to the point of evanescence"). According to the legislative history, the definitional change was made to "enable the Department of Justice to pursue a LaMacchia-like defendant who steals copyrighted works but gives them away –instead of selling them – to others." 143 Cong. Rec. H9883 (1997) (statement of Rep. Coble). The change "would make clear that 'financial gain' includes bartering for, and the trading of, pirated software." 143 Cong. Rec. S12, 689-90 (1997) (statement of Sen. Leahy).

<sup>24</sup> See *United States v. Williams*, 705 F.2d 603 (2d Cir. 1983), *cert. denied*, 464 U.S. 1007 (1983) (stating that "anything of value" in bribery statute is measured by defendant's subjective view, not by actual value); *United States v. Girard*, 601 F.2d 69, 71 (2d Cir. 1979) (noting that the term "thing of value" includes, for example, amusement, sexual intercourse, a promise to reinstate an employee, agreement to run in a primary election, and testimony of a witness). Recognizing the significance of this change, some legislators registered concern about the scope of the new definition. Senator Hatch, Chairman of the Judiciary Committee, for example, stated: "It would be contrary to the intent of the provision . . . if 'anything of value' would be so broadly read as to include enhancement of reputation or value remote from the criminal act, such as job promotion." 143 Cong. Rec. S12, 689-90 (1997) (statement of Senator Hatch).

<sup>25</sup> See *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001) (noting that "trading infringing copies of a work for other items, 'including the receipt of other copyrighted works,'" meets the definition of a financially motivated transaction under the NET) (internal citation omitted).

<sup>26</sup> See NIMMER, *supra* note 6, at §15.01[A][2] (recognizing that the willfulness element is "the only bar against . . . criminalizing nearly every copyright infringement case"). For commentary on the willfulness element, see Loren, *supra* note 6, at 877-97 (arguing for a rigorous definition); Saunders, *supra* note 6, at 687-88 (discussing varying judicial interpretations of the word "willfully" in the copyright context).

Most courts have adopted a rigorous definition of willfulness. Saunders, *supra* note 6, at 688 ("The majority of courts have said that . . . a prosecutor must show that the accused specifically intended to violate the copyright law."). See, e.g., *United States v. Moran*, 757 F. Supp. 1046, 1050-51 (D. Neb. 1991) (defining willful conduct as "a voluntary, intentional violation of a known legal duty" and rejecting government position that "intent to copy" satisfied the willfulness requirement) (quoting *Cheek v. United States*, 498 U.S. 192, 200 (1991) (internal citation omitted)).

The NET provides that "evidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish willful element." 17 U.S.C. § 506(a)(2) (2000); NIMMER, *supra* note 6, § 15.01[A][2] (interpreting the provision as requiring more than a general intent to copy in the absence of financial gain).

that unless conduct meets the requirements for civil infringement, it is not a crime.<sup>28</sup>

Accordingly, defenses to civil infringement, such as fair use and the right of first sale, apply also to criminal charges under the NET.<sup>29</sup>

### **B. The "Pre-Infringement" Offense of the DMCA**

The Digital Millennium Copyright Act (DMCA) of 1998 does not address infringement per se;<sup>30</sup> rather, it provides criminal sanctions for conduct that may lead to infringing uses.<sup>31</sup>

Among a host of civil provisions, the DMCA prohibits circumventing of, or dealing in a technology that disables electronic protection systems that are devised to prevent copying and distributing digitized material.<sup>32</sup> Although distinct provisions apply to accessing protected

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<sup>27</sup> See 17 U.S.C. § 506(a)(1)-(2) (2000).

<sup>28</sup> See *United States v. Larracuente*, 952 F.2d 672, 674 (2d Cir. 1992) (stating that elements of criminal infringement are the same as in civil infringement: “ownership of a valid copyright and copying”); NIMMER, *supra* note 6, at § 15.01[A][2] (“conduct that does not comprise civil infringement cannot constitute criminal infringement”).

<sup>29</sup> See 17 U.S.C. § 107 (2000) (fair use standard); 17 U.S.C. § 109(a) (2000) (first sale doctrine).

<sup>30</sup> See Digital Millennium Copyright Act, 17 U.S.C §§ 1201-1205 (Supp. IV 1998). The DMCA was enacted to conform United States copyright law to the treaty that followed the World Intellectual Property Organization conference of 1996. See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001); *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 315-16 (S.D.N.Y. 2000) (stating also that Congress wished to adapt copyright law to the digital age), *aff’d sub nom.*

For commentary on the DMCA, see Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. Rev. 354 (1999) (criticizing the DMCA on First Amendment and other grounds); Jo Dale Carothers, Note, *Protection of Intellectual Property on the World Wide Web: Is the Digital Millennium Copyright Act Sufficient?*, 41 ARIZ. L. REV. 937 (1999) (raising issues that are not addressed in the DMCA); Jeffrey T. Green & Matthew J. Perry, *Practice Tips: The Long Arm of Copyright Law*, 8 BUS. CRIMES L. REP. 1 (Oct. 2001) (providing analysis of criminal provision); Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833 (2000) (arguing that internet service providers should not be liable under the DMCA unless they provide “knowing assistance” to copyright infringers).

<sup>31</sup> See CRAIG JOYCE, et. al., COPYRIGHT LAW (1998) (characterizing DMCA as a “paracopyright” law).

<sup>32</sup> See 17 U.S.C. § 1201(a)-(b) (2000). Violations of the civil provisions trigger criminal liability when they are committed willfully and for purposes of commercial advantage or private financial gain. See 17 U.S.C. § 1204 (2000). First offenders are subject to fines of \$500,000 and five years in prison; penalties increase to maximums of \$1,000,000 in fines and ten years imprisonment for repeated violations. *Id.*

work<sup>33</sup> and to using copyrighted material,<sup>34</sup> both measures prohibit the use of circumvention devices as well as trafficking in and marketing them. This activity is a crime when it is performed willfully for financial gain. Thus it is a crime to market circumvention devices, but consumers who circumvent an access code on material they own do not commit an offense.<sup>35</sup>

The first DMCA indictments, of a Russian computer software designer and his employer,<sup>36</sup> elicited considerable public comment.<sup>37</sup> Although the software designer cooperated in the trial of the employer, Elcom, a jury found the firm not guilty.<sup>38</sup> The *Elcom* case is also significant because the trial court rejected pre-trial motions to dismiss that were based on constitutional challenges.<sup>39</sup>

### C. The Effect on Personal Use of Copyrighted Material

In sum, the long-standing criminal copyright provision was designed to reach commercial

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<sup>33</sup> See 17 U.S.C. § 1201 (a)(1)-(2) (2000).

<sup>34</sup> See 17 U.S.C. § 1201(b)(1)(A) (2000) (dealing with “technological measures that effectively protect a right of a copyright owner”); *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1119-22 (N.D. Cal. 2002) (explaining meaning of the separate provisions of section 1201). The DMCA also makes it criminal to provide, distribute, or import copyright information systems that are false or to tamper with copyright management information systems. See 17 U.S.C. § 1202 (2000).

<sup>35</sup> See Amy Harmon, *New Economy: New Visibility for 1998 Copyright Protection Law, with Online Enthusiasts Confused and Frustrated*, N.Y. TIMES, Aug. 13, 2001, at C4 (explaining effect of DMCA on consumers).

<sup>36</sup> Dmitry Sklyarov had designed a computer program that allowed users to decrypt copyright safeguards on Adobe's Ebook Reader Software. *Id.* (discussing Sklyarov's development of technology to disable copyright protection and recounting his arrest).

<sup>37</sup> See, e.g., Lawrence Lessig, *Jail Time in the Digital Age*, N.Y. TIMES, July 30, 2001, at A17 (criticizing DMCA as “criminalize[ing] activities that are central to research in encryption and security”).

<sup>38</sup> Matt Richtel, *Russian Company Cleared of Illegal Software Sales*, N.Y. TIMES, Dec. 18, 2002, at C4 (reporting that a federal jury acquitted Elcom despite the fact that Sklyarov testified against the firm).

<sup>39</sup> See *United States v. Elcom*, 203 F. Supp. 2d 1111, 1135-40 (N.D. Cal. 2002) (holding that the DMCA is not unconstitutionally vague, not an unconstitutional restriction of speech, not overbroad, and not a violation of the intellectual property clause of the Constitution).

actors who sought to compete against the copyright holder by willfully reproducing and selling copyrighted material. The new criminal copyright infringement provisions continue to capture competitive infringement,<sup>40</sup> but an explicit provision also subjects those who copy for personal use, who by definition do not act for commercial advantage, to criminal penalties.<sup>41</sup> The expanded definition of financial gain, which applies to the competitive offense, means that the traditional prohibition against competitive use may also reach consumers who copy protected material for noncommercial, personal use.<sup>42</sup>

Professor Loren has provided hypothetical cases that illustrate how easily the threshold of \$1000 is reached.<sup>43</sup> Those who use filesharing services to download music over the Internet may also violate the new criminal copyright laws. In the civil case against Napster, the district court found that unauthorized downloading of music files was an infringement of copyright.<sup>44</sup> Those who uploaded music into the Napster system violated the right of distribution; those who downloaded music files from other computers violated the right of reproduction.<sup>45</sup> The court

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<sup>40</sup> 17 U.S.C. § 506(a)(1) (2000) (criminalizing willful infringement for commercial advantage or financial gain). Note that competitive infringement could also be prosecuted under section 506(a)(2), which does not require proof of financial motivation. *See* 17 U.S.C. § 506(a)(2) (2000).

<sup>41</sup> 17 U.S.C. § 506(a)(2) (2000) (applying to infringements of over \$1000 of retail value).

<sup>42</sup> *See* 17 U.S.C. § 101 (2000) (“The term ‘financial gain’ includes receipt or expectation of receipt, of anything of value, including the receipt of other copyrighted works.”); 17 U.S.C. § 506(a)(1) (2000).

<sup>43</sup> *See* Loren, *supra* note 6, at 862-64 (providing examples to demonstrate that the \$1000 threshold is not consistent with the stated purpose of the legislation because it subjects consumers who are neither hackers nor disgruntled employees to criminal sanctions). The examples include a sales representative of a pharmaceutical company who forwards two medical articles to one hundred customers, a participant in an Internet e-mail listserv that automatically sends each member of the service a copy of posted material, and a law professor who gives her students summaries of important cases published by a legal periodical. *Id.*

<sup>44</sup> *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014 (9th Cir. 2000) (agreeing with district court ruling plaintiffs had established a prima facie case of direct infringement); A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 911 (N.D. Cal. 2000) (finding that plaintiffs had established a prima facie case of direct infringement).

<sup>45</sup> *Napster*, 239 F.3d at 1014 (interpreting 17 U.S.C. § 106(1), (3) (2000)). *See also* Playboy Enterprises, Inc. v.

rejected Napster's argument that consumers were engaged in a fair use of copyrighted material.<sup>46</sup>

If the numerical threshold of \$1000 in retail value and the requisite willfulness are present, the downloader has violated the criminal copyright provisions.

Ironically, the new provisions do not directly reach commercial entities that facilitate file sharing because those entities do not necessarily infringe reproduction or distribution rights.<sup>47</sup>

As the *Napster* case indicates, their offense is of a vicarious or contributory nature,<sup>48</sup> conduct that is not encompassed in the criminal copyright statutes. The exposure of file sharing services to criminal liability seems to depend on whether the conduct at issue would satisfy the elements of accomplice liability or conspiracy.<sup>49</sup>

The DMCA offense of circumventing electronic systems also implicates lawful copying for personal use. The DMCA makes it criminal for consumers to purchase software that would breach electronic protection systems, even though consumers could lawfully circumvent such

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Webbworld, Inc., 991 F. Supp. 543 (N.D. Tex. 1997) (holding that the defendant had violated the plaintiffs distribution rights by “allowing its users to download and print copies of electronic image files”); Joseph D. Schleimer & Kenneth D. Freundlich, *Criminal Prosecution of Online File Sharing*, 5 J. OF INTERNET L. 14 (2001) (concluding that Napster users who act willfully are engaged in a per se criminal violation of section 506(a)(1)).

<sup>46</sup> *Napster*, 239 F.3d at 1019 (agreeing with the district court’s dismissal of Napster’s affirmative defenses of fair use and substantial non-infringing use); *Napster*, 114 F. Supp. 2d at 912-17 (dismissing Napster’s affirmative defenses of fair use and substantial non-infringing use). The opinions have been critiqued for giving short shrift to the fair use issue as it applies to those downloaders who owned the CD on which the song appears. The argument is that this activity is space-shifting, akin to time-shifting, and a fair use under *Sony Corp. v. Universal Studios*, 464 U.S. 417 (1984).

<sup>47</sup> The provisions are designed to and would reach the “Robin Hoods” who willfully infringe the right of copying and distribution by posting digitized copies as long as the retail value is at least \$1000.

<sup>48</sup> See *Napster*, 239 F.3d at 1019-20 (finding that Napster was likely to be held liable for contributory copyright infringement). In a recent decision involving two filesharing services, a district court granted summary judgment for the defendants on the ground that their decentralized networks insulate them from complaints of contributory and vicarious infringement. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029 (C. D. Cal. 2003). Cf. *UMG Recordings, Inc. v. MP3.Com, Inc.*, 92 F. Supp. 2d 349, 350 (S.D.N.Y. 2000) (finding that defendant had actually copied and replayed protected material).

<sup>49</sup> 18 U.S.C. §§ 2, 371 (2000).

systems themselves. Thus, the law does not take into account the rights of consumers who are entitled to copy protected material that they own, or who wish to engage in other fair uses of it.<sup>50</sup>

Nevertheless, the few courts that have considered these issues in civil cases have rejected the fair use defense.<sup>51</sup>

In 1999, federal law enforcement agencies announced an initiative aimed at elevating the priority of criminal enforcement of intellectual property rights.<sup>52</sup> Most of the cases filed thus far have been resolved as plea bargains and there are very few reported opinions that interpret the criminal provisions. In 2000, thirty-two cases involving copyright infringement were filed.

Twenty-two defendants pleaded guilty and one was tried and found guilty.<sup>53</sup> This compares with twenty-six cases filed in 1999, with twenty-three pleading guilty and no trials. Thus far, only a few criminal DMCA cases have been brought.<sup>54</sup>

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<sup>50</sup> See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001) (stating that DMCA did not eliminate all fair use); *United States v. Elcom*, 203 F. Supp.2d 1111, 1134-35 (N.D. Cal. 2002) (“The fair user may find it more difficult to engage in certain fair uses”).

<sup>51</sup> See, e.g., *Elcom*, 203 F. Supp. 2d at 1133-35 (rejecting fair use defense in a case involving a program enabling the copying of electronic books); *Universal City Studios Inc. v. Reimerdes*, 82 F. Supp. 2d 211, 219 (S.D.N.Y. 2000) (rejecting fair use defense to gaining unauthorized access to copyrighted works), *aff’d Corley*, 273 F.3d 429, 458-59 (holding that the injunction did not unconstitutionally eliminate owners' right to fair use of copyrighted materials).

<sup>52</sup> Intellectual Property Crime Statistics from the Attorney General's Annual Report, at <http://www.cybercrime.gov/ipstats.htm> (last visited July 13, 2003) (providing statistics and reports for cases involving intellectual property crimes). The initiative targeted four intellectual property statutes: 18 U.S.C. § 2318, 18 U.S.C. § 2319; 18 U.S.C. § 2319A, and 18 U.S.C. § 2320. *Id.* In addition, the Department of Justice heightened its attention to trade secret theft and economic espionage. *Id.*

<sup>53</sup> Intellectual Property Cases - United States Attorneys Office Fiscal Year 2000, at <http://www.cybercrime.gov/01ipstats.htm> (last visited July 13, 2002) (providing statistics for intellectual property cases in the fiscal year 2000). The total figures for all copyright infringement statutes in 2000 show that 106 cases were filed, 71 pleaded guilty, and 5 were brought to trial and found guilty. *Id.* The statistics, however, do not distinguish between competitive infringements brought under section 506(a)(1) and other types of infringement brought under section 506(a)(2).

<sup>54</sup> See Joseph M. Terry, *California Man Indicted for Violations of Digital Millennium Copyright Act*, 9 BUS. CRIMES 9 (2002) (reporting arrest of Moshin Mynaf for “circumventing security measures placed on analog videocassettes,” among other charges); Intellectual Property Cases - Computer Crime and Intellectual Property Section (CCIPS), at

A definitive interpretation of the criminal copyright provisions awaits future cases.<sup>55</sup>

Unresolved issues include determining the breadth of the term "financial gain," resolving the definition of willful, and applying the fair use factors and the first sale doctrine to novel and incipient forms of consumer use. It is not premature, however, to explore how these criminal laws relate to their doctrinal underpinnings.

## **II. The Doctrinal Frameworks**

Subjecting copyright infringers to criminal sanctions, rather than to civil actions, implicates two legal regimes, copyright law and criminal law. As part of the copyright code, the criminal provisions should further the general purposes of copyright law. As penal statutes, the new crimes must also comport with principles of criminal law.

### **A. The Rationale of Copyright Law**

The purpose of copyright law and the manner of attaining that purpose are set out in the Constitution. The Copyright Clause states that copyright law exists to benefit the public by promoting learning and ideas.<sup>56</sup> In order to promote that goal, Congress is authorized to grant

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<http://www.usdoj.gov/criminal/cybercrime/ipcases.htm> (last visited July 13, 2003) (providing an intellectual property case chart of DMCA violations).

<sup>55</sup> The single case concerning section 506(1a)(2) that resulted in published opinions at the time of this writing dealt with a guilty plea and did not interpret the provision. *See* *United States v. Rothberg*, 222 F. Supp. 2d 1009 (N.D. Ill. 2002) (considering defendant's motion for downward departure); *United States v. Rothberg*, 2002 U.S. Dist. LEXIS 1569 (N.D. Ill. Feb. 1, 2002), (considering value of infringing items); *United States v. Rothberg*, 2001 U.S. Dist. LEXIS 21119 (N.D. Ill. Dec. 20, 2001) (considering withdrawal of plea agreements).

<sup>56</sup> *See* U.S. CONST. art. I, § 8, cl. 8 ("Congress shall have power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.") *See* *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 349 (1991) ("The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.'"); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (citing *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948) (stating that the public benefit from the labors of authors is the only interest and primary objective of copyright)); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (relying on the legislative history of the 1909 Copyright Act (citations omitted)); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 661 (1834) (addressing the purpose of granting rights in copyright).

Judge Roger Miner has summarized those public benefits. "[T]he purpose of copyright law is no less than

authors certain exclusive rights. As an instrumental, utilitarian conception,<sup>57</sup> copyright law protects author's interests as a means to an end; protection is not an end in and of itself.<sup>58</sup>

This granting of exclusive rights reflects the perception that creators will not be motivated to produce new works unless they can recoup their investment of time and money.<sup>59</sup> The limited grant to authors provides an economic incentive to create new expressions of ideas. Copyright law thus has a decidedly commercial aspect, to protect copyright holders against certain forms of competition.<sup>60</sup>

To fulfill its ultimate purpose of promoting progress, copyright law provides unfettered

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the dissemination of knowledge, the promotion of cultural enrichment, the conveyance of information and the consequent betterment of society through the encouragement of creativity and innovation.” Miner, *supra* note 8, at 303.

<sup>57</sup> See JOYCE, *supra* note 31, at 54-55 (1998) (describing the “utilitarian” and “Lockean” theories of copyright); MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 1, 15-17 (1989 ed.) (providing the economic rationale for copyright protection); MARK A. LEMLEY, ET AL., SOFTWARE AND INTERNET LAW 42 (2000) (“The fundamental purpose underlying U.S. copyright law is to promote the creation and dissemination of knowledge.”).

<sup>58</sup> See *Feist*, 499 U.S. at 351 (reciting that copyright assures authors' rights to their original expression in order to achieve the constitutional objective); *Sony*, 464 U.S. at 429 (stating that the limited grant to authors “is a means by which an important public purpose may be achieved”).

<sup>59</sup> See *Eldred v. Ashcroft*, 123 S. Ct. 769, 786 (2003) (agreeing that Congress' authority is “contingent on an exchange,” and quoting *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'”)); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985) (noting that “by establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas”); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (stating private motivation of authors serves the cause of promoting broad public access); *Graham v. John Deere Co.*, 383 U.S. 1, 7-9 (1966) (noting Thomas Jefferson viewed patents as an inducement to bring forth new knowledge).

<sup>60</sup> See *Dowling v. United States*, 473 U.S. 207, 221-23 (1985) (noting evidence that Congress viewed infringement as essentially an economic offense); *Harper & Row Publishers*, 471 U.S. at 568-69 (rejecting fair use defense, in part because printing memoir of former President Ford stripped the economic value from the forthcoming book); NIMMER, *supra* note 6, at §15.01(A)(2) (noting that in reality, almost all civil cases that reach litigation are of a “for-profit posture”); Douglas Y'Barbo, *The Heart of the Matter: The Property Right Conferred by Copyright*, 49 MERCER L. REV. 643, 706 (1998) (stating that copyright law protects the holder's market position against “unfair' and 'harmful' commercial activity”); Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 22-23 (1996) (noting that until recently copyright law “has been addressed primarily to commercial and institutional actors who participated in copyright-related businesses”); *supra* text accompanying notes 9-11 (noting that criminal provisions applied only to infringement for financial gain until enactment of NET).

access to the work once the statutory grant expires.<sup>61</sup> In addition, copyright law provides only limited rights<sup>62</sup> to original expression of ideas,<sup>63</sup> so as not to overly restrict public access and use of new work during the term of the copyright. By confining protection, setting out limited rights, restricting the time period for those rights, and maintaining a public domain of existing material, copyright law enables others to build freely on the ideas and information conveyed in existing work.

Although American copyright law is a decidedly utilitarian conception, the idea that authors have a natural claim on their creative expression is a strong undercurrent in copyright discourse.<sup>64</sup> In this view, authors' rights emanate from the Lockean principle that people own the fruits of their labor; it is independent of the utilitarian exchange.<sup>65</sup> Civil law countries, such as

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<sup>61</sup> See 17 U.S.C. § 302(a) (2000). The Copyright Term Extension Act extends the term of most copyrights from creation until 70 years after the author's death. See *Eldred v. Ashcroft*, 123 S. Ct. 769, 771 (2003) (rejecting arguments that Congress was without constitutional authority to extend the term in this manner).

<sup>62</sup> See 17 U.S.C. § 106 (2000) (providing specific rights to reproduce copies of the work, prepare derivative works, and distribute copies; certain types of works include the right to perform publicly, to display work, and in the case of sound recordings, to perform the work by means of digital audio transmission). Other provisions limit those rights. See 17 U.S.C. § 107 (2000) (providing fair use exception); 17 U.S.C. § 109(a) (2000) (right of first sale); 17 U.S.C. § 115 (2000) (granting compulsory licenses in non-dramatic musical works).

Supreme Court decisions corroborate the limited nature of the rights in copyrighted material. See *Sony*, 464 U.S. at 432 (noting that copyright “protection has never accorded the copyright owner complete control over all possible uses of his work”); *Dowling*, 473 U.S. at 216-17 (noting that the copyright holder's dominion is subject to precisely defined limits).

<sup>63</sup> See *Feist*, 499 U.S. at 350 (elaborating on the fact/expression dichotomy in copyright).

<sup>64</sup> See, e.g., Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L. J. 1533 (1993) (arguing that free speech interest might be protected by a natural rights conception of intellectual property); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517 (1990) (advocating “the restoration of the natural law to our copyright jurisprudence”). See also JAMES BOYLE, SHAMANS, SOFTWARE, & SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996) (locating the source of property rights in information in an idealized notion of creative authorship); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455 (1991).

<sup>65</sup> See JOYCE, *supra* note 31, at 56-57; LEMLEY, *supra* note 57, at 351-52 (discussing Kantian right of personhood). Cf. *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1002-04 (1984) (endorsing view that trade secrets are property for purposes of due process, on ground that property includes the products of “labor and invention” and citing Locke).

France and Germany, base their copyright law on a similar theory, the "moral right" of authors to control their work.<sup>66</sup> Although this theory is intuitively powerful, it is so malleable as to border on being meaningless. The theory does not provide an inherent limit to authors' rights or a principled guide to allocating grants to authors.<sup>67</sup> If carried to its natural conclusion, authors' rights would be without limitation. More to the point, the natural rights position conflicts with the utilitarian cast of the constitutional justification for extending limited rights to authors.

### **B. The Rationale for Treating Conduct as Criminal**

As previously noted, the new criminal copyright laws shifted infringement for personal use from a largely unenforced civil claim to the criminal realm. Evaluating this shift requires a brief review of the general reasons for treating conduct as criminal.

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<sup>66</sup> See LEAFFER, *supra* note 57, at 2-3 (noting authors have a moral entitlement to control and exploit the product of their intellect).

<sup>67</sup> See JOYCE, *supra* note 31, at 57 (concluding that the natural law justification is indeterminate); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 285 (1970) (noting that the difficulty of a moral justification for copyright "lies in discerning the extent to which a creator should be able to maintain control of a published book").

Although the distinction between criminal and civil law has long occupied legal minds,<sup>68</sup> little progress has been made in identifying the source and parameters of the distinction.<sup>69</sup> The issue of deciding what conduct merits criminal sanctions is often confused with general justifications for punishment: deterring future crimes, stigmatizing offenders, expressing community values, extracting retribution, reforming the offender, and so on. Although identifying conduct that is subject to criminal sanctions and justifying penal sanctions are not entirely distinct ideas, the punishment justifications do not provide an answer to the question of

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<sup>68</sup> Nineteenth-century utilitarians suggested that there was no meaningful distinction between tort and crime. *See* JOHN AUSTIN, LECTURES ON JURISPRUDENCE 416, 517 (4th ed. 1879) (stating that terms "public" and "private" may be applied indifferently to all law); JEREMY BENTHAM, RATIONALE OF PUNISHMENT 12 (1830) (stating there was no substantive difference between punishment and compensation because all sanctions are punitive and civil sanctions can be more painful and therefore more punitive than criminal sanctions); OLIVER W. HOLMES, THE COMMON LAW 44 (1881) ("[T]he general principles of criminal and civil liability are the same."). *But see* Jerome Hall, *Interrelations of Criminal Law and Torts: I*, 43 COLUM. L. REV. 753 (1943) (rejecting the Holmesian view of an underlying unity in criminal law and torts, on the ground that criminal law encompasses a moral dimension and civil doctrine does not).

<sup>69</sup> *See* Larry Alexander, *Crime and Culpability*, 5 J. OF LEGAL ISSUES 1, 1 (1994) (stating that determining the principles that support criminalization, rather than civil remedies, is one of four major theoretical controversies in criminal law); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 454 (1997) ("The debate over the justification for punishing criminals has been deeply confused, and the confusion has a long and honorable history.").

why conduct is made criminal in the first place.<sup>70</sup> As H.L.A. Hart queried, what is it we want to deter? Which offenders do we want to stigmatize? What values are expressed? What conduct merits retribution? Who should be reformed, and for what?

Two philosophical approaches, and various syntheses of the approaches, indicate that the decision to criminalize is based on judgments about the morality and harm of the conduct at issue. The concepts of morality and harm are related and they overlap in significant ways; for instance, unjustified conduct that causes grave harm is usually regarded as immoral. Notwithstanding that relation, it is useful to treat them separately.

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<sup>70</sup> See H.L.A. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY 8 (1968).

The idea that immoral behavior merits criminal treatment is generally associated with retributivists who believe that blameworthy offenders ought to receive just deserts, or punishment.<sup>71</sup> Although there are several forms of retributivism,<sup>72</sup> there is general agreement that it is appropriate to treat conduct as criminal when it is morally wrong.<sup>73</sup> Moral wrongfulness has two components: a culpable state of mind and a morally wrongful act.<sup>74</sup> Thus, a person is culpable when he or she chooses to engage in morally wrong conduct.<sup>75</sup> In addition to personal culpability, however, the conduct itself has a moral dimension.<sup>76</sup> The source of that dimension is unclear; it may rest on community norms or on principles derived from conceptions

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<sup>71</sup> See Lloyd L. Weinreb, *Desert, Punishment, and Criminal Responsibility*, 49 L. AND CONTEMP. PROBLEMS 47, 79 (1986) (“Punishment follows directly from desert because only if desert is fulfilled can we be regarded fully as persons . . . free, morally responsible, and deserving . . . at all.”). See also MICHAEL S. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP 233-43 (1984) (suggesting that retributivism is a prima facie goal of punishment); HERBERT MORRIS, ON GUILT AND INNOCENCE 32-33 (1976) (explaining that retributivism is based in part on the need to provide a counterweight to the actor’s conduct by imposing punishment or just deserts); Michael S. Moore, *Prima Facie Moral Culpability*, 76 B.U. L. REV. 319 (1996) (considering the issue of culpability, or blameworthiness, in criminal theory).

For discussions of types of retributivism, see generally R.A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, in 20 CRIME AND JUSTICE: A REVIEW OF RESEARCH 1, 25-45 (Michael Tonry ed. 1996) (examining five retributivist rationales for state-imposed punishment); Kenneth W. Simons, *The Relevance of Community Values to Just Deserts: Criminal Law, Punishment Rationales, and Democracy*, 28 HOFSTRA L. REV. 635 (2000) (examining the sources of retributive principles).

<sup>72</sup> See Simons, *supra* note 71, at 642 (noting that “just deserts’ is a notoriously contested concept,” and that retributivists vary in their emphasis on culpability).

<sup>73</sup> See Heidi Hurd, *What In the World Is Wrong?*, 5 J. CONTEMP. LEGAL ISSUES 157, 215 (1994) (concluding that things that are morally wrong ought to be prohibited on grounds that the goal of all law is “to perfect our compliance with the demands of morality”).

<sup>74</sup> See PAUL H. ROBINSON, CRIMINAL LAW § II.2 (1997) (describing culpability requirements of actus reus and mens rea); Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 U.C.L.A. L. REV. 1511, 1522-23 (1992) (stating that criminal law requires the actor to have engaged in culpable conduct and to have been morally responsible for that culpable conduct); Moore, *Prima Facie Moral Culpability*, *supra* note 71, at 320 (stating that actors are culpable when they “choose to do a wrong in circumstances when that choice is freely made”).

<sup>75</sup> See JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 149 (2d ed. 1960) (defining the moral component of a crime as the “intentional or reckless doing of a morally wrong act”).

<sup>76</sup> See Moore, *Prima Facie Moral Culpability*, *supra* note 71, at 320 (stating that as between conduct and culpability, the primary aspect of morality is conduct).

of what is right and good.<sup>77</sup> In its most affirmative form, retributivism supports criminal sanctions even when punishment would not prevent future harm.<sup>78</sup>

The second philosophical approach, consequentialism, avoids the problem of defining moral conduct by focusing on the notion of harm.<sup>79</sup> Consequentialists derive authority to criminalize from a society's right to maximize social welfare by preventing harm to the community.<sup>80</sup> Criminal law may prevent future harmful conduct because of its power to deter both the specific offender and the general public. It also enables a community to incapacitate and rehabilitate offenders.<sup>81</sup> The strict form of consequentialism explicitly divorces the notions of morality and harm.<sup>82</sup> But just as retributivists face the issue of identifying immoral behavior, consequentialists face a similar predicament, to decide when and what conduct is harmful.

The interplay between morality and harm permeates significant issues in criminal law.

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<sup>77</sup> See Arenella, *supra* note 74, at 1518 (explaining that fair imputation requires the actor chose to act in a manner that breached community norms); Hurd, *supra* note 73, at 207-08 (explaining the deontological view that morality is a function of a reasoned logical system).

<sup>78</sup> See I. KANT, *METAPHYSICS OF MORALS* 142 (M. Gregor trans. 1991) (suggesting that even in a society to be dissolved, the last murderer remaining in prison must be executed).

<sup>79</sup> See Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 Harv. L. Rev. 414, 478 (1999) (noting that liberal deterrence theory “famously oppose[s]” public moralizing).

<sup>80</sup> See ROBINSON, *supra* note 74, at § 1.2 (stating that preventing crime may be the most important function of government); O.C. SNYDER, *AN INTRODUCTION TO CRIMINAL JUSTICE* 762-63 (1953) (quoting *Jackson v. United States*, 102 Fed. 473, 488 (9th Cir. 1900) (“The right to punish a person who commits an offense depends on the right of society to protect itself.”)).

<sup>81</sup> ROBINSON, *supra* note 74, at § 1.2.

<sup>82</sup> See *Commonwealth v. Kennedy*, 48 N.E. 770, 770 (Mass. 1897) (Holmes, J., writing) (“[T]he aim of the law is not to punish sins, but is to prevent certain external results”); *Robbins v. State*, 8 Ohio St. 131, 171 (1857) (“Criminal punishment is not inflicted as an atonement or expiation for crime; that must be left to the wisdom of an overruling Providence.”); JAMES FITZJAMES STEPHEN, *GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND* 2 (1863) (criticizing using morality to distinguish between torts and crimes; “Nearly every crime is not only a crime, but is also an individual wrong or tort . . . . [T]he criminality of an act is distinct from its moral character.”). For a more contemporary reprise see Harry V. Ball & Lawrence M. Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STANFORD L. REV. 197, 212 (1965) (stating that the morality of the prohibited conduct has little to do with criminalizing it).

Debates over regulatory offenses,<sup>83</sup> victimless crimes,<sup>84</sup> inchoate offenses,<sup>85</sup> and negligence and strict liability crimes<sup>86</sup> may be characterized as debates over which construct is paramount.

Notwithstanding these debates, various syntheses of retribution and consequentialism are generally accepted,<sup>87</sup> and neither justification entirely excludes the other.<sup>88</sup> Thus, most

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<sup>83</sup> Those who oppose regulatory offenses argue that it is self-defeating to criminalize conduct that has no moral content, even when it is harmful. Henry M. Hart, *The Aims of Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 417-25 (1958); Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 427 (1963). See also John C. Coffee, *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991). But see Ball & Friedman, *supra* note 82, at 197; Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533 (1997).

<sup>84</sup> Scholars who oppose criminalization of victimless acts, such as consensual sexual relations, object to criminalizing such conduct on the ground that it does not cause societal harm. See generally PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965) (arguing against the legal regulation of morality); H.L.A. HART, *LAW, LIBERTY, AND MORALITY* (1963). See also HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 267 (1968); Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157 (1967). For a current formulation and critique of the use of the harm principle in the context of sexual conduct, see generally Bernard Harcourt, *The Collapse of the Harm Principle*, 90 J. OF CRIM. LAW & CRIMINOLOGY 109 (1999).

<sup>85</sup> The debate over inchoate conduct centers on whether it should be punished as a completed crime when, by definition, the act produced no harm. See ROBINSON, *CRIMINAL LAW*, *supra* note 74, at § V.1 (imposing liability in the absence of harm is consistent with general and specific deterrence, incapacitation, rehabilitation, educative function of law, and just desert); Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1606-07 (1974) (concluding instrumental value of harm does not justify punishing attempt less harshly than completed crime).

The community consensus that immoral but harmless attempts should be punished less harshly than acts that result in palpable harm has largely prevailed over the views of theorists. ROBINSON, *supra* note 74, at § V.2 (noting majority of states rejected Model Penal Code provision that generally punishes attempt as a completed crime).

<sup>86</sup> Opponents of criminal sanctions in these circumstances argue that without criminal culpability the actor does not deserve punishment, even when harm results. See HALL, *supra* note 75, at 9; Green, *supra* note 83, at 1548, n.30 (noting the near-unanimity of opinion against strict liability offenses); Hart, *supra* note 83, at 417-25 (arguing against imposing punishment for negligent acts and for strict liability offenses).

<sup>87</sup> See HALL, *supra* note 75, at 304 (noting existence of mixed theories and quoting Asquith, *The Problem of Punishment*, THE LISTENER, May 11, 1950, at 821 (published by the British Broadcasting Company) (stating that there must be an element of retribution or expiation in punishment; but if enough retribution is present the punishment may be given the shape that is most likely to deter and reform)); H.L.A. HART, *supra* note 70, at 3-13 (1968) (explaining that consequentialist theory supports imposition of punishment generally and retributivist theory justifies the allocation of punishment); PACKER, *supra* note 84, at 264-66 (concluding criminal sanction should be limited to conduct generally viewed as immoral, but that immorality is not a sufficient condition). Cf. Weinreb, *supra* note 71, at 48-49 (critiquing composite theories).

For more current formulations, see Robinson & Darley, *supra* note 69, at 494 (using utilitarian principles to argue for desert-based criminal law); Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 U.C.L.A. L. REV. 266, 266-67 (1975) (pointing out that a harm requirement is consistent

utilitarian scholars agree that criminal liability is only appropriate when conduct is unjustified and the actor is culpable.<sup>89</sup> Similarly, harm-based retributivists rely on the harm principle to limit the use of criminal law, to explain why all immoral acts are not criminal, to rank blameworthy conduct, and to apportion punishment.<sup>90</sup>

Ultimately, the constructs of morality and harm reinforce one another. This insight underlies the work of Paul Robinson, who argues that retribution's desert theory reinforces consequentialist goals by strengthening the moral credibility of criminal law and thus compliance and deterrence.<sup>91</sup> Similarly, Joel Feinberg's conception of harm as the justification for criminal laws incorporates a notion of morality; in his view, only *wrongful* harms justify criminal treatment.<sup>92</sup>

In sum, however one parses the concepts of harm and morality, a decision to criminalize conduct that was previously subject only to civil remedies depends on identifying some component of harmfulness or immorality. Taking up that task, the following sections analyze the harm and moral content of copyright infringement.

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with both deterrence theory and retributive theory).

<sup>88</sup> See HALL, *supra* note 75, at 304-09 (explaining inclusive theory); Weinreb, *supra* note 71, at 79 (stating that, standing alone, neither justification for punishment is entirely satisfactory).

<sup>89</sup> See Arenella, *supra* note 74, at 1531 (explaining that most utilitarian scholars “defend some version of a moral responsibility for culpable conduct requirement”).

<sup>90</sup> See HALL, *supra* note 75, at 20 (suggesting that an immoral act is not criminal unless it causes external societal harm).

<sup>91</sup> See Robinson & Darley, *supra* note 69, at 454-55 (arguing that while the “underlying rationales” of the consequentialist and retributivist views are probably irreconcilable, “their practical applications...suggest similar distributions of liability and punishment”).

<sup>92</sup> See JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 35, 109 (1984) (stating that a harmful intrusion is not wrong if the victim has no right to the contested interest or to having others respect that interest and that injurious conduct is not harmful in the absence of wrongdoing). Cf. Hurd, *supra* note 73, at 210-13 (pointing out that Feinberg conflates harm and wrongdoing).

### III. The Harm of Infringing a Copyright

The need to prevent future harm, or deterrence, is the reason given by consequentialist theory for criminal sanctions. Consequentialist theory, however, also explicitly limits the harm justification. For instance, traditional utilitarian theory teaches that criminal sanctions are appropriate only as a last resort.<sup>93</sup> Legislators routinely ignore this principle when they automatically add criminal sanctions to civil legislation without waiting to evaluate the effect of new civil sanctions or to ascertain whether they adequately control the conduct. The DMCA, which enacted a new civil standard and, in the same stroke, imposed criminal penalties for willful violation, is an example of this congressional predilection.<sup>94</sup>

A second and important limitation is that a harm suffered by an individual must implicate some interest of the greater community.<sup>95</sup> Harm to individuals can implicate broader interests of the community in peace and public safety.<sup>96</sup> Community harm does not only derive from injuries

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<sup>93</sup> Punishment should not be inflicted “[w]here it is needless: where the mischief may be prevented, or cease of itself, without it: that is, at a cheaper rate . . . .” JEREMY BENTHAM, *An Introduction to the Principles of Morals and Legislation*, in THE UTILITARIAN 162, 166 (Dolphin Books, 1961).

<sup>94</sup> See *supra* text accompanying notes 31-39 (discussing the DMCA). A current example is the bill introduced by Senator Ernest F. Hollings (D, S.C.); the Consumer Broadband and Digital Television Promotion Act requires technology companies to develop programs enforcing copy-protection measures on pain of fines up to \$500,000 and sentences up to five years. See Rob Pegoraro, *Fast Forward: As Copyright Gets a Starring Role, We're Cast as the Villains*, WASH. POST, Mar. 31, 2002, at H6 (criticizing the Hollings bill as a kind of “technological totalitarianism”).

<sup>95</sup> See HALL, *supra* note 75, at 242-43 (stating that distinction between tort and crime is that criminalization requires social harm rather than damage to an individual); SNYDER, *supra* note 80, at 762-63 (“The government cannot make conduct a crime, unless the conduct works a public harm.”) (quoting *Lawton v. Steele*, 23 N.E. 878, 879 (N.Y. 1890) (conduct must be “to the injury of the health, morals, or welfare of the community”)).

<sup>96</sup> See *Dennis v. United States*, 341 U.S. 494, 510 (1951) (noting the difference between isolated acts and conduct that poses “a substantial threat to the safety of the community” at large); *Jackson v. United States*, 102 F. 473, 488 (D. Alaska 1900) (stating that conduct that is severely punished must be “destructive to public safety and the peace and quiet of a community”). See also ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974) (suggesting that a freedom from fear may justify criminal law); Robert W. Drane & David J. Neal, *On Moral Justifications for the Tort/Crime Distinction*, 68 CAL. L. REV. 398, 410-13 (1980) (discussing Nozick's justification for criminal laws).

suffered by individuals, however. Conduct may directly affect an interest of the community even when no individual has been injured.<sup>97</sup> This conception of community harm includes detriments to public interests embodied in government policies, such as those vindicated by environmental crimes, money laundering, and copyright infringement.<sup>98</sup> These limitations of the harm justification are considered below.

A third limit to the harm principle is that punishment is not justified unless it "excludes some greater evil."<sup>99</sup> Criminal penalties are thus not warranted when they would produce a greater harm than that to be prevented. A mere identification of a societal harm is not sufficient; one must assess the effect of criminal punishment on other interests. The following discussion applies this limitation to the new criminal copyright statutes.

In sum, three conceptions of harm are used to justify criminal sanctions: (1) an injury to the individual that (2) implicates a societal interest or (3) a direct injury to a government policy, in this case, national policy regarding intellectual property. Punishment is appropriate only after civil sanctions have failed, and even then it is necessary to first evaluate the likely effect of criminalization on other social policies.

### **A. Harm to the Copyright Holder**

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<sup>97</sup> See FEINBERG, *supra* note 92, at 11. This conception of community harm includes remote and nonspecific injuries to the greater community. Inchoate conduct, such as attempt, satisfies the harm requirement because attempts create a risk of harm, which is a community harm in and of itself. See ROBINSON, *CRIMINAL LAW*, *supra* note 74, at § V.1. Reckless endangerment statutes are based on the harm of creating risks that cause public insecurity. See also N.Y. PENAL LAW § 120.20 (McKinney 1997) (defining reckless endangerment in the second degree as conduct that creates "a substantial risk of serious physical injury to another person"); MODEL PENAL CODE § 211.1 (2001) (grading the offense of assault as a misdemeanor or petty misdemeanor).

<sup>98</sup> See *Ferguson v. City of Charleston*, 532 U.S. 67, 83 (2001) (noting that "law enforcement always serves some broader social purpose or objective").

<sup>99</sup> Since all punishment is in itself evil, it should be imposed only to exclude some greater evil. Punishment should not be inflicted "[w]here it is unprofitable; or too expensive; where the mischief it would produce would be greater than what it prevented." BENTHAM, *supra* 93, at 166.

Harm is generally defined as a disvalue, a detriment, or a set-back to a socially valuable interest.<sup>100</sup> A person or entity with an interest in copyrighted material suffers some degree of deprivation when that product is used or reproduced without authorization.<sup>101</sup> The specific claim is that copyright holders have a stake in the "well-being" of their interest in copyrighted material and are less well off when it is used without authorization or payment.<sup>102</sup> This simple statement is complicated by the limitation that an individual's loss must also result in a harm to the community.

### **1. Establishing Harm -- The Measurement Issue**

Whether harm is conceived as a loss to the copyright holder and thus the community, or a broader harm to national copyright policy, an objective estimate of economic loss is required. But identifying and appraising the economic harm caused by infringement is not a straightforward matter. Empirical evidence from the Napster phenomenon discloses causation and measurement problems that are also inherent in other types of infringement for personal use.

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<sup>100</sup> See FEINBERG, *supra* note 92, at 33 (defining harm). See also HALL, *supra* note 87, at 217 ("Harm signifies the loss of a value.").

<sup>101</sup> See FEINBERG, *supra* note 92, at 33-34 (stating that an interest is some thing in which an individual has a stake such that the person will gain or lose depending on the nature of the intrusion).

<sup>102</sup> See FEINBERG, *supra* note 92, at 34 (explaining that an interest is set back when it is in a worse condition than before it was invaded).

The recording industry reported that sales of CDs in 2001 decreased by as much as 10.3% from sales in 2000<sup>103</sup> and blamed this decline on the widespread practice of using the Internet to share music files. The estimate assumes, however, that everyone who downloaded a music file would have purchased the item, which is patently untenable. It is also not entirely clear that file sharing accounted for the entire decline in sales, market saturation and high prices almost certainly contributed to the losses.<sup>104</sup>

In addition, consumers who purchased CDs after downloading and sampling them may have offset lost sales due to filesharing. Sampling music through file sharing often increases interest in new music and stimulates purchases.<sup>105</sup> Studies show that consumers who share music files also purchase CDs; 52% of experienced file sharers reported they had increased their spending on music.<sup>106</sup> Thus, the loss of potential sales due to file sharing must be balanced

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<sup>103</sup> David Lieberman, *How dangerous are pirates? Music industry blames dying sales on copying*, USA TODAY, Apr. 5, 2002, at B1 (discussing industry executive's fears that sales will continue to fall at the hands of digital copying). The International Federation of the Phonographic Industry reported that revenue from global music sales fell only 5% in 2001. See Matt Richtel, *Access to Free Online Music Is Seen as a Boost to Sales*, N.Y. TIMES, May 6, 2002, at C6 (discussing the Jupiter report which indicates that filesharing has boosted record sales).

In contrast, the recording industry reported in February 2002 that it lost \$4.5 billion because of pirated CDs and downloaded MP3 files, about 10% of industry sales. See Alberto Enriquez, *Music Morality: New Technology Raises Questions*, ANCHORAGE DAILY NEWS, Feb. 22, 2002.

<sup>104</sup> See Lieberman, *supra* note 103 (reporting views that recent declines in sales reflect the tailing off of CD penetration, the pop boom, and the high prices of CDs). The music industry also faces competing products and activities, such as computer games, DVDs, and extensive satellite and cable programming. See Laura M. Holson, *Twilight of the CD? Not if It Can Be Reinvented*, N.Y. TIMES, Feb. 24, 2003.

<sup>105</sup> See Richtel, *supra* note 103, at C6 (reporting Jupiter study that found that "people who use file sharing networks to obtain music at no charge over the Internet are more likely to have increased their spending on music than are average online music fans").

<sup>106</sup> *Id.* (citing findings of the Jupiter report which collected data on both experienced filesharers and average Internet users). See also Matt Richtel, *Foes Hone Strategy for Web Copyright Clash*, N.Y. TIMES, June 16, 2000 (reporting that a study by the Digital Media Association stated that "50% of people who download or play music over the Internet said the activity led them to purchase music later").

The results of these studies undercut those of recording industry experts who testified that 22% of file sharers did not buy more music. *Id.* See *A&M Records, Inc., v. Napster, Inc.*, 239 F.3d 1004, 1016-17 (9th Cir. 2001) (upholding district court's acceptance of recording industry experts' testimony that online file sharing had resulted in a loss of sales within college markets).

against the gain in sales that occurred because of filesharing.<sup>107</sup> Estimates of losses to other types of copyrighted material share these problems of identifying and quantifying the harm of infringement for personal use, both of which stem from an overbroad premise and a tendency to ignore other explanations.

## **2. Harms to the Copyright Holder from Competitors and Consumers**

As previously noted, the criminal copyright provisions no longer distinguish between harm caused by competitors and those acting for commercial gain, and by personal use of protected material. Nevertheless, the injuries are not entirely the same and they implicate different societal goals.

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<sup>107</sup> Note that the harm analysis is different from the issue of whether sampling is fair use. *Napster*, 239 F.3d at 1118 (stating that the positive impact of file sharing on CD sales does not deprive the copyright holder of the right to develop the digital download market).

Deterring harm by competitors and commercial facilitators is consistent with the rationale of copyright law, which functions to protect the market positions of copyright holders.<sup>108</sup> Competitive losses to creators and their licensees can be significant, as can the losses imposed by those who facilitate infringement by others. Moreover, a fair approximation of the economic harm caused by competitors can be traced to them; there is a rough congruence between the holder's loss and their gain. Indeed, common law doctrines of misappropriation and unfair competition reflect the debilitating effect of competitive harm.<sup>109</sup>

In contrast, the harm from noncompetitive infringement by individuals who copy material for personal use does not directly threaten a market position. The harm imposed by infringement for personal use is profit that would have been generated from a sale of the object that was copied. But as noted, this claim of lost profit is not definitive, largely because it assumes the user would have purchased the object.<sup>110</sup> Even accepting the assertion of lost sales, the injury caused by any individual user is slight,<sup>111</sup> especially when compared with total revenues or lost profits.<sup>112</sup> Finally, unlike competitive infringement, the total harm cause by

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<sup>108</sup> See *supra* text accompanying notes 79-82.

<sup>109</sup> See *International News Service v. Associated Press*, 248 U.S. 215 (1918).

<sup>110</sup> See *supra* text accompanying notes 104-105.

<sup>111</sup> Under the criminal copyright provision, infringement exists if the copied material exceeds \$1000 in retail value. Retail value does not translate to profit, however, as costs must be subtracted from sales. Assuming a generous 10% profit, the real loss to a copyright holder of \$1000 in retail value – which subjects the infringer to penal sanctions – is \$100.

<sup>112</sup> According to one source, “creative” industries (publishing, software, TV and radio, design, etc.) produced \$960 billion in annual revenue in 1999. See RICHARD L. FLORIDA, *THE RISE OF THE CREATIVE CLASS: AND HOW IT'S TRANSFORMING WORK, LEISURE, COMMUNITY AND EVERYDAY LIFE* 46, Table 3.1 (2002) (citing JOHN HOWKINS, *THE CREATIVE ECONOMY: HOW PEOPLE MAKE MONEY FROM IDEAS* 116 (2001)). Music distributors estimate the loss due to pirating and downloading at \$4.5 billion. See Alberto Enriquez, *Music Morality: New Technology Raises Questions*, ANCHORAGE DAILY NEWS, Feb. 22, 2002.

personal use does not accrue to the individual infringer. What is actually at issue -- the real harm -- is an accumulated or total loss from many small infringements by many individuals.

The issue of accumulated harm raises a related problem, how to punish an individual infringer. That problem, one of imputing the copyright holders' loss to the individual's conduct, implicates the criminal law doctrine that punishment be roughly proportional to the harm.<sup>113</sup> This proportionality doctrine argues against subjecting infringers who cause slight harm to criminal sanctions or for imposing light penalties.

In this sense, infringing for personal use is somewhat analogous to shoplifting, which also deprives the victim of income. The harm that the store seeks to avoid is the total harm from many acts of shoplifting. In both situations, the infringer/shoplifter cannot control the other actors who contribute to the accumulated injury. This may be why shoplifting, where similar acts of large numbers of offenders cause an aggregate economic injury, is not considered a serious offense.<sup>115</sup> In the shoplifting case, the harm is a certain lost sale because when the item

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<sup>113</sup> See *supra* text accompanying notes 71-78 (discussing retribution theory). The problem of punishing accumulated harm that is not proportional to the harm actually imposed may also implicate consequentialist theory. Disproportional punishment ignores a limiting utilitarian principle, namely that punishment is not appropriate when it would produce greater mischief than that prevented. See *supra* note 93 (quoting Bentham).

<sup>115</sup> See ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 65 (1985) (discussing the non-serious nature of shoplifting despite the high numbers of people that shoplift). The parallels to personal use infringement are striking. Retailers lose nearly \$10 billion a year to shoplifters, shoplifters strike one million or more times a day, shoplifters commonly steal \$2 to \$200 in merchandise per incident, and 58% of all shoplifters are 24 or younger. See Marty Racine, *Five-Finger Discount*, HOUSTON CHRON., Nov. 8, 2001, at A1.

States deal with shoplifting in various ways, taking into account the value of the merchandise and whether the conduct is a first offense. For instance, Pennsylvania grades the offense of retail theft according to the value of the merchandise and whether it is first, second, or third offense. See 18 PA. CONS. STAT. ANN. § 3929 (2003). In Texas, if the value of the property stolen is between \$500 and \$1500, the sentence is a fine not to exceed \$4,000 and a jail term not to exceed one year. See TEX. PENAL CODE §§ 12.21, 31.03 (2003). Wisconsin punishes retail theft of merchandise valued at under \$2,500 as a Class A misdemeanor. See WIS. STAT. ANN. § 943.50 (2003). In California, a first conviction for theft of retail merchandise worth \$50 or less is subject to a fine of at least \$50 and a prison term not to exceed six months. See CAL. PENAL CODE § 490.5 (2003). Petty theft may be charged as an infraction and is not punishable by imprisonment. *Id.* at § 490.1. Massachusetts, however, authorizes imprisonment for up to two and one half years when retail value is over \$100). MASS. GEN. LAWS ANN. Ch. 266, § 30A (2003).

is taken, the store cannot sell the object to another person. In contrast, harm to the copyright holder is much less certain because the copyright holder retains the ability to sell the information product. But even if infringement was treated as a less serious offense, the issue of determining what harmful conduct should be prohibited remains problematic when each individual's conduct causes only minimal economic harm. The inability to identify substantial harm from infringement for personal use when the injury is an accumulated loss makes relying on individual harm to justify criminalizing infringement somewhat problematic.

In sum, the harm to a copyright holder from personal noncommercial use is difficult to impute, hard to measure, and may not be significant. For all those reasons, the conception of harm as an individual injury may not justify criminal treatment for personal use. Even assuming that it does, a second step in the harm analysis must be satisfied - harm to the copyright holder must redound to the community as a whole. Thus crimes of theft that injure individuals are generally said also to injure the community's interest in peace and security. If a stronger or more cunning person may take a neighbor's cow, others may be fearful about their own cows. In contrast, if someone copies a poem without permission, the copyright holder is not deprived of the poem and, indeed, may continue to offer it to other readers. This distinction between physical and intangible objects reduces the force of the generalized insecurity conception of community harm. On the other hand, if authors are unable to recoup their investment because of personal use infringements, there might be a direct harm to the national copyright policy.

### **B. Direct Harm to the National Copyright Policy**

Criminal sanctions are also appropriate when a community interest is harmed directly;

this conception of harm does not require actual harm to individuals.<sup>116</sup> One of the rationales for copyright effectively defines this type of harm. The community interest at stake is a national policy of encouraging the creation of works of original expression.<sup>117</sup> The law provides rights to authors in order to encourage the creation of new material, and unauthorized use of copyrighted material by consumers may undermine that policy. If original expression can be used without authorization or payment, then no one may bother to produce it. Criminal sanctions are one way of ensuring that authors and creators may profit from their investment, thus achieving the policy objective.

### 1. The Incentive to Create

The harm to copyright policy hinges on a theory of incentives. To wit, authors will not create new material unless they have an economic incentive to do so. Because information is intangible the market alone will not provide that incentive; hence the need for legal protection.<sup>118</sup> Technological change, however, suggests it is time to revisit this theory. It may no longer be necessary to rely so heavily on law to provide an incentive to create. 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

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<sup>116</sup> See *supra* text accompanying notes 80 (discussing direct harm to community interest).

<sup>117</sup> See *supra* text accompanying notes 60 (discussing copyright rationale).

<sup>118</sup> Copyright law fails to distinguish those products for which the market would provide an incentive. The incentive rationale does not support the protection of material that would have been produced even without legal protection (software and telephone directories come to mind). See Geraldine Szott Moohr, *The Problematic Role of Criminal Law in Regulating Use of Information: The Case of the Economic Espionage Act*, 80 N.C. L. REV. 853, n.318 (2002) (noting studies by economists into the effects of patent law).

companies may decrease costs to consumers.<sup>119</sup>

Again, the Napster phenomenon is instructive. Although some musicians condemn file sharing on the ground that it deprives them of income,<sup>120</sup> others welcome it as a way to regain control over their work.<sup>121</sup> Technology has already challenged the way music is distributed,<sup>122</sup> and it promises to similarly affect other industries.<sup>123</sup> Direct distribution of creative work over

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<sup>119</sup> Steven King sold a novel in installments over the Internet expressly to avoid sharing profits with his publisher. See David D. Kirkpatrick, *Stephen King Sows Dread in Publishers With His Latest E-Tale*, N.Y. TIMES, July 24, 2000, at C1 (reporting also that King would stop writing unless 75% of those who downloaded the story submitted payment). The effort was successful and a second book is planned. See also Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 310 (2002) (suggesting that musicians could adapt King's "ransom model" of selling over the Internet).

Emerging musicians are benefiting from using the Internet to sell their music. See Teresa Wiltz, *Man Vs. Music Machine*, WASH. POST, June 13, 2000, at C1, C2 (reporting that one musician charges \$10 per CD over the Internet, netting about \$7.50, while if he signed with a major record label, he would net only about 56 cents per CD).<sup>120</sup> See Steven Levy et al., *The Noisy War Over Napster*, NEWSWEEK, June 5, 2000, at 46 (quoting a music manager who considers the file sharing movement sparked by Napster to be "thuggery"); Mike Stoller, *Songs That Won't Be Written*, N.Y. TIMES, Oct. 7, 2000, at A19 (noting importance of receiving royalties to his songwriting career); Teresa Wiltz, *Man Vs. Music Machine; Chuck D is a Revolutionary in the Free-For-All Over Plucking Songs Off the Internet*, WASH. POST, June 13, 2000, at C1 (reporting that Dr. Dre, Metallica, Eminem, and Madonna oppose file sharing).

<sup>121</sup> See Teresa Wiltz, *Man Vs. Music Machine*, WASH. POST, June 13, 2000, at C1 (reporting that some musicians, among them Chuck D and John Perry Barlow of the Grateful Dead, welcome file sharing because they believe that it will reinvigorate the music business). See also Chuck D, *'Free' Music Can Free the Artist*, N.Y. TIMES, April 29, 2000, at A25 (advocating file sharing in part because it is a promotional tool and stating that the structure of industry distribution hurts artist more than people trading songs). Relations between musicians and the recording industry seems particularly acrimonious, in part because even very popular musicians receive only a fraction of their total income from recordings. See Ku, *supra* note 118, at 306-07 (noting that musicians rarely earn royalties from the sale of CDs and are often indebted to the recording industry).

<sup>122</sup> See Clay Shirky, *Freedom, One Song at a Time*, N.Y. TIMES, July 15, 2000, at A27 (noting that new software frees consumers from the industry's ten track format by delivering one song at a time); *supra* text accompanying note 118 (noting efforts of musicians to sell music directly to consumers); *infra* text accompanying note 177 (noting recording industry effort to offer subscription and fee-based music downloads). See also Ann Powers, *Artists Take a Serious Look at the Business of Music*, N.Y. TIMES, Jan. 16, 2001, at B1 (reporting Senator Hatch's opposition to the control over new, wide distribution channels by those who have controlled the old, narrower channels).

<sup>123</sup> Consider that libraries have the capability to lend digitized version of books directly to patrons' computers. See David D. Kirkpatrick, *Publishers and Libraries Square Off Over Free Online Access to Books*, N.Y. TIMES, June 17, 2002, at C7 (reporting that lending via remote access to digitized books has alarmed publishers).

College courses can be delivered over the Internet. See Georgia Holmes & Daniel A. Levin, *Who Owns Course Materials Prepared by a Teacher or Professor? The Application of Copyright Law to Teaching Materials in the Internet Age*, 2000 BYU EDUC. & L.J. 165 (2000) (discussing the copyright implications of posting course materials on a university website); Jacques Steinberg, *Boola, Boola, E-Commerce Comes to the Quad*, N.Y. TIMES, Feb. 13, 2000, at WK1 (reporting on potential income from Internet education firms). See also Eric A. Taub, *You*

the Internet could stimulate innovators to create more, not less, material, and make legal prohibitions less important in the artist's calculation. Technology and market forces may thus provide an incentive to create, making it unnecessary to rely so heavily on legal devices, such as criminal copyright laws, to motivate innovation.

Moreover, the innovation argument itself argues against the enhanced protection of criminalization. Economic theory demonstrates that even civil protection of copyrights can make future innovation more difficult and expensive.<sup>124</sup> Adding criminal penalties to enhanced civil protection similarly increases the possibility of a decline in innovation;<sup>125</sup> the threat of criminal sanctions can influence law-abiding citizens to refrain from engaging even in legal conduct.<sup>126</sup> Fear of criminal penalties may inhibit second-generation creators from working with material they believe may be off-limits – even when such use is not in fact unlawful.<sup>127</sup> Those

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*Oughta Be In Print*, N.Y. TIMES, Oct. 17, 2000, at C1 (recounting experiences of authors who publish with firms offering digital services).

<sup>124</sup> See William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. Legal Stud. 325, 332 (1989) (explaining the paradoxical result that strong rights in existing works can decrease the quantity of new work and increase the cost of producing it).

Less protection may result in less expensive use of information by second-generation users. See *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 354 (1991) (noting that copyright is designed to prevent duplicative efforts, thus encouraging more efficient production); Edmund W. Kitch, *The Law and Economics of Rights in Valuable Information*, 9 J. LEGAL STUD. 683, 709 (1980).

<sup>125</sup> See Geraldine Szott Moohr, *Federal Criminal Law and the Development of Property Rights in Information*, 2000 U. Ill. L. Rev. 683, 727 (2000) (discussing the consequences of criminalization on innovation); Moohr, *supra* note 117, at 910-15 (discussing the likelihood of diminished innovation as a result of criminalizing misappropriation of trade secrets).

<sup>126</sup> See PACKER, *supra* note 84, at 68 (noting the desire of law-abiding citizens to avoid involvement with the criminal justice system). See generally 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 (2000).

<sup>127</sup> See Moohr, *supra* note 118, at 905, 910 (discussing over-deterrence in the context of trade secrets); Moohr, *supra* note 125, at 730 (discussing over-deterrence in the context of business information).

who create new knowledge and information products inevitably build on the work of others,<sup>128</sup> so chilling lawful use of copyrighted material could decrease rather than increase production of new work.

Criminal enforcement of interests in information may also negatively influence innovation in another way. Economic studies show that consumers are often better innovators than original producers, largely because they use the products.<sup>129</sup> Yet the DMCA, and to a lesser extent the criminal infringement law, discourages consumers from tinkering with products, even those they own.<sup>130</sup> Treating code-breaking and unauthorized use as criminal may impede consumer innovation as it effectively bars entrants from new markets.<sup>131</sup> In sum, the goal of

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<sup>128</sup> See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989) (stating that “imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy”). See also Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutory Impulse*, 78 VA. L. REV. 149, 167-68 (1992) (noting that the synergy of intellectual life depends on a vibrant public domain of work available for use by others); Landes & Posner, *supra* note 123, at 332 (“Creating a new work typically involves borrowing or building on material from a prior body of works . . .”).

Innovation comes in many forms; for instance, new music sometimes utilizes previous recordings. See Shaun Assael, *Bluegrass's New-Age Hootenanny*, N.Y. TIMES, June 30, 2002, at Wk5 (recounting the release of a new album that sets Pink Floyd’s “The Wall” (hard rock) to a bluegrass beat); Hal R. Varian, *Economic Scene: New Chips Can Keep a Tight Rein on Consumers, Even After They Buy a Product*, N.Y. TIMES, July 4, 2002, at C2 (recounting remixing of an Elvis Presley single that produced a “fresh new sound”).

<sup>129</sup> See Varian, *supra* note 127, at C2 (summarizing the study of Professor Eric von Hippel of MIT documenting the importance of “user innovation”).

<sup>130</sup> See Amy Harmon, *Pondering Value of Copyright vs. Innovation*, N.Y. TIMES, Mar. 3, 2003, at C2 (recounting concern that digital locks interfere with a “tradition in which innovators figure out how a competitor’s product works by taking it apart”).

<sup>131</sup> Licensing arrangements are not apt to avoid this result because negotiations are unlikely to result in agreement. See Varian, *supra* note 127 (explaining that relative bargaining positions prevent resolution through negotiation). Approaching the rights’ holder before experimenting is not an option because holders would have no basis on which to choose one user-innovator over another. *Id.* Innovators need to experiment before they begin to bargain over a license with the copyright holder. Once they have made that investment in innovation, however, their bargaining power vis-à-vis the copyright holder is reduced. Copyright holders, who “hold all the cards,” are likely to set licensing fees too high, reducing the incentive for user innovation in the first place. *Id.*

Moreover, if the industries supplying the products are not very competitive, like the software, music and video markets, controlling after-purchase behavior can be “used to extend a monopoly from one market to another.” See *id.* (concluding that “[t]oo much control can be a bad thing, particularly when innovation is a critical source of competitive advantage”).

encouraging creative expression leads to skepticism about the desirability of criminal sanctions.

## 2. The Policy of Maintaining Public Access

The copyright rationale imposes another internal constraint that cautions against aggressive measures, such as criminal sanctions, to protect the interests of copyright holders. The constraint is that copyright policy specifically encompasses another, at least equally important, purpose: maintaining effective use of information by limiting the rights of holders and by safeguarding a public domain of knowledge that is free for all to use.<sup>132</sup> Copyright policy thus differs from other national interests that support criminal sanctions, such as the interest in the integrity of securities markets that justifies treating securities fraud and insider trading as crimes.<sup>133</sup> The two prongs of copyright policy mean that legislators must balance goals, rather than pursue a single objective.

The harm rationale supports criminalization of consumer infringement only when the community benefits more than it would if information were free for all to use.<sup>134</sup> At a minimum, the limitation requires accounting for the negative effect of criminalization on the second policy of copyright law, to maintain effective public access to information.<sup>135</sup> Yet in their effort to encourage innovation, legislators seem to have overlooked the second prong of the policy, to encourage effective use of knowledge.<sup>136</sup> Nevertheless, the two-pronged policy of encouraging

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<sup>132</sup> See *supra* text accompanying notes 61-63.

<sup>133</sup> See *United States v. O'Hagan*, 521 U.S. 642, 653 (1997) (discussing criminal liability under the Security Exchange Act of 1934 and the need to protect “the integrity of the securities markets”).

<sup>134</sup> See *supra* text accompanying notes 99.

<sup>135</sup> This endeavor appears no more speculative than the prediction that infringement for personal use will discourage creative efforts.

<sup>136</sup> See Gordon, *On Owning Information*, *supra* note 128, at 151-53 (noting the reversal of a long-standing policy of

innovation *and* maintaining effective access argues against over-emphasizing the need to encourage innovation. Given these considerations, it seems almost perverse to use criminal laws like the DMCA to narrow public use of information products at a time when the potential for access has never been more promising.<sup>137</sup>

### 3. An Accumulative Harm to the National Interest in Copyright

The injury from personal use of copyrighted material is, as mentioned earlier, an accumulative harm. Accumulative harm is even more pertinent when the issue is direct harm (or, more accurately, the risk of harm) to the governmental policy objective of encouraging innovation. In considering the issue of accumulated harm to a government policy, Joel Feinberg concluded that the harm principle does not always warrant a simple criminal prohibition.<sup>138</sup> He suggests that when harm to a public policy is caused by the unconnected acts of many people, it is infeasible to impute the harm to individuals. In this situation, Feinberg noted the impossibility of formulating a criminal statute that avoids vacuousness, arbitrariness, and legislative overkill. Feinberg therefore concluded that accumulative harm justifies a governmental scheme of regulation, which can set objective standards for wrongful conduct. The role of criminal law is

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protecting the public's interest in the efficient use of property); Landes & Posner, *supra* note 123, at 326 ("Striking the correct balance between [public] access and incentives [to create new works] is the central problem in copyright law.").

<sup>137</sup> See, e.g., David F. Gallagher, *New Economy; A copyright dispute with the Church of Scientology is forcing Google to do some creative linking*, N.Y. TIMES, Apr. 22, 2002, at C4 (reporting that civil and criminal provisions of the DMCA interfere with linking between websites, making the Web less effective in making information available).

<sup>138</sup> FEINBERG, *supra* note 92, at 229 (providing example of air pollution). Feinberg outlined five characteristics that identify an accumulative harm to a public interest. First, an undesired threshold that diminishes the policy is reached by joint and successive contributions of numerous parties. Second, the contributions to that threshold by individuals are uneven and unequal. Third, each contribution is "harmless" in itself, except that it moves the whole closer to that undesired threshold. Fourth, when that threshold is reached, a public harm to the community results. Finally, most of the activities that produce the contributions are beneficial to the public so that total prevention would also cause public harm. *Id.*

then limited to serving as a back-up sanction that aids the state in enforcing the regulations.<sup>139</sup>

Peter Alldridge has relied on Feinberg's framework in his analysis of a similar criminal prohibition, money laundering. This crime is analogous to criminal infringement because it is also justified by an accumulated harm to a social policy.<sup>140</sup> The community harm of concealing illegal gains is an increased risk of economic dislocation or of inefficient financial markets.<sup>141</sup> Alldridge concluded that the leap from identifying this harm to attributing it to a single actor is unacceptable because the causal contribution of any individual to these risks will almost necessarily be very small.<sup>142</sup> Alldridge concluded that harm is not a basis for criminalization absent proof that individual actors actually and materially increase the risk of economic dislocation.<sup>143</sup> Criminalizing noncompetitive infringement embodies a similar attenuated connection between personal unauthorized use and the risk of a decrease in creative production.

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<sup>139</sup> *Id.* This resolution is not ideal. Administrators of regulatory schemes can impose civil penalties that are tantamount to criminal sanctions. See Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991) (discussing "the constitutional dangers posed by hybrid criminal-civil proceedings"); Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679 (1999) (criticizing the Supreme Court's approach of definitively labeling a proceeding as either civil or criminal and proposing alternate conceptualizations); Kenneth Mann, *Punitive Civil Sanctions: The Middle Ground Between Criminal and Civil Law*, 101 YALE L.J. 1795 (1992) (discussing the use of punitive damages in civil settings and concluding that "the existing framework of punitive civil monetary sanctions must be criticized not only for inadequate procedural protections it provides for defendants, but also for the inadequate severity of the sanctions allowed"); Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775 (1997).

<sup>140</sup> Peter Alldridge, *The Moral Limits of the Crime of Money Laundering*, 5 BUFF. CRIM. L. REV. 279 (2001) (relying in part on Feinberg's analysis to conclude that harm to be prevented by money laundering does not justify criminal penalties).

<sup>141</sup> See *id.* at 302-15 (identifying the harm of money laundering).

<sup>142</sup> See *id.* at 317 (distinguishing between the identification of a harmful phenomenon and its attribution to a single perpetrator).

<sup>143</sup> *Id.* ("If the harm, which is being ascribed to the defendant for the purposes of the imposition of serious punishment is that of creating or increasing a risk of the occurrence of the consequences set out in the direct prediction of the effect of laundering, then, without some proof that the defendant did materially increase that danger, there is no harm and no basis for punishment.").

The harm principle, however, requires evidence that personal use infringement materially increases the likelihood that innovation will decline.

In sum, criminal copyright law is not unequivocally justified by the need to prevent harm. First, it is hard to find the harm, especially from personal use. When harm is conceived as a loss to the copyright holder, identification and measurement of economic loss obscures the extent of the injury. This problem is especially pertinent to personal use of copyrighted material, which on an individual basis imposes far less serious harm than competitive, commercial infringement. Alternately, when harm is conceived as a direct harm to a national interest, the result is also dubious. Copyright policy encompasses balancing two rather contradictory goals. Protecting holders' interests through criminal law may unduly diminish the public's interest in access to protected material. Finally, the accumulative harm of many small infringements, whether to the individual copyright holder or to the government policy, raises rather than assuages doubts about criminalizing noncompetitive, noncommercial infringement.

#### **IV. The Moral Content of Infringement**

The second reason for treating conduct as a crime stems from the retributivist theory that violators are worthy of blame when their conduct breaches a moral norm and they have chosen to engage in it. This justification for criminalization requires an inquiry into the moral content of infringement.

As commonly understood, the terms "moral" and "immoral" connote conduct that is good or bad, right or wrong. Moral conduct accords with standards and precepts of goodness or with established codes of behavior.<sup>144</sup> Accordingly, the morality of conduct is measured against

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<sup>144</sup> "Moral" is defined: "of or concerned with the judgment of the goodness or badness of human action and

generally accepted standards that govern an individual's interactions with others.

Criminal theorists corroborate this common understanding, explaining that the wrongfulness of an act is determined by "primary norms of morality."<sup>145</sup> Whether those norms emanate from abstract conceptions of what is good or from more concrete evaluations of harm and culpability, norms direct the behavior of individuals within the community. A criminal law expresses community norms and the community's condemnation when those values are breached. A consideration of the moral content of conduct necessarily takes community norms – in this case about using copyrighted material without permission – into account.

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character . . . Arising from conscience or the sense of right and wrong.” The American Heritage Dictionary of the English Language (1971).

Ethical behavior also accords with accepted principles of right and wrong. *See id.* (“Ethics” is the study of the general nature of morals and specific moral choices to be made by individuals in relationships with others. An “ethic” is a principle of right or good conduct.). Unethical professional conduct is not necessarily immoral; the rules that govern a profession may connote a less rigorous standard of conduct and are often aspirational. *Id.* (“Ethical . . . stresses . . . essentially idealistic standards of right or wrong, especially those applicable to the practices of lawyers, doctors, and businessmen.”). This connotation has some bearing on the intuition that conduct considered wrong in the business realm might not be so considered by the general public.

<sup>145</sup> Moore, *Prima Facie Moral Culpability*, *supra* note 71, at 319 (discussing moral culpability and pointing out that “primary norms of morality . . . tell us what it is wrong to do”).

Viewing infringement as an immoral act and relying on that view to treat it as a crime seems like an easy case. Competitors and commercial enterprises that facilitate infringement seek to enrich themselves without regard for the economic interests of copyright holders.<sup>146</sup> Some competitors, like the dueling newspapers in *International News*, may be found to have duties to one another because of their competitive relationship,<sup>147</sup> and infringing one another's copyrights violates that duty. Moreover, predatory, competitive infringement violates established standards of business ethics.<sup>148</sup>

Infringement for personal use may also reflect a selfish motivation that injures copyright holders. Personal use infringement deprives the copyright holder of legal rights, and, even when the injury is minimal, it operates as a cheat on the holder. Those who act with knowledge that the work is protected are culpable and thus blameworthy. At the very least, a person who violates a criminal statute has disobeyed the sovereign.<sup>150</sup>

Yet doubt lingers about criminalizing both competitive and personal use infringement. All competition is not unethical, and not every immoral act is illegal.<sup>151</sup> Vindication of wrongful conduct is often limited to civil remedies, and in the case of some injuries, there may be no

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<sup>146</sup> See Gordon, *supra* note 128, at 167-68 (discussing unjust enrichment in context of intellectual property).

<sup>147</sup> *Int'l News Serv. v. Assoc. Press*, 248 U.S. 215, 235-36 (1918) (stating that each competitor had a duty to conduct its business in a way that did not unnecessarily or unfairly injure that of the other).

<sup>148</sup> See *DuPont v. Christopher*, 431 F.2d 1012, 1016 (5th Cir. 1970) (“[O]ur devotion to free wheeling industrial competition must not force us into accepting the law of the jungle as the standard of morality expected in our commercial relations.”); *Y'Barbo*, *supra* note 60, at 706-09 (concluding that the rationale that supports misappropriation doctrine applies to copyright infringement).

<sup>150</sup> Green, *Why It's a Crime*, *supra* note 83, at 1533 (identifying the moral content of a regulatory offense as disobedience).

<sup>151</sup> See Arenella, *supra* note 74, at 1520 (noting that the requirement of breach of moral norm means that the morality condition does not prohibit all undesirable states of affairs that an actor may cause).

remedy at law. In order to resolve doubt about criminalizing infringement, it is necessary to explore the issue further.<sup>152</sup>

### A. The Immorality of Taking Property

Infringement is sometimes presented as immoral because it is like stealing; infringement is then per se immoral.<sup>153</sup> The reasoning is that the material protected by the copyright is a kind of property.<sup>154</sup> A more sophisticated version notes that copyright confers certain rights in a created object. Notwithstanding the intangible nature of that object, the holder's rights are seen as equivalent to rights that attach to a physical object. In either case, treating information as if it were the same as physical property allows lawmakers and copyright holders to equate infringement with theft.

This reasoning, while rhetorically effective,<sup>155</sup> ignores several realities about infringement and intellectual property. First, the copyright statute explicitly disavows the notion

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<sup>152</sup> See *id.* at 1521 (noting that one could ask whether the conduct proscribed by some less serious malum in se crimes actually constitute a breach of some independent moral norm).

<sup>153</sup> See, e.g., *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 442 (2d Cir. 2001) (noting that “the excitement of ready access to untold quantities of information has blurred in some minds the fact that *taking what is not yours and not freely offered to you is stealing*” (quoting *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000)) (emphasis added)).

<sup>154</sup> See INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 205 (1995) (suggesting that children can be taught that a copyright is property because they know that a jacket, a ball, or a pencil is “mine” or “not mine”).

Legislators considering the NET explicitly equated intellectual property with physical property. See 143 Cong. Rec. S12, 689-S12, 691 (1997) (statement by Sen. Leahy) (“Just as we will not tolerate the theft of software, CD’s, books, or movie cassettes from a store, so will we not permit the stealing of intellectual property over the Internet.”); 143 Cong. Rec. H0993 (daily ed. Nov. 4, 1997) (statement of Rep. Coble) (“intellectual property rights are no less deserving of protection than personal or real property rights”).

<sup>155</sup> One must acknowledge the power of the property analogy as a rhetorical device. Proponents of increased protection of copyrighted material have successfully shifted the debate from a consideration of limited interests defined by statute -- which are by definition defeasible -- to a natural law view of creative expression -- which is not readily defeasible.

that the protected material is property.<sup>156</sup> Second, viewing the copyright itself as property fails to acknowledge that the rights provided by copyright law are limited in significant ways.<sup>157</sup> Third, the property claim does not explain why patent infringement is not a crime, when patents have a far stronger claim to property status.<sup>158</sup> This example from the world of intellectual property illustrates that all property is subject to limits of one sort or another, and every property-like right that is subject to civil law is not subject to criminal law. Fourth, and most significantly, recourse to the property argument is circular: it assumes what is at issue, which is whether the taking is immoral (or harmful) and therefore subject to criminal treatment.

### **B. Community Norms About Copyright Infringement**

Empirical and anecdotal evidence indicate that a substantial number of people do not view unauthorized use of copyrighted material for personal use as immoral.<sup>1</sup> Data regarding sharing music via the Internet is particularly telling. As noted, willfully copying copyrighted

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<sup>156</sup> 17 U.S.C. § 202 (2000). See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263-64 (11<sup>th</sup> Cir. 2001) (stating that the author never owns the work itself).

<sup>157</sup> See *Dowling v. United States*, 473 U.S. 207, 216-17 (1985) (stating that “[t]he copyright owner, however, holds no ordinary chattel. . . . A copyright . . . comprises a series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protections”); *United States v. Riggs*, 739 F. Supp. 414, 422-23 (N.D. Ill. 1990) (stating that “the copyright holder owns only a bundle of intangible rights which can be infringed, but not stolen or converted” (citing *Dowling*, 473 U.S. 207; *United States v. Smith*, 686 F.2d 234 (5<sup>th</sup> Cir. 1982))); *supra* text accompanying notes 61-63.

<sup>158</sup> Unlike copyright, patent law provides a right against any use, even when the invention was independently created. 35 U.S.C. § 154(a)(1)-(2) (2000) (granting patent holders the right to exclude others from making, using, selling, or importing the product or process and providing that right of exclusivity ends twenty years after the date of application); Miguel Deutch, *The Property Concept of Trade Secrets in Anglo-American law: An Ongoing Debate*, 31 U. RICH. L. REV. 313, 329 (1997) (contrasting trade secrets with patents and indicating that in “contrast to a patent, the owner of a trade secret does not acquire a monopoly on the information”).

<sup>1</sup> See Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT’L L. & POL., 219, 226 (1997) (noting the lack of public feeling about the wrongfulness of breaking intellectual property laws).

material with a threshold retail value of \$1000 is now a felony.<sup>159</sup> Nevertheless, between 17% and 29% of adult Internet users reported downloading music.<sup>160</sup> One survey reports that "[t]he striking growth of the music downloading population occurred across virtually every demographic group and level of online experience."<sup>161</sup>

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<sup>159</sup> See discussion *supra* Part I (discussing infringement prohibited by the NET).

<sup>160</sup> Lieberman, *supra* note, at 1B (reporting a CNN/USA TODAY/Gallup Poll indicating that 17% of adults with access to the Internet have downloaded music). In February 2001, 29% of adult Internet users reported downloading music files, an increase of 7% since August of 2000. Mike Graziano & Lee Rainie, *The Music Downloading Deluge*, at <http://www.pewtrusts.com/pubs> (last visited July 16, 2003).

<sup>161</sup> Graziano & Rainie, *supra* note 158. Fifty-one percent of people between the ages of eighteen and twenty-nine and 53% of all youths between twelve and seventeen with Internet access have downloaded music files. Among boys between ages twelve and seventeen, the figure rises to almost 75%. *Id.*

Students are particularly likely to download music. A. S. Berman, *College Students Say They're Hooked on Their Campus Broadband Access*, USA TODAY, Nov. 12, 2001, at 7E (reporting survey by Webnoize that showed more than 85% of students downloaded music from the Internet before Napster went off-line). By August 2000, 34% of U.S. colleges and universities had barred access to Napster. *Id.*

Most of those surveyed do not believe that sharing music files is wrong. Surveys indicate that well over half of those polled -- 55.9% and 59% -- do not view downloading music as immoral.<sup>162</sup> Over 60% are indifferent about the legal status of the music.<sup>163</sup> Over 40% of those polled believe that downloading music through Napster and other services should be legal.<sup>164</sup>

The view that copying is not immoral is not confined to information on the Internet. The evidence on photocopying books and magazines is even more striking; over 70% reported they did not think it wrong to copy a book or magazine.<sup>165</sup> Almost 60% of those polled in one survey would consider copying computer software, and 25% do not think this conduct is wrong.<sup>166</sup>

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<sup>162</sup> Poll Suggests Home PC Users Favor Napster's Arguments, Tech Law Journal, at <http://www.techlawjournal.com> (last visited July 16, 2003) (reporting that 55.9% of those polled agree that downloading music over the Internet is harmless); John Fetto, *Penny for Your Thoughts*, AM. DEMOGRAPHICS, Sept. 2000 at 8 (reporting a survey of 1000 people by Taylor Nelson Sofres Intersearch showing that 59% did not think it is wrong to download free music online, 11% thought it was wrong, but said they would probably do it, and only 18% thought it was wrong and would not do it). See also Dick Kelsey, *Jury Pool Survey - Napster's Chances Good*, NEWSBYTES, Oct. 10, 2000 (reporting that "41.5 percent of 1,000 men and women over 18 years of age believe that taking copyrighted music off the Internet should be free if it's for personal use"); Rob Pegoraro, *As Copyright Gets a Starring Role, We're Cast as the Villains*, WASH. POST, March 3, 2002, at H6 ("Not only are many people sampling, sharing and swapping movies and music online, many don't even think they're stealing.").

Anecdotal comments are revealing. See Bruce Schwarz, *Napster Fans Scour Net to Keep on Swapping*, USA TODAY, July 27, 2000, at 1D (quoting Kevin Glackmeyer, banned from Napster after rock group Metallica identified him as illegally downloading music, as saying "I don't think I was doing anything wrong"); Alberto Enriquez, *Music Morality: New Technology Raises Questions: Is there such a thing as a free tune? Is it right to listen?*, ANCHORAGE DAILY NEWS, Feb. 22, 2002, at E1 (recounting view of a University of Washington student, "It's rather morally ambiguous whether this type of theft is wrong. . . Downloading MP3s rather than buying a CD will take a small amount of money from a large corporation, which tend to be unethical and morally degenerate institutions in themselves").

<sup>163</sup> See Graziano & Rainie, *supra* note 158 (61% of those who downloaded music said they did not care much about the copyright status of the music they retrieved).

<sup>164</sup> See Lieberman, *supra* note 103 (reporting the results of CNN/USA Today/Gallop Poll; 43% say swapping music online should be legal; less than half, 46% think it should be illegal); *Dear Congress: Leave Napster Alone*, HOUSTON CHRON., Oct. 29, 2000, at 24 (reporting that 93% of 5000 responses to survey posted by Rep. Dick Arney regarding Napster thought the government should leave Napster alone); Poll, *supra* note 161 (reporting poll by PC Data showing that 46.3% of those polled do not agree that downloading music without paying for it is a form of illegal piracy, and 45% did not support suit against Napster or think it should be shut down).

<sup>165</sup> Fetto, *supra* note 161 (reporting survey of 1000 people by Taylor Nelson Sofres Intersearch showing that only 10% thought it was wrong to copy books or magazines).

<sup>166</sup> *Id.* A survey of Belgians showed that 36% of those interviewed thought there was nothing wrong with copying

Seventy-four percent would consider copying CDs and tapes; 49% do not think it is wrong.<sup>167</sup>

Sixty-two percent would consider copying videocassettes; 35% do not think such copying is wrong.<sup>168</sup>

The views of those who participated in these surveys may simply reflect bald self-interest, and of course the surveys may not be completely reliable because of nonrandom selection and inadequate sample size. But even given those considerations, the results do not indicate the existence of a strong community norm that condemns infringement. One might ask why this is so and what it portends.

### 1. Consumer Confusion

One explanation for these results is that consumers hold mistaken views about the legality of copying information. There is some ground for believing that the public attitudes are

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software. *Illegaal Software Kopieren Niet Echt Erg [Copying Illegal Software Is Not Really Bad]*, DE STANDAARD, Nov. 4, 1998, at 19 (reporting results of a survey of 700 Belgians commissioned by the Business Software Alliance, a software trade association). Of those who believed it was wrong, 12% admitted they had copied software. *Id.* These results are interesting given Europe's natural rights approach to intellectual property products, which should reflect a robust social norm supporting creators' rights. See also John Schwartz, *Trying to Keep Young Internet Users from a Life of Piracy*, N.Y. TIMES, Dec. 25, 2001, at C1 (reporting that twenty-four percent of all business software used in the United States is pirated versus more than one-third worldwide).

<sup>167</sup> Fetto, *supra* note 161.

<sup>168</sup> Fetto, *supra* note 161; Tyler, *supra*, note 159, at 219-20 (reporting various studies finding that between 50% and 90% of all computer software use is unauthorized).

Plagiarism, or taking credit for another's work, is another manifestation of copying that also appears to be increasing. Plagiarism attained headline status when two respected professional historians, Doris Kearns Goodwin and Stephen E. Ambrose, admitted incorporating the writings of others into their books. David D. Kirkpatrick, *Historian Says Borrowing Was Wider Than Known*, N.Y. TIMES, Feb. 23, 2002, at A10 (recounting Goodwin's disclosure that she had not acknowledged "scores of quotations or close paraphrases from other authors"). Although the historians were not subject to legal action, informal sanctions followed disclosure. David D. Kirkpatrick, *Historian Leaves 'News Hour' in Midst of Furor over Book*, N.Y. TIMES, Feb. 12, 2002, at A21 (reporting that Goodwin took an indefinite leave from her role as commentator on a public television news program after reaching a "mutual agreement [with the network] that until this whole thing is resolved it makes more sense for [Goodwin] and the [program] to take a break from each other").

Plagiarism is so widespread that universities have developed software to detect it. Green, *supra* note 5, at n.81. See also Jode Wilgoren, *School Cheating Scandal Tests a Town's Values*, N.Y. TIMES, Feb. 14, 2002, at A1 (reporting on a schoolteacher's use of a plagiarism-detection website after she suspected her students of plagiarism).

the result of mistaken understandings of copyright law.<sup>169</sup> For one thing, only subtle distinctions separate lawful use from unlawful use, and use that risks civil sanctions from that which is a crime. Copying a television program onto a videotape to replay at a more convenient time is neither wrongful nor illegal.<sup>170</sup> But taping the television program to give to a friend is not lawful

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For data regarding instances of plagiarism by students, professors, and etc., see Green, *supra* note 5, at n.67-75.

<sup>169</sup> Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 48-50 (1994) (suggesting that consumers do not understand copyright law because copyright law is “chock-full” of provisions that “don't make a lot of sense” and adding “much of the activity on the net takes place on the mistaken assumption that any material on the Internet is free from copyright unless expressly declared to be otherwise”).

Professor Hardy offers a related explanation that focuses on common views about property, suggesting that a rational understanding of the abstract rights in intangible property is not as strong or immediate as the instincts formed through childhood experience about tangible property. See I. Trotter Hardy, *Criminal Copyright Infringement*, 44 WM. & MARY L. REV. (forthcoming 2003).

<sup>170</sup> Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 454-55 (1984) (holding that recording videos to view them at a later time is a fair use).

(although a civil action is unlikely).<sup>171</sup> Similarly, copying an LP or CD that one owns to a cassette in order to listen to music while driving is a lawful use of copyrighted material.<sup>172</sup> In these circumstances, it is quite possible that people do not view downloading music on to their own CD by using their own computer in order to play the music on their own car CD player as unlawful or possibly criminal.

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<sup>171</sup> Audio Home Recording Act of 1992, 17 U.S.C. §§ 1003 et seq. (2002) (promoting the sale of video recorders by protecting manufacturers and distributors of digital and analog audio recording devices from copyright infringement actions by saying, “No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings. In return, manufacturers and distributors must contribute to a royalty fund.”). The royalties compensate those who hold copyrights in sound recordings. *Id.* at § 1006 (allocating 50% of the fund to music publishers and 50% to writers). *See also* Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1078 (9th Cir. 1999) (holding that the Audio Home Recording Act did not apply to computer hard drives and MP3 players).

Ironically, the general failure of copyright holders to enforce their statutory rights against personal use infringers through civil actions may have contributed to the current views about the morality of infringing for personal use. *See infra* text accompanying note 201 (noting recent enforcement actions by the recording industry).

<sup>172</sup> *See Recording Indus. Ass'n of Am.*, 180 F.3d at 1079 (suggesting that space shifting, or using MP3 player to shift music from a computer hard drive to make it portable, is consistent with time shifting, “a paradigmatic noncommercial personal use”). *See also Sony Corp.*, 464 U.S. at 423 (holding that “timeshifting,” recording a television program to view at a later time, is fair use).

The DMCA may have contributed to public confusion. In addition to providing criminal penalties for circumventing electronic protection systems, the DMCA provided a safe harbor for Internet Service Providers.<sup>173</sup> Thus, a service provider, such as America Online, is not liable for infringement by users of its service. Based on this, file sharers may have concluded that neither the Napster service nor downloading was illegal.<sup>174</sup> Significant debate exists over whether file sharing violates copyright law, especially when the "infringer" owns a copy of the work that is downloaded, and more sophisticated consumers may realize that the issues are not yet resolved.<sup>175</sup> Taking all of this into account, it seems not unreasonable for consumers to believe that downloading is not wrong.

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<sup>173</sup> 17 U.S.C. § 512 (2000) (setting out the limitations on a service provider's liability for copyright infringement by its customers).

<sup>174</sup> The *Napster* opinion casts doubt on this argument. *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1025 (9th Cir. 2001) (upholding injunction on grounds that recording industry raised serious questions regarding Napster's ability to obtain shelter under the DMCA).

<sup>175</sup> See *supra* text accompanying notes 44-48 (explaining opposing views over *Napster* decision). Yet another explanation is a conceptual confusion over invisible, virtual representations of physical objects that give unauthorized use an unreal, thus harmless, aspect. See George Johnson, *Lost in Cyberspace: If You Can't Touch It, Can You Steal It?*, N.Y. TIMES, Dec. 16, 2001, § 4 (noting the "ambiguity of the ethereal something called information").

On the other hand, the NET was enacted in the wake of a well-publicized case and its passage might have been expected to have some impact on public views.<sup>176</sup> The consumer-confusion explanation also loses some force in the wake of the successful lawsuits against Napster and MP3. Napster lost its well-publicized copyright infringement suit in 2000 and its appeal in 2001,<sup>177</sup> and the resulting publicity provided notice that consumers who downloaded music were acting unlawfully. Despite this, substantial numbers of users still have not given up the practice of sharing music files. They have simply found other file sharing services from which they continue to download music files.<sup>178</sup> The explanation for this significant disregard for the law may lay a competing social norm.

## 2. A Competing Social Norm

The view that unauthorized use of information, knowledge, and ideas is morally wrong exists in conjunction with another set of deeply-entrenched community values that point the other way.<sup>179</sup> When individuals use information products, a powerful and competing social norm

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<sup>176</sup> See discussion *supra* Part I (discussing passage of NET).

<sup>177</sup> *A&M Records, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (rejecting argument that downloading was fair use of copyrighted material and other defenses and upholding, although narrowing, the preliminary injunction).

<sup>178</sup> *CD Burning, Song Swapping Cuts into Online Music Sales*, CHICAGO TRIB., Nov. 4, 2002, at 34 (reporting study that found former Napster users flocked to alternative filesharing networks such as KaZaa and Morpheus after Napster went offline in the summer of 2001).

The recording industry belatedly recognized the public's desire to utilize fully the new technology, and, after a rocky start, now offers Internet sites that provide downloads to subscribers for a fee. See David Pogue, *The Internet as Jukebox, At a Price*, N.Y. TIMES, Mar. 6, 2003, at E1 (critiquing the sites as overly complex and for limiting use of downloaded music). Apple, Inc. recently made a promising entry into the downloading market. See David Pogue, *Apple's New Online Music Service*, N.Y. TIMES, May 1, 2003, at E1 (praising Apple's service for its simplified pricing structure and for striking a balance between the interests of record companies, musicians, and consumers).

<sup>179</sup> In crimes such as murder, rape, assault, and robbery, competing social norms are nonexistent, weak, or have been incorporated into the criminal law. For instance, the social norm that mitigates heat of passion homicide is incorporated into the law of manslaughter. The norm that compels one to defend one's home is part of the doctrine of self-defense.

is implicated -- that information, knowledge, and ideas are free for all to use and enjoy. The public may view these kinds of products as not subject to absolute control by any single person or entity. Thus, there is no obligation to seek permission to use copyrighted material and it is not wrong to use it without authorization.<sup>180</sup>

This norm emanates from the realization that human progress has been and is contingent upon the use of knowledge and ideas, something we learn from our earliest experience in school. We grow up understanding that human development, whether personal, social, or economic, depends on the dissemination of information through the community. Because knowledge and information exist for the benefit of the public, it is reasonable to believe that all should be able to use it.<sup>182</sup>

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<sup>180</sup> See LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 12 (2001) (defining “free” to mean that the object may be used without permission or that any required permission is granted neutrally).

<sup>182</sup> Some scholars of intellectual property share the viewpoint. See generally BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 2 (1966) (observing that “the right to imitate [others] and thus to reap where [one] has not sown” is a natural right and observing that “[e]ducation . . . proceeds from a kind of mimicry”); Litman, *supra* note 168 (arguing that the Constitution creates a right to read); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 *YALE L.J.* 283 (1996) (arguing that copyright’s goal is to support a democratic culture). Local governments who fund libraries that lend books to the public without charge also share that same view.

To the extent that copyrights prevent use of information they may burden speech rights. See generally, Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 *Stan. L. Rev.* 1 (2001) (arguing for a rigorous analysis of First Amendment claims).

The value is well-entrenched in common law.<sup>183</sup> The Constitution specifically bases the power of Congress to enact intellectual property laws on the purpose of benefiting the public.<sup>184</sup> The constitutional value is corroborated by statute; intellectual property laws limit the right of exclusive use in order to maintain public access and to develop a public domain.

The ethos is also reflected in doctrines that are similar to copyright. The common law of misappropriation and of trade secrets similarly reveals the social understanding that information and knowledge are not subject to complete control.<sup>185</sup> The public understanding, which is not inaccurate, is that holders of information and knowledge products have only a limited set of rights.<sup>2</sup>

The popular conception that using information developed by someone else for noncommercial purposes is not wrongful may also rest on an intuition about the harm of using information products without authorization. Using an information product is nonrivalous; it does not deprive anyone else of its concurrent or future use; thus personal use is consistent with ideas

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<sup>183</sup> “The general rule of law is, that the noblest of human productions -- knowledge, truths ascertained, conceptions, and ideas – became, after voluntary communication to others, free as the air to common use.” *Int’l News Serv. v. Assoc. Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

<sup>184</sup> *See* discussion *supra* Part IIA (discussing rationale for intellectual property laws).

<sup>185</sup> Although trade secret law does not provide the public with access to the protected information, holders of trade secrets do not have the right of exclusive use of the information, resulting in a leaky and contingent right. *See* Moehr, *supra* note 118, at 867-68. Rights to information under the common law of misappropriation are also limited by such requirements as direct competition. *See* *International News Service v. Associated Press*, 248 U.S. 215, 221 (1918) (emphasizing the relation of the parties in the case – “competitors in the gathering and distributing of news and its publication for profit”); *National Basketball Assoc. v. Motorola*, 105 F.3d 841 (2d Cir. 1997) (strictly interpreting misappropriation doctrine and applying it only to direct competitors who seek to free-ride on the work of others); *U.S. Golf Ass’n v. St. Andrews Systems*, 749 F.2d 1028 (3d Cir. 1984) (same). *But see* *U.S. Golf Ass’n v. Arroyo Software Corp.*, 81 Cal. Rptr. 2d 708 (Cal. App. 45<sup>th</sup> 1999); Jeff C. Dodd, *Rights in Information: Conversion and Misappropriation Causes of Action in Intellectual Property Cases*, 32 HOUS. L. REV. 459, 462 (1995) (noting that recent decisions have invigorated misappropriation to protect information products).

<sup>2</sup> *See supra* text accompanying notes 61-63, 157.

about sharing information.<sup>186</sup> Since everyone may continue to enjoy the protected material, the costs of using it without permission are obscured and use does not seem immoral. Moreover, the legal standard concerning infringement for personal use has not been enforced in the civil realm, so the operative law has moved from virtually no enforcement to criminal sanctions. The historical absence of enforcement against personal use through civil actions may even have reinforced the idea that infringing for personal use is not illegal or wrong.

In sum, existing social norms do not provide a consensus that personal, unauthorized use of copyrighted material is so immoral as to merit criminal sanctions. Despite new laws and well-publicized lawsuits, substantial numbers of consumers do not view using information products as immoral. Consumer confusion, competing social norms, and other factors are possible explanations for the observed public views. Whatever the explanation, the tension between community norms and legal norms about personal use of copyrighted material justifies a certain skepticism about the wisdom of pursuing the criminal course at this time.

### **C. Implications of Current Social Norms**

The gap between the values embodied in the criminal copyright laws and the public's values poses a dilemma. The new laws authorize state-imposed punishment for conduct that is not viewed as blameworthy by substantial numbers of citizens, and criminal sanctions seem

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<sup>186</sup> “[The] peculiar character [of knowledge] is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.” See THOMAS JEFFERSON, *Letter to Isaac McPherson, August 23, 1813*, in 6 THE WRITINGS OF THOMAS JEFFERSON 180-81 (H. A. Washington ed., Philadelphia, J. B. Lippincott & Co. 1871). See also *Graham v. John Deere Co.*, 383 U.S. 1, 8-9 n.2 (1966) (quoting Thomas Jefferson).

inappropriate when a governing moral standard has yet to evolve. Moreover, on a pragmatic level, the absence of a strong community norm against personal use infringement presents significant issues concerning effectiveness and enforcement.

Many law-abiding citizens obey the law intuitively, without reflection, out of an instinct to do the right thing.<sup>187</sup> This occurs because they have internalized the social norms of their community. Others obey the law out of a concern for what others in their community may think.<sup>188</sup> Still others comply in marginal circumstances, for instance where the law is unclear, out of a general respect for the law.<sup>189</sup> Each of these motivations for law-abiding behavior is undermined when the law does not reflect a moral consensus of the community.

When a shared norm exists, citizens rely on personal, internalized moral codes and an intuitive realization that certain conduct is prohibited. In the absence of an internalized community norm, individuals receive notice through external sources, such as legal prohibitions,

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<sup>187</sup> See PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY & BLAME* (1995); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997) (discussing why individuals commit crimes and what deters them from so acting); Robinson & Darley, *supra* note 69, at 468 (asserting that people usually obey the law because they want to behave morally and fear the disapproval of peers); Tyler & Darley, *supra* note 125.

Another reason for law-abiding behavior is that the risks attached to unlawful behavior – apprehension and punishment – outweigh its advantages. Thus, consequentialists generally posit that deterrence or harm-prevention can be achieved by increasing the risk of criminal sanctions. See generally Erling Eide, *Economics of Criminal Behavior*, in V ENCYCLOPEDIA OF LAW AND ECONOMICS 345 (Boudewijn Boiuckaert & Gerrit De Geest, eds., 2000) (explaining deterrence theory); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (reviving Bentham's theory).

Legal scholars are now refining deterrence theory to account for the effect of social norms and to consider the work of behavioral economists. See, e.g., Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997) (analyzing how conforming to norms influences individual behavior); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 V. AND. L. REV. 1499 (1998) (summarizing legal scholarship that incorporates behavioralist theory).

<sup>188</sup> See ROBINSON & DARLEY, *supra* note 187, at 468 (noting that social scientists categorize compliance as produced by social influence or internalized morals standards).

<sup>189</sup> See *id.* at 457. As Professor Robinson has noted, the goal of deterrence is also served when criminal laws are viewed as moral and legitimate. See *id.* at 498 (summarizing the argument).

that are not as effective in guiding conduct.<sup>190</sup> The most obvious negative effect of the absence of a shared norm is simply that these new laws will not be obeyed; people will continue to copy copyrighted material for personal use. In addition, a criminal law that is not supported by community consensus will be less effective and can even be counterproductive.<sup>191</sup> Members of the community will not condemn those who violate such laws. This state of affairs can eventually weaken respect for the law. Witnessing punishment for conduct not viewed as immoral may cause people to view the law as less than legitimate and not morally credible. For this reason, courts have been generally cautious when deciding whether conduct in which citizens routinely engage is a crime.<sup>192</sup>

#### **D. Using Criminal Laws to Educate the Public**

Criminal laws are not frozen in the moral code of our predecessors. Criminal law necessarily evolves to reflect changes in the community consensus about wrongful or immoral behavior, and it continuously adapts to societal changes.<sup>193</sup> Recent history provides the example

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<sup>190</sup> See Tyler & Darley, *supra* note 125, at 712-13 (noting that studies suggest one's estimate of the likelihood of criminal sanctions have, at best, a minor influence on people's law-related behavior); Tyler, *supra* note 159, at 220-22 (citing studies that show the likelihood of being caught and punished have a minimal influence on behavior).

<sup>191</sup> See ROBINSON & DARLEY, *supra* note 187, at 481 (stating that use of stigmatization in absence of consensus about morality of the conduct is likely to be ineffective because "it offends rather than educates the moral code of the community").

<sup>192</sup> See *United States v. LaMacchia*, 871 F. Supp. 535, 544 (D. Mass. 1994) (noting that treating infringement as fraud would criminalize the conduct of "the myriad of home computer users who succumb to the temptation to copy even a single software program for private use"). The *LaMacchia* court also noted that it was not clear that criminalizing software copying is a result that even the software industry would consider desirable. *Id.* (citing industry testimony).

The Supreme Court has relied, in varying degrees, on the behavior of citizens in decisions that narrowly interpret criminal laws. See *Ratzlaff v. United States*, 510 U.S. 135 (1994) (noting that structuring financial transactions is a routine, innocent strategy to avoid regulation or taxes); *Staples v. United States*, 511 U.S. 600 (1994) (noting the "common experience that owning a gun is usually licit and blameless conduct"); *Liparota v. United States*, 471 U.S. 419 (1985) ("[t]o interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct").

<sup>193</sup> See ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* (3d ed. 1982) 289-91 (noting "misdeeds, once

of environmental crime. When enacted, there was only a nascent social norm regarding pollution; now pollution is seen as a moral wrong. Renewed seriousness about drunk driving reflects a change from viewing driving while drunk as an entitlement to viewing it as a reckless and immoral act. On the other hand, prohibition and current drug laws teach that caution is in order when dealing with conduct about which the community is ambivalent.

In a period of transition, such as the one encountered here, lawmakers may be tempted to use criminal laws to mold a new community norm. There is some basis for this course of action. After all, one purpose of punishment is to express the community's condemnation when conduct violates shared moral standards.<sup>195</sup> The statement of law and its subsequent enforcement are government directives that communicate an official standard to the public. A derivative by-product of this educative effect is that criminal law may play some role in the development of social norms.<sup>196</sup> Given this possibility, criminalizing infringement for personal use might be justified as a way to create a social norm against unauthorized use. Nonetheless, purposefully using criminal law to form social values is not an inviting option.

The most significant flaw in the approach is the research that indicates using criminal law

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regarded as only mildly wrong, are now branded as definitely and gravely anti-social”).

<sup>195</sup> The expressive function of criminal law is consistent with both retributivist and consequentialist theories. See Duff, *supra* note 71, at 31 (expressing a preference for emphasizing the communicative, rather than the expressive, aspect of criminal laws). For writings on expressive theories, see Bernard E. Harcourt, *Joel Feinberg on Crime and Punishment: Exploring the Relationship Between the Moral Limits of the Criminal Law and the Expressive Function of Punishment*, 5 BUFF. CRIM. L. REV. 145, 146 n.2 (2001).

<sup>196</sup> See Johannes Andenaes, *General Prevention -- Illusion or Responsibility*, 43 J. CRIM. L. & CRIMINOLOGY 176, 179-80 (1952) (noting secondary effects of punishment include forming and strengthening the public's moral code); Ball & Freidman, *supra* note 82, at 220 (claiming that “social sanctions can be used to change beliefs, attitudes, and personal values and goals”); Coffee, *supra* note 83, at 200 (noting temptation to harness the criminal law's socializing and educative power).

as a primary tool to influence individual behavior is not a particularly effective strategy.<sup>197</sup>

Individuals develop personal codes of conduct through interactions with people in their family and social circles, not from external sources such as laws.<sup>198</sup> The role of criminal law in shaping social norms is most effective (and may be limited) in confirming and maintaining existing values, not in forming them.<sup>199</sup> Criminal law, standing alone, is unlikely to engender internalization of the values the law represents.<sup>200</sup>

The Napster experience illustrates the ineffectiveness of legal prohibitions in forming social norms; even now, consumers continue to engage in file sharing of copyrighted material.<sup>201</sup>

Even when people know that certain behavior is prohibited, they do not necessarily internalize

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<sup>197</sup> See ROBINSON & DARLEY, *supra* note 187, at 473 (presenting evidence for the view that “[p]assing a law cannot itself create a norm”). Criminal law does not operate directly on individuals. See *id.* at 471. Rather, the effect of criminal law is indirect; it may influence and strengthen the norms of the social group, which individuals may then internalize. See *id.* at 473.

<sup>198</sup> See *id.* at 468-71 (providing research that indicates people come to accept the moral standards of the culture in which they are raised).

<sup>199</sup> See Michael C. Harper, *Comment on The Tort/Crime Distinction: A Generation Later*, 76 B.U. L. REV. 23, 24-25 (1996) (stating that the “more significant” educative force of criminal law “operates not to change morals or values, but rather to confirm them in such a way as to insure that they become more deeply internalized or inculcated in the public psyche”).

<sup>200</sup> Enforcement of the law plays a significant role in forming community values and in an individual’s deterrence calculations. See ROBINSON & DARLEY, *supra* note 187, at 492. It is too early, however, to judge the effect of criminal enforcement against noncommercial users.

Historically, copyright holders have not pursued civil actions against noncommercial users. In the past six months, however, the recording industry has become increasingly aggressive in enforcing civil copyright laws. In April of 2003, the recording industry sued four students, requesting \$150,000, the maximum damages amount, for each of more than one million downloaded songs. See Gary Gentile, *4 Students Face Suits for Song-Trading Sites*, HOUSTON CHRON. Apr. 6, 2003, at 12A. That suit was settled when the students agreed to pay a total of between \$12,000 and \$17,000. See Amy Harmon, *Suit Settled For Students Downloading Music Online*, N.Y. TIMES, May 2, 2003, at A20.

As this Article was being prepared for publication, the recording industry announced a new initiative that would target file sharers who downloaded “substantial” amounts of music. See Lynette Holloway, *Recording Industry to Sue Internet Music Swappers*, N.Y. TIMES, June 26, 2003, at C4.

<sup>201</sup> See *supra* text accompanying notes 44-48 (discussing effect of Napster litigation).

the underlying value in a way that changes their behavior.<sup>202</sup> This realization may account for the view that criminal law is not as effective a communicator as is claimed.<sup>203</sup> Reservations about the efficacy of criminal law in forming individual values seems especially pertinent in the face of strong competing social norms, such as those regarding rights to use information products.

More significantly, a conceptual problem arises when the state attempts to form social norms through criminal laws. The argument for a criminal prohibition based on morality is most compelling when that law is based on an existing, shared moral code.<sup>204</sup> Indeed, there is something intuitively unprincipled about using a criminal law to build support for a criminal law.<sup>205</sup> To make conduct criminal, that is to express society's condemnation, for the purpose of

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<sup>202</sup> Recent corporate scandals indicate that the moral code communicated in the laws against fraud and insider trading has not been internalized by corporate executives and insiders, even though it is widely acknowledged. See Geraldine Szott Moohr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 Fla. L. Rev. 973 (2003).

<sup>203</sup> See PACKER, *supra* note 84, at 354-63 (concluding that even criminal law is not that potent a weapon of social control); Richard A. Epstein, *The Tort/Crime Distinction: A Generation Later*, 76 B.U. L. REV. 1, 18-20 (1996) (expressing the conviction that the views of ordinary people are not shaped in any material way by the day-to-day operation of criminal law); Hart, *supra* note 83, at 421 (expressing skepticism regarding educative effects of criminal law in context of regulatory crimes). For more recent commentary, see Christopher Slobogin, *Foreword: Is Justice Just Us?*, 28 HOFSTRA L. REV. 601, 607-08 (2000) (asserting that most people follow the law "because they believe the law reflects the right thing to do and because they respect the authorities who promulgate the law"); Tyler & Darley, *supra* note 125, at 717 (claiming that most people respect authority not out of fear but because they "view them as legitimate authorities who ought to be obeyed").

<sup>204</sup> See *supra* text accompanying notes [71-78] (discussing retributivist theory). See also Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (considering the relation between community values and law).

<sup>205</sup> See Coffee, *supra* note 83, at 223 (noting that idea that law should engage in "preference shaping" raises the specter of Clockwork Orange and state-engineered brainwashing); Simons, *supra* note 71, at 659 (raising issue of whether it is ever legitimate to use law to change prevailing opinions).

Objections to government programs designed to instruct children about the ethics of using computers have been registered. See LESSIG, *supra* note 2 (noting that a government program for increased educational efforts about the nature of protecting intellectual property is "indirect regulation of behavior by direct regulation of norms"); Peter Jaszi, *Caught in the Net of Copyright*, 75 OR. L. REV. 299, 299 (1996) (stating that government white paper suggestion that schools prepare students for electronic citizenship is a "good idea gone wrong" because it "smacks of a program of mind control"). See also John Schwartz, *Trying to Keep Young Internet Users from a Life of Piracy*,

teaching citizens that the conduct is immoral has it precisely backwards.

More pointedly, the cost to those individuals who fall foul of the new offenses is too high to justify criminal laws enacted in order to educate the public. When the legal standard is evolving and a community norm is not yet in place, criminal penalties offend notions of due process, fairness, and commonly held ideas about notice and legality.<sup>206</sup> Given the numbers of personal users of copyrighted material who may be subject to criminal penalties in the period of evolving standards, there may be no basis for selecting some but not others for criminal action. In these circumstances, filing charges, gaining convictions, and imposing punishment treats such individuals as pawns. The absence of enforcement of statutory rights against noncommercial users in the civil realm, gives criminalization of this class of infringement a decidedly draconian cast.

In sum, using the immoral nature of infringement to justify the criminal law is unwise given the community view that personal use is not wrong. Moreover, using criminal law to educate the public about the morality of personal use is neither attractive nor viable.

## **V. Integrating the Analysis**

Criminal theory explains that criminal sanctions are appropriate when conduct is harmful to the community or when it offends notions of morality. The present inquiry into the harm and morality of copyright infringement indicates that neither principle provides robust support for treating infringement as a crime, especially for personal use infringement. The inquiry also

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N.Y. TIMES, Dec. 25, 2001, at C1 (reporting preparation of course materials for use in secondary schools on computer ethics).

<sup>206</sup> See generally Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753 (2002) (recommending a new rule of lenity when new criminal laws ensnare those still operating under old norms).

reveals strengths and limitations of the analysis from harm and morality principles.

### **A. The Harm and Morality of Copyright Infringement**

Even after setting aside the significant problems in measuring the losses of copyright holders, harm caused by copying for personal use differs from that caused by competitive infringers or by those who facilitate infringement for commercial purposes. The magnitude of the injury from competitors and commercial facilitators of infringement can be grave and is directly related to holders' losses. In contrast, economic loss imposed by personal use is an accumulated harm caused by relatively small acts of infringement. Each act imposes a slight diminution of economic value, and the total harm to the copyright holder does not accrue to the infringer. A criminal law that implicitly imputes that total harm to injuries from individual users presents a fairness concern, one that is not totally resolved by manipulating punishment schemes.

Harm may also be conceptualized as an injury to the national interest, as reflected in copyright law, concerning the production of creative expression. When the complete harm rationale is measured against the complete rationale for copyright law, however, the conception of harm as a detriment to a public policy fails to provide a convincing rationale for treating infringement as a crime. One goal of copyright policy is to encourage innovation, but conceptualizing harm as an injury to public policy does not account for technological changes that have reduced dependence on traditional methods of distribution, which makes the need to encourage innovation through legal restrictions less compelling. Moreover, the harm principle also limits the use of criminal law; for one thing, criminalization should not result in a greater harm than that to be prevented. Yet, criminalizing infringement may actually cause a greater harm. To the extent it chills legitimate use of protected material, creation of new material

becomes less certain and more expensive. In this case, the risk of a decline in productive activity caused by infringement must be balanced against the possibility that criminalization may result in over-deterrence and, in the long run, a decline in innovation. The blunt instrument of criminal law undermines a critical balance between the two goals of copyright policy, to protect public access to copyrighted material and to motivate production of new creative work.

In addition, identifying harm as an injury to the national interest in encouraging innovation ignores potential harm to the second prong of copyright policy, to maintain public access to protected material during the copyright term. The NET and especially the DMCA are likely to inhibit fair use of copyrighted material and to undermine that purpose by reducing public use. Finally, harm to national policy is also an accumulated harm; in this case a risk that authors will reduce their productive activity. Yet the causal contribution of any user to the risk of a decline in innovation is so attenuated and slight as to call the justification into question. Taking all of these considerations into account, the harm principle provides, at most, only equivocal support for criminalization of personal use infringement.

Criminal theory also teaches that a community may criminalize conduct that is immoral. Criminal law embodies and expresses the community's norms, so a breach of those values will subject violators to moral condemnation and stigma.<sup>207</sup> In this case, infringement is not without moral content. Competitors engage in self-serving and unjustly-enriching conduct that offends notions of morality and business ethics. Personal use infringers may also act out of selfish

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<sup>207</sup> See Hart, *supra* note 83, at 404-05 (stating that the community's condemnation distinguishes a criminal from a civil sanction). Criminal conduct is that which "will incur a formal and solemn pronouncement of the moral condemnation of the community." *Id.* at 405. *But see generally* John L. Diamond, *The Myth of Morality and Fault in Criminal Law Doctrine*, 34 AM. CRIM. L. REV. 111 (1996) (arguing that the number of criminal law doctrines that sanction punishment in the absence of an immoral act repudiates the claim that criminal law exists to punish immoral conduct).

motives, and if one conceives of copyright as property, personal use seems per se immoral. As we have seen, however, characterizing statutory rights as property and infringement as theft are essentially circular exercises that ignore the statutory limitations inherent in copyright and that neither resolve the issue nor advance the debate.

In the case of personal use infringement, the extraordinary gap between community norms and the values embedded in the criminal copyright laws increases skepticism about criminalization. The strong competing community norm that knowledge may not be absolutely controlled, which emanates from constitutional principles, common law, and copyright doctrine, argues against the absolute prohibition of personal use infringement. On a pragmatic level, the absence of community consensus about the morality of infringement foreshadows significant problems in enforcing the law. First, a large portion of the public may never intuitively obey the prohibition against copying for personal use. Second, when the societal view is at odds with the legal standards, as it is here, the community will not naturally reinforce the legal standard through informal sanctions or condemnation. Third, in this situation, enforcement can lessen respect for the criminal law, diminishing its legitimacy and thus its general effectiveness. Finally, using criminal laws to educate the public and to develop a consensus against using information without permission is not an inviting prospect. That policy is unlikely to succeed, makes pawns of those caught in the transition period, and is, at its core, contrary to the idea that criminal law enforces established community norms.

Criminalizing personal use of copyrighted material is thus not entirely consistent with the justifications for treating conduct as criminal or with the underlying policy of copyright law. Civil regulation, or requiring personal users to compensate copyright holders through civil

damages, may be preferable to criminal enforcement because it is more closely aligned to notions about the harm and morality of infringement. These considerations also argue for returning to a criminal law formulation that distinguishes between commercial and noncommercial infringement.

The interest of the copyright holder (and the community) is strongest when infringement by a competitor threatens the holder's market position. In contrast, the interest of the copyright holder and the community is weaker when infringement is for personal use. The interest of the user and the national policy both to maintain access and to encourage innovation counterbalance the holder's interest. The moral content of commercial and noncommercial infringement similarly varies, in this case with the posture of the user. A competitor's motives, to expropriate for itself the sales that are assigned to the holder by statute, offend both copyright law and established business standards. In contrast, personal use infringement, although not devoid of self-enriching motives, encompasses a different degree of moral content. Given the distinctions in the interests of copyright holders and the community and in the moral content of commercial and noncommercial infringement, a blanket prohibition against all infringement seems neither ideal nor appropriate.<sup>208</sup>

### **B. On Utilizing the Concepts of Harm and Morality**

The harm requirement has been heralded as "the primary consideration" in criminal

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<sup>208</sup> Entities like Napster that facilitate personal use infringement present slightly different problems. First, the new criminal copyright laws do not target this activity. Second, there is significant dispute about whether such entities violate civil copyright laws. Nevertheless, such entities would appear to occupy some intermediate position on the harm continuum between commercial and personal use infringement. Whether the interests of holders and the community would also trump the interests of those entities is an open issue. Similarly, entities that facilitate personal use infringement in order to enrich themselves through commercial profit occupy some intermediate position on a morality continuum, which may or may not offend business standards and morality.

law.<sup>209</sup> Harm often has the virtue of material objectivity, and even when harm is not tangible, one expects to assess and debate the harm caused by certain conduct. Notwithstanding that expectation, a certain indeterminacy permeates the concept of harm and the debates about specific harms. Indeed, the first step in justifying criminalization – to identify a societal harm by thinking of an individual's loss as an injury to the community – is an exercise in abstraction.

In addition to this inherent indeterminacy, the concept of harm is necessarily elastic.<sup>210</sup> For one thing, community values necessarily inform specific conceptions of harm.<sup>211</sup> This means that what is regarded as harmful is not static; definitions of harm may change over time and conditions. This elasticity permits broad, speculative conceptions of harm, such as harm to government authority<sup>212</sup> or harm from bypassing the market.<sup>213</sup> The malleability of the harm

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<sup>209</sup> See HALL, *supra* note 75, at 213 (“harm is the fulcrum between criminal conduct and the punitive sanction”); PACKER, *supra* note 84, at 267 (noting function of harm in legislative context); Albin Eser, *The Principle of "Harm" in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests*, 4 DUQ. U. L. REV. 345 (1965-66).

Harm has several functions. It is used to determine an appropriate level of punishment. *United States v. Cotton*, 535 U.S. 625, 634 (2002) (“Indeed, the fairness and integrity of the criminal justice system depends on meting out to those inflicting the greatest harm on society the most severe punishments.”). The harm principle is also relevant to the doctrines of causation, culpability, legality, and to the defense of justification. See DAN-COHEN, *Causation*, in 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 165-66 (Sanford Kadish ed., 1983) (explaining that causation is a corollary of the relevance of harm in determining criminal liability); John C. Coffee, *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 AM. CRIM. L. REV. 117, 164 (1981) (noting that intent to cause harm can be a “proxy for culpability”); Geraldine Szott Moohr, *Mail Fraud Meets Criminal Theory*, 67 U. CIN. L. REV. 1 (1998) (stating that community consensus regarding the prohibited harm strengthens notice to defendants, thereby enforcing the requirement of legality); Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA 266, 291 (1975) (arguing for availability of a justification defense when the defendant's conduct did not cause harm).

<sup>210</sup> The elasticity of harm has stimulated stinging critiques. See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW*, (1978) § 6.2 (noting that “[t]he notion of harm appears to be infinitely expandable”); Harcourt, *supra* note 84 (noting that proponents of regulation and prohibition of pornography, prostitution, disorderly conduct, and homosexuality rely on expansive notions of harm to justify their programs).

<sup>211</sup> *State v. Western Union Tel. Co.*, 80 A.2d 342, 361 (N.J. 1951) (“The concept of a public wrong is the product of social evolution and whether an act has been or is deemed to be a public injury or menace depends upon the stage of civilization and the conditions which confront a people.”).

<sup>212</sup> See FEINBERG, *supra* note 92, at 20-21 (providing example of contempt as a derivative harm that justifies criminal laws that enforce civil regulations).

principle is at once a great strength and a great weakness. The concept of social harm allows the government to protect important national interests. On the other hand, the absence of an objective measurement of detriment to public policy makes it difficult to evaluate when criminalization is necessary or appropriate.

Another complicating factor in identifying and evaluating societal harm is that the principle is more useful in protecting established interests than it is in ascertaining when harm to some new interest merits criminal sanctions.<sup>214</sup> With no guidance beyond the general requirement of some societal harm, the power of the legislature to define harm and to justify criminalization is thus both unconstrained and biased toward protecting existing interests. This insight is illustrated by criminal copyright legislation, in which legislators were forced to choose between the present interests of existing copyright holders and the nascent interests of the public

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<sup>213</sup> See Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1195-96 (1985) (suggesting that the major function of criminal law in a capitalist society is to prevent wealth transfers that have no social utility). See also PETER ALLDRIDGE, *RELOCATING CRIMINAL LAW* 167 (2000) (stating that economic crimes that prevent a market from functioning in accord with its avowed objectives are a societal harm); Ball & Friedman, *supra* note 82, at 211 (“Criminal law, particularly as it relates to economic crimes, is a set of techniques to be manipulated for social ends.”).

<sup>214</sup> See HALL, *supra* note 75, at 310 (stating that the harm requirement presupposes a set of values by reference to which the harm is ethically significant); FEINBERG, *supra* note 92, at 35 (noting that the state vindicates harms that violate established priority rankings); Kahan, *supra* note 79 (noting that a preexisting value is a common characteristic of consequentialist theories).

in utilizing technology, accessing information, and creating new information products. In these circumstances, as George Fletcher predicted, harm may be anything the government says it is,<sup>215</sup> and any act can be made a crime. A careful analysis of the harm at issue, which would include a consideration of the principle's limiting axioms and the effect of criminalization on other interests, may avoid this outcome.

The morality principle also is most useful in explaining the origins of traditional or established crimes, a characteristic that may explain the trend to conceptualize unauthorized use of copyrighted material as theft. The resort to the property/theft paradigm, however, reveals that the morality principle may conceal a naked emperor. Like the harm axiom, the morality principle does not provide obvious guidance about how to weigh other considerations, such as evolving community norms during times of transition. It also does not guide legislators in deciding what degree of immoral conduct justifies criminal sanctions: Is a modicum of immorality enough? Nonetheless, the principle is not completely unfettered. Abstract notions of morality are necessarily constrained by community views, at a minimum because of pragmatic concerns about enforcement. As the analysis of personal use infringement revealed, the general requirement of immoral behavior may be affected by technological developments and by existing, but contrary, community norms.

Views about the morality of particular conduct are also influenced by the nature and extent of resulting harm. The analysis of the moral content of infringement illustrates how overemphasizing the need to prevent harm can lead to criminalizing conduct in the absence of a social norm that would condemn such conduct. Oddly, emphasizing harm at the expense of

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<sup>215</sup> FLETCHER, *supra* note 210, at § 6.

morality leads lawmakers to harness the power of the criminal law with little regard for the moral force that makes criminal law effective in the first place. In the long run, ignoring the moral force of criminal law seems bound to result in disrespect for that law and for criminal law in general, diminishing its power to deter. These insights argue for using the concepts of both harm and morality in determining whether to enact a criminal law.

In sum, the concepts of harm and morality are not perfect analytic vehicles for determining whether, and under what circumstances, conduct should be subject to criminal sanctions. Nevertheless, using these concepts when deciding whether to criminalize certain conduct provides a framework for considering the issue. The harm and morality principles include limitations to criminalization, such as those inherent in the harm principle and in the effect of community views about the morality of the conduct at issue. When legislators are cognizant of these limitations, their analysis is likely to identify issues that otherwise may be overlooked. For instance, a rigorous and complete survey would include the effect of, as well as the reasons for, criminalization. Thus, although the principles of harm and morality do not provide exact instruction, they each provide boundaries that, when crossed, warn that legislation has gone too far. And, although the harm/morality framework does not guarantee an analysis that is free from manipulation, it may expose the inevitably political nature of decisions to criminalize.

### **Conclusion**

In examining the shift from civil liability to criminal sanctions for personal use infringement, this analysis raised a primary question: What conduct should be criminal in the first place? Working from the theory that we criminalize conduct that is harmful or immoral,

the answers to the inquiry are troubling. The moral consensus that would condemn such use is far from robust and the harm rationale provides only an equivocal basis for criminalization. Given current community views, treating personal use infringement as a criminal act may not be an effective way to protect the interests of copyright holders and to achieve the goals of copyright policy.

If the new criminal laws are effective in preventing personal use infringement, we are faced with a different problem. An effective criminal law may undermine the reasons for enacting the law in the first place – to implement the national policy of encouraging creative expression. Criminal laws that treat infringement as theft convey the message that information or knowledge may not be used without permission. This repressive lesson may not be one that we want to impart. In the long term, creative persons who internalize this teaching may constrain their talent and repress their desire to create new ideas and products, thus limiting future innovation. In a final irony, criminalizing copyright infringement may produce the opposite of its intended goal to encourage creative effort.